

EXHIBIT 2
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My name is Rachel King and I am an attorney for the American Civil Liberties Union's Capital Punishment Project. The ACLU is devoted to the protection and enhancement of the fundamental rights and constitutional values embodied in the Bill of Rights of the U.S. Constitution and the constitutions of the states. I work with our state affiliates on repealing and reforming death penalty laws. I have written extensively about the death penalty publishing several articles and two books. Besides my current position, I have lobbied on criminal justice policy at both the state and federal levels; I have been a public defender and a law school professor.

I applaud you for holding this hearing on this important issue. While we sit in this chamber reconsidering the death penalty, other states are doing the same thing. The high courts of both New York and Kansas struck down their death penalty statutes last year and legislatures in both states are now considering whether to "fix" the laws. Interestingly, New York and Kansas were the most recent states to reinstate their death penalty statutes in the wake of the Furman decision striking down all death penalty statutes in 1972. Kansas passed its death penalty law in 1994 and New York in 1995. There has been a groundswell of public opposition to the death penalty in New York and it is highly likely the legislature there will not bring it back. It looks as though Kansas will not reinstate either. What we are seeing is a very real turning back the tide on the death penalty.

Connecticut, faced with the first execution in 45 years, is now reconsidering whether it wants to get back into the business of state killing. A repeal bill has traction there and is working its way through the legislature. And in New Mexico, there are enough votes in the House to pass a repeal bill and only a couple of votes shy in the Senate. New Jersey and Illinois have implemented moratoria - through the courts and the executive branch respectively - and legislatures in North Carolina and Maryland are seriously considering moratoria as well.

Indeed there has been a groundswell of activity to restrict or eliminate the death penalty. This trend began in 2000 when then Republican Governor George Ryan of Illinois ordered a moratorium on all executions after nearly presiding over the execution of an innocent person. Governor Ryan established a high-profile bi-partisan commission with the mission of creating a death penalty system where he could be sure that no innocent person would be executed. The Commission met for two years and made a detailed report including over 85 recommendations on how to improve the death penalty in Illinois but ultimately determined that the only way to make sure that an innocent person is not executed is to abolish the death penalty.

The problem of innocent people being wrongfully convicted is not unique to Illinois. Indeed, during the "modern death penalty era" which began in 1976, there have been just under 950 executions and 117 exonerations of innocent people from death row. For every eight executions there has been one exoneration. With an error rate that high, the logical conclusion is that some of those who were executed were likely innocent, too.

Around the country, public support for capital punishment reached its lowest level in 25 years. An October 2003 Gallup Poll measured public support for the death penalty at 64%, down six percentage points from 2002 polling data.

According to Department of Justice statistics, death sentences have declined for five straight years. Sentences are now down by almost 50% when compared to the number of death sentences in the late 1990s. Executions also declined in 2003 and are down 30% when compared to the 98 executions in 1999. Of all the executions that did take place, only three were conducted outside of the south, which accounted for almost 90% of the executions this year.

The reason that the death penalty is on the decline is because it is bad public policy. It does not serve any deterrent value, it is expensive, and states that have the death penalty actually have higher, rather than lower crime rates. The death penalty is not applied uniformly: poor people, people of color and people from certain geographic regions of the country are more likely to get sentenced to death and executed.

Death Penalty Systems are Fraught with Serious Error

A comprehensive study by a team of Columbia University scholars concluded that America's death penalty system is "persistently and systematically fraught with error." See J. Liebman, S. Rifkin, J. Fagan & V. West, *A Broken System: Error Rates in Capital Cases 1973-1995* (2000).

The first part of this study, based on an analysis of 4,578 capital cases prosecuted between 1973 and 1995, includes the following findings:

- The overall rate of prejudicial error in the American capital punishment system is 68% – in other words, courts have found serious, reversible error in nearly 7 out of every 10 of the thousands of capital sentences reviewed in this study.
- Death-penalty trials produce so many mistakes that it takes three judicial inspections to catch them – leaving grave doubt as to whether the courts are able to catch every serious error. After state courts threw out 47% of death sentences due to serious flaws, federal courts found serious error in 40% of the remaining cases.
- The most common errors prompting a reversal in state court after a death-penalty conviction are (1) incompetent defense lawyers who failed to seek or simply missed important evidence that the defendant was innocent; and (2) police or prosecutors who did discover such evidence of innocence but suppressed it.
- Catching error in capital cases takes a long time. Inmates spend, on average, 10.6 years on death row pending the review required to uncover error and abuses.

The second part of the study includes a number of findings that demonstrate death-penalty prosecutions are highly politicized undertakings, and it is this dynamic that makes such prosecutions routinely susceptible to bias, prejudice, misjudgment and outright error. These findings include the following:

- Ineffective state law-enforcement systems – those with the worst records of arresting, conviction, and incarcerating serious criminals – are the most likely to conduct seriously flawed investigations, prosecutions and trials of capital defendants.
- Lower competence in criminal prosecution is associated with greater pressures to invoke the death penalty in response to the ineffectiveness of law enforcement – that is, the death penalty is sought in weaker cases and with limited prosecutorial competence.
- Significantly higher error rates in capital cases occur in those states in which judges are more susceptible to "political discipline" (through direct elections and elections that are more frequent and more partisan) as a consequence of issuing rulings that are inconsistent with popular sentiment.
- The greater the proportion of a state's population that is African-American, the greater the state's rate of serious error in death-penalty cases. How can this be explained? The study concludes that the "racial factor" is a powerful indicator of the pressure exerted upon officials to respond forcefully to crime.

World Opinion Favors Abolition

The United States stands virtually alone among advanced industrialized democratic nations in retaining the death penalty. The global trend is clearly towards abolition. Today, over half of the countries in the world have abolished the death penalty in law or practice, including such diverse nations as Argentina, Australia, France, Hungary, and Mozambique. Indeed, over the past decade more than three countries a year on average have abolished the death penalty in law, or having abolished it for ordinary crimes, have gone on to abolish it for all crimes. In 1999 alone, Albania, Bermuda, Cyprus, East Timor, Latvia, Nepal, Turkmenistan, and Ukraine all effectively abolished the death penalty. In 2003, Protocol 13 to the European Convention on Human Rights went into effect – this is the first legally binding international treaty to abolish the death penalty in all circumstances with no exceptions. There has also been significant progress in Africa where last month Senegal abolished the practice and where Sierra Leone's Truth and Reconciliation Commission has recommended doing away with the death penalty in its entirety. In South Africa, capital punishment was abolished in 1995 in the new South African constitution.

It is unsettling that in contrast to the global shift away from the death penalty, the United States consistently ranks among the top executing countries in the world. In 2003, the United States, China, Iran, and Viet Name accounted for 84% of all recorded judicial executions. While 118 countries have not abolished the death penalty in law or practice, the United States has killed 950 people since 1977 and has more than 3,400 prisoners under the sentence of death in this country. The United States' refusal to abandon this punishment strongly diminishes our standing as an international defender of human rights.

Montana Would Benefit From Abolition

Montana could realize significant economic benefits from eliminating capital punishment. The European Union's opposition to the death penalty has been steadily increasing. Countries cannot join the EU until they get rid of their death penalties. Some members of the EU are suggesting that Europe should stop investing in U.S. states that have the death penalty. If Montana were to repeal its death penalty statute, it would make it an attractive investment location for European companies to invest.

Furthermore, the legislature is currently considering establishing a state-wide public defender system in an effort to ensure adequate defense to all indigent Montanans charged with crimes. This is a laudable goal. An expensive piece to any public defender system would be providing for capital representation. The American Bar Association has established protocol for indigent defense in capital cases that includes two attorneys for each case, investigators, mitigation experts, and other expert witnesses. These "defense" teams are necessary to ensure adequate due process in capital cases. Eliminating the death penalty at this time would eliminate the need to establish indigent capital defense teams and would save the taxpayers significant money.

Continuing to Have the Death Penalty Would Require Significant Changes to Other Areas of Law

If the legislature decides not to repeal the death penalty, I would urge you to examine your entire criminal code to ensure that it is in keeping with the best practices necessary to safeguard against wrongful convictions. Governor Ryan's Commission in Illinois and Governor Romney's Commission in Massachusetts both set out standards they believed were necessary in order to decrease the likelihood of a wrongful conviction.

Here is just a sampling of the dozens of recommendations made that the legislature should consider implementing in order to safeguard against wrongful convictions.

Illinois Commission:

- Videotaping of the entirety of custodial interrogations.
- Electronic recording of interviews of significant witnesses, where it is reasonably foreseeable their testimony may be challenged.
- Special jury instructions with regard to the testimony of in-custody informants, and pre-trial hearing to assess such informant's reliability.
- Double-blind sequential line-ups to safeguard against unreliable eyewitness identification.
- Independent scientific review of forensic evidence plus accreditation of crime laboratories and forensic service providers.

Massachusetts Commission:

- Drastically narrowing the types of murders eligible for the death penalty in an effort to lessen disparities by race and geography.
- Using separate juries for the guilt and punishment phases of a capital trial.
- Requiring the sentencing jury to find that there is "no doubt" about the defendant's guilt.
- Giving the trial judge the power to change a death verdict to life without parole where the trial judge deems it appropriate.
- Precluding procedural bars and narrow legal constructions – such as time limits on presenting new evidence – from precluding judges' ability to determine that a death sentence has been wrongfully imposed.

When you consider that the death penalty is not a deterrent and that it is more expensive than life in prison, repealing it makes sense.

The Death Penalty is Not a Deterrent

According to a survey of the former and present presidents of the country's top academic criminological societies, 84% of these experts rejected the notion that the death penalty acts as a deterrent to murder. What this means is that the death penalty does not have any additional deterrent value beyond that of a lengthy prison term. Montana already has the sentence of life without parole. A person who will not be deterred from committing a crime because of the threat of a life sentence is not going to be deterred by the threat of the death penalty.

Furthermore, according to the FBI Uniform Crime Report, the South repeatedly has the highest murder rate. The South also accounts for 80% of executions. The Northeast, which has less than 1% of all executions in the United States, has consistently had the lowest murder rate.

The Death Penalty is Too Expensive

Every state that has done a cost study of its death penalty system has found it to be more expensive than lengthy prison sentences. This may be counter-intuitive for the average voter who believes it will save money to kill people instead of spending to house them in prison for life.

- The State of Kansas reviewed its death penalty in 2003 and found that capital cases are 70% more expensive than comparable non-capital cases, including incarceration.
- A study by Indiana's Criminal Law Study Commission found that the total costs of the death penalty exceed the complete costs of life without parole sentences by about 38%, assuming that 20% of death sentences are overturned and re-sentenced to life.
- The most comprehensive study in the country found that the death penalty costs North Carolina \$2.6 million per execution over the costs of a non-death penalty murder case with a sentence of imprisonment for life. The majority of those costs occur at the trial level.
- Enforcing the death penalty costs Florida \$51 million a year above and beyond what it would cost to punish all first-degree murderers with life in prison without parole. Based on the 44 executions Florida has carried out since 1976, that amounts to a cost of \$24 million for each execution.
- In Texas, a death penalty case costs an average of \$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest level for 40 years.
- The death penalty costs California \$90 million annually beyond the ordinary costs of the justice system – \$78 million of that total is incurred at the trial level.

I recognize that the death penalty is a highly emotional issue, which brings out strong feelings in people. I urge you as much as possible to try not to look at this issue in moral or emotional terms, but strictly as a public policy issue. If you do that, I believe you will conclude that repeal is in the best interests of Montana.

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