

Testimony in Support of HB 561
ABOLITION OF DEATH PENALTY IN MONTANA

EXHIBIT 3
DATE 8/14/05
HB 461

Mr. Chairman and Members of the House Judiciary Committee

I am Ronald F. Waterman, an attorney in private practice in Helena, Montana. I submit this testimony in support of HB 561 which would abolish the Death Penalty in Montana.

I was one of the attorneys who represented Duncan McKenzie during his appeals from his death sentence. I conducted the hearing on the clemency petition Mr. McKenzie submitted to former Governor Racicot immediately before his execution. I was with Mr. McKenzie at the time of his execution.

I support HB 561. It is time to abolish the death penalty in Montana. The death penalty is cruel and unusual punishment and should be banned as being in violation of the Eighth Amendment to the United States Constitution. Presently the death penalty is disproportionately applied to minority members of our society and is applied in a random and capricious manner, with virtually no predictability. The exercise of the death penalty is riddled with mistakes, leading to the sentencing and potential executions of innocent individuals or individuals who should not be subjected to this severe a sentence. It is estimated that over 75% of all death sentences are subject to some flaw, either in the guilt phase or in the penalty phase of the proceeding. An examination of the death sentence in Montana reveals that the death sentence has been improperly imposed at least 68% of the time. On at least four occasions, courts have set aside death sentences and directed that the inmate be resentenced to a lesser sentence. Other death sentences have also been set aside due to errors committed in the sentencing process.

Several years ago, during a conference on the death penalty, former Governor Racicot correctly commented that the only justification for the death penalty was if this sentence deterred other capital crimes. While Governor Racicot offered his personal view that the death penalty did deter crime, his view is not shared by any criminologist or other individual who has studied this issue. There simply is no research which supports the conclusion that the death penalty deters crime.

There are several reasons for this conclusion. The first, noted above, is that

most people believe that the death penalty is flawed and frequently results in an erroneous sentence. This belief dispels any deterrent effect of the death sentence.

Second, the death penalty is simply too random in its application to deter crime. It is too easy for any individual to quickly become convinced that the death penalty will not be applied to their act, regardless of the severity of the crime. For years, my legal work took me to Montana State Prison at Deer Lodge on a number of occasions. Most of the time when I was at the prison, I was on the high-security side and I spent a considerable amount of time in the Maximum Security Unit. If I could take committee members to the prison, I could identify individuals in the prison population, who committed crimes of a similar and in some instances an identical nature of the crimes which resulted in a death sentence imposed upon only a few individuals at prison. A death penalty sentence is simply too randomly applied to result in any deterrence.

Third, even with the actions of Congress which have eliminated successive and repetitive appeals of death sentences, the amount of time between the commission of a capital crime and the carrying out of a death sentence, results in a lack of deterrent effect of any such sentence.

Finally, the death sentence does not deter due to the nature of the underlying capital offense itself. There are a number of reasons why people kill. None, however, warrant society deliberately taking an individual's life.

Criminals typically do not commit a capital crime through planning and stealth. The typical capital crime does not involve any cost-benefit analysis, weighing the crime and its potential punishment, on one hand, and the crime and its potential benefits on the other. Rather, most capital crimes are the result of a combination of factors, none of which are affected by the potential of a capital sentence.

Individuals who commit capital crimes, like virtually all criminals, are socially disabled or socially deficient individuals. These individuals are incapable of forming close bonds or friendships with others, they are incapable of empathy, and incapable of projecting that their actions could cause harm or injury to another. Usually this social disconnect is the result of early childhood sexual and physical abuse. About 80% of all inmates have a history of early childhood abuse

-- the percentage is higher among capital crime inmates. Recent studies point to the conclusion this social disconnect is most extreme in the capital offender.

Additionally, capital crimes are not planned crimes but usually are the result of an unexpected escalation of poorly thought out lesser crimes, typically a robbery or burglary gone sour, with events cascading out of control. Capital crimes are the result of the easy availability of firearms. Capital crimes usually involve drug or alcohol use -- not that the perpetrators are intoxicated or high, only that the individuals have used substances sufficiently to wipe away any normal inhibitions which would otherwise form a boundary against such conduct.

Thus, the only justification for the exercise of capital punishment, that carrying out such a sentence will deter other capital crime, simply does not exist.

Earlier I commented that capital punishment is randomly exercised. However, as to those under a capital sentence, there are a cluster of unfortunate statistics, which all underscore the basic unfairness of this sentence.

1. The individuals who are sentenced are usually strangers to the community where the crime occurred.
2. The individuals are poor -- virtually all have been represented by appointed counsel -- usually underexperienced, underpaid and without adequate resources for investigation and expert testimony include penalty phase representation.
3. The individuals have been subject to early childhood abuse -- often sexual abuse.
4. The individuals have experienced some type of significant head trauma -- or have a mental capacity at or below normal -- a recent study showed an identifiable head injury in virtually every capital defendant.
5. The individuals have been the focus of some law enforcement officer who pushed to make the case a capital offense.
6. The individual is a member of a racial minority. At one time in

Montana, we had one Afro-American out of four capital defendants at a time when Afro-Americans represented less than 1% of Montana's population. For a time Montana had 2 out of 8 death sentence defendants who were native American when the native American population was 5% of the total population.

These disturbing statistics underscore the conclusion that in America and in Montana, we execute the poor, the slow, the strangers and the racial minorities.

Finally, at a time when this Legislature is looking for sources of revenue to find schools, to develop the economy and to attend to the needs of the elderly and the mentally ill, continuing to apply the death penalty wastes the limited resources of the state. Every capital case requires the dedication of substantial state resources from the commencement of the prosecution, throughout the criminal justice trial and appellate reviews, through to the execution. Looking at the entire justice and correctional system costs, every capital case requires the consumption of hundreds of thousands and at times, over a million dollars. While a person could assert that there are some savings, comparing the cost of housing an individual for a full life sentence as compared with the shorter period of incarceration until an execution is carried out, such an assertion can only be made if one first ignores all of the criminal justice system expense consumed during the trial and appellate phases of a capital case.

Society should not and Montana should not merely retain the death penalty simply to retaliate against an individual who has taken the life of another. Presently as our state seeks revenge, we cheapen all human life.

It is time to abolish the death penalty in Montana.