EXHIBIT 37
DATE 3/25/09
SB 236

WRITTEN TESTIMONY IN SUPPORT OF SB 236

My name is Ronald F. Waterman. I am an attorney who has been practicing for 40 years and a portion of my practice has been involved with the correctional system. I present this written testimony in support of SB 236. I apologize for not being able to attend this hearing in person, but I am involved in a trial in Missoula and so have to submit my testimony in writing.

I wish to address two aspects of the bill before you, the economic costs of a death penalty case and the potential of convicting and executing an innocent person. Before doing so, however, I believe that this committee should understand what the long history of capital punishment in the United States has established and why all western nations aside from the United States have banned this form of punishment as being inconsistent with humane evaluations of life and dignity.

In America, the death penalty has been disproportionately applied in a random and capricious manner, with virtually no predictability. The exercise of the death penalty is filled with mistakes, leading to the sentencing and potential executions of innocent individuals or individuals who should not be subjected to this severe a sentence. To date approximately 200 individuals have been freed due to the use of DNA testing and findings that individuals convicted had not actually committed the crimes which they were convicted of. Of these individuals a substantial number were under a death sentence. Last year, two individuals in Mississippi, who had been convicted by perjured and false testimony provided by two state experts who testified about teeth marks on the victim which did not actually exist. Error is prevalent in all states which have a death penalty. It is estimated that 75% of all death penalty cases experience some flaw, either in the guilt phase or in the penalty phase of the proceedings. An examination of the death penalty 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 the death sentence directing that the inmate be resentenced to a lesser sentence. Other death sentences have been set aside due to errors committed in the sentencing process.

One point is important to underscore. The death sentence does not deter crime or other capital crimes. Only scant research exists which supports the conclusion that a death sentence has any deterrent effect. There are several reasons for this, including that individuals who commit capital crimes do not engage in any analysis of what penalty their conduct might trigger and as noted above, since most people believe that the death penalty is flawed, this dispels any deterrent effect of the death sentence.

Additionally, the death penalty is simply too random in its application to deter crime. It is too easy for an individual to quickly become convinced that the death penalty will not be applied to their act, regardless of the severity of the crime. From my work at the Montana State Prison, I know that on both the high side and the low side, individuals in the prison population who have committed crimes similar to the crimes which have resulted in the two death penalty cases; this was also true when we had a larger death penalty population. There have always been individuals in prison serving a sentence whose crimes were identical to those individuals who committed crimes which had resulted in a death sentence.

In looking at how we decide to exercise the death penalty, some unfortunate statistics arise which underscore the basic unfairness of the death penalty. Those who are sentenced to death are typically strangers to the community where the crime occurs. The individuals who are sentenced to death are typically poor, virtually all have been represented by appointed counsel, typically under-experienced, underpaid and without adequate resources for investigation and expert testimony including penalty phase representation. While Montana now has a new and more effective public defender system, it has been under funded and is struggling to receive the financing necessary to effectively carry out its state wide responsibilities. However, all of the current death sentence inmates were convicted under the old system and all were represented by appointed counsel. One of those under a death sentence had an attorney who spent a total of 10 hours in his representation of the defendant from the initial interview, plea to sentencing.

Most of the individuals under a death sentence have been subjected to early childhood abuse, often sexual abuse. Typically those under a death penalty have experienced some type of significant head trauma or have a diminished mental capacity below normal. Usually those sentenced to death have been the focus of some law enforcement official who pushed to make the case a capital offense. Finally those under a death sentence are disproportionately a member of a racial minority. At one time in Montana we had one Afro-American out of four capital defendants when Afro-Americans represented less that 1% of Montana's population. For a time, Montana had 2 out of 8 death sentence defendants who were Native Americans when the Native American population was 5% of the total population.

These statistics are disturbing and support the conclusion that in America and in Montana society executes the poor, the slow, the strangers and the racial minorities of our communities. These disturbing statistics alone amply support the abolition of the death penalty.

I do want to address two specific points. One is cost. As the law now exists, a decision to prosecute a case as a capital crime virtually doubles the expense of the prosecution. A capital defendant is entitled to two attorneys, who have to be death penalty qualified, that is they have to have had experience in defending another death case. In Montana, this means that there are few attorneys who are even capable of being appointed to represent a criminal defendant and it is possible that in the future, it may be necessary to import a qualified attorney from another state if there was an increase in the number of capital punishment prosecutions. Additionally, the defense in a capital case is entitled to retain investigators and experts, both for the guilty phase of the case and also for the penalty phase of the case. The three most recent capital cases, none of which resulted in a capital sentence, all cost in excess of $400,000 to defend. Additionally, once a death sentence is adjudicated, the costs simply continue and most evaluations indicate that a capital case will cost, on average an additional $150,000 a year from sentence to execution. Since, in Montana there is typically about a 20 year delay between sentence and execution, the math is rather simple to carry out and to understand the additional expense of a death sentence. I would urge that this is a poor use of public funds and that these funds could be better spent on early childhood programs to identify, treat and divert individuals before they enter the criminal justice system.

The other concern, and one which Montana is not immune from, is the potential of executing an innocent individual. We too often believe that DNA evidence will assure that no innocent person will ever be convicted of a capital offense. However, DNA evidence is not typically available and the numbers frequently work against DNA evidence as a safety net against a wrongful execution. Generally it takes about 8 years from sentence to execution; it usually takes about 11 years from conviction to reversal of a wrongful conviction. Therefore it takes longer for an individual to be exonerated than to be executed, which clearly means that DNA evidence alone will never be a certain protection against the execution of an innocent person.

Further, too often those who are convicted wrongfully are not convicted due to the mistake of any crime lab but such convictions are the result of intentional misconduct. I mentioned earlier the false testimony in Mississippi which resulted in the conviction of two individuals based solely on the false and fabricated evidence by two state employees. In Montana, we have seen wrongful convictions set aside due to false and fabricated hair evidence; three individuals wrongfully convicted have been freed and there remains close to 230 other cases which have never been fully examined to ascertain whether there remain others who were also wrongfully convicted by false testimony. As we have too often seen in America, it is not the careless mistake of an individual which results in an invalid conviction, but the intentional misconduct which often places an innocent individual into prison and intentional misconduct is more difficult to guard against than the simple mistakes of crime lab employees.

I would submit that it is time to abolish the death penalty in Montana and urge that all of the foregoing reasons fully support this committee's vote in favor of SB 236. Thank you.