EXHIBIT 3
DATE 2/9/2011
HB 324

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TALKING POINTS MEMO ON THE JURY RIGHTS BILL:

FULLY INFORMED JURIES ARE REQUIRED BY THE MONTANA CONSTITUTION

* This bill is needed to correct unconstitutional and illegitimate practices in Montana's courtrooms. Although the Montana Constitution requires in Article II, §6 that *"[t]he right of trial by jury is secured to all and shall remain inviolate,"* juries today are instructed that they may only decide questions of fact. Judges generally order juries that they must follow the judges' interpretation of the law and Constitution.
* Juries are supposed to be independent bodies of citizens who protect their neighbors and members of their community from unfair and oppressive government. Yet today in Montana jurors are falsely told that they are mere fact-finders, and that they "must convict" or "should convict" if the government meets its burden of proof in a criminal case. Such instructions wrongly communicate to jurors that they do not have the right to acquit a criminal defendant if the government proves its case beyond a reasonable doubt. This defies the original purposes behind trial by jury and even conflicts with a Montana Supreme Court decision that held that *"the jury has power to disregard the law as declared and acquit the defendant, however convincing the evidence may be, and that the court or judge has no power to punish them for such conduct."* State v. Koch, 33 Mont. 490; 85 P. 272 (Mont. 1906).
* The present practice of deception violates the Constitutional "Right to Know," which protects the right of every Montanan to know the workings and mechanics of state government. Why would some lawyers and judges acknowledge that jurors have an absolute right to acquit but then argue that jurors should be deceived into thinking they do not have this right?
* A proper instruction is that juries "must" *acquit* if the government *fails* to meet its burden of proof, but that jurors "may" convict if the prosecution meets its burden of proof. The jury has the eternal right—recognized by all scholarly authorities, including the Montana Supreme Court—to choose not to convict, regardless of the circumstances.
* Today in Montana, criminal defendants are not even allowed to argue to the juries that they are innocent on grounds that the laws they are accused of violating are unconstitutional, tyrannical, or oppressive. This defies the true intent behind the Constitutional right to trial by jury. Current jury instruction practices also arguably circumvent the Montana Constitution's Article II, § 3, which protects the right of all persons to defend their lives and liberties.
* Most Montanans are shocked to learn that Montana jurors are sometimes told that they may not even look up the Constitution or the laws that a defendant is accused of violating.
* All of the most famous Founding Fathers, including John Adams, Alexander Hamilton, Thomas Jefferson, John Jay and James Madison, supported the right of juries to judge both the law and the facts. See www.FIJA.org.
* The Jury Rights Bill will require that Montana judges fully inform jurors of their absolute right to acquit and of any and all sentencing implications that may arise from their verdicts of guilty. (This was the common practice in all American courtrooms

throughout early American history.)

THE FIJA BILL IS CONSISTENT WITH MONTANA SUPREME COURT PRECEDENT

* The FIJA Act will codify an existing decision of the Montana Supreme Court regarding trial by jury. See State v. Koch, 33 Mont. 490; 85 P. 272 (Mont. 1906). Koch was a murder case in Fergus County in which the defendant admitted under oath in open court that he committed every element of the offense. Specifically, Koch admitted that he had reentered a bar in Stanford with a rifle and shot the victim after accusing the victim of cheating him in a card game. (Koch's defense was that he had no intent to kill). The trial judge instructed the jury that the jury could find Koch guilty of first degree murder, second degree murder, involuntary manslaughter or voluntary manslaughter, but that the jury could not acquit Koch. (The jury convicted Koch of voluntary manslaughter.)
* Upon Koch's appeal to the Montana Supreme Court, the Attorney General argued that the "admissions of defendant in his testimony are in effect a plea of guilty as to each offense, and the jury could not ignore this evidence." The State Supreme Court disagreed, ruling that juries in Montana have an absolute right to acquit a defendant regardless of how insurmountable the evidence of guilt is. (We don't know what happened on retrial, but at least the jury was properly instructed.)
* Here are the exact words of the Montana Supreme Court: "It has nevertheless always been recognized in practice in this jurisdiction, that the jury has power to disregard the law as declared and acquit the defendant, however convincing the evidence may be, and that the court or judge has no power to punish them for such conduct." 33 Mont. 497; 85 P. 274. The FIJA bill closely tracks this language and intent.
* Rep. Wagner's FIJA bill will simply codify and elaborate upon the Koch ruling. This codification should have been done by the Legislature long ago. Indeed, it is arguable that present statutes in the MCA (which the FIJA Act will amend) are of suspect constitutionality in light of the Koch decision.[1]

THE FIJA BILL IS CONSISTENT WITH THE REPUBLICAN AND DEMOCRATIC PARTY PLATFORMS

* The Montana Republican Party Platform calls for fully informed juries: *"We recognize both the power and the moral obligation vested in juries to secure justice by judging both the facts of a case and application of the law itself. We support requiring judges to fully inform jurors of their constitutional rights and responsibilities."*
* The Montana Democratic Party Platform calls for a fair and equal court system with equal access for all. Present court procedures are unfair and unequal because the government is treated as a privileged litigant. For example, Montana prosecutors routinely ask juries to "send a message" by convicting a defendant, while defense attorneys who ask juries to "send a message" by acquitting a defendant are sometimes sanctioned for asking the jury to go outside the facts. See, e.g., State v. Flynn, 346 Mont. 286; 194 P.3d 694 (Mont. 2008)(allowing prosecutors to ask jurors to go outside the facts and "send a message" to the broader community by convicting a defendant). The FIJA bill will correct this lopsided, unfair and unequal practice in Montana's courts.

FACT AND LAW ARE IN MANY CASES NOT CLEARLY DELINIATED

* Current Montana statutes purport to reserve all "questions of law" for judges and to allow juries to decide only "questions of fact." But such a false bright line is unrealistic in practice. "Any attempt to draw a rigid line poses a genuine problem because of the very nature of the two concepts. . . .matters of law grow downward into roots of fact, and matters of fact reach upward, without a break, into matters of law."[2] Therefore the false bright line which current MCA sections 25-7-102, 26-1-201, and 46-16-103 suggest is unwieldy and oppressive in its implementation. In practice, attempts by government lawmakers—including judges—to pronounce the existence of such a false bright line and proclaim for themselves the sole power to "decide the law" invariably lead to a usurpation of power by government actors. The FIJA bill will provide a more realistic statutory framework for describing the constitutional prerogatives of juries in Montana court practice. [3] Even the judges on the Montana Supreme Court occasionally disagree about what is fact and what is law. *See, e.g., Wadsworth v. State of Montana*, 275 Mont. 287; 911 P.2d 1165 (Mont. 1996) (posting rival opinions regarding what is a question of fact and what is a question of law).

* A good example of the way that some judges try to control the outcomes of cases by proclaiming the existence of a false "law/fact" dichotomy is found in the infamous trial of William Penn (later founder of Pennsylvania) in England in 1670. Penn and a fellow Quaker named William Mead were charged with the crime of "unlawful assembly" after preaching a Quaker sermon in a London street. The court, seeking to convict Penn and Mead, falsely instructed the jury that the jury could only consider the "fact" question of whether the Quakers had met at all, which they clearly had. The court, clearly trying to force a verdict of guilty, attempted to reserve for itself the "law" question of whether such a meeting constituted the crime of unlawful assembly. (The jury acquitted Penn and Mead in spite of their technical guilt.)

THE FIJA BILL WILL:

* Make it clear that jurors may never be punished for, or excluded from jury service, for knowing about or exercising their constitutional prerogative to scrutinize the propriety of the application of the law.
* Make it clear that parties may argue to jurors that a law is unconstitutional, unconstitutional as applied, or should be nullified for any other reason.
* Require that judges in criminal jury trials must inform jurors that the jurors may vote their conscience to acquit an accused in spite of technical guilt—as is consistent with settled Montana Supreme Court precedent (see State v. Koch, supra).
* Recognize that jurors may read the Constitution and other laws in order to decide their verdicts.
* Require that jurors be informed of the sentencing ramifications of their verdicts.

PLEASE SUPPORT THE FULLY INFORMED JURY ACT BILL!!!!!!

[1] Indeed, the Koch Court virtually suggested that the precursors of MCA Sections 25-7-102, 26-1-201, and 46-16-103 (which falsely indicate that judges are to be sole determiners of the law and jurors are to follow judges' orders regarding the interpretation

of the law) were likely unconstitutional in some applications. "We are aware that the legislature has declared (Penal Code, section 2105) that upon the trial for any other offense than libel, questions of law are to be decided by the court and questions of fact by the jury, and that, although the jury have the power to find a general verdict, which includes questions of law as well as of fact, they are, nevertheless, bound to receive as law what is laid down as such by the court." Koch at 33 Mont. 497; 85 P. 274. "It has nevertheless always been recognized in practice in this jurisdiction, that the jury has power to disregard the law as declared and acquit the defendant, however convincing the evidence may be, and that the court or judge has no power to punish them for such conduct." Id. 497; 274.

[2] Henry J. Abraham, The Judicial Process (4th ed.) 383 (1981) (citing John Dickinson, Administrative Justice and the Supremacy of Law 55 (1927).

[3] As Abraham points out, one illustration of the blurry line between law and fact is the U.S. Supreme Court's 1972 decision in *Neil v. Biggers*, 409 U.S. 188. The Court divided five to three on the question of whether an identification process was constitutionally valid. The constitutional determination required the justices to bicker over such matters as the time period between the alleged offense and the identification of the defendant, the certainty or lack of certainty of the alleged victim, and the similarity of the defendant to previous descriptions. Id. One may easily wonder how much "law" and how much "fact" was applied by the rival justices in their ultimate determinations. Cf. Abraham, supra, at 383. The Supreme Court's jurisprudence on a wide variety of other issues, such as its convoluted "drug courier profile" Fourth-Amendment cases, so commingle fact with law, that the distinction essentially evaporates.