



EXHIBIT 13
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House Judiciary Committee
March 15, 2011
Senate Bill 185

Testimony of Betsy Griffing
Legal Program Director
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Former Assistant Montana Attorney General

Mister Chairman and Members of the Committee:

I was a supervising attorney in the Montana Attorney General's office for over 9 years. For almost 5 years I was Bureau Chief of the Appellate Bureau at the Montana Attorney General's office and coordinator of a Death Penalty Task Force in that office. I was the supervising attorney for the Death Penalty Team that represented the State of Montana in the execution of Duncan McKenzie in 1995. Over the 9 years at the Attorney General's office I was the supervising appellate attorney for all of the 9 death penalty cases on appeal at that time: Terry Langford, David Dawson, Vern and Lester Kills On Top, Dan Johnson, Dewey Coleman, Douglas Turner and Rodney Sattler. I personally handled the appeal of Ronald Allen Smith twice before the Montana Supreme Court and in the federal court system.

I saw the death penalty applied in an arbitrary and random manner, depending upon the personality of the local prosecutor and the resources of the county. Even if the county had limited resources and the county attorney decided to go forward with a death case, it would require trial assistance from the Montana Attorney General's office as well as advice from the Appellate Bureau. The trial and initial imposition— while extremely costly in themselves — are just the beginning of years and years of litigation, which correctly explores whether or not the proper procedure was used to exact the most extreme punishment. These years of litigation still do not alleviate the risk of executing an innocent person.

Death penalty cases are a severe burden on numerous resources. They overburden:

Personnel Costs: The number of work hours put in by numerous attorneys over 10-30 years of litigation is staggering. This cost is measured not just in the number of hours, but also in the amount of stress both in terms of the complexity of the litigation but also in the substantial emotional stress of knowing you, as a prosecutor, are advocating for another person's death. The night after Duncan McKenzie was put to death, I returned back home and told my family that after I left the Attorney General's office, I would do anything I could to abolish the death penalty in Montana as it was such a waste of time, resources, and takes a huge emotional toll on the prosecutor.



System Costs: The entire criminal justice system is overburdened by death cases when the time and energy could be devoted to other areas that actually serve to protect society. Law enforcement, trial attorneys, defense costs, expert costs, judicial costs are all magnified as discussed below in my testimony.

In a non-death penalty case there is generally only one prosecuting attorney and one defense counsel. In a death penalty case, and in order to assure proper representation and procedures, there are at least two prosecuting attorneys – the local county attorney and an attorney from the Montana Attorney General’s office which initially doubles the prosecution costs of a death penalty case to the county – the local government. Rather than just one public defender, a death penalty case requires two “death-qualified” public defenders. Again doubling the defense attorney costs over a non death penalty case. In 2007, the administrative director of the Public Defender Office estimated shows that the time spent by public defenders on the recent death penalty case in Bozeman was **760 hours** as opposed to the 30 hours spent on the stabbing in Helena of the Supreme Court law clerk, a case which was not prosecuted as a death penalty. Thus, from the beginning and just at the trial stage, a death penalty case requires four state-sponsored attorneys.

Death penalty cases are more complex procedurally. Every action by the police, prosecutors and defense counsel must be done absolutely correctly because of the high stakes involved and to assure that full constitutional requirements are met. Prosecutors must file initially a Notice of Intent to seek the death sentence. This generally triggers a set of pre-trial motions. Frequently, if the death sentence is sought, it is a high profile case and involves very sensational facts. Often, then, a motion for a change of venue is filed. Generally a case is heard where the crime occurred – the witnesses, the police, the attorneys are close at hand. But, because of the sensational nature of a death penalty case, it is not uncommon to have to change venue in order to find a jury that has not been tainted by the press in the areas. This means adding costs associated with bringing in factual witnesses, perhaps even paying for the county attorney and his staff aiding him, and the judge to travel at a different spot. Or, I have seen situations where it is too expensive to remove the trial and all of the witnesses, judge, prosecutors and defense counsel to a different venue, so a jury actually has to be shipped in and given housing during the week. And this is just in deciding **where** the trial is to take place.

Other numerous pre-trial motions are filed and fought fiercely in death penalty cases. Frequently, a question of the legality of a confession or the propriety of a search are at issue. Even if the merits of a motion may not be as strong as a defense counsel would like, in a death penalty case, defense counsel are obligated to raise almost every possible claim. Because of the high stakes and how their performance will be reviewed under a microscope later, they must file and argue all possible motions.

The cost of expert testimony in a death penalty trial is potentially astronomical. Frequently, the defendant’s mental state is at issue at the trial and at least one expert hired both by the state and defense (all at the state’s expense) to give expert testimony regarding whether a defendant had

the capacity to have the requisite intent to commit the crime. And, while expert costs at trial are often great, they are even greater at the penalty phase of a death penalty case. At the penalty phase, the jury must consider and weigh "aggravating and mitigating" circumstances. Again, at least one expert for each side must be obtained in order for the jury to be able to fully consider the circumstances and appropriateness of actual imposition of the death penalty.

So, we know of the great added costs of having extra counsel on both sides, added costs of investigation, numerous motions filed and expert testimony. In Blaine County, in the prosecution of Lawrence Dean Jackson – prosecuted as a death penalty case, the cost for defense counsel ALONE was \$311,306. And this was billed at \$60/hour. The current rate is \$120/hour, so a conservative estimate of the Blaine County prosecution now would be \$622,000 for defense costs, this can be easily doubled in prosecution time and expert testimony costs, with a total cost of \$1.2 million to prosecute such a trial.

Remember that the trial stage is only the beginning. There is an automatic appeal of a death penalty case, and then there are post-conviction proceedings that frequently look at the effectiveness of defense counsel. The cost of an appeal of a death penalty case is staggering in that it frequently lasts 20 years as in McKenzie and Dawson. I know when we were in the final months before the McKenzie execution, a literal team of attorneys from the Attorney General's office was working on the case, some filing responses in the district courts, some in the 9th Circuit, and I was preparing briefs that were lodged in the US Supreme Court in anticipation of last minute appeals. The time and effort was literally staggering.

Again these appeals do not include one appeal to the Montana Supreme Court, but also review of those procedures in post-conviction system – they can easily accumulate to over 2,000 hours of attorney time over the course of a 10 to 20 year legal process – amounting to an additional \$240,000 in defense costs – and this does not count at least a similar amount of time spent in the attorney general's office. Assuming an appellate attorney spends a similar amount of time, the resulting cost is about another \$500,000, making the total cost of any death penalty case almost \$2 million dollars.

Execution costs themselves are expensive – setting up the lethal injection chamber, personnel expenses and overtime – for the David Dawson execution it was approximately \$45,000. Studies in other states have said that the added cost of a death penalty trial is at least 48% (a study in Tennessee) or as much as 70% (a study in Kansas). A commission appointed by the Connecticut General Assembly stated that costs of a death penalty trial were DOUBLE those of a non-death penalty trial.

Lastly, and I will close with this thought. Even if the State incurs all this added expense of a death penalty trial, the majority of cases which go on appeal after imposition of a death sentence do not result in execution because error has been found at the trial stage. In New York, after the death penalty was reinstated in 1995, the state spent an estimated \$170 million prosecuting a handful of cases. After expending all this money, only seven death sentences were handed down

in nine years, and of those, five have already been reversed on appeal. As Exhibit A attached to this testimony shows that five of those who went through death penalty trials and appeals in Montana had to be resentenced because of plea bargaining down after either errors in the trial and sentencing phase of their cases or because of settlement.

In sum, every state that has ever undertaken a cost study of the death penalty system has found capital cases to be substantially more expensive than cases where prosecutors seek lengthy prison sentences. In terms of economics alone – cold hard numbers – it makes more sense to abolish the death penalty in favor of other sentencing options.

EXHIBIT A
Attached to Testimony of Betsy Griffing
Senate Bill 185
House Judiciary Committee
March 11, 2011

MONTANA DEATH ROW STATISTICS 1973 – 2011

Total sentenced to death:	13
Executed.....	3
David Thomas Dawson (8/11/06 @ 20 years on death row) Terry Langford (02/24/98 @ 10 years on death row) Duncan McKenzie (05/10/1995 @ 20 years on death row)	
Died (Suicide)	2
Rodney Sattler (02/02/2004) Douglas Turner (07/08/2003)	
Died (Non Suicide).....	0
Resentenced by Courts.....	5
Daniel Martin Johnson [LWOP (plea agreement)] Bernard Fitzpatrick [300 years WOP] Dewey Coleman [commuted to extended sentence] Lester Kills on Top [2 consecutive life terms + 40 years WOP] Vernon Kills on Top [2 consecutive life terms + 40 years WOP]	
Sentence Commuted by Governor.....	1
David Keith**	
** Reasons reportedly included Keith's partial paralysis and blindness, remorse, religious conversion, and the possibility that he may have shot the victim as a reflex action. Note: Montana is a state in which the governor must have the recommendation of clemency from a board or advisory group.	
Other Removals.....	0
Under Sentence of Death 03/15/11.....	2
William Jay Gollehon Ronald Allen Smith	