



MONTANA HOUSE OF REPRESENTATIVES

SPONSOR'S REBUTTAL TO FISCAL NOTE

House Bill Number: HB370

Date Prepared: 02-22-15

Short Title: Generally Revise Death Penalty Laws

Sponsor: Representative David "Doc" Moore

Generally, why do you disagree with the fiscal note?

The Fiscal Note makes the flawed assumption that the two inmates currently on death row will be actually executed in 2016, and this is highly unlikely. The Fiscal note also doesn't address the current absence of a death chamber at the Montana State Prison. A chamber would need to be built or refurbished prior to an execution taking place; and the cost of such should be included in HB 370's Fiscal Note.

Additionally, the Fiscal Note does not take into account the legal expenses of the death penalty. The Fiscal Note merely reflects the Department of Corrections' costs of the two current death row inmates. But as long as we continue to have the death penalty on the books, there will most certainly be death penalty cases sought. In the Governor's Budget Highlights Report 2016-17, a shortfall is reflected in the Office of Public Defender's budget. "The Office of the Public Defender is projecting a shortfall in FY 2015 of \$1,700,000... This projected shortfall is due to capital cases and workload related to dependent neglect cases." (*Governor's Office of Budget and Program Planning, Governor's Budget Highlights 2016-2017; Page 23*). We would expect to see this kind of shortfall every time there is a capital case filed in the State of Montana. The Office of Public Defender's budget as submitted to the Governor for the Executive Planning process, included a budget line item of \$1 million per year for the "defense of Capital Cases" (*Office of Public Defender, budget memorandum, October 3rd, 2014, Page 3*). Also, previously there was \$500,000 general fund for each fiscal year in the Executive Budget for the potential defense of capital cases by the Office of Public Defender. This budget appropriation was removed from later versions of the 2016-17 budgets but the cost to the Office of Public Defender remains. \$500,000 - \$1 million per year and \$1-2 million for the biennium in cost savings to OPD and should be reflected in HB 370's Fiscal Note.

The Fiscal Note also fails to quantify the costs to the Department of Justice in the prosecution of death penalty cases. While the Agency "acknowledges staff attorney time involved on death penalty appeals can be considerably more costly than "normal" cases as they do require more staff attorney time" (*HB 370 Fiscal Note*); the fiscal note and the agency fail to quantify this cost savings. Although we can assume the passage of HB 370 would reduce costs to the Department of Justice, thereby saving the state money; we do not know how much. An assumption can be made that the costs of prosecution would be similar to the costs of defense in a Capital case; The Office of Public Defender assumes \$500,000-\$1 million a year as the cost of the death penalty to their office; so the cost savings to the Department of Justice could be estimated to also be \$1-2 million over the biennium. Whatever the actual dollar amount, the cost savings of abolishing the death penalty should be reflected in the Department of Justice's section of the fiscal note.

Specifically, what in the fiscal note do you feel is flawed?

The Fiscal note assumes that executions would take place in FY2016. This assumption is flawed at best. Currently, there is a legal challenge to lethal injection that until resolved prevents any execution from taking place. This challenge is scheduled for bench trial in July, 2015. Should the State's lethal injection protocol be found unconstitutional by the Court; no execution could proceed prior to action being taken by the 2017 Legislature. But no matter what ruling results from the trial, there will most certainly be an appeal process that would further delay executions. In any case, there is very little likelihood of an execution proceeding in 2016. The fiscal note is flawed in its assumption of an execution in 2016 and therefore, the costs reflected are incorrect.

It is important to take notice that the fiscal note for 2013's House Bill 370, also a bill to replace the death penalty with life without parole (precisely the same bill text as 2015's House Bill 370), made a similar assumption. The 2013 HB 370 fiscal note stated "There are currently two inmates who have a stay of execution until the settlement of a lawsuit pertaining to the legalities of lethal injection. One inmate is still awaiting a clemency determination. The lawsuit is estimated to take approximately 14 months to reach a conclusion. Once the decision and appeals are final, it is assumed both executions could take place in FY 2014." (*House Bill 370 Fiscal Note*) We can clearly see that the Department of Corrections is incapable of projecting an accurate timeline for executions proceeding.

It should be noted that currently there is no execution chamber at Montana State Prison. Prior to an execution taking place, the Department of Corrections would need to build or refurbish a chamber that would pass Constitutional muster. The fiscal note does not account for the cost of building of such a chamber.

In 2010, there was some discussion of building a room that would be useable as a death chamber. In a 2010 newspaper article, Department of Corrections spokesman, Bob Anez told the Billings Gazette that

["The agency plans to conduct future executions in a yet-to-be-built "multipurpose room" at Max. The 800-square-foot room would be used mostly to store extra mattresses, shoes and other items needed in Max and as a place to put the large, portable food heaters that keep inmates' meals warm when meals are being served, Anez said.

"We are not building an execution chamber," he said. "It is a multipurpose room, and it has the ability, should the time ever arise, to function as a makeshift execution chamber."

The addition is expected to cost \$300,000..."] (*Billings Gazette, "Montana to Build Multipurpose Execution Site", January 11th, 2010*)

This room has yet to be built at the Montana State Prison and the cost of building such a room/execution chamber should be reflected in House Bill 370's fiscal note.

Because an execution will likely not take place, independent of the passage or not passage of House Bill 370, the cost of incarceration of the two current death row inmates should not be factored in to HB 370's fiscal note. Or if the Department of Corrections assumes that an execution will take place, the cost of building a suitable death chamber should be included (estimated at \$300,000) in the fiscal note and show as a cost savings to the passage of HB370. In short, either the cost of death row incarceration to the Department of Corrections should not be included in HB 370's fiscal note because an execution will likely not occur, or an additional cost savings of \$300,000 should be reflected as a result of passing HB 370.

What is your estimate of the fiscal impact?

Department of Corrections

If we assume (as is likely) that no execution would occur in this biennium, there will be no effect on the Department of Corrections budget. This cost line should be \$0.

If we assume that an execution will occur in this biennium, the Department of Corrections should show the following:

1. There are currently two inmates on death row at Montana State Prison. The average number of years spent on death row for those two inmates is 27.14.
2. There are currently two inmates who have a stay of execution until a lawsuit pertaining to the legalities of lethal injection is settled. The lawsuit is estimated to be resolved in FY 2016. All appeals are exhausted so, once the lawsuit is resolved, it is assumed both executions could take place in FY2016.
3. The estimated cost of an execution is \$49,500 based on the last execution. For two executions, a cost of \$99,000 could be incurred in FY 2016 under the current law. Although the department has not specifically budgeted for this expense, with a change in law, the FY 2016 cost of \$99,000 would not be incurred.
4. As there is currently no execution chamber at Montana State Prison, the Department of Corrections would need to build one. Previous estimates for the cost of building a multi-purpose room/makeshift execution chamber is \$300,000. This would be incurred in FY 2016 under the current law. With a change in law, the FY 2016 cost of \$300,000 would not be incurred

5. The current annual cost to house an inmate is \$37,329 Cost of housing two inmates for an additional year is \$74,658.
6. FY 2016 will show a savings of \$324,342, which is the difference between the cost of two executions and the building of an execution chamber versus the annual cost of housing two inmates.
7. Starting in FY 2017 the cost of housing the inmates include an inflationary rate of 1.5% per year.

Office of Public Defender

The current fiscal note shows no impact on OPD; however the line item in the Office of Public Defender’s budget for the executive planning process is clear. The cost to that agency of Capital case defense is \$1 million per year. Under current law, \$1 million would be incurred in FY2016 and FY2017. With a change in law, a \$1 million annual cost to the Office of Public Defender would not be incurred. The fiscal note should reflect a cost savings to the State of Montana of \$2 million resulting from the passage of House Bill 370.

1. FY2016 will show a cost savings of \$1 million.
2. FY2017 will show a cost savings of \$1 million.
3. FY2018 will show a cost savings of \$1 million.
4. FY2019 will show a cost savings of \$1 million.

Department of Justice

There was no information provided regarding the fiscal impact for the cost of litigating death penalty appeals so none has been shown. The agency acknowledges staff attorney time involved on death penalty appeals can be considerably more costly than “normal” cases as they do require more staff attorney time.

Based on the idea that the cost of death penalty prosecution is similar to the cost of death penalty defense, we should assume a cost savings of \$1 million annually to the Department of Justice.

Fiscal Summary – Assuming no execution in this biennium

	FY 2016 Difference	FY 2017 Difference	FY 2018 Difference	FY2019 Difference
Expenditures:				
General Fund – Dept. of Corrections	\$0	\$0	\$0	\$0
General Fund – Office of Public Defender	(\$1,000,000)	(\$1,000,000)	(\$1,000,000)	(\$1,000,000)
General Fund – Dept. of Justice	(\$1,000,000)	(\$1,000,000)	(\$1,000,000)	(\$1,000,000)
Revenue:				
General Fund	\$0	\$0	\$0	\$0
Net Impact – General Fund Balance	\$2,000,000	\$2,000,000	\$2,000,000	\$2,000,000

Fiscal Summary – Assuming an execution in FY2016

	FY 2016 Difference	FY 2017 Difference	FY 2018 Difference	FY2019 Difference
Expenditures:				
General Fund – Dept. of Corrections	\$(324,343)	\$75,777	\$76,914	\$78,067
General Fund – Office of Public Defender	(\$1,000,000)	(\$1,000,000)	(\$1,000,000)	(\$1,000,000)
General Fund – Dept. of Justice	(\$1,000,000)	(\$1,000,000)	(\$1,000,000)	(\$1,000,000)
Revenue:				
General Fund	\$0	\$0	\$0	\$0
Net Impact – General Fund Balance	\$2,324,343	\$1,924,223	\$1,923,086	\$1,921,933

Sponsor Signature: _____