

Senate Bill 306  
Senate Judiciary  
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Testimony of Betsy Griffing  
Legal Program Director  
ACLU of Montana  
Former Assistant Montana Attorney General

Mr. Chairman and Members of the Committee:

I do not envy you this task – this weighty and serious task of allowing the death penalty in Montana to go forward. I am not here to appeal to your moral or ethical senses or legal and constitutional beliefs. Instead, I am here to address that all important function of the legislative branch – its power of the purse.

I am here today to talk about the great financial costs of a death penalty prosecution. I have attached as an Exhibit to my testimony a chart that shows why just the trial costs of a death penalty case far exceed the costs of a non-death penalty trial. I have also attached as an Exhibit a listing of those death penalty cases that arose in Montana since 1973 to the present. Although there are few hard numbers in Montana with respect to a comparison of the costs of death penalty cases vs. non death penalty cases, I can provide personal and first-hand testimony concerning the greater financial burden on the state regarding such cases.

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.

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 and two public defenders. John Connor from the Attorney General's office participated in prosecuting numerous death penalty cases and in doing so the local counties are charged for his time and expertise in aiding in the prosecution of such cases. Initially doubling 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. 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 court 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. We requested from the Attorney General's office an estimate of the tremendous cost of appeals of death penalty cases. 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 9<sup>th</sup> 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. We did not keep separate records of the time spent on death penalty appeals, and I recently requested the cost and time spent on appeals from that office. John Connor replied to me and stated that although the costs and time spent had never been separately calculated, he could affirm that they take considerable time and effort.

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 costs 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.

I have left out the costs of incarceration – death penalty cases frequently take up to 20 years before the execution. The cost of keeping an inmate on death row or maximum security is about \$48,000 /year – 20 years at a cost of \$1 million dollars. The cost of maintaining an inmate not in general population is about \$27,000/years, a \$20,000 less per year or a savings of \$400,000 over the 20 years.

This estimate comports with studies in other states.

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 B on my handout shows – 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.

Thank you for your time and attention. I would be pleased to answer any questions.