

Testimony of

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SB 306

An Act Abolishing the Death Penalty and Replacing it with Life Imprisonment  
without Possibility of Release

Montana State Senate Judiciary Committee Hearing

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I'm Sam Millsap and I come to you from the state of Texas, where we execute folks like its going out of style. I'm no wild-eyed, pointy-headed liberal; I am the former elected District Attorney from San Antonio, Texas, the 8<sup>th</sup> largest city in America. As Bexar County District Attorney, I oversaw the successful prosecution of several capital murder cases, each of which resulted in the execution of the defendant. I have been a strong supporter of the death penalty throughout my adult life. Last year, a major Texas newspaper established to my satisfaction that one of my prosecutions may have resulted in the execution of an innocent man.

I believe prosecutors whose best efforts may have produced unfortunate results in capital murder cases have a moral duty to publicly acknowledge and accept responsibility for their mistakes. I fervently hope that there are only a few prosecutors and former prosecutors in America today who find themselves, as I do, in the position of having to admit an error in judgment that may have led to the execution of an innocent man. I'm here today to discuss the death penalty from the perspective of a former prosecutor who is responsible for prosecution and execution of a man who may well have been innocent.

Although it is crucial that we be willing and able to look back and correct the errors of the past, as Montana has done in the non capital convictions of Chester Bauer, Jimmy Ray Bromgard, and Paul Kordonowy, it is more important that we look to the future in the search for a system that guarantees--in capital murder cases--the protection of the innocent.

As is the case in Texas, the criminal justice system in Montana, on its best day, is driven by very dedicated, but imperfect, human beings and, try as we do to get it right, sometimes we simply don't. Our courts and juries determine guilt or innocence based on testimony from witnesses who are sometimes wrong and who don't always tell the truth.

It is against this backdrop--what our states have in common--that I address the issue of innocence in the context of the case of Ruben Cantu, who was prosecuted by my office in 1985 and executed in 1993.

Because Ruben Cantu didn't receive just a fair trial--but arguably received a perfect trial--its facts are both instructive and haunting for every state that permits the death penalty.

Ruben Cantu had a fine defense lawyer, an ethical prosecutor, a fair judge, and a jury that returned the only possible verdict, based on the evidence that was presented. And yet, it has been determined 21 years later that he may well have been innocent. Whether he was innocent or not, the system failed him.

You are entitled to wonder how I can argue that the system failed in a case in which it is unclear whether the defendant was, in fact, innocent. In Texas, like Montana, prosecutors have vast discretion in deciding whether and how to prosecute capital murder cases.

I made an error in judgment by permitting Cantu to be prosecuted for capital murder based on the uncorroborated testimony of one eyewitness. Most prosecutors in America, confronted with the same circumstance at that time, would have made the same decision I made. That eyewitness, who had absolutely nothing to gain but trouble for doing so, has recently recanted his sworn trial testimony under circumstances that make his current claim credible.

One might argue that my mistake can be remedied by requiring more than the testimony of a single eyewitness in death penalty cases. That would be a good decision, but it would ignore the fact that prosecutors acting entirely in good faith make all sorts of judgments in murder cases and, because they are human, sometimes make mistakes. Add to that undeniable fact, the reality that judges, jurors, defense attorneys, and witnesses also make mistakes and what you end up with is a system that, by definition, cannot be relied on to protect the innocent in all cases.

The system we rely on to decide who may live and who must die is broken and, because it is driven by decisions that are made by human beings, can't be fixed. What we have seen over and over again are situations in which witnesses who have nothing but trouble to gain by recanting sworn trial testimony nevertheless do so and for good reasons. We have seen junk science debunked, and the exposure of terrible mistakes by forensic laboratories. And finally, we have seen misconduct and errors by many players within the system. In short, the undeniable fact is that the system we rely on in this country to prosecute capital crimes simply cannot be trusted to protect the innocent.

Some suggest that it's good enough if we get it right most of the time. That good intentions and strong procedural safeguards like you have here in Montana are sufficient. If you believe, as I do, that we **MUST ALWAYS GET IT RIGHT** in capital murder cases, that the system **MUST** do what is intended—guarantee the protection of the innocent--accepting a system that tries hard and gets it right most of the time is simply not good enough when the sanction is so final.

Death penalty supporters argue that there is no proof that an innocent person has ever been executed in the United States. United States Supreme Court Justice Antonin Scalia recently said in his concurring opinion in *Kansas v. Marsh* that he knew of no innocent man who had been executed.

I would challenge Justice Scalia and anyone else who is tempted to argue that there is no proof that an innocent person has ever been executed in the United States to make that argument after they have examined the record from Texas.

Consider first the clearest of the recent Texas cases and tell me that the criminal justice system protects the innocent. Cameron Willingham was convicted of arson and executed; his three children were killed in the fire that burned his house to the ground. His conviction was based on expert testimony that was generally considered at the time to be reliable. What we now know with certainty—too late for Willingham—is that what we accepted as expert testimony at the time was nothing more than junk science; it is now clear that the expert testimony upon which his conviction was based was flawed and that, in fact, the State of Texas convicted and executed not only an innocent man; we executed a man for a crime that never occurred.

I urge you to recommend that the death penalty be abolished in the State of Montana.