

Thank you for attending this conference. I will be discussing the issues of lethal injection; you should understand that we anticipate filing suit against the State of Montana and other state officials soon to challenge lethal injection. Also, however, you should understand that this challenge is not the end of the struggle to end the death penalty in Montana. Rather this is the first step to underscore that the death penalty, no matter how administered constitutes cruel and unusual punishment and should be abolished in Montana.

While the challenge to the continued use of lethal injection will be presented to the court system, ultimately abolition needs to be presented to and passed by the legislature. While it is possible that the court system may, at some time in the future, hold that all death penalties are cruel and unusual punishment, this is not the direction of the current challenge, nor is this the challenge which is pending before the United States Supreme Court. Therefore, I would ask you to learn about this issue and to then, between now and when the 2009 legislature meets, to speak to individuals elected to the house and senate and inform them of why you want them to vote for an abolition bill.

Last legislative session, the abolition movement came very close to achieving passage of a bill in both houses of the legislature. The bill passed the senate and would have passed the whole house had it not remained bottled up in the house judiciary committee.

So, please do not become convinced that the upcoming legal challenge will succeed and therefore nothing further needs to be done. Although I fully expect to see a victory in the litigation, this will only ban one type of execution protocol but leave the death penalty still an option to the courts, provided of course that the state can develop another form of execution which the state is willing to proceed with.

I do want to start with the reasons why I support the abolition of the death penalty. It is my belief that the death penalty is cruel and unusual punishment and simply should be banned as a violation of the eighth amendment to the U.S Constitution. Presently the death penalty is disproportionately applied to minority members of our society and is applied in a random and capricious manner, with virtually no predictability. The exercise of the death penalty is riddled with mistakes, leading to the sentencing and potential executions of innocent individuals or individuals who should not be subjected to this severe sentence. Most of you appreciate that of the more than 200 individuals freed due to the use of DNA testing and findings, that individuals convicted had not actually committed the crimes which they were convicted of; of the 200, a substantial majority were under a death sentence, including two individuals in Mississippi, who had been convicted of perjured and false testimony by two state experts, who falsely identified teeth marks on the victim which did not actually exist.

Error is prevelant in all states which has the death penalty. It is estimated that

75% of all death penalties are subject to some flaw, either in the guilt phase or in the penalty phase of the proceedings. An examination of the death sentences in Montana reveals that the death sentence has been improperly imposed at least 68% of the time. On at least four occasions, courts have set aside death sentences directing that the inmate be resentenced to a lesser sentence. Other death sentences have been set aside due to errors committed in the sentencing process.

Over a decade ago, during an early conference on the death penalty, former Governor Racicot correctly commented that the only justification for the death penalty was that this sentence deterred other capital crimes. While Governor Racicot offered his personal view that the death penalty did deter crime, his view is not shared by the majority of criminologists or other individuals who have studied this issue. There simply is scant research which supports the conclusion that the death penalty deters crime.

There are several reasons for this conclusion. The first, noted above, is that most people believe that the death penalty is flawed and frequently results in an erroneous sentence. This belief dispels any deterrent effect of the death sentence.

Second, the death penalty is simply too random in its application to deter crime. It is too easy for any individual to quickly become convinced that the death penalty will not be applied to their act, regardless of the severity of the crime. For years my work has taken me to Montana State Prison at Deer Lodge on a number of occasions. Most of the time at the prison, I have been on the high-security side with a considerable amount of time spent in the maximum security unit (max). If I could take other individuals with me, I could identify individuals in the prison population, who committed crimes of a similar and in some instances, virtually identical in nature to the crimes which resulted in a death penalty imposed upon only a few individuals in prison. Some few persons are sentenced to death; most are sentenced to life imprisonment. The difference between the crimes and the offenders are indistinguishable. At present there are only two individuals under a death penalty and both of those convictions have serious flaws and both are in the federal system ongoing review of sentences given a decade or more ago.

Third, even with the actions of congress which has eliminated successive and repetitive appeals of death sentences, the amount of time between the commission of the capital crime and the carrying out of a death sentence, literally decades, results in any lack of deterrent effect of any such sentence.

Finally, the death sentence does not deter due to the nature of the underlying capital offense itself. There are a number of reasons why people kill. None, however, warrant society deliberately taking another individual's life.

Criminals typically do not commit a capital crime through planning and stealth. The typical capital crime does not involve any cost-benefit analysis, weighing the crime and its potential punishment, on one hand, and the crime and its potential benefits on

the other. Rather most capital crimes are the result of a combination of factors, none of which are affected by the potential of a capital sentence.

Individuals who commit capital crimes, like virtually all criminals, are socially disabled or socially deficient individuals. These individuals are incapable of forming close bonds or friendships with others, they are incapable of empathy, and incapable of projecting that their actions could cause harm or injury to another. Usually this social disconnect is the result of early childhood sexual and physical abuse. About 80% of all inmates have a history of early childhood abuse -- the percentage is higher among capital crime inmates. Recent studies also point to the conclusion this social disconnect is most extreme in the capital offender.

Additionally, capital crimes are not planned crimes, but usually are the result of an unexpected escalation of poorly thought out lesser crimes, typically a robbery or burglary gone awry, with events cascading out of control. Capital crimes are frequently the result of the easy availability of firearms. Capital crimes usually involve drugs or alcohol use -- not that the perpetrators are intoxicated or high, only that the individuals have used substances sufficiently to wipe away any normal inhibitions which would otherwise form a boundary against such conduct. We are taught not to take another life throughout our upbringing and early childhood development; it takes a combination of a number of bad things in sequence with each other to alter these teachings and allow an individual to kill another human being.

Given all this, the only justification for the exercise of capital punishment, that carrying out such a death sentence will deter other capital crimes, simply does not exist.

Additionally, if the fact that the principal argument, deterrence, is an invalid argument and no justification for the death penalty, I would offer two other observations. First, if you just want to look at the proper expenditure of public funds, then spending funds to accomplish a death penalty makes no sense. Administration of capital sentences in the United States and specifically in Montana is a very expensive procedure. Most capital cases consume an additional one million dollars or more. Most of these funds, about \$400,000 to \$750,000 now are expended up front, between the time of the arrest and the sentencing. This is because the commencement of a prosecution of a capital offense requires two death penalty certified attorneys, with numerous experts, including mitigation experts and psychologists to speak to issues of intent and the effects early childhood abuse may have had upon the accused. As I noted earlier in this discussion, we have to abolish the death penalty; if we don't, even if there is never another conviction in a capital case, we still get to spend the upfront costs, even if there is not a sentencing of a capital case. Remember that the last three capital cases resulted in no death sentence; in one, the court declined to sentence the offender to death; in the other cases, the Supreme Court of Montana found that the prosecution took too long to charge the accused with a capital offense and therefore could not proceed and request a death sentence at trial. Still these three "capital cases" cost Montana's taxpayers more than one million dollars.

The drain of money does not end with the death sentence. There is an automatic appeal to the Supreme Court of Montana and the trip through the federal system. Every year after conviction a capital defendant consumes an additional \$100,000 to \$150,000 per year above the costs of incarceration of a non-capital offender. Do the math, after 20 years of appeals, this adds up to a considerable expenditure of public funds. And if in the end, the sentence is set aside and the individual sentenced to some other sentence, all of these funds have been wasted.

Second, and perhaps the most disturbing aspect of the death sentence is the cluster of statistics, all of which underscore the basic unfairness of this sentence.

1. The individuals who are sentenced to death are usually strangers to the community where the crime occurred.
2. The individuals who are sentenced are poor -- virtually all have been represented by appointed counsel -- usually under-experienced, underpaid and without adequate resources for investigation and expert testimony including the penalty phase representation. Admittedly, Montana now has a new and much more effective public defender system; even though it has been in operation for only a few years, the increase in spending, training and supervision has already produced results. The past three capital cases have not resulted in any death sentence; we only have two individuals under a death sentence, all old convictions and all represented by appointed counsel under the old public defender system. One of those individuals has an attorney who spent a total of 10 hours in his representation of the defendant from initial interview, plea and sentencing.
3. The individuals have been subject to early childhood abuse -- often sexual abuse.
4. The individuals have experienced some type of significant head trauma -- or have a mental capacity at or below normal -- a recent study showed identifiable head injury in virtually every capital defendant.
5. The individuals have been the focus of some law enforcement official who pushed to make the case a capital offense.
6. The individual is a member of a racial minority. At one time in Montana, we had one Afro-American out of four capital defendants at a time when Afro-Americans represented less than 1% of Montana's population. For a time, Montana had 2 out of 8 death sentence defendants who were Native Americans when the Native American population was 5% of the total population.

I find these statistics disturbing. They underscore the conclusion that in America and Montana, society executes the poor, the slow, the strangers and the racial minorities of our communities. From these facts I reach the conclusion that we must abolish the death penalty in Montana.

Before we achieve this goal, however, we need to confront the current method of execution in Montana and elsewhere, the lethal injection protocol. The last execution in Montana was by lethal injection, as have been all the three executions since 1995 when

we commenced executions following a 50 year absence of executions. It would have seemed obvious that having gone 50 years without an execution and not seeing any capital offense escalation, Montana would have realized that the criminal justice system did not need to resume executions. However, since 1995, Montana has executed three individuals. The last, David Dawson, was a volunteer for his execution and had he not been a volunteer, had we been able to find a party with standing, more likely than not, his execution would have been stopped.

The Montana protocol has been challenged in a number of other states, including Arkansas, California, Delaware, Missouri, Ohio, Tennessee and the District of Columbia. One of the cases from the U.S. District Court in California concluded after an extensive hearing that the administration of lethal injection protocol was barred by the eighth amendment because it was both cruel and unusual punishment and likely to result in the infliction of pain and suffering through the administration of the three drug protocol. This case is now on appeal to the ninth circuit. If the circuit affirms, then this case will affect and prohibit all executions by lethal injection throughout the ninth circuit, including Montana. Additionally, New Jersey has recently abolished the death penalty and Nebraska has found that their execution procedure, by electrocution, also is a constitutionally prohibited method of execution.

I want to turn finally to the lethal injection procedure which is followed in Montana. Again, Montana's protocol is open to any of a number of challenges. Montana Statute is the authority for lethal injection, however, the statute sets forth a two drug protocol. Nevertheless, the Department of Corrections uses a three drug protocol, something which troubled U.S. District Judge Molloy to comment: "I am deeply troubled by the death warrant in this case and looking at this statute. *** (w)hen I read the statute the protocol goes beyond the statute *** and if the protocol exceeds the bounds of the law, then you truly do, it seems to me, have a potential homicide." Further the Judge commented: " (w)ith all of the evidence, then I think there could be a determination as to whether or not the Montana Statute, as written, is unduly vague, or whether or not executions that go beyond the specific authorizations of the statute, are, in fact, legal executions, and then the protocol that is involved with the current execution protocol, whether or not that, in fact, violates the eighth amendment to the United States Constitution."

The constitution prohibits punishment which involves something more than the mere extinguishment of life, such as torture or a lingering death; it prohibits the infliction of unnecessary pain in the execution of the death sentence. There is nothing more cruel than the purposeless and needless imposition of pain and suffering.

The three drug protocol was developed in Texas and Oklahoma in the 1970s in an effort to provide a humane way to execute individuals without the horror of electrocution and the burning of an individual while still alive and without having to watch as an individual struggled and strangled to death in a gas chamber. Essentially borrowed from drugs then used by veterinarians to end pets' lives, the drug protocol was

never tested on humans before being used in executions. The three drugs are sodium pentathol, a barbituate, designed to render the inmate unconscious; pancuronium bromide, which paralyzes an individual, regardless of whether the person is conscious or not; and potassium chloride, which disrupts the heart's functions and leads to cardiac arrest. While Montana statutes authorize utilization of the first two drugs, it does not mention nor authorize the administration of potassium chloride; still this latter drug has been administered in all of the three recent executions in Montana.

The risk of mistake during the administration of these three drugs is substantial. Montana heightens the risk by not requiring that the individuals who administer the drugs have training needed to effectively measure the administration of the initial barbituate to assure that the inmate is in a completely unconscious state before the rest of the protocol is administered. Indeed, the problem with this three drug cocktail starts with the initial drug, which though used by anaesthesiologists during surgery throughout America, its use in the operating room is simply to induce a patient to a level of unconsciousness to then allow the introduction of other drugs to assure that a patient remains in an unconscious and painless state throughout a surgical procedure. Sodium pentathol was never intended nor is it used, in hospital settings to both induce and sustain unconsciousness. However, when the state becomes the executioner, it uses this drug inappropriately.

Administration of any drug intravenously requires skill and training; monitoring an individual's state and level of unconsciousness requires training and experience. The Montana protocol contains none of these safeguards to assure that an inmate has achieved a level of unconsciousness to assure that the inmate is at a state where pain cannot be felt and there appears to be some evidence from at least two of the executions in Montana that the inmate had not remained unconscious during the entire procedure.

Aside from the difficulties of using a barbituate to achieve a state and length of unconsciousness which it is not designed to obtain, most commentators and critics of lethal injection point to the use of pancuronium bromide as the one substance which is most questionable in this procedure. Pancuronium bromide is a paralytic agent, it stops all movement of the inmate, but it also stops all voluntary muscle contractions, including lung function and the diaphragm. Conscious or not, injection of this drug causes the inmate to stop breathing and if the inmate is not sufficiently unconscious, the inmate starts to suffocate and struggle for breath. During executions, this struggle is evidenced by the sound of snoring -- this is not an individual asleep, but a less than fully unconscious individual struggling for breath. This is the "needless pain and suffering" prohibited by the constitution. Pancuronium bromide is administered for only one reason, to assure that the witnesses do not see an inmate struggling as the other drugs are applied to the inmate's body.

Once paralyzed, the inmate can not twitch or shudder or flail. Rather the inmate remains still, regardless of whether the inmate is unconscious or not. And, if the inmate

is not unconscious, then the inmate struggles as his breathing stops and he starts to strangle to death.

Beyond this, then, if the inmate is not unconscious, when the potassium chloride is administered, then the inmate experiences a fierce burning sensation as the drug courses through the veins to the heart.

As noted, any problem in the administration of these drugs will inflict pain on the inmate. Since there are three separate drugs, the risk of incorrect administration increases exponentially. Add to this the lack of training and qualifications for the personnel who perform the execution; add to this the lack of minimum safeguards to assure that this procedure is carried out correctly, and add to this the lack of detailed and accurate record keeping and you have a procedure which is likely to cause unnecessary and unconstitutional conscious pain and suffering by the inmate before the inmate's death.

Montana's constitution invokes a higher standard than the standard imposed by the United States Constitution. Article II, Sect. 4 guarantees the right of human dignity to all individuals. Montana's constitution prevents a punishment which degrades the dignity of a prisoner. This broader protection is violated by the current lethal injection protocol.

As we proceed to challenge this procedure, this drug protocol which is contrary to statute, administered by untrained and unskilled individuals, in inadequate facilities, with no training nor experience, some attention must be given to the case from Kentucky pending before the United States Supreme Court. This case will not prohibit lethal injections, even if the inmate prevails, rather it will only set the standard for cruel and unusual punishment at the federal level. Montana, which has a higher standard, protecting human dignity, will not be affected regardless of the outcome of this litigation.

Society and Montana should not retain the death penalty, which is used to retaliate against an individual who has taken the life of another person. When we seek revenge and when our punishment is mere retaliation, we cheapen all human life. We have to ask the question of why we believe that by killing a person who killed another person, we will thereby keep other people from killing other people. It is obvious that this action has never prevented individuals from killing others.

It is time that the death penalty is abolished in Montana.