

## **Statement to Law and Justice Interim Committee**

Madam Chairwoman and Members of the Committee:

Thank you for this invitation to address you and share with you my observations concerning the Board of Pardons and Parole.

I start with this disclaimer. While I have formed a number of opinions concerning the operation of the Board and what its functions should be, I do not regularly appear before the Board on behalf of clients. I have however conducted one major hearing before the Board, when my client, Duncan McKenzie, sought clemency shortly before his execution. Additionally, I have worked with Ron Smith's other attorneys to develop the evidence for his clemency hearing and testified during that hearing.

My connection with the Montana Correctional system reaches back almost 25 years to the situation which developed immediately following the 1991 Prison Riot at Max. I represented numerous inmates who asserted they had been abused by correctional officers following the retaking of control of the Max Unit and was the lead attorney for all of those inmates. Additionally, I coordinated with representatives of the Department of Justice in their separate conditions case which was filed following the riot and which led ultimately to reforms in the dental, physician availability and mental health screening for present and future inmates. The current classification and housing evaluation program and the identity of vulnerable inmates is an outgrowth of those efforts.

Additionally, I have represented Native American inmates alleging discrimination in their religious practices and assisted in developing programs outlining how those religious practices can be carried out without discrimination in all of the correctional institutions in the state. I have further represented inmates in litigation over prison policies and individuals who suffered injuries due to negligence of the prison system while those individuals were incarcerated at MSP. I have had the privilege of representing an individual who was factually innocent of charges brought against him but who was nevertheless incarcerated at MSP for over 15 years. I have likewise represented individuals wrongfully convicted of crimes which they did not commit, one a failure to register as a sexual offender who was convicted prior to when the registration law was passed. Recently, I participated in litigation addressing the needs of those inmates who suffer from mental health needs but who are under the age of 21 when they come into the Montana Prison system. This resulted in new programs for the housing and treatment of these individuals.

My work has not been restricted to only working at the men's facility at MSP and Shelby. I have also had numerous clients at the Montana Women's Prison in Billings. I represented a number of women there who challenged the programming available to them dealing with education, religious practices, canteen and other privileges because the programs were not equal to those programs available to men at the various correctional institutions across the state. Most recently I have represented, with the ACLU and other cooperating attorneys, women at the Billings facility who challenged

both the lack of boot camp and the therapeutic program which tied receiving education, employment and other programs to being involved with the therapeutic program which had no behavioral justification and was demeaning to the women involved in the program.

I have also been involved with substantive reform of the public defender system and I have worked to abolish the death penalty in Montana, securing an injunction against the death penalty protocol in 2009 which remains in place today, with the challenge ongoing in District Court.

Finally, I have open correspondence files with over 200 men and 120 women at all of the penal institutions in the state, assisting them in evaluating potential claims against the prison system or considering issues arising from either their original convictions or looking at issues which have arisen since they have been incarcerated in the correctional institutions of our state. While I do not institute much litigation from this element of my practice, I find that I can help inmates who often are proceeding pro se, to understand the justice system and assist in decisions of what type of actions to commence and whether the claim has merit and is worthwhile to pursue. Most of the work I do with these inmates is pro bono.

While not directly related to my work with the Montana prison system, I am now a life member of the American Law Institute, a national organization of lawyers, judges and law professors from the United States and across the world working to set forth principles of best practices of what the law should be in a variety of situations.

Turning to the question before this committee, I would strongly recommend rethinking the current structure of the Board of Probation and Parole. But I would do so only as a part of a larger reform of the criminal justice system. Admitting that the system is broken and that the Board has too much unfettered discretion in its parole decisions is only a start of the reform needed to the system. Removing the discretion of the Board in making parole decisions alone will not revise the system to produce a system which responds appropriately to the needs of Montana to have a functional criminal justice system.

I make this initial recommendation upon the numerous discussions I have had with inmates and my personal observations of the operation of the probation and parole system. Inmates who statutorily are eligible for parole and who have lengthy good conduct records and who have completed all of the programs required by their sentencing judge or by classification upon entry to MSP uniformly fail to obtain parole on their first and often their second applications for parole. This has become the standard at MSP and the Women's Prison, one must endure multiple applications for parole before it is granted. Given the broad discretion granted to the Board by statute, its decisions are largely incapable of judicial review. The result has been one of leading elements of frustration to inmates who may have complied and demonstrated their expectation of parole only to be told that they need to return to the Board months later to seek parole again. When a party to these proceedings cannot understand the basis

for a decision to either grant or deny parole, looking at similarly situated individuals, the evidence strongly supports the conclusion that the discretion of the Board without realistic regulation by statute results in arbitrary and capricious decisions by the Board which are beyond court review. The goal of good government must be one of transparency. A person involved with the system must be able to understand the rules which govern the operation of the system and the system must function with a substantial degree of consistency. Follow the rules and most likely a predictable outcome will occur. Using this definition, the operation of the Board lacks transparency.

While clearly this situation suggests that one reform would be for the Legislature to provide clear statutory direction to the Board as to when to grant parole, the better direction may be to simply eliminate parole all together.

I cannot make this recommendation in a vacuum however. Before proceeding in this direction, the Legislature must see this action as a part of a more comprehensive review of the entire criminal justice system because it is not just the parole function which is broken; it is the entire system.

Thus if reform is to occur, one must step back and look at the entire criminal justice system and start afresh by looking at recommendations made from various sources which call for a total revisiting of the entire structure of what occurs following conviction of a crime. First on the block is sentencing. In this regard, I would encourage you to consider the recommendations of the ALI, which not only recommends elimination of the system of parole due to the numerous opportunities for disproportionate and inconsistent decisions, but starting at the beginning, the ALI also recommends a sentencing commission to study the appropriateness of sentences and their length. Montana has never undertaken a comprehensive study of the length of sentences and compared them with how other states treat similar crimes. Nor has Montana ever looked to assure that the sentences given are consistent with the impact the particular crime has upon its victims and society as a whole. As a substitute for parole, the recommendations are to allow the sentencing court the power and authorization for a look back provision, allowing the sentencing judge who most often was also the presiding judge of the criminal conviction to look again at a sentence to determine whether the length of sentence originally given was appropriate in light of the individual's actions subsequent to conviction and sentencing. Thus my recommendation is to take advantage of the professional work being done in this area by noted legal scholars, judges and lawyers who recognize the need for reform but do so systemically and not just piecemeal by addressing only the parole element of the sentencing and incarceration decision of the criminal justice system

The ALI is embarking on a review of the initial Model Penal Code and is working its way through the entire code and while the work is not complete, recommendations relating to both sentencing commissions to review the appropriateness of sentences and considerations of continuation of the system of parole and alternatives are outlined in recent drafts of the ALI and should be reviewed with care to assure that if reform is to

be sought in Montana that the result is a system consistent with the best recommendations from experts across the United States.

I firmly believe that reform is critical to the present system of justice in Montana. We incarcerate too many individuals for too lengthy a sentence and then release those individuals too often under circumstances where the individuals are likely to fail upon release, only to have them returned to the prison system.

I would ask this committee to consider the European model which stands in contrast to the system of justice in America. European countries generally incarcerate fewer individuals for shorter periods of time with lower recidivism rates, and with lower overall crime rates. One must of course eliminate crimes involving firearms given the approach in European countries towards access to firearms, but even with this element of the criminal statistics taken into consideration, the overall crime rate and the incarceration rate is well below that in the United States.

My understanding of the European model is that just like in the United States, they view those who violate the criminal law as individuals who have announced by their actions that they cannot abide by the rules of the prevalent society. In America, this conclusion results in punishment. In Europe, on the other hand, this is seen as an opportunity, perhaps the last opportunity for society to adjust the convicted person's mind and attitude towards the norms of the prevalent society. The European model is focused more on rehabilitation than retaliation and the differing outcomes are the result of this different focus of the system.

Thus, individuals who enter prison in Europe are given exhaustive tests to identify their mental health needs, their educational deficiencies and their employable skills and aptitudes for work. Where deficiencies are identified, they are aggressively addressed with specific training and counseling, appropriate to address the deficiencies identified. Moreover given the shorter sentences, inmates are not isolated from families and knowing that inmates will likely return to live with family members who have stayed with the inmate through the criminal justice system, services are also offered to families to address any social, mental health, educational or employment deficiencies identified. The result is shorter sentences and lesser recidivism, about one third of what is experienced in the U.S., and with individuals who can successfully move from incarceration to employment.

For too long, Montana has rejected the role of incarceration in reforming an individual and providing that person with skills to reenter the work force and potentially be restored to an engaged citizen. Montana has only sought to punish individuals who have violated the law instead of using an individual's conviction as an opportunity to restore that individual to becoming a contributing member of society.

One final point, we need to also reform the front end of the criminal justice system by removing to the extent possible, those who are mentally ill, suffer from addictions and those veterans who suffer from PTSD and other service related injuries. If this

committee were to do one thing towards reducing the prison population it would be to encourage and fund drug, mental health and veterans' courts. Removing these groups from the criminal justice system and allowing them to progress in dealing with their individual needs and using therapy in lieu of punishment will allow many of these individuals to return to being productive citizens and avoid the excessive expense of incarceration for individuals who are in these groups who neither belong in prison and who do not perform well in prison due to the special needs they bring to the prison system. We have for too long incarcerated individuals suffering from addictions instead of providing treatment to individuals who contact the criminal justice system. Regretfully, individuals who suffer mental illnesses are too frequently incarcerated, denied appropriate treatment, and sent to prison. Montana State Prison, rather than the state hospital, houses the largest population of individuals suffering from a mental illness. However, prison lacks the resources to deal with these individuals and the neglect and minimal treatment while incarcerated only aggravates the underlying illness.

There is much work to be done, for too often we have continued to build prisons to have the capacity to deal with a perceived growing crime rate. Building prisons however will never deal with any of the problems from sentencing to probation and parole, any more than building cemeteries will ever successfully deal with a public health crisis.

This committee has a large task in front of it. Please do not look for piecemeal solution to a problem which transcends all of the criminal justice/correctional system. Reform must be comprehensive and complete.

Thank you.

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