

3-27-2008

# Should the death penalty be abolished?

R. Lyn McClellan

Allan Sobel

Richard Dieter

Follow this and additional works at: [http://scholarlycommons.susqu.edu/adams\\_events](http://scholarlycommons.susqu.edu/adams_events)

---

## Recommended Citation

McClellan, R. Lyn; Sobel, Allan; and Dieter, Richard, "Should the death penalty be abolished?" (2008). *Arlin Adams Center Events*. Paper 2.  
[http://scholarlycommons.susqu.edu/adams\\_events/2](http://scholarlycommons.susqu.edu/adams_events/2)

This Conference Proceeding is brought to you for free and open access by the The Arlin M. Adams Center for Law and Society at Scholarly Commons. It has been accepted for inclusion in Arlin Adams Center Events by an authorized administrator of Scholarly Commons. For more information, please contact [sieczkiewicz@susqu.edu](mailto:sieczkiewicz@susqu.edu).

The Arlin M. Adams Center  
FOR LAW AND SOCIETY  
Susquehanna University

ARLIN M. ADAMS CENTER FOR LAW AND SOCIETY  
SYMPOSIUM  
SHOULD THE DEATH PENALTY BE ABOLISHED?

SUSQUEHANNA UNIVERSITY  
DEGENSTEIN THEATER  
SELINGROVE, PENNSYLVANIA  
MARCH 27, 2008  
7:00 P.M.

SHOULD THE DEATH PENALTY BE ABOLISHED?

PARTICIPANTS:  
Richard Dieter, J.D.  
R. Lyn McClellan, M.D.  
Allan Sobel, J.D.

Before: Sarah C. Thomas, RMR  
Reporter-Notary Public

ERVIN BLANK ASSOCIATES, INC.

MR. SOBEL: Good evening. I am Allan Sobel, the director of the Arlin M. Adams Center for Law and Society at Susquehanna University. And I welcome all of you to our concluding event this evening of the first ever Adams Center Symposium, a symposium examining whether we should abolish the death penalty in America.

We have had a number of just wonderful events that started last night with a presentation by Bud Welch, who lost a daughter, a 23-year-old daughter, in the Oklahoma City bombing. He told us about what it was like to lose a daughter in those circumstances and the transitions he has made in his thinking about how to overcome the anger and the rage that he felt as a result of the death of his daughter, and where he stands today with regards to the death penalty.

Today we started off with a wonderful presentation by Dr. Joel Berberich, who is a physician at Geisinger - in fact, the head of the anesthesiology department there - who helped us understand how the three-drug cocktail, the lethal injection method of execution, was supposed to work and why at times it doesn't work in a way that ends the life of a condemned person without pain and suffering.

From there we had three panel discussions. The first looked at the death penalty through the eyes of co-victims, co-victims being people who lost a loved one through murder, and then through the eyes of an exoneree, somebody who was convicted of a murder that he didn't commit, spent nine years on death row, and was ultimately released from death row.

Then we had a panel that looked at whether the death penalty is just and moral. On that issue our speakers were Dr. Barrett Duke, who is with the Southern Baptist Convention and spoke about the views of that particular denomination with regard to the death penalty, and Dr. Howard Zehr, who is really the father of restorative justice.

Then we concluded with a debate on whether the death penalty is administered fairly and non-arbitrarily.

In tonight's concluding dialogue we are going to put all of these issues together and examine with great intensity, with the benefit of our two speakers, whether it is time to abolish the death penalty in America. I want to repeat a couple of remarks that I made last night - - so it will be redundant for those of you who were in attendance -- because I think it's important to keep this in mind.

There are many ways to consider the ultimate question of whether the death penalty should be abolished. And I suggest to you that the primary way that most people react to that question is by prioritizing their values regarding punishment when someone commits a horrible act against society and takes one or more lives. Should the perpetrator be allowed to live or be put to death?

I suggest to you most people answering that question assume certain things about our criminal justice system that may or may not be accurate; like only guilty people are convicted, that nobody who is innocent is convicted of a crime that he or she didn't commit and no one is sentenced for either a period of years or to death for a crime that he or she didn't commit, and they assume that all criminal cases are handled in a way that the defendant receives competent and effective counsel who represents the defendant zealously, and that the defendant's rights are recognized, are safeguarded, are enforced by all who participate in the system -- law enforcement, prosecutors, judges, defense counsel, juries, witnesses, everybody - and they assume that the criminal justice system with regard to the death penalty is

especially administered in a way that does not allow any improper influence to affect any judgment, influences such as biases or, for example, racism. They make all those assumptions.

What we are going to do here tonight, as we did today during our panel discussions, is, in part, examine whether those assumptions are true or not. And if one or more of them turns out not to be true, then you need to think individually and discuss with others whether, in light of the actual state of the criminal justice system in America as opposed to what we might assume, we should have a death penalty.

To help enlighten us on these very important matters we have two fabulous speakers, Richard Dieter and Lyn McClellan. They are both attorneys, but they offer much more than the knowledge and wisdom of an average attorney to the subject under consideration.

Mr. Dieter graduated cum laude from Georgetown University Law Center in Washington. He also holds degrees from the University of Notre Dame, undergraduate, and a Master's degree from Ohio State University. He is a member of numerous bars, including the United States Supreme Court Bar, and he serves as an adjunct professor at Catholic University School of Law in Washington, where he teaches a seminar on the death penalty.

He has been the executive director of DPIC, the Death Penalty Information Center, in Washington, D.C. for more than 15 years and I assure you that there is no place in the United States that has a greater collection of information relating to the death penalty than Mr. Dieter's shop, the Death Penalty Information Center. It's a non-profit organization that serves the public and the media with regard to resources and information about the death penalty. Everybody who is interested in knowing about the death penalty who is a scholar and does work in the area is very familiar with Mr. Dieter and the Death Penalty Information Center.

Mr. McClellan received an undergraduate degree in government and a Master's degree from Texas Tech University and then a law degree from South Texas College of Law. Since graduating from South Texas College of Law in 1981, he's been employed by the Harris County, Texas District Attorney's Office, where he is currently the bureau chief of the felony trial bureau.

Now, what makes his appearance here tonight so special is that Mr. McClellan is involved in death penalty cases where the rubber hits the road, where all these issues that we are talking about play out in real life. He's not somebody that has to depend upon scholarly research to reach some valid opinion and judgments about the administration of the death penalty. He has actually tried 35 cases representing the State of Texas in which he sought on behalf of the State a conviction of the defendant and the imposition of the death penalty.

He frequently speaks at professional conferences about the death penalty and other criminal justice matters, and he has addressed, among other organizations, the National District Attorneys Association, the Texas District and County Attorney's Association, the Houston Bar Association, the Texas Society of Psychiatric Physicians, and the Center for American and International Law.

Now, let me give you a sense of how we are going to handle this dialogue tonight. First I am going to call upon Mr. Dieter and he will have 20 or 25 minutes uninterrupted to present his position to you, which will be that the death penalty should be abolished. When he finishes those remarks, I will call upon Mr. McClellan, who will have

an equal amount of uninterrupted time to explain why he believes we need a death penalty.

After his remarks are concluded, I may have a question or two that each of these gentlemen will be asked to respond to and then we will open it up for questions from the audience. There is an aisle mic on each side of the auditorium. If you have a question, I encourage you to stand up in line behind one of the aisle mics and ask it when it's your turn.

Thank you.

Mr. Dieter.

MR. DIETER: Good evening. My name is Sister Prejean. No. I am actually Richard Dieter that Helen talked about. I want to thank Professor Sobel for inviting me to be part of this unique and inspiring event at the Adams Center and thank Susquehanna University for putting this together, as well.

In speaking about the death penalty to a group of students and professors, those who know the academic world and the academic cycle, I have to recall a case that I think students will understand and relate to and that I think says a lot about our death penalty system today. The significance of this case is that the events started in September, which is when the school semester starts. And that turns out to be very important.

In 1998 in September, a man on Illinois' death row by the name of Anthony Porter was scheduled to be executed. His attorneys managed to file a last minute appeal that said that Anthony Porter had a mental defect, that he was mentally retarded and to such an extent that he should not be executed; that he was incompetent to be executed.

The judge felt this was perhaps a delaying tactic, but said, Well, we will hold a hearing. We will try to determine whether that's actually the case and so I'm going to delay this execution until we have this hearing.

At the same time some journalism students at Northwestern met for their first class. Northwestern has a notable journalism school, the Medill School of Journalism, and the students that were involved met for their first day with a professor, David Protess, and were given an assignment.

The way this class would work is the professor says, You are going to be journalists. I want you to take, in this instance, a criminal case and I want you to treat it as you would if you were a journalist; that is, not to believe anything that you've been told either by the media or anyone else. You do the investigating.

And four students -- there were a number of students in this class -- four people, four students, 20, 21 years old, were assigned the case of Anthony Porter because that case had a little more time. If he had been executed it would have been over but, fortunately, they took this case.

And they thought it was a wonderful opportunity. One of them I got to know very well. She said that it was much more interesting than a lot of the classes. They cut other classes and they began to investigate the facts of Anthony Porter's case.

They had the trial transcript, for example. And four of them said, Well, let's see if what was said at his trial matches up with the facts. We will have to go down to Chicago, where this crime occurred, and you play the victim and you play the defendant and you play the witness, and according to the transcript, you stand there.

And all of a sudden they realized that what was described in the trial could not have happened; that the witness could not see what was happening if she, in fact, stood there and watched the defendant or the person who committed this crime kill this victim. Something was wrong.

Well, step two, you go and talk to that witness. This witness, of course, whose name appeared in the transcript -- and it's some 15, ten years later, I guess, from when the crime occurred, but you had the name. You track her down. That's your job. And they found eventually the woman who gave this testimony about Anthony Porter that said that he was the one who did the shooting.

And they had to go into some difficult areas, but they did. And they knocked on her door and she said, My gosh. I thought this day would never come. I'm so glad that you're here. I have a confession to make. Ten years ago I was in a relationship with a person and I felt pressured and I said that Anthony Porter did that murder, and he did not do it. I feel terrible. The police encouraged me to say this and to say it was Porter and my boyfriend told me to say it was Porter, but it wasn't.

You know, people change their testimony sometimes ten years later. That wasn't going to be enough. And she said, I can tell you who did do this murder. I feel like I have to do that now, especially since Mr. Porter is now facing execution, and she gave them a name of another man.

And he had long since left the area, but with an investigator the school had as part of its journalism team, they tracked him down. He was in Milwaukee. He was in Milwaukee. And they went to his house and during discussion of it, he started to break down and he admitted that he had done this murder and he even was willing to give them a deposition on videotape.

And, of course, you know, at that point the whole case fell apart. I mean, you now had the person who committed the crime admitting on videotape that he did it, you had the chief witness saying that's who did it and it wasn't Anthony Porter, and you had poor Anthony Porter staring sort of in a daze. He was about to be executed. Even his lawyers weren't saying he is innocent. They were saying he's mentally deficient, shouldn't be executed.

Anthony Porter was then freed. The students and the professor were the person of the week on ABC Evening News. There was, you know, hugs as he was released from death row in Illinois. It was quite a moment.

But it's a moment that should make us all pause. I mean, this was not the system working well. This was not the criminal justice system working at all. This was a group of students who, fortunately, got excited about a case and reinvestigated it and found out an innocent person had been convicted, sentenced to death, and almost executed.

A little later I met Anthony Porter. Actually, we were on a TV thing, a TV program. It made me shutter to be next to him, because he was almost dead. And he was kind of a resilient person. Definitely mentally limited. But here he was, alive.

And one of the students, Sharon Albress, became -- went to Georgetown Law School. I was her mentor at the school and know her very well. She has now gone on to do innocence work, directs an innocence project in our area. I mean, that story, the implications of that for our system should be enough to sort of capture this whole issue. If it were just that one case, perhaps we would say, well, that was a fluke and good for the

students. Actually, there has been some other cases in which journalism students have actually helped free innocent people.

But beyond that, we now have 127 people who have been freed from death row since the death sentence started up again after the Supreme Court stopped it. One hundred twenty-seven people have been exonerated. Many of these also came close to execution. And that number is what I think is starting to make a difference around our whole country.

It's not just what I think. The American public is shifting on the death penalty and I think it's these cases, these disturbing instances.

And DNA is another set of examples where, you know, if science -- thank goodness for the scientists coming up with DNA testing. There would have been a lot of executed people, because that's the only thing that helped free a number of the 127. Not all, by any means, but some of the more recent numbers.

So we've had -- since the death penalty came back in 1976, Supreme Court ruling, we have had 1,099 people executed in that time. During the same time we have had 127 people freed. That's for every execution there has been one person freed from death row who never should have been there in the first place.

I mean, it's not saying it's out of the 1,000 who were executed 100 were innocent, but just that these two things help capture the death penalty in our area.

And as I say, it should be enough to say the risks are too high. I'm not talking about a few or scattered. I mean, innocence always was an issue with the death penalty. It's irrevocable. But the numbers have started to change. The exposure of problems in the system have, I think, brought a whole new day.

I do want to touch, though, on some other issues that I think are also important. I mean, my role here tonight, this is a dialogue. This is not a, you know, you should think the way I think. You should abolish the death penalty. I think you should.

This is something, I am very anxious and welcoming to hear Mr. McClellan. I'm anxious to hear your comments. This is an exchange. But these are some of my thoughts about this innocence debate.

The three issues I wanted to touch on -- some of these have already been talked about, of course. This is a two-day event, with just an enormous number of wonderful speakers, so some of this you may have already heard, some of these issues.

But I think I want to focus on the fact that the death penalty is divisive; the fact that it is, and remains to be, arbitrary in the way it's applied; thirdly, and perhaps curiously, that it's become very costly. I'll try to say why I think those issues are important, but first let me say a little about each one.

The death penalty is divisive. A lot of things are divisive, but in the session this afternoon there was some discussion of what happens in a death penalty case in selecting the jury. A strange thing happens. The district attorney from Pennsylvania alluded that it's fairly common, but it's not.

In death penalty cases, if you were ever asked to serve on one of those cases or be in the jury pool, you will be asked about your personal, religious, moral, ethical views and if you have the ones that are not correct, you will not be allowed to serve on that jury, on that capital jury, because death penalty cases have to be what they call death qualified. You have to go through that process, not just to determine

the sentence of the individual, but to determine whether he or she is guilty or innocent, so you will be asked these things.

Now, the implication is, well, you will to be able to follow the law. If there were just like one out of 1,000 people who just couldn't believe in the death penalty, perhaps that would be an aberration. But that is not America today. America today is split on the death penalty.

The latest Gallup Poll asked people, you know, which would you support, the death penalty or life without parole? And it came out just about even; 48 percent for life, 47 percent for death. That kind of split, then, is reflected in who gets on the jury. If you have the wrong view, you're out.

Well, that then becomes a jury that is not America. That is not representative of us as a people.

You know, we have very few special privileges as Americans and citizens. We have lots of tradition. When you come down to it, you can vote and pay taxes and you can serve on a jury, but not if you have certain points of view when it comes to the death penalty. Then you'll be excluded.

Who has those views? Is it just kind of random? No. Minorities tend to be more against the penalty. More of them are going to be excluded from that service. Women tend to be more against the death penalty. More of them are going to be excluded from service. And certain religious faiths are going to be excluded. That's not who we usually are and that's why I say it's divisive. It's not just that it's a controversial issue. It's an issue that takes us away from our democratic tradition, from our equality tradition, and puts a divisiveness that does not need to be there.

Of course, it's also even more divisive. We have heard a lot about racial disparities and the statistics and charts and numbers. But when it comes down to it, of those people I mentioned, the 1,100 people who have been executed, 80 percent of those cases involved a white victim.

Now, in our society blacks and whites are victims of murders about equally. About 49 percent of murders have white victims and black victims. But that's not what happens when it comes to the death penalty. Eighty percent, you know, for the past 30 years.

What does that mean? What kind of fields some of this. What that means, if a murder is committed in a black community it is not a death penalty case by and large. If a murder is committed in a white community in a state that has the death penalty, that may well be, you know. And the whole system kind of supports that. The juries are mostly white. The prosecutors are mostly white, the judges, the defense attorneys, a lot of us.

It's a system that isn't working out well. Whether the biases can be proved with statistical studies or not, it is divisive. It's a very different perspective on the death penalty, depending on which community you are in. It's because it doesn't serve both communities equally. It doesn't ask for both communities to serve equally. So in that sense it's also divisive.

It's also divisive for victims. We heard from a victims' representative, Ms. Achilles, today. And, you know, in the victims' community, just as within the same family, you have some people who want the death penalty for the defendant and others who don't. Of course, that's divisive at a very sensitive time and victims generally. But we support the death penalty partly because it's supposed to serve victims.



In reality, you know, there is, unfortunately, a lot of murders, maybe 15,000 murders in the United States last year. How many executions were there? Forty-two.

The chance of a victim's case going for the death penalty is miniscule. We could have a lot more, but we don't.

So 99 percent of the victims' families, as long as you have the death penalty, are going to feel cheated. Oh, my victim, my mother, my father, son, whoever was murdered was not worthy to get the death penalty. The other, that one percent, maybe it happens. It's not just random who gets it, as I said. So you have this divisiveness that creeps over even into the victims' community and divides them.

A lot has been talked about the death penalty being arbitrary. We had actually a whole session on that this afternoon, so I won't kind of go through all those arguments, but I wanted to -- of course, I think the best example is one which was mentioned, is that who gets the death penalty? Arbitrary means it's not the worst people who get the death penalty, the worst offenders, most culpable, the most heinous crimes. Is it some other factor that drives that? That's what it would be if it were arbitrary.

The biggest factor that drives that is whether you get a good lawyer or not. Good lawyers cost money. Some of them aren't working on death penalty cases. It makes a world of difference.

The perfect example was talked about in Philadelphia, where, for various reasons, one of every five death penalty cases is assigned to the Philadelphia Public Defender and in not one of cases that they have received, not one person has received the death penalty. Those are good lawyers.

Philadelphia produces a lot of people to Pennsylvania death row. I think it's over half of Pennsylvania's death row is from Philadelphia, but none from, you know, the group of lawyers who have training, resources to do the cases right.

Is that chance? Is that by accident? No. I mean, that's what good representation does. And not everybody gets good representation. Some people get lawyers who have slept during parts of the trial. Some get lawyers who never did one before or are doing it on their own or doing it for \$1,000. And that means, you know, if you want to get paid you only push a few hours to do the work. So it's arbitrary in that sense.

It's arbitrary in another interesting sense, because the death penalty has become very political. There was a survey done by the Associated Press which looked at what happens to death penalty cases when they are appealed up to the federal courts. And this is by the Associated Press just about two years ago.

They found that whether the defendant won or lost on appeal depended on which president appointed the judge who reviewed the case. It should depend on whether they got a fair trial. It should depend on a lot of factors. It depended on whether it was Reagan or Carter, Clinton or Bush.

I'm not saying that either one of them are right. They were both wrong in a sense, for somehow 80 percent of people who go up for that federal review with a Clinton or Carter appointee get their cases overturned. Eighty percent of those who go in front of a Bush or Reagan appointee, their cases get affirmed. What's going on there? That's an arbitrariness. I don't think it's because the judges are bad. I don't even think the appointment system is bad. It's that the death penalty is not a normal part of the

criminal justice system. It's not something that you weigh like were the facts there for your guilt or did you apply the sentence within the guidelines? No. The death penalty is full of judgments, personal judgments, weigh all sorts of thing that are not usually part of the criminal justice system.

We ask jurors to decide between guilt and innocence. We've done it for 250 years. The standard is did the prosecution prove this beyond a reasonable doubt. You have to find that unanimous. That's what jurors do.

In death penalty cases it's a whole other thing. There is no more, you know, proving beyond a reasonable doubt. There is aggravating and mitigating factors, and the victim's family gets up there and tells how bad it's been. All of this is thrown together and the jury is supposed to decide life or death; not did they prove beyond a reasonable doubt, but should I give him life or should I give him death.

That's what's distorted this system. That's why the death penalty does not fit within the criminal justice system. It fits within the political system and it's part of the political system that I think is old and should be discarded. I mean, it's part of that political system that is divisive rather than moving forward and it's something that is a dinosaur in a lot of ways.

Finally, and perhaps, as I said, a little curiously or out of focus is this issue of cost. It was one of the Reverends spoke earlier today. We certainly don't consider the cost. We consider whether it's just, whether it's moral, et cetera.

But I think when you people who are going to decide on this death penalty for the future are going to go into voting booths or whatever, you are going to be making policy decisions. You are just not going to be making moral decisions. Is this system helpful to our society or is it somehow holding us back? Is it contributing in some way?

In that world costs make a difference. Costs also make a difference because the numbers, the amount, the money that the death penalty is taking is starting to become very significant.

California has 660 people on death row. In 30 years they have had 13 executions. So to keep that system, that legal system of appeals and judges and prosecutors and everything going, the Los Angeles Times recently estimated that that costs the State of California for the death penalty \$124 million; okay? How many executions did they have? Thirteen over 30 years.

Quick math. One execution every two years. One hundred twenty-four million dollars a year to keep that system going and it takes, you know, two years to get an execution. That's \$250 million that the State of California is paying to execute one person. Those are staggering numbers.

Just think of what \$250 million can buy in terms of making society safer, in terms of putting more police on the streets, in terms of putting better lighting in crime areas, in terms of educational programs, jobs. Two hundred fifty million.

It's not just California. New York recently abolished the death penalty. The estimate there was in nine years they spent \$170 million. Nobody was executed. No case was upheld on appeal.

New Jersey also recently abolished the death penalty. They did a study. Two hundred fifty million dollars was spent. No executions in New Jersey.

Pennsylvania is not a lot different. I don't know what the costs are, but it's something that you should be considering. It's a factor that weighs into this broader public policy concern. That's the issue.

I think we come out of this from a lot of different moral perspectives. Professor Sobel talked about if we had a perfect world. We have to deal with the death penalty that exists. These costs are not going down. The time that it takes to get an execution is not going to get shorter.

The innocence cases are going to interfere with that. We now know that a fast death penalty, a cheap death penalty, whatever, is going to make errors. It's going to make mistakes. That's an even greater cost.

So we are faced with a death penalty that hasn't been working, that has been divisive, arbitrary, and becoming so costly as to raise deep concerns. It's for all of those reasons that I think you should choose to abolish it.

Thank you.

MR. SOBEL: Mr. McClellan.

MR. MCCLELLAN: Thank you, Professor Sobel, Mr. Dieter. I would like to thank you all for inviting me here. They didn't really have to go all the way to Texas to find someone to be in favor of the death penalty, but they did.

In fact, the statistics will show in a few minutes that the biggest anti-death penalty group in America are prosecutors. And I talked to David when we were coming in here the other day. I didn't know he had the facts to kind of back up this situation. I said, You know what happened here? Texas just got life without parole.

Before we didn't have life without parole. It was life equals 40 years day for day before you could be possibly paroled. It was either that or death. A lot of people said in Texas, life without parole, there won't be any more death penalty. I said, I don't think that is going to be the case.

I think my experience, 35 or more capital murder cases, death is determined on the facts of the case itself and nothing else. You can bring any case you want to that falls under the purview of death penalty qualified and meeting the legislative statutory scheme, but you are not going to get death unless you have a case that calls for it. That's the cases that we bring to the jury.

But his statistics show that there were 4,000, about, per year, 4,000 death penalty eligible defendants, of which 140 received death, 160 the jury spared their life, and 3,700 the prosecutor spared their life by deciding not to seek death. Because we --

In fact, the day before I came here, prosecutors had already selected a death penalty jury, getting ready to start the case on Tuesday. They said the defendant is willing and ready to plead life without parole. He is also going to plead to another murder case. He agreed to stack that on life without parole. I said you can stack time on life without parole in case they decided to undo life without parole. We had lost some evidence and they know about that, too.

So what should we do? Of course, we wanted to consult the victims. I spend more time convincing - telling victims why we don't seek the death penalty than I do saying we ought to seek the death penalty. Anyway, we ended up pleading that case. The prosecutor said it's a sure thing.

And so I get the feeling, having been here for the last day or so, that prosecutors are viewed as one of these people that want a notch on their belt, want to do whatever, convict innocent people, do all kinds of things. I am in favor of effective assistance of counsel.

Mr. Dunham talked here today -- and I'm glad he's in Pennsylvania. He is a defense lawyer, public defender. I'm glad he's not in Texas. Really not. But I would like to have somebody this qualified, because I want to do my job and let them do their job. What I don't want to do is have to do both people's jobs. What I want is a final conviction that's not going to have to be overturned or anything else.

But the cases that we will select to go for death are, quite frankly, pretty heinous. Now, I am going to talk about he said in death penalty cases it's no longer beyond a reasonable doubt. Let me tell you what it takes to get to death in the State of Texas, anyway.

First of all, you got to find somebody guilty. Then we ask two questions. Do you find from the evidence beyond a reasonable doubt there is a probability that the defendant would be a continuing theft to commit future acts of violence, a continuing threat? Yes or no. Where is the burden? On us.

The second question is the penury question about mitigating factors. It says take into consideration all of the evidence, the evidence determining guilt and innocence -- that's about how the defendant committed the crime -- the evidence you hear as punishment.

In a capital murder case you have a punishment trial where you hear additional evidence about a defendant's character, his background, his mental history or lack thereof, his criminal history or lack thereof, all kinds of information about the defendant that was not necessarily relevant to whether he committed the crime, but it's entirely relevant to what punishment he receives for the crimes he was found guilty of. And you look at all that evidence.

They refer to it as the defendant's personal moral culpability. I like to refer to that as the personal moral responsibility. Is he the person that pulled the trigger that fired the shot that killed the person or is he a get-away driver?

Then if you find sufficient mitigating facts or factors, that means that he should receive life as opposed to death. Mitigating factors are nothing more than reason. There have to be sufficient mitigating factors or sufficient reason why he should receive life or death.

Basically the last question asks you to stop where you are at that point in the trial. You have already found him guilty. You found him a continuing threat. That's not good enough. You still need to stop and reevaluate everything you heard so far. And if you find there is sufficient evidence to convince you that life would be more appropriate than death, if you do, you say yes and he receives life.

For someone with those questions, two questions and also with the guilt or innocence, the vote has to be 36 to zero. If it's 35 and one, he receives life. It's unanimous on every issue. Mitigation, they don't have to be unanimous about what the mitigation is; just that something is mitigating that they believe makes the life penalty more appropriate.

Quite frankly, capital litigation is the Mount Everest of due process in this country. Everybody says we ought to just have life without parole and do away with the death penalty. You think everybody is going to come up and say, Great, man. I got life without parole? That doesn't sound like a

good idea. Court says you cannot have the death penalty for someone under the age of 18, but life without parole is appropriate for a 17-year-old -- at least in the State of Texas, that is -- then the other question is going to be why should they have life without parole? It's like the DA talked about earlier this afternoon. If it's not this issue, it's another issue.

You find very few people that come and will talk to you as a death penalty advocate, because I don't know what a death penalty advocate means. I am not here to advocate the death penalty. I am here to say it's a proper punishment for certain types of crimes.

But I don't decide whether the death penalty is applied or not. Jurors do. You go through the process of selecting a jury. And we talked about the fact that's not fair because you get a death qualified jury. Here is what a death qualified jury means. You take an oath to a true verdict render based on the law and the evidence. That's a death qualified jury. A true verdict render based on the law and the evidence; okay?

What that means is that if you answer and you find a defendant guilty of capital murder, that's fine. You go forward to the punishment stage of trial. If you find him not guilty, that's the end of the trial.

But when you get to the punishment stage of the trial, if you believe the evidence beyond a reasonable doubt -- state's burden, again, part of this 36 to zero -- that that person is a continuing threat to society, if you believe the evidence shows that, you are not at liberty to say no. You have to follow the law and the evidence. If the law and the evidence proves to you that the answer ought to be yes, your answer is yes.

When you get to the last issue, which is mitigation, if you believe that there's not enough mitigating circumstances sufficient to mitigate this punishment, you have to vote no, there's not. If you vote no, the death penalty would be imposed.

Now, if you ask somebody, Can you be fair during the trial, they say sure. Well, let me walk you through this. If you come in and say, I don't believe in the death penalty. I don't believe there is any kind of case ever deserving the death penalty, then can you really a true verdict render based on the law and the evidence?

Because if you take that oath as a juror you are going to be confronted either with finding evidence there to prove him to be a continuing threat and, if you believe that, you either have to violate your oath or violate your conscience. You shouldn't be put in that situation. That's what a death qualified jury is, somebody that doesn't have to violate their oath or violate their conscience in order to render a verdict.

We have lots of people who go through and say, Well, I don't believe the death penalty, but if you prove it to me, I could do it in the right case. That person is going to be on the jury unless I use a preemptory, which in Texas we have.

Defense attorneys used to come up and say that, well, Madam Juror or Mr. Juror, you need to understand that the best I can hope for, as a defense attorney, are 12 people who believe in the death penalty. Well, that's true, believe meaning that they believe that in a proper case, if the evidence proves it, I can return it. If they want to trade that unanimous verdict for letting people on who don't believe in it, I'm willing to bargain. But we don't -- evidently in Florida -- I don't even know if this is right or not -- but a ten-

two verdict returns a death. You don't have that. You have to have a unanimous verdict at every stage of the trial.

So the beyond a reasonable doubt, you know, issue about a capital case, it's a Mount Everest of due process.

The costs, I can't get away from costs. I had no earthly idea until I got ready to come here -- I read some of the information from the Death Penalty Information Center -- that they calculate cost of a death penalty by taking the cost of all death penalty litigation, let's say, in a state and divide it by the number of people that get executed. I thought the cost of the death penalty, whenever I hear people say it's more expensive to have the death penalty than it is to have somebody in the penitentiary for the rest of their life, take this much for the lawyer, take this much for this, take this much for the courtroom, take this much for the appeals and all that on this individual.

In Pennsylvania you have executed three people and you got 200 or 300, or something, people on death row. You take the cost not only of those, but also of the ones that didn't even get death.

You take the cost of all of those people and put it together, and that's where you come up with \$254 million to have the death penalty. Because you divide it by the number of people who actually have been executed.

Now, I was a CPA before I went to law school to become a lawyer. I don't think that's going to pass constitutional muster. I mean, the CPAs are going to have to deal with it.

If we are going to talk about the cost, all the costs -- really, quite frankly, there are very few variable costs in a death penalty case. The judge is going to get paid whether we are going for a death penalty or not. I am still going to get paid, the court reporter is going to get paid.

Aren't you glad of that?

The jurors are going to get paid. They may be there a little longer. Experts are going to come in.

If we are trying somebody for life without parole you think we are not going to put on some experts? The defense is going to put on some experts. They are going to come in. Sure they are. Then the appeals. You tell me you are not going to appeal a life without parole case? What in the world do they have to do the rest of their life than to get somebody to appeal that case? It's going to be appealed.

I thought they were coming through and saying, Okay. Take the costs. How can it be more expensive to have the death penalty and execute somebody than it is to keep somebody alive for the rest of their life? Now I figured it out. They throw everybody into the mix, divide that by three, and come up with \$254. That's not -- that's disingenuous. That's just disingenuous.

And the same thing applies to the exoneration issue, how about actual innocence? When they look at the 127 people freed from death row, that might be right. But exonerated? Oh, well. Wait a second. Stop for a second. We are talking actual innocence.

Here is the information of the Death Penalty Information Center for whether or not somebody gets exonerated. Their case has been reversed, they have been retried and acquitted, which means found not guilty, the state has dismissed the case or the governor has given them a pardon.

Now, none of those things equal innocence. We try a case. The jury finds a defendant not guilty. They don't find him innocent.

I can't tell you the number of times somebody -- jurors come up to me and said, Well -- I am not talking with death penalty days cases, but all types of cases -- we thought the defendant did it, but you just didn't prove it beyond a reasonable doubt; okay? That's not guilty. That's not innocent.

The state dismissed the case. Well, I was looking on the exoneration list to see, well, there must be in Texas. We are kind of the death penalty capital of the world. You need to realize if Harris County were a state, we would be the 25th largest state in the nation. I don't want to exaggerate.

So I figure, well, we got Vernon McManus and Aldape Guerra, but neither one of them were exonerated as innocence. Vernon McManus got the death penalty for killing somebody for hire. The person who testified against him at his trial, who was prosecuted herself for an event, refused to testify a second time at a retrial after the state case was reversed and we had to dismiss the case.

Aldape Guerra, the judge ruled the evidence of all the witnesses to be inadmissible because of what he thought was impropriety. I thought what we ought to do was put them all in and let the jury decide all that. We had to dismiss that case.

A dismissal of a case that's been reversed is not actual innocence and is not exoneration. It's releasing somebody from the penitentiary, but it's not actual innocence. So what I would caution you to do is, don't believe everything you hear somebody say.

Mr. Dieter just got through saying the affirmance of cases in some city, or whatever, depended on who appointed the judge. Time out. You think you might ought to look at the facts of the case as to whether or not it was reversed or not or affirmed? Think that might have something to do with it?

The last time I checked, Earl Warren was appointed by a Republican president and he sure didn't turn out to be what my idea of a Republican jurist ought to have been. He was pretty liberal in that regard in the Warren court. But they are determined that if George Bush, or whoever else, appointed somebody, they are going to affirm everything and if Clinton pointed somebody, they are going to reverse everything.

Now, that's just kindergarten logic. That's not logic at all. You are saying because this person was appointed by someone and the result ended this way, they did it because they were appointed by this person. You don't get there. You don't get there.

Andrea Yates -- you may have heard about the Andrea Yates case in person; a capital murder case -- she drowned her five kids. Almost from day one it hit on the news Andrea Yates suffers from postpartum depression. She killed her kids because of postpartum depression.

Where is the connector? Anybody else in America suffer from postpartum depression? Do they all kill their kids? No. Don't you think there might be some other factor that figured into this deal other than postpartum depression? But no. Death of children, postpartum. We will connect them. That's got to be the reason. That's just not logic.

Now, she was tried for capital murder, found guilty, given a life sentence because of mitigating factors. Wasn't the kind of person you'd expect to go out and do that again. Case was reversed, retried, and she was found not guilty by reason of insanity. The system works. No problem there.

But my position is this. People jump to the conclusion because she is postpartum depression, that's the reason she killed her kids. You

can't make that connection. If you got evidence to make that connection, fine. But you can't say that a judge is appointed by a certain person and because of that he is going to sustain every case or not reverse anything or vice versa.

Ineffective assistance of counsel. I said earlier, I want to have good counsel just like anybody else. I want the defendant to have a good attorney.

I had the opportunity to retry a case that occurred in 1980. The guy committed capital murder by killing three young teenage boys -- two boys and a girl, at a bowling alley about the time they were closing. I was a junior in law school. Twenty-five years later I got the opportunity to retry that case because it was reversed.

It was reversed for ineffective assistance of counsel. One of the lawyers for the defendant was the sleeping lawyer Joe Cannon. I don't think he slept that day, but he's been known to have these sleeping spells and he had the case reversed because he was asleep during part of the trial. Well, no wonder that that Burdine guy got convicted. Ineffective of counsel, this, that, and the other. On the retrial of the case the Texas Defender Service, excellent lawyers -- and after three weeks or four weeks of trial, the jury returned a death verdict 25 years after the fact.

Now, it's not real easy to put together a case 25 years after it's been tried, 26 years after it had been committed, but the facts were there. The jury heard the evidence. And it didn't make a difference whether it was Joe Cannon or the best lawyers there. The facts are what control. We don't get the death penalty on any case we want to throw up there just because it meets the technical qualifications of aggravating factors for the death penalty.

In Pennsylvania a drug deal is an aggravating factor. You get the death penalty for that. You probably get misdemeanor murder for that in Texas. We are not real big. That's not a very sympathetic victim; okay?

Here is the problem I have with all the stats that everybody wants to throw out. A robbery murder is a capital murder, but a robbery murder is not a robbery murder. They are not all alike. There are all kinds of variables to all these cases; witnesses, facts that occurred, who saw it, who didn't, what evidence you have, the juries you pick, whether or not the jury finds one thing aggravating or no things aggravating, whether there was a 35-to-one, meaning a life sentence, or whether it was 36-to-zero, meaning a death penalty.

You can't take the color of the skin. This was outrageous, that murder in the black community is not prosecuted. Well, come to Texas. We do that.

Most of the black defendants basically kill black complainants. That happens on a higher percentage than anything else. Whites kill whites, blacks kill blacks. That's just my experience of 27 years in the DA's office, that's what it is.

You can't go around -- this is the most outrageous. Again, we have a lot of the most outrageous things tonight. The ABA, in examining the death penalty in Pennsylvania -- I've got to read it. It's too -- I wouldn't want to misquote. In evaluating fairness and accuracy in the state death penalty system, the Pennsylvania Death Penalty System, uh, Session Report, October 2007, hot off the press, the committee found that one-third of the African-American death row inmates in Philadelphia County would have received sentences of life imprisonment if they had not been African-American. I'd love to say what I want to say, but I can't.



You have got to be kidding me. They would have received life in prison if they had not been African-American? How in the world did they come up with that determination?

Don't give me retrograde analysis or statistics, or whatever. You can't make -- what you are telling me is if you had another victim there with the same facts, they wouldn't have gotten the death penalty. How in the world do you know that? The answer is you don't. You don't.

If they put in their literature -- yeah. They have a lot of information. Now, they said in front of the literature, the Death Penalty Information Center does not take a position on the death penalty per se. Well, if they don't, then they are sure missing anything about anything favorable about the death penalty. You won't find that there. You will find lots of information. I'm not sure a lot of it will be accurate. You will get this cost analysis that will show \$254 million for the cost for a death penalty case.

But you can't go out and make a determination that some result was race based. They said, also, to show that the system -- tell me when to shut up. About now?

MR. SOBEL: I think you're about done.

MR. McCLELLAN: One of the reasons to prove that there is a race bias is that 98 percent of the prosecutors who make the decisions are white. Well, one reason there is not a lot of African-American prosecutors at a higher level in our office and other offices is because once they get enough experience and they are great trial lawyers, then the private sector calls them, and they go out and make lots of money. I don't begrudge that.

One guy with our office, when he got his first check, he said, "Do you get paid yearly here?" It looked more like his yearly salary than his monthly salary. The fact that 98 percent of the prosecutors who make decisions are white is basically irrelevant to the issue.

Thank you.

MR. SOBEL: I am going to let each of our speakers have, let's say, three minutes to respond to the remarks that were made. So, Mr. Dieter, you have three minutes and then,

Mr. McClellan, you have three minutes.

MR. DIETER: My first reaction is that Mr. McClellan doesn't like the results that we found and, therefore, they must be wrong. You know, that I don't find to be a sharp way of addressing these important issues.

We are not trying to say that people are bad who are pushing the death penalty or the prosecutors are racist or that judges are biased. We are saying that the system isn't working right. That's the problem.

And, you know, these studies that have been done, these aren't done by the Death Penalty Information Center. These are studies that are done by reputable sources out there. We put them out there.

There is a lot wrong with the death penalty. That's why you will find a lot of information that's wrong with the death penalty. You will find a lot of neutral facts, as well.

What does exonerated mean? I actually went to Catholic school and we had Latin. You know, onus, onus is a burden that's put on people.

When you put the ex in front of onus, take that burden off. That's what exonerated means.

The 127 people who are exonerated, that's exactly what happened to those people. They got the death penalty. They were convicted. And then that burden was lifted by our court system and by the prosecutors, who said, We can't even convict this guy of a traffic ticket. The people who were exonerated, they were not convicted of one single offense related to the thing that put them on death row.

I come from a system that believes in our constitution. That's our definition of innocence. If you are not guilty, you have a right, you have the status of being innocent. That's what it means. Not guilty until proven innocent.

The people who are freed, who are exonerated, are as innocent as Mr. McClellan or as you or as I of that crime. They have not been convicted of anything related to that. That's what it mean.

His definition of, you know, not innocent means that he has a suspicion or maybe some other prosecutor has a suspicion that maybe this guy did it. That is what he means by, You are no longer innocent. If that was our standard in America, I think I'd move on to another country. That is not our standard and there is no need to prove your innocence.

The people who have been exonerated, that's exactly what they are. The people who have been freed, that's exactly what they are.

The costs are what they are. You can add them up. You have a death penalty and you don't execute people, that's not the death penalty. The way to measure the death penalty is how much does it cost to get to that execution. That's exactly the right way. That's exactly the way the Duke University study that concluded the numbers that were the first significant cost study. That's the way the federal system. That's the way the L.A. Times. That's the way all of these people, they look at what does the death penalty cost.

Mr. McClellan says, well, the judge still works and the prosecutor still works. That's not how you do cost studies. You ask how long, how much extra time does everybody put into a case because it's a death penalty case and how much is their time worth. That's what is called a true cost evaluation.

Death penalty cases take weeks, months. They take weeks just to pick a jury because a lot of you people have to be excluded. Then the whole process can take months.

Ninety-five percent of criminal cases are settled with a plea bargain. There is never any trial. Death penalty is a whole other world, and they are expensive and they are getting more expensive. You know, this idea that you get super prosecutors. I just want to quickly, 30 seconds or so, tell you about the due process that a man named Michael Richard got in Texas. You know now that we are in a period of a moratorium, six months with no executions. The last person executed was somebody in Texas and it was on the day that the U.S. Supreme Court granted certiorari in the lethal injection case.

And Mr. Richard raised the same issue everybody in the country has been raising and has now been receiving stays from the U.S. Supreme Court and from state courts all over. We are in this period. He had the same stuff; you know, lethal injection is not constitutional. The Texas courts closed their doors at 5:00 o'clock knowing his appeal was coming, knowing that the lawyers were having, you know, trouble getting it ready. The Supreme Court had just granted cert. that day. And they closed it and he was executed because, you know, they wouldn't keep it open for five more minutes.

If that's the kind of due process, that's not what I would call it. You know, Texas isn't the only one. But that sort of thing flies in the face of this promise of fairness and everybody will be treated the same. He wasn't treated. He was executed. Everybody since him is alive. That's not fair.

MR. SOBEL: Mr. McClellan.

MR. McCLELLAN: First of all, the presumption of innocence applies to all people. It applies to everybody. But that's not the same thing as being found not guilty. Doesn't mean that you are innocent. Presumption of innocence means the burden is on the State of Texas that we have -- state of Pennsylvania, the state you are in, that we have to prove the case beyond a reasonable doubt.

To say that to me actual innocence means I didn't do it, you got the wrong guy. These people have been released from death row for various reasons and they ought to have for various reasons.

The issue about the Court of Criminal Appeals not accepting or filing too late, how long does it take to write, My guy is on death row and is about to be executed. Please stay? How long does it take to do that? They only had, what, let me see, about four years and they have to wait until 5:00? That never crossed their noggin? As you said, everybody is filing them. And then they say, Well, too late to get it because they wasted all their time.

Don't attack the Court of Criminal Appeals because somebody waited and couldn't just write it out and send it over. You got faxes. You got e-mails.

MR. SOBEL: Anybody with questions, please step over to one of the aisle mics. And we will start with this gentleman over here.

QUESTION: This is to Mr. Dieter. I'm not sure if you heard of the case that happened in Maryland about four years ago. Michael Anthony Scrocca, who was murdered by arson at the Maryland campus, and they didn't find the young man who did it until a year later. With the murder, I believe the young man -- the prosecutor was seeking the death penalty on him and he pleaded guilty to it and got 40 years.

The question really is, I read the average murder sentence is 18 and a half years only. And I'm not sure. Is that true? Have you heard of that before?

MR. DIETER: Not true.

QUESTION: I read 18 and a half years. I believe if he would have seeked the death penalty, he might have gotten a less portion. He got 40 years. Another man was burned severely for it. I believe if they didn't seek the death penalty he would have only been in jail for the average 18 and a half years. Now he has been paroled after 25 years.

If you could just comment on that.

MR. SOBEL: Go ahead and then Mr. McClellan will have an opportunity to respond to the comments, too.

MR. DIETER: First of all, somebody doesn't get the average sentence. They get the sentence that, hopefully, meets the crime. So 18 and a half years for murder means probably all those non-negligent manslaughter cases, you know, and all the way up to serial killers,

and some of them get life without parole and some of them, you know, like Andrea Yates, someone that Lyn referred to, it's a whole different ball game.

So people are getting longer sentences. More people are getting life without parole sentences. Almost every state in the country -- Texas is the most recent -- have now adopted life without parole. If the crime meets it, that's the sentence they're getting.

Your suggestion is dangerous, that we keep the death penalty as a threat. We keep it as a bargaining tool. I don't know what Mr. McClellan will say. That's an ethical problem. That is, we hold over you the threat of unless you plead guilty, you get a death sentence. That's terrible. That's saying I am going to kill you unless you give up your right to a trial.

I hope that's not the basis for the death penalty.

MR. McCLELLAN: Let me see if I understand this right. We have a person who has committed the crime of arson and killed an innocent person. Instead of the state seeking a death penalty, they gave him a break to let him plead to 40 years, and the state did something wrong with the fact we should have gone ahead and sought death and gotten him death?

QUESTION: No. The fact that he did commit the murder, but he probably would not have pled guilty. He had the lawyers from the sniper case. He had those lawyers with him, so he had the good lawyers. I am just saying that he might have not plead guilty.

MR. McCLELLAN: What you are saying is the prosecutors folded and gave him a lesser penalty. Now you want to complain about the lesser penalty and wished that we had gone ahead --

QUESTION: What I really wanted to get out of this is that I believe the murder system, that the average is 18 and a half years.

MR. McCLELLAN: I don't believe there is an average of anything. I think every case stands on its own. That could have been a life without parole case; right, and he got 40 years --

QUESTION: Yes.

MR. McCLELLAN: -- you know, and he's not happy with it. Nobody forced him to plead. He wanted to go ahead. You want life without parole, do that. But evidently the state decided to come down to 40 years, for whatever reason. If he didn't want to do that, go to trial.

MR. SOBEL: I think it's fair to say that, generally speaking, criminal defendants who plead guilty do so to cut their risk of going to trial and being convicted of a more serious offense and getting a longer sentence. That's the motivation, I think, that causes most criminal defendants to plead.

And so really the question is whether a prosecutor for improper reasons such as coercion is threatening somebody with the death penalty or in complete good faith has sought the death penalty because he or she feels that the facts and circumstances justify it, and in response to the fact that he faces a potential death sentence the defendant agrees and/or pleads to a lesser charge and gets a sentence of a term of

years. So as long as the prosecutor is proceeding in good faith, there is no problem.

QUESTION: Thank you. It's just that the kid that was murdered was a really good friend of mine. I just wanted to get a comment on that.

QUESTION: I have a question for either Mr. Dieter or Mr. McClellan. I wanted to ask Mr. Dieter first. If the death penalty was exclusive to people who outright committed the crime or there was more than one witness, would you then support the death penalty and, if not, then what would you suggest would be done to the people who admitted or were outright guilty of a crime?

MR. DIETER: Well, you know, the problem with the death penalty, I think, goes beyond innocence, but even people who admit to crimes are not always guilty. Earl Washington was convicted, got the death penalty in Virginia for rape and murder. He admitted to it. He described it. As a matter of fact, he had great details.

It turns out a lot of those details were fed to him. He was mentally retarded and he didn't do it. Fortunately, DNA evidence proved that, even though he admitted it, he didn't do it.

So someone confessing to something is not absolute proof of guilt. But, you know, we don't have a system that somehow, you know, is perfect. We have a system that juries, prosecutors, judges, everybody is fallible.

You know, if we had a perfect system, I can tell you the Death Penalty Information Center wouldn't be in business. We don't have a position on the death penalty in theory as a moral matter or per se. We look at how it's being applied. Is it fair along racial lines? Is it fair along, you know, economic lines? Is there a risk that some innocent people will be executed?

We had a case in the Supreme Court recently, Paul House, where they had DNA evidence of the victim's blood on his pants. Sounds like a guilty guy to me. Turns out, as far as we can tell, that that blood got on his pants as the evidence was being shipped to the FBI lab and the vials of the victim's blood spilled out on his pants. But that didn't come out until 10 years later. They thought they had the guilty guy; the blood of the victim, DNA, and everything on his pants.

So there is no absolute system. There is no perfect system. I think definitely it just takes too many risks along those lines.

MR. SOBEL: Mr. McClellan.

MR. McCLELLAN: Some people do confess to things that they do. A lot of people confess to what they do. People who commit crimes, for whatever reason, have a propensity to want to tell somebody about it, bragging or whatever. But there have been occasions where people have confessed to things they didn't do.

QUESTION: I just wanted to ask you, well, murderers often somehow justify murders in their mind. I'm just wondering if we are making a mistake by allowing the death penalty.

MR. McCLELLAN: No. I don't think so. Because most criminals don't think past the end of their hand. They don't think about the consequences that occur from this, that, and the other. That's not a

mental illness. That's just the way they don't see things like everybody else.

That's why some people would say, you know, I think being on death row or being incarcerated for the rest of my life would be worse than getting the death penalty, because every day I have to wake up living with what I had done. I would say, Well, that's because you are who you are and that would bother you. There are many people who it does not bother that they have taken somebody else's life. They woke up just fine the next day and the next day and every day the rest of their lives because it doesn't register in their system.

QUESTION: I have a couple questions for Mr. McClellan. Two are very simple and straightforward regarding a couple laws in Texas with capital punishment. Please correct me if I'm wrong, because I'm having a little trouble understanding them.

One is regarding -- you are not the only state that does this, but I have you before me -- where if you and I are robbing a bank and you previously discussed this, and I drive you and you shoot somebody in the bank, you can get life without parole and I instead get the death penalty. I was wondering if you could tell me why and how that works.

MR. McCLELLAN: Well, conceivably you could get the death penalty for that. Reality is, you will not because you never took the act of pulling the trigger that fired the shot that killed the person. But the law says if you understand what's going to happen and realize that there is possibility that death would result, you are guilty of capital murder just like the person who went in and pulled the trigger at the bank, or whatever, during the robbery.

But the likelihood of that case being tried as a death penalty case is almost down to zero. It would be a bcapital murder case. You could get life without parole. But my experience would be that probably you would not get life without parole. What you would probably get, if you are just a get-away driver, you are going to -- the case is going to be broken down to aggravated robbery or murder and you are going to get some kind of plea bargain or whatever.

Now, we would have the right to try for life without parole if you said, Hey, I ain't taking nothing. Take your best shot. It would be a decision we would have to make, whether we try for aggravated robbery or what we call a non-death capital.

QUESTION: My next question is a little more broad. I was wondering if you can shed some light on why the execution rate in Texas is so high.

MR. McCLELLAN: Well, I don't know that the execution rate is so high. We put more people on death row than many other states or whatever. Harris County puts more people on death row.

And the law is drawn up and, as I said, the facts dictate. I don't decide the death penalty. You know, 12 citizens decide the death penalty. They look at lots of different factors.

I've done a lot of these cases. Jurors don't go in and just make a quick life and death decision. You have to realize you are taking 12 people off the street, putting them over here in the jury box, and saying, Okay. We are going to tell you a story about a deal and at the end you may be required to kill this person over here. I mean, I'd be going, What? You have got to be kidding me.

But here is the deal. You follow the law and the evidence, and if that leads you to do whatever, then that's what you do.

All I want are people who follow the law and the evidence. I never have stood up and asked for the jurors to take the life of a defendant. I will stand up and ask them to follow the law and the evidence and go where that leads them, because I have the luxury of knowing what the facts are. I know in my mind where the right jury will be led.

Sometimes I'm wrong and most of the time I'm right. But that's -- and I don't begrudge the situation if they find for a person a life sentence. That doesn't bother me. Or if I get a death penalty we don't go out drinking beer. You know, that's just not a celebration deal.

This is not what you asked, but I care for each person. I care for that defendant and I hope that he has the opportunity to get his life straight with his Lord.

But here is the one problem that I do have. When somebody -- as I walk out of here today, somebody walks up and shoots you or anybody else, if you are not in that right place with the Lord, you don't have a chance to get it straight, what I understand, my religious beliefs. It's too late. And that bothers me that somebody takes the life of another person when the person who took that life, they can sit in the penitentiary five, ten, 15 years and have an opportunity to get things straight, but not the person whose life I took.

MR. DIETER: Just a quick thought. Mr. McClellan has described probably what is true in his office, but, again, I think we have to look at how the death penalty works in practice. It's not the sort of, well, you just look at the facts and you can tell whether it's going to be a death penalty case and this system just goes along like a machine.

Let me mention a few names to you. Gary Ridgway was mentioned earlier today. He is known as the Green River Killer. He admitted to 48 murders in the State of Washington.

Charles Cullen, New Jersey. I think there might have been a couple murders here in Pennsylvania that he committed. He was a nurse, admitted to those.

There is Eric Rudolph. You might have heard of him. He dropped a bomb at the Olympics. He killed people at abortion clinics. He fled and was number one on the FBI's most wanted list.

Zacarias Moussaoui, convicted of helping to plan the attacks on September 11th. Ted Kaczynski, the Unabomber.

What do all these people have in common other than that they were the most heinous crimes in our memory in history? None of them are on death row.

That's not a system. I mean, for better or worse, it should be. The system, you have to take it as it is. It's somewhat arbitrary. It does not pick the worst of the worst. It does not just depend on the facts and the fact that 98 percent of the prosecutors are white, you know, that starts to affect which cases.

We have 100 death sentences out of 15,000 murders. How do 100 get picked? You know, it's not that they are evil people picking them. It's that they relate to a certain set of facts, what makes the crime one of the worst of the worst? Because it is a big story in the media? Because the people in the community are shocked? Because, you know, people have come out and demanded the death penalty? Is that what makes the decision of the death penalty? That could be distorted by

racial lines, economic lines, opportunities that people have.

That's how a case gets to be the death penalty; not just the facts.

MR. SOBEL: Let me raise a question I would like to get you each to respond to. In Pennsylvania district attorneys are elected, which, I assume, is also the case in Texas. And in Pennsylvania, as I also believe is true in Texas, the local district attorney individually makes the decision as to whether to seek the death penalty in any case which he finds at least is a death eligible case. That decision is not reviewable except insofar as the defendant might raise an objection by way of motion and bring it before the court.

At times, because of budgetary considerations, certain prosecutors, local prosecutors, elect not to seek the death penalty. They simply don't have the funds available to pursue a death penalty case, a case that they feel really warrants the death penalty. At times the prosecutors in Pennsylvania elect not to pursue a death penalty case which is really identical in all material ways to a case in some other county in Pennsylvania in which the local prosecutor has decided to seek the death penalty either for political reasons, because he or she feels that's what the constituents in his elected district would want, or possibly just because he or she has made a decision that this is the case that really warrants the death penalty.

In any event, there are discrepancies within the Commonwealth of Pennsylvania with regard to how similar cases are pursued, yet all the prosecutions at the level of murder are brought on behalf of the Commonwealth of Pennsylvania. The local district attorney is acting as the state's attorney pursuing state charges.

Does that situation bother either one of you? If it does, why? If it doesn't, why not?

MR. McCLELLAN: Well, we already heard people testify or talk about the fact that in Oklahoma County the DA, newly elected DA there on the QT doesn't believe in the death penalty and that's -- so how can I affect that? So evidently some people in Oklahoma County -- commit the same crime in Tulsa County or Oklahoma City, you get different punishments because the DA didn't believe in death in one place and did in the other.

Isn't my fault. I mean, what are we going to do, tell the guy in Oklahoma County he has to seek death or tell the other guy in Tulsa County he can't seek death? What if they make it because they don't want to enforce the law?

I don't think people go around seeking death because they are trying to get reelected or this, that, and the other. There are just so many -- we have so many cases, I mean, that are death penalty type cases we make lots of different decisions.

In Harris County, as I said, it would be the 25<sup>th</sup> largest state of its own. I grew up in Hansford County. I'd love to go back to the ABA and take another shot at them. They said, Well, there is a lot of counties here in Pennsylvania don't have death qualified lawyers. I bet those are probably counties that don't have death penalty cases.

The fact that you have a small county over here or they compared North Dakota and Texas, yeah, there is a lot of comparison between North Dakota and Texas. We are a lot alike in so many ways. They have a big metropolitan -- no, they don't. Okay. The fact we are in Harris County, 25th largest state in the nation, and then over here you have -- even if you have Bexar County, San Antonio,



totally different. Maybe the DA doesn't want to seek it or whatever. Of course, the ABA is arguing for quotas. We are going to have quotas. Whenever you fill your quota, you stop. And you got to keep going until you get your quota.

That's not the way to do it.

MR. DIETER: I find it disturbing. It's not a question of one state has the death penalty, so they use it and other states doesn't. Massachusetts doesn't have it; Texas does. That's not what the problem is. The problem is within the state that you could commit the crime on one side of the street and get the death penalty and on the other side of the street, because it's a different county, you won't.

That's a life and death decision that's based on arbitrary reason and that's the problem with the death penalty.

Is it Mr. McClellan's obligation to fix that? No. He is doing the right thing. He is following whether his sense of the law and conscience tells him to seek it or not.

But when you look at how it comes out in practice, there are many counties in Texas that don't have anybody on death row. Philadelphia has over 100 people on death row and Pittsburgh, a city with a comparable compilation and crime rates, has a few.

What's going on there? Is it giving the death sentence in Philly, but in Pittsburgh they are just weenies and they don't? No. It's because the prosecutor in Philly seeks it all the time and Pittsburgh they don't. That's not a fair system. This is the State of Pennsylvania representing the people. You know, it depends.

What drives prosecutors? I don't know. I mean, that's something they have to face. But I can tell you that there are prosecutors who campaign saying that, I will seek the death penalty, and it is a part of their platform.

You know, when somebody makes a contribution to their campaign and their relative is killed -- and, you know, it's hard to escape all of that stuff. Somebody in another part of town never contributed, I don't know, is not going to help with my election, it is just a minor murder, will be prosecuted, but it's not a death penalty case. That doesn't happen all the time, but it can happen.

The death penalty is full of these political temptations that help to drive it and that's the problem. It's not necessarily bad intentions. It's bad results.

MR. SOBEL: Yes, sir.

QUESTION: This question is for Mr. Dieter. According to the proponents of the death penalty, they frequently cite the disparity in race of defendants on death row. Urban inner city areas that are prone to violent crimes often have a large minority population. Isn't it fair to say that if the rough urban streets were primarily white dominated you would see the same disparity, only even with more white people on death row?

MR. DIETER: I'm not sure your numbers come out the way you might think they do. It's not the urban city areas that produce the death penalty cases. In Maryland, where I live, there's Baltimore City, which has kind of like a lot of poor areas, and then there is Baltimore County, the area around Baltimore City, wealthy, white. Almost all of the death penalty cases come from the white, you know, surrounding rich county; not from Baltimore City.

So if what you are hinting at is people get put on death row because they come from the wrong side of the tracks, it's actually not what happens. It's not the race of the defendant that's the big problem. It's the race of the victim, whom you kill, in Baltimore County. And if you kill a white person and you are black, you have probably two strikes against you.

This is something I just looked up. There have been studies in 26 cases and 96 percent of those studies found this race of victim effect.

MR. McCLELLAN: Well, you just can't do that type of analysis. There are so many factors on whether or not the jury is going to give the defendant the death penalty, I guarantee you it is not dependent on the race of the victim. There's all kinds of different factors; how aggravating it was, is there any mitigation, is there not mitigation, are there aggravating factors in addition to what happened?

Just because you come up and say, Well, I can find the judges in this deal reverse those cases, that's because of that. Or they are a white victim and a black defendant, that's because -- they got the verdict because of that just doesn't work. There should be some logic course somewhere you all take that tells you you just can't do that.

MR. SOBEL: Well, I want to thank Richard Dieter and Brian McClellan for this evening's dialogue. I think they did a fabulous job.

(Whereupon, the panel discussion concluded at 8:40 p.m.)

ERVIN BLANK ASSOCIATES, INC.