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# Is the death penalty administered fairly and non-arbitrarily?

Robert Dunham

David McCord

John Morganelli

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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  
STRETANSKY CONCERT HALL  
SELINGROVE, PENNSYLVANIA  
MARCH 27, 2008  
3:00 P.M.

IS THE DEATH PENALTY ADMINISTERED  
FAIRLY AND NON-ARBITRARILY?

PARTICIPANTS:  
Robert Dunham, J.D.  
David McCord, J.D.  
John Morganelli, J.D.

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

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MR. McCORD: I am the moderator of the panel discussion today. I am David McCord.

Sitting here to my right is John Morganelli, who is the long-time District Attorney in Northampton County, which is in eastern Pennsylvania. He is a graduate of Moravian College and of Villanova Law School.

He is a long-time trial lawyer who has prosecuted first degree murder cases to verdict and has represented the Commonwealth of Pennsylvania in appellate proceedings both in state and federal court. He is also, for those of you who are Democrats, your nominee for Attorney General in your Commonwealth in the upcoming November election.

Sitting to my left is Rob Dunham. Rob is the director of training and an Assistant Federal Defender in the capital habeas corpus unit of the Philadelphia Federal Defender's Office and an adjunct professor of the death penalty law at Villanova University. Prior to being in the Federal Defender's Office, he was the executive director of the Pennsylvania Capital Case Resource Center.

Rob has argued death penalty cases at all levels of the state and federal systems, including the U.S. Supreme Court. He is on the supervisory board of the ADA Death Penalty Representation Project and a member of the Board of Directors of Pennsylvania Association of Criminal Defense Lawyers.

So we all thank you for inviting us here today and I am going to give, hopefully, a brief introduction, sort of tutorially and numerically, to the issue I am going to talk about and then I am going to turn it over to Mr. Morganelli first for 20 minutes or less for commentary, then to Mr. Dunham, and then they can rebut each other, if they wish, for five minutes or so and then we are going to leave plenty of time for audience questions.

Our topic is, Is the death penalty administered fairly and non-arbitrarily? This is, in fact, the one major basis on which the Supreme Court has sort of leaned from a constitutional standpoint on death penalty law, is to mandate back in 1972 through 1976, that states and the federal government, if they are going to have the death penalty, must cabinet in some way, to some extent minimize its arbitrary and irrational infliction.

So I wanted to use this diagram -- I didn't expect to be in such a large room, so I'm sorry my diagram is a little small, because I'm going to explain it. I hope it will be useful context for this discussion.

Some of these figures are pretty hard figures. That is, I know them to a good degree of certainty. Some of them are relatively soft, but are close enough for our purposes.

Take a typical year within the past three or four years. You would find, according to the Bureau of Justice Statistics, there are, plus or minus, 8,000 murder convictions in death penalty jurisdictions nationwide. You would also find there are, plus or minus, 700 murder convictions in non-death penalty jurisdictions, which would be at this point 14 states. These, of course, we set off to the side in talking about whether the death penalty is arbitrary or not.

You can certainly make an argument the same crime committed now in California, Delaware, New Jersey, versus Philadelphia, Pennsylvania, that that's a species of arbitrariness. But our system doesn't consider it to be such, because our federal system is such it does allow jurisdictions to make these decisions independent of other jurisdictions.

We are going to focus on 8,000 murder convictions in death penalty jurisdictions across the country. When you came in you should have gotten a handout I made up that lists the 19 most common aggravating circumstances that you find as statutory aggravators that would make the murder eligible for death sentencing in most jurisdictions across the country.

As it turns out, there are enough of those aggravating circumstances in most jurisdictions that, plus or minus, 50 percent of these 8,000 murders would be death eligible. That is, they would -- the prosecution would be able to prove at least one of the aggravating circumstances that would put the defendants toward the top of culpability.

Down here we have the least aggravated homicides and up here we have the most aggravated homicides. Down here I suppose you could imagine perhaps a typical domestic killing or a bar room fight. Up here you would imagine a sexually motivated serial killer who has raped and killed several women or way up at the very top would be people like Timothy McVeigh, who killed 168 people.

So this is meant to indicate a gradation upward of the level of badness of the offenses. So the death penalty eligible, roughly speaking, would be the top 50 percent or so of those homicides.

Typically in the past few years out of this eligibility pool there have been 140 death sentences. The most recent figures are from -- that I know of are from 2002 to 2006. There were 146 death sentences nationwide in 2004, 139 in 2005, and 125, I think, in 2006, so I am going to average that out at 140 death sentences per year.

One hundred sixty here, out of death sentences, there are roughly 40 percent of cases that get submitted to juries asking them whether to impose a death sentence or not. About 40 percent of those turn out to be death sentences and about 60 percent not. So I am going to say roughly 160 sentences are spared verdicts.

That is, nationwide there are probably about 300 cases go to juries for juries to answer the issue of whether the defendant should get the death penalty. That means there are plus or minus 3700 what I am going to call PS cases, which are prosecutor spared cases. He doesn't take it to the jury on the death question; that is, essentially bargains the case out. You can see that number dwarfs either of the other numbers.

Also here, until the whole execution system got shut down by the issue of whether lethal injection is constitutional, for the past few years, you find, plus or minus, 60 executions per year. Of course, these are earlier years.

So if I could use my colored markers here, you would find death sentences, DS -- I am not going to write 140 of them here -- but you would find a lot of death sentences towards the top of the heap and some of them, this line here, by the way, is -- represents the top ten percent are the most aggravated murders and I am going to call those the worst of the worst. That's just sort of becoming a term of art. Up here would be people who had killed two people and had a bad criminal record or killed somebody and raped them and have a bad criminal record or killed three victims, people who have a lot of those factors mounting up that you have there on the sheet in front of you.

And my hypothesis, which the panel is free to disagree with, the system really doesn't have the resources or education, the system hasn't demonstrated any capacity to handle more than about ten percent of murderers as really pursuing capital punishment against them. So this population represents the worst of the worst.

A lot of the death sentences cluster among the worst of the worst. There are a few death sentences you find that are not what you think of as the worst of the worst, but are bad enough to be aggravated. So similarly the sentence spared cases would stand in this whole separate category, as would the prosecutor spared cases. Sprinkled in with them would be these 60 executions that would also be sprinkled throughout the spectrum arising from prior years.

Just to make the situation even more complex, these executions that pop up from prior years, if you follow these 140 death sentences out into the future, what you would find historically is at least 50 percent of them end up getting reversed. Mostly just the sentences gets reversed. Sometimes the convictions get reversed. About 50 percent of them get reversed. Also, those that get reversed also don't get sentenced to death. So that the 140 figure sort of overstates the effective death sentencing that you will get through the appellate process.

So I hope that's clear enough that you can see it raises at least three questions that we can talk about in terms of arbitrariness. One of them is what is known as the issue of over inclusion, which on this diagram would be indicated by people who get death sentences and/or are executed who are not among the worst of the worst, but still were bad enough to have an aggravating circumstance.

A second question we could ask is the question under inclusion; that is, there are a lot of people even within the category of the worst of the worst who escape death sentences and execution. In fact, many more escape it than who get it even at the very top of the range.

One of the things that's most surprising to me in my empirical research is to see how many serial killers actually don't get death sentences. They are sort of the poster boys for the death penalty.

The third question we could ask is, is there differential treatment or outcome of similar cases? That is, if you have two cases that are at that level of aggravation, you don't expect, the way the system operates, to get consistent outcomes among them. They are unpredictable in their outcome.

So what I think this may boil down to is a question of what are the reasons for whatever differentials of treatment exist. And I am going to suggest that there are some -- this is by no means an exclusive list -- but I am going to suggest that there are some legitimate reasons for differential treatment, there are some debatable reasons for differential treatment, and there are some illegitimate reasons for differential treatment.

Among the legitimate reasons, a very aggravated defendant comes in who could have a very powerful mitigation. Prosecutors oftentimes don't have perfect cases and may be willing to compromise the case or plea bargain it to get the conviction and get a significant sentence because there is some risk that if they take the case to trial they might lose either the conviction or the sentence.

There is also -- in almost every jurisdiction that has a death penalty has a jury sentence, which in most it is required the jury be unanimous in order to return a death sentence. You find a significant number of cases where it's 11 to one or ten to two, but it won't result in death because there is no unanimous verdict.

Here are three reasons, which I think are debatable, for differential treatment. One is the fact in every jurisdiction except the federal government and Delaware the prosecutorial decision-making lies at the local level; not at the jurisdiction-wide level, so you get vast

disparities of treatment between prosecutorial decisions in one county versus another county.

Similarly, you get vast discrepancies in the available resources prosecutors have to prosecute death penalty cases because they are very resource intensive.

Something -- what we heard a lot about this morning was how much do the survivor's wishes count? My perspective is that criminal justice is a state function on behalf of the state. I'm skeptical that survivors should be able, to a large extent, dictate whether a defendant should get a death sentence or not, but in a surprising number of cases prosecutors do compromise cases, at least on a stated basis, that the victim's family didn't want to pursue it.

Here is some illegitimate reasons: Race, which we heard mentioned several times, bad defense lawyering would be an illegal reason, and police or prosecutor misconduct. I'm sure our panel can add to all of these categories and can, if they wish, take exception to my explanation of my outline, but that's my outline and I'm sticking to it.

Now, Mr. Morganelli, have at it.

MR. MORGANELLI: Thank you very much, Mr. McCord. First of all, good afternoon to all of you. I would like to thank the Professor for inviting me to participate in this discussion. It's always good to be with my friend Rob Dunham. Ron and I have done a few of these. I think we will take these around the country sometime, Rob. We have had a couple opportunities to be together.

It's an interesting issue that's been debated. I remember back in junior high school I participated in a debate of whether we should have a death penalty or not. Here it is, long after my junior high days, and I'm still here to discuss that.

I have to say at the outset, those who oppose the death penalty for religious or moral reasons, I have very, very great respect for those individuals. The people who are morally opposed or religiously opposed to capital punishment, they don't need any statistics. They don't need any manipulation of numbers or charts. They are opposed to capital punishment for the reason that they believe that it is wrong. They don't care what the murder was, they don't care what the victim says, and they don't care what all the stats are.

Quite frankly, when dealing with people like that, you know, I respect their opinion. I'm never going to persuade you one way or the other and I wouldn't try to persuade you because you have a moral or religious reason to oppose it. You don't need to have charts or statistics.

But during my 16 years as a prosecutor -- and my job as a prosecutor I see very simply; that is, to protect our community, to keep our citizens safe. I believe that throughout Pennsylvania we have 67 district attorneys who do the same thing in their communities. During my years when I've been involved in these capital punishment discussions we always get around to talking about charts and arguments. The first argument that I hear is that we need more time to study the death penalty because we just haven't looked at it long enough. When I think about that argument, I say to myself, My God, the Pennsylvania death penalty statute was scrutinized for the longest time by the United States Supreme Court and it was held to be constitutional. It was reviewed meticulously by the Supreme Court and it was found to be a process that comports with the constitution.

Then the other people who are opposed to the death penalty not because of religious or moral reasons necessarily, it's because they want to use the chart. They say, Well, we need more time to study each case, the guilt or innocence of these people, because they might be innocent. I look at Pennsylvania and I recognize that people on death row are here 15, 25 years or longer while their cases are being reviewed not only by the Common of Pleas Court, the Supreme Court of Pennsylvania, but the federal court; not just once, but numerous times, and whether the lawyers were effective or not.

When the system works, when people who have been given a death sentence are relieved from that sentence and maybe given life or in those cases where convictions are overturned, the people who are opposed say, Look. We should have a death penalty. This is terrible. Someone could have been executed.

And yet the system works. The system recognized the deficiencies in that particular case and was able to remove it from those numbers that actually went to execution.

So what I'm thinking about today when we talk about is the death penalty administered fairly or in a non-arbitrary manner, I think what we have to look at is not outcome, because outcomes, as Mr. McCord indicated, are dictated by so many factors, but we have to look at process. And the issue is whether the process is being -- does every single person who is charged with a capital offense have the same rights -- the right to due process, the right to a trial -- are they governed and evaluated by the same standards, by the death penalty statute of aggravating factors?

And the answer is yes to those questions, that every single person faced with a capital offense is judged by the same criteria, has the same rights and the same standards as outlined in that law that the Pennsylvania -- U.S. Supreme Court has declared to be constitutional.

Now, we have other people who advocate moratoriums on the death penalty even though we had a de facto moratorium in Pennsylvania for many, many years and we have had three executions in Pennsylvania since 1960, despite the fact that we have over 200 people on death row. So what I'm saying today is, you know, how can we arrive at the conclusion by looking at outcomes when we should be looking at process?

And there are two issues that come up when we talk about whether the death penalty is fairly administered in a non-arbitrary manner. The first argument that we see and the issue that's often raised is race issues. I know that was discussed earlier in this forum. And, you know, with the modern death penalty, the fact of the matter is, is that white murders -- these are Bureau of Justice statistics, the same statistics Mr. McCord used for his chart here -- white murderers are twice as likely to be executed as African-American murderers and are also executed 15 months more quickly than African-American murderers.

A 1991 RAM study showed, as well as a Smith College study indicated, that the foundation for a death sentence was not the race of the defendant or the race of the victim. It was the nature of the crime committed. The studies conclude that juries are not looking at race. They are looking at the crime and the nature of the crime that was committed.

And the fact is that the majority of those executed since 1976, have been white even though African-American criminal murderers committed a slim majority of murders during that period. According to U.S. Bureau of Justice statistics, African-Americans committed 51.5 percent of the murders between 1976 and 1999, and whites committed 46.5 percent.

Yet even though African-Americans committed the majority of murders, the Bureau of Justice statistics I am quoting say since the death penalty was reinstated by the Supreme Court in 1976, white inmates have made up the majority of those under death sentence. That's really important.

So we can't look at the race because it is really not an issue in terms of what juries are doing. The studies show that juries are evaluating based on the nature of the crime.

And, you know, the other issue that we have to look at is that if race is an issue and if it can be established, the Supreme Court of Pennsylvania isn't obligated to look at race on review, so every case is reviewed by the Supreme Court. And let me review the standards. The Supreme Court shall affirm the sentence of death unless it determines that the sentence of death was the product of passion, prejudice or other arbitrary factor.

So built into the system is a review by the courts to make sure that death sentences are not the product of prejudice or racism or some other arbitrary factor. The courts have an obligation and, if they find that, they are obligated to overturn and to vacate those death sentences.

Now, let me just say that in my view it is impossible to come up here, either myself or anybody else, and to throw stats around and to conclude that we ought to get rid of the death penalty because we can manipulate statistics to show somehow there is issues of race in regards to this. Because here is the problem. We don't have the same juries.

You know, if we had the same jury looking at the same facts of the case, and one defendant was white and one defendant was black, and the African-American got the death sentence by the jury and the white murderer got life imprisonment, then I think we would be able to say, You know what? That's pretty good. That shows that probably that decision was based on race only.

But the fact of the matter is we have numerous juries hearing these cases. It's not the same jury. It's people from all over the country, different people hearing different cases with different facts. And you cannot come to a conclusion based on the race of the victim or the defendant as to what motivated the jury to that outcome. In fact, studies show otherwise, that what motivated the jury was the nature of the crime and only that.

So if we look at the issue of arbitrariness, let's not look at outcomes. Let's look at process. Is the process being administered in a manner that every defendant, whether they are black or white or some other ethnicity, are they being treated fairly? Do they have the same rights, the same due process?

The answer is a resounding yes, that every person charged with a capital offense is judged by the same laws, the same standards.

And are there going to be different outcomes? Sure, there is going to be different outcomes. Why? Because we have different juries hearing those cases. We have different facts.

You know, when a jury hears that a four-year old girl was taken out of her bedroom, she was raped and then buried alive by some criminal, that may motivate that jury to give a death sentence. When the jury hears that somebody walked into McDonald's and shot 20 people for no good reason because his girlfriend broke up with him, that might motivate a jury for the death sentence. But the other jury might have one person that decides that they can't give the death penalty.



Does that mean the system is arbitrary and unfair? No. Because it's the same process. That person is getting evaluated under the same standards. You cannot look at the outcomes. You have to look at the process for arbitrariness.

Lastly, let me just say that in the criminal justice system the death penalty is only applicable in certain cases, as Mr. McCord has shown. Not every first degree murder case is a death penalty case. Is that arbitrary? No. That's what the legislators told us prosecutors.

There are murders that are first degree murders that there are no aggravating factors, that the death penalty is not in play. If I took a robbery case and said, you know, not all robberies people are going to jail for 20 years. Some robbers are going to jail to 20 years. Some are only going to jail for five years. Let's get rid of the robbery statute. It's unfair. It's unrealistic to say the every single person who comes through the system is going to have the same outcome.

So what we are here to talk about today, the issue of arbitrariness, we have to look at process and not outcomes. Outcomes are dictated by too many factors we can't control. To say, Let's get rid of the death penalty as an option, that's not my judgment. That's up to the legislature. That's up to all you people writing to your legislators to decide.

If they get rid of the death penalty tomorrow, like myself and Mr. Rosini, a district attorney, we are going to follow along. We have to have the same process in place for every single person.

In closing, let me just say that we have excellent lawyers in Pennsylvania -- Mr. Dunham is one of them - doing criminal defense work for death penalty people. I served on the Pennsylvania Supreme Court's commission to bring up standards and I supported better resources for capital defendants. I supported DNA testing. I supported that they have more than one counsel, that they have funds available for investigators, et cetera. And our system is getting better and better all the time.

A lot of these cases that have been overturned are 20-year-old cases where DNA has now helped us. But now we have DNA moving forward and our system -- this death penalty is probably one of the lowest, lowest possibilities in the state.

And let me, lastly, say there is not one piece of evidence -- not one piece of evidence since 1900 that any person who has been actually executed was innocent. There is no proof whatsoever that we have ever executed an innocent person. I think that certainly is noteworthy.

So let me just say, in conclusion, that I have the highest respect for people who oppose capital punishment and I have no debate with those people. If that's how they feel, I accept it. But what I think is completely unfair is to take these charts and stats and try to reach a conclusion on outcomes when we are trying to decide whether the process was fair.

My contention is that every single person charged with a capital offense is not being judged by some arbitrary factor. He is being judged by different people, by different juries, and that's what results in the outcome differences, which is going to happen in robbery cases, burglary cases.

When I was a young college student at Moravia, I was standing in front of the auditorium giving a speech in speech class and I said, "That is unfair." My professor, he said, "Hold it, Mr. Morganelli. You are going to have a great career, but don't let me ever hear you say as a justification that something is unfair. It is unfair that you are short and I'm tall. It's unfair that you are good looking and I'm not.

It's unfair that you are rich and I'm poor, and life has unfairness in it."

What we do here in the criminal justice system is give everybody the same playing field. We cannot guarantee outcomes. There is going to be disparity in outcomes. But that does not mean that the process is arbitrary or unfair as long as the factors being evaluated are the same standards.

Thank you very much.

MR. DUNHAM: First of all, why does John always get to be the one that's good looking?

When you talk about arbitrariness and the death penalty you actually can't use one word without the other. The death penalty is the classic example of a public policy that is arbitrary and unworkable. It is arbitrary across the board. It is arbitrary procedurally. It is arbitrary in outcome.

I don't see -- with all due respect to John -- and I wish that John were in the position to control defense resources, because what he does want to have is a system that's fair. But I can't see how you can take a look at the system that we have right now and say, Let's not take a look at outcomes.

When you are disciplining a child and the child says what you are doing is arbitrary, it isn't because of the process by which you punish. Maybe it is. Maybe the process is arbitrary. It's what the outcome is. When somebody gets a traffic ticket the question of whether they get that arbitrarily is a product of what? The outcome.

You have to look at outcomes. Without that you have no basis to make any judgment at all as to whether a public policy is working or not working.

I think we have to take a look at a couple of things. First of all, who is it that goes to -- that goes to death row? Are they vicious human beings? How did they get there? What is the process that's involved in their getting there?

When you talk about the death penalty itself, you look at the crime and you look at the defendant's background and so forth. The jury has to make a decision about whether this is an individual whose life should be spared or whose life should be taken.

What we see in case after case, over and over, because of deficiencies in the judicial system, the failure to provide resources, the failure to provide training, that in case after case after case the jury never gets to see who that defendant is. So when they are making a choice about that defendant's moral culpability, about whether that person deserves to live or ought to die, they don't get to see the little child with a little dog who had no clothes, who had no chance as a kid, who got sexually abused throughout his lifetime, who suffered brain damage, who was set on fire by the neighborhood kids, who had rocks thrown at him, and had many, many other things happening throughout the course of their lifespan.

The death penalty is arbitrary because in case after case after case in a decision about whether this unique human being should live or this unique human being should have his or her life taken, it is arbitrary because of juries, because of lack of talent, because of lack of resources, because of lack of commitment, because of breakdown in the process never get to see who the defendant really is and never get to make the choice that the law requires.

The death penalty is arbitrary because we don't know who it is that we are judging in case after case after case in the ultimate question as to whether they should live or whether they should die.

Now, there is evidence of arbitrariness across the board when it comes to capital punishment. Despite what John has said, study after study shows that the severity of the offense is not the predictor of the death penalty.

Yes, there are some cases in the high range of severity where people will agree that are much, much more likely to result in death and some cases at the low end of severity that are much, much less likely to result in death, but for most cases across the board ranging between it is a crap shoot. It is a crap shoot. It is a random toss, a random roll of the dice. What the offense was is not a key predictor of whether one lives or one is sentenced to die. In fact, there is no appreciable difference between who gets death and who gets life. Why is it that the Green River Killer in Washington State, who has 48 bodies and some more that were just discovered, does not get capitally prosecuted, but the person who is in the dime store robbery with a more intelligent co-perpetrator, who knows enough about the law, who is smarter and goes states evidence, who is much more involved, becomes a snitch and testifies against him so that the less culpable guy in a less serious offense ends up on death row when a more culpable person not? That happens in case after case after case, jurisdiction after jurisdiction, state after state.

The death penalty is arbitrary and the severity of the offense does not determine whether you get life or you get death.

Now, we like to think that maybe states have built into the process some mechanism to overcome this arbitrariness. It's usually through a mechanism called proportionality review where you compare one case against another.

The problem is most states have never taken proportionality review seriously. Indeed, in 20 years in which the Pennsylvania courts conducted proportionality review how many capital cases did they reverse because they were disproportionate? Zero.

In 1997, the Pennsylvania Supreme Court ceased proportionality review because the State legislator repealed it. Why did they repeal it? Because in that same year David Baldus' study about racial discrimination and imposition of the death penalty came out in Philadelphia. At that time he showed the odds you would get death in Philadelphia increased by a factor of three among all death penalty cases if one thing happened; the color of your skin was black. The odd you would get sentenced to death increased by a factor of nine if one thing happened; the color of your skin was black.

When cases advanced to the penalty phase and juries had to make a decision between life and death based on aggravated circumstances they had found and mitigating circumstances, where they had to make the choice whether to spare somebody's life or take somebody's life, the decision whether to spare or kill was grossly affected by one thing; the color of the defendant's skin.

So that that has shown the odds that the defendant would be sentenced to death in those circumstances increased by a factor of 9 if they were black. In that setting the State legislature in Pennsylvania amended Pennsylvania law to remove from the Pennsylvania Supreme Court the power to grant relief because a sentence was disproportionate. Now, there are other arbitrary factors. Who decides what the capital charges are? Now, Professor McCord talked about this again, so I won't go into it in much detail, but prosecutors, for various different

reasons, make various different choices. In state after state -- Pennsylvania, Maryland, California, everywhere there have been studies -- there are geographic disparities in the way in which the death penalty is sought and the way in which the death penalty is imposed.

Unless you have a uniform prosecutorial practice, you will have jurisdictional, geographic disparities in choices to seek death. That means depending where the homicide is tried, where the homicide is committed, there will be vastly different outcomes. The system works very differently depending upon who the prosecutor is and what side of the bridge the offense was committed.

There also are problems with who presides. That's the whole issue of elected judges. Elected judges are a very serious problem when it comes to arbitrariness in being sentenced. When a judge is dependent upon the votes of the public, their views on critically important and controversial and potentially politically damaging issues for them make a difference.

So what you see is when a judge is up for retention or when a judge is up for election or when a judge has gotten elected because he ran on a platform that he will be tough on crime, you see that there are effects in the decision-making process.

One classic example in Philadelphia is the case of Judge Sabo. Judge Sabo was responsible for 32 people going to death row. More people went to death row in Judge Sabo's courtroom than any other judge in the United States.

Ninety-three percent of the people who were sentenced to death in Judge Sabo's courtroom were black. Another five percent were racial minorities of other types. Of those cases, to date no one has been executed. Three-quarters of the cases have been reversed because of prejudicial error in his courtroom.

Now, some people may say that that shows the system works, because 75 percent of the people in Judge Sabo's courtroom have not been executed. But the fact of the matter is, they should never have gone to death row in the first place. They should never have had to go through the extensive appellate process that the error in Judge Sabo's individual bias occasioned.

The fact that something gets corrected years and years and years down the road doesn't mean that the system works. It means the system was grossly broken up front, but through the miracle of somebody actually catching the error later on, it got fixed. Now, notably, of those cases that were reversed, more than two-thirds of those were reversed only because a non-profit organization that was not funded by the state became involved. The errors had avoided detection in all the cases -- in a large number of cases in which the representation had been provided by under-funded, under-trained, under-resourced appointed counsel.

That is not the case of the system working. That is yet another example of an arbitrary system being broken and it being found, only because of the arbitrary fact itself, that there was an organization there that was able to step in and point out the errors.

Who decides who lives or dies? Well, that's arbitrary, too. There are problems with death-qualified juries. You know, in the issue of life or death isn't it ironic that only those who swear to be able to cast the first stone are permitted to participate at all? I mean, how reliable is a system that disqualifies you unless you say that you are willing to kill?

The Eighth Amendment is supposed to reflect the underlying sense of humanity, the standards of decency of society at large. And yet a

critical segment of society is excluded from these decisions altogether. That is the beginning of arbitrary decision-making.

There is are pervasive misunderstandings in jury instructions. For those of you who were present at the lunch, the American Bar Association has done studies on eight different states, including Pennsylvania, and one of the things they discovered or problems across the country is a lack of understanding of what the jury is supposed to do, misunderstanding of jury instructions.

In Pennsylvania among death-qualified juries - that is, those individuals who survived the voir dire process and were actually impaneled -- among those jurors 98.6 percent, the same as a normal body temperature, 98.6 percent of jurors harbored material misapprehensions of law after hearing the jury instructions, meaning that when they made their decision 98.6 percent believed the law to be something other than it was and believed it to be something different in a manner that was hurtful to the defendant.

You talk about a fair trial. How do you get a fair trial when there is almost universal misunderstanding of jury instructions in a way that hurts the defendant?

The system is arbitrary. The jury selection process is just part of it.

And also, another thing that goes into that is a system called preemptory challenges. People are excluded from juries because they can't be fair. People are excluded for cause. There are another set of challenges that both sides have that are called preemptory challenges. You can exercise them for any reason, you can exercise them for no reason, but you can't exercise them for an unconstitutional reason. You can't do it on the basis of race.

What we find over and over in jurisdiction after jurisdiction is that in capital cases. In Philadelphia we happen to have one of the best studies ever done. We have 20 years of data on selection of juries. We have seen how the Philadelphia District Attorney's office acts with respect to 14,000 jurors. Of those 14,000 jurors selected or struck over a 20-year period, we know the race of almost 12,000.

And from that 12,000 we have been able to demonstrate that the Philadelphia District Attorney's office strikes you at twice the frequency if you are black than if you are any other race. Among every else, you are struck with twice the frequency if you live in an integrated neighborhood than if you live in a highly segregated white neighborhood.

So over this two-decade period for which we have statistics -- and we know the practice existed before this -- in that two-decade period we have demonstrated a consistent practice of racial profiling in the selection of jurors based, first, on the race of the jurors and then based on the race of the people that the jurors associate with.

How do we know about that? What we have been able to find over and over and over again is that the more racially isolated and the more racially insulated the jury is, the more they are likely to convict on less evidence, the more prejudiced they are against black defendants in a jurisdiction like Philadelphia, where there are many black defendants. That makes a huge difference.

One of the things we heard at lunch from the Report of the Pennsylvania Task Force of the Supreme Court Committee on Racial and Gender Equity was that when the results - the outcome, which you have to look at to see if something is arbitrary, when the outcome of death sentences were reviewed in Philadelphia, one-third of all the death sentences that were imposed on black jurors would not have been imposed but for the

fact of the -- I said black jurors; black defendants -- would not have been imposed but for the color of the defendant's skin. That translated into 35 individuals from Philadelphia who went to death row not because of what they did, but because of the color of their skin.

In this country, with our values, in this century it should be anathema to the law and it should be offensive to our sense of decency and fairness that the color of somebody's skin may dictate whether they live or whether they will die. Those are the racially discriminatory outcomes.

You know -- five minutes. Let's see. I'm on slide four of 67.

We see over and over from jurisdiction to jurisdiction that there are various different kinds of race effects. In Philadelphia we saw race of defendant effects. Virtually everywhere else we see race of victim. And race of victim effects tell us that in every jurisdiction the likelihood that you will go to death row is a product, more often than not, of the color of the skin of the person who is killed as opposed to almost any other factor.

Now, why is that? Why is that? Well, that's a product of our own kind of arbitrariness, our own prejudice that can be seen in at all levels of the judicial system.

And so sometimes we throw up our hands, like the United States Supreme Court did in *McClusky vs. Kent*. Even though you can show the odds that the defendant will go to death row increase by a factor of 4.3 because the defendant is black, that race is a product of an endemic process, because it's endemic, we can't address it.

First of all, we should address it. It's unacceptable at all levels. But it is particularly unacceptable when race is infusing a decision about whether human beings should live or die. Just because we can't fix the whole system or we think we can't is no excuses not to fix it in an area where we can, where it's a matter of life and death. If we can't make the whole system fair, then let's take away the ability to put somebody to death because of potential racial problems.

Economic bias. Sister Helen Prejean said it's called capital punishment because if you have the capital, you don't get the punishment. Virtually everybody who goes to death row is poor.

What does that mean? That means they can't afford O.J. Simpson's dream team defense. You get court-appointed lawyers with lack of resources, lack of training.

In Pennsylvania -- Pennsylvania is one of only two states in the United States that has the death penalty that provides for no state funding for indigent defense at any level in the process. The funding is left to the counties, which creates a different type of resource arbitrariness from jurisdiction to jurisdiction.

Beyond that, we know that -- let's take Philadelphia. Since the Public Defender's office, which is a full-time institutional defender, has begun handling 20 percent of capital cases, their clients have taken zero death sentences. In the 80 percent of all the other cases, which are from a variety of severity of murders, no different. The 20 percent is random. The other 80 percent of the cases in the time in which the Philly DA's office has obtained death verdicts there have been 85 death sentences returned in Philadelphia.

It is not a product of chance. It's because counsel makes the difference.

New Jersey counsel made the difference. In New Jersey it was clear that the death penalty when there was proper representation was imposed

so infrequently that it became a financial burden on the state and they abolished it.

In New York, where there was a public defender system that was adequately funded, the death penalty was imposed so infrequently that virtually nobody went to death row. And then, when the state courts threw out the death penalty on state constitutional failure, the legislature didn't reenact it.

What becomes clear is where there is adequate counsel the level of death sentencing plummets and the futility of the death penalty as a public policy becomes clear. The arbitrariness becomes clear. If you've got good lawyers, you don't get dead. If you've got bad lawyers, the odds are you are more likely to get dead.

More arbitrary factors, the innocence epidemic. Thank God for DNA testing, because DNA testing is able to expose systemic failure that we can't otherwise see. The problem is DNA evidence is present in such a small portion of cases that you can only guess what is going on everywhere else. In the DNA cases what we find is it's not just boom, there is DNA and there was nothing else going on in the case. No. We see there are systemic problems with the use of snitch testimony. We see systemic problems with the failure of defense counsel. We see the use of junk science fortunately DNA was able to pierce. We see problems with all sorts of eyewitness identification. We see problems with false confessions. We see problems with prosecutorial problems.

Those problems persist across case, across jurisdiction, from state to state. They persist whether or not DNA is present.

So really the lesson from the innocence epidemic with DNA is not that we should be confident that we are able to ferret out and correct the problems, but that we should be worried beyond belief because in the 90 percent of cases in which there is no DNA the same problems are happening and we can have little to no confidence in the reliability of the death verdicts when there is that much going on that's wrong on a regular basis in all of these cases.

Speaking of arbitrariness -- I'm out of time. I will be happy to answer questions later and bring up some more of the issues. Thank you.

MR. MORGANELLI: Let me just show you how all these statistics don't add up to anything. Let me just show you one.

You know, Rob mentioned that down in Philadelphia the likelihood is if you are an African-American you are more likely to get the death penalty. I am looking at the stats here. The average homicide case in Philadelphia, 50 percent of the average Philadelphia jury is African-American. So that means that 50 percent of the jurors that are evaluating these cases are of the same race as the defendant or another minority.

So what we are saying, then, they got the death penalty. How could this be a problem of race when the people evaluating the case are of the same race as the defendant? Philadelphia has a high percentage of African-American population. The facts are the average Philadelphia jury has a 50 percent makeup of African-Americans on the jury.

So if we follow Rob's theory, that means that these African-American jurors are convicting African-American defendants based on race. That's why you can't use these stats to say well, all these people got the death penalty because they are black. Who is on the jury?

So that's the one point I want to make. The other point is that the issue of factual innocence is often raised.

I love Rob. He is a great guy. He is actually a friend. We have gotten a good relationship over the years. We've had cases against each other and I respect him very much as a lawyer.

But we are talking about a study that was done that .4 percent of the 7,000 death sentences since 1973 -- this is what the study said -- .4 percent of 7,000 death row inmates may have been factually innocent. These individuals were identified by the criminal justice system and ultimately released.

Here is a conclusion. It is unlikely any other criminal sanction in the world has a better record of convicting the guilty and identifying and freeing the factually innocent than the current system in place to review death penalty cases.

That's why I am saying to look at outcomes. We have this in a vacuum. The jurors in Philadelphia in a case of an African-American defendant, does that mean they are prejudiced because they impose the death penalty? You've got to look at death cases, too, because they're not all the same.

What do we have now, 18 aggravating factors that makes a case a death penalty case? Let me tell you one of them, if it's related to a drug deal. If a murder is related to a drug deal, that's an aggravating factor which means the death penalty could be imposed if the prosecutor seeks it.

Another aggravating factor is multiple homicide, you kill more than one person. So if someone goes into McDonald's and kills 50 people in one episode and another guy is a gang member and kills another gang member over a drug deal, then both are in front of a jury for the death penalty.

Now, I would think that perhaps the jury might say, you know, the guy who killed the 50 people at McDonald's really deserves the death penalty, but I don't really care that this gang member drug dealer guy got killed. I am not sympathetic with that victim, so they give that guy life and they give the McDonald's killer death. Does that mean somehow this process is unfair -- they are both death penalty cases -- because one guy got life and one guy got death?

Well, the jury makes those decisions and the juries are evaluating the cases based on the facts of each case. So not all death penalty cases -- he didn't say these are all death penalty cases. He said these are death eligible cases, though. But that doesn't mean they are all egregious murders.

Or the jury might not be sympathize with a victim that was a gang member who got killed by another gang member. They might say, It's not a big deal. But when they see a grieving family who lost a little child because some dirt bag took her out of her bedroom at night, raped her, and buried her alive, that's a death penalty case. You might impose the death penalty.

You can't look at outcomes. Every criminal sanction has different outcomes.

As I said, drug dealers, some get probation and some go to jail. Should we get rid of the drug laws because the outcomes are unfair? That's not the criterion. Arbitrariness ought to be looked at, is the process fair?

That's why I work with Rob, to make sure that everybody gets lawyers, adequate resources, good training. And we are working on that all the time. Pennsylvania has improved a lot. We are getting better all the time.



The ultimate judgment of the death penalty is not up to me, but to you and the legislatures. I believe if they got rid of them tomorrow, I would prosecute them for life imprisonment. We would have a forum here with a lot of people saying life imprisonment is unfair because some people are getting four years and others life. We would be having the same debate.

MR. DUNHAM: Look, no one is saying that what the choice is is the death penalty or -- we will do away with the death penalty or, in the alternative, do away with any punishment for murder whatsoever. That's just not what anyone is saying. The choice here is the death penalty versus the alternate sentence of life without possibility of parole.

When you are talking about what level of arbitrariness you want to tolerate in terms of outcomes, it makes a huge difference if the difference in the outcome is a person is alive with opportunity later on to fix problems that might be discovered or the individual has been executed and so the legal errors in this case are rendered moot because, hey, there is no legal maneuver you can possibly do that will bring that person back to life.

I am always interested when Justice Scalia's views of innocence get quoted and his numbers get tossed out, which is the .4 percent. That has been roundly criticized by anybody who has taken a look at any of the murder statistics. Justice Scalia doesn't believe that anybody who is innocent, that just a tiny portion of the innocent have ever gone to death row.

In Pennsylvania I am aware of eight individuals who are innocent who have gone to death row. My client Fred Thomas was innocent and died on death row after we had proven his innocence while the appeal from the Philadelphia District Attorney's office was pending. They knew that he was dying of terminal cancer and they opposed our motion for an expedited appeal, which had the effect of having him die on death row without contact with his family instead of having the opportunity to be released to a hospice.

This was a question of acting in a manner that was vindictive and vengeful as opposed to in a manner designed to bring about a just result.

We know about the case of Dennis Counterman, who is not technically counted as being innocent because in order to be released immediately from prison he pled to third degree murder to something that was no crime at all. Dennis' kid had a history of starting fires and there was evidence in social services records. There was a fire started in his house. His wife awoke with the house on fire and told Dennis about it, who went downstairs and tried to get the family out.

So what happens? The state suppressed the evidence from the social services files that the kid had a history of fire starting, said there was an accelerant used, used junk science that is no longer acceptable anywhere in this country and said there was an arson where there was none. Dennis lost his kids and then he was sentenced to death for killing them when it was just an accident.

Dennis is not considered innocent because he pled to third degree because he had already served enough time to be released. So rather than risking addition years of litigation, he pled to something he didn't do.

I mean, we feel bad when we get a traffic ticket for something we think we didn't do. Imagine the choice of having to plead to third degree murder when you didn't kill anybody and you know that your kids died because of an accidental fire?

I mean, there are cases all over the place and the problem is, as the DNA epidemic shows, there are many, many more cases for which we won't be able to pull out that smoking gun of innocence evidence because what you have are bad eyewitness IDs, but no physical evidence that you can test it against. What you have are snitches who are getting themselves with no way objectively of proving the falsehood of that stuff.

I mean, these are really, really serious problems that are endemic to the legal system that come up over and over again in capital cases. And life is precious and the loss of life is a reason not to allow people to have their lives taken when you know that there are these serious, serious problems out there.

John talks about why are all these blacks worried, sentencing black people to death in Philadelphia. The fact of the matter is that the composition of juries in Philadelphia has changed over time. The numbers that he is talking about now are numbers that came about well after 1997.

What happened in 1997? There was a videotape of jury training in the Philadelphia District Attorney's Office that came out. It was disclosed because the proponent of those -- it was a tape that taught other prosecutors how to discriminate on the basis of race. The person who gave that training was running for district attorney and the incumbent district attorney said, Look what we just found in our files. There is a videotape by this guy who is running against me teaching people how to discriminate on the basis of race in jury selection. That came out in 1997.

Guess what's happened to the rate of death sentences in Philadelphia since that time? It's gone down. What do we think has caused that? Well, the percentage of African-Americans who are eligible for jury service has been rising in Philadelphia over the last 20 years, so that trend has continued and at the same time the tolerance of the courts for what appeared to be just business as usual in striking black juror after black juror, the tolerance wore off, so there were fewer and fewer of those strikes. The jury became more racially mixed. What was the outcome of that? A drop in death sentences.

So what John has talked about proves my point; not his. The death penalty was arbitrarily imposed on the basis of race.

A very, very interesting and shocking study that recently came out took a look at just photographs of black defendants who had been sentenced to either life or death in Philadelphia. Broke them down into physical characteristics, those with stereotypically African-American looking features and those with lighter skin.

They took a look at what the outcomes were for those defendants. They found that when there were black victims it made no difference what the black defendant looked like, but when there were white victims the black defendants who had stereotypically black features were sentenced to death at twice the rate of those who did not have stereotypically African-American features.

Now, think of this. This is an outcome in the system in which the juries have been selected based on racial profiling. You've been taken out if you're black. You've been taken out if you are white and live in an integrated neighborhood. Who is left? Those who have the least contact with African-Americans in their daily life, those who are the most isolated and afraid.

What did the outcome show? Subconsciously when these isolated white jurors look at these stereotypically African-American black defendants, they were afraid and that unspoken fear that's a product of their

segregated environment and their unconscious prejudices leads to death sentences based upon the appearance of the defendant. That's unacceptable. And those patterns are repeated across multiple jurisdictions, here in Pennsylvania and elsewhere.

MR. McCORD: Okay. Now it's time for your questions. I see people streaming to the microphones.

QUESTION: I worked at corrections for 30 years or so. Listening to Attorney Morganelli reminded me of inmates. They really denied their own culpability a lot of times when they got arrested, just like the district attorney denies or he didn't quite mention prosecutor discretion in accepting a death penalty case.

The reason I mention that is because prosecutors aren't completely unaware that they have discretion. In fact, they really fight to keep it.

There is a bill that's been passed in the Senate that asks for -- or that proposed pretrial determination of mental retardation. It passed in the Senate. It's now in the House, referred to the Judiciary Committee. The District Attorney's Association, as I understand it, opposes the move because of the pretrial qualification.

Could you explain how we, as taxpayers, should have to go to the expense of the capital offense just so you can decide to go for that and have it determined afterwards when a pretrial determination would simplify it a lot?

MR. MORGANELLI: I think you are incorrect. The Pennsylvania District Attorneys Association opposed that bill because we believe the jury should be deciding those issues and not a single judge. The reason why we feel that way is, quite frankly, we believe that the collective judgment of 12 individual citizens from the community are much more able to evaluate based on non-arbitrary factors rather than personal opinion.

When you have one judge -- every one of us brings to our jobs our own predispositions and so do judges. So you may have a judge who is a liberal judge, for example, who is opposed to the death penalty and he will never find anybody who is not incompetent and it will basically be an eradication of the death penalty by judicial fiat. On the other hand, you may have a judge who is a conservative who will find that these defendants are always competent and the case moves forward.

This is not a taxpayer issue, by the way. The same amounts of time and effort go into presenting that case whether it's a single judge or 12 citizens sitting there. We have to go through the process. We have to present the evidence, the defense gets their chance to present their evidence, and then a decision is made.

When you frame this, why should taxpayers pay money, it's the exact same premise. It's just that there are 12 citizens who are going to collectively make that judgment rather than one judge who may just bring his prejudices either to the benefit or the detriment of that defendant.

The Pennsylvania DA's Association feels jurors' selective judgment as citizens from all walks of life are able to make that decision. Then we will have a very fair decision.

MR. DUNHAM: The DA Association supports having a post-trial determination made by a death-qualified jury precisely because death-qualified juries do not believe in mental health evidence and are less

likely to find a person who has mental retardation has mental retardation. You know, if you're going to have a jury determination of mental retardation, then let's find a system that makes that work.

I think, frankly, you need to have judicial determination. We don't bring a jury in to decide whether somebody is under age 18. We don't bring a jury in to determine issues of law as to whether the case -- a sufficient case has been made out to warrant particular charges being actually brought to trial. Those are pretrial issues that are for a judge to decide. So is this.

But if you are going to have a jury decide it, then let's bring in a jury up front. Let's go through the entire process, qualifying the jury to make sure that they don't harbor stereotypes and biases that will prevent them from properly deciding whether somebody has mental retardation.

Let's leave the question of the death penalty out of it altogether, because people who can impose the death penalty, there is nothing that says that automatically disqualifies them from making decisions about mental retardation, but the fact that they oppose doesn't mean they can in an unbiased way ascertain mental retardation. If you are going to have it be a jury choice, then let's have a jury choice made by an entire eligible public; not by folks who have been excluded because they oppose the death penalty.

Let's do an up-front adjudication and avoid the expense of an unnecessary capital trial. Let's not throw this thing at the end of a trial and then leave it open for the conviction being reversed, as well, because if you are not eligible for the death penalty, then you should not have been tried in front of a death-qualified jury. So anybody who goes through that process at some later stage is found to have mental retardation, based on the way in which the jury was selected, the entire case might be thrown out later on.

QUESTION: This is going to be for Mr. Morganelli. When you guys were talking about the decline in the lack of difference in death penalty cases determining whether or not the jurors are black and the defendants are black, and I was wondering if you guys think that it's impossible for people of the same race to be prejudiced against one another or that is just a coincidence.

MR. MORGANELLI: I didn't understand your --

QUESTION: You guys talked about how black jurors knew whether a black defendant gets the death penalty and they are less likely to get the death penalty. About the issues of race, the race of the --

MR. MORGANELLI: What I was saying -- and I don't know if I made myself clear -- is that Mr. Dunham made the point in Philadelphia African-Americans were getting sentenced to death. You got to remember a death sentence has to be a unanimous finding by all the jurors and they have to find aggravating factors beyond a reasonable doubt. If one disagrees, there is no death sentence.

The point I made is you can't say that this is a result of prejudice when we have statistics that show that 50 percent of jurors who are imposing these death sentences are minorities on the jury. So to say the death sentences are a process of racial discrimination when we have minorities on the jury voting for the death penalty, I think the statistic started out before that video came out.

The African-American population of Philadelphia is significant. There are African-Americans serving on juries. The fact is every one of them has to vote for a death sentence in order for there to be a death sentence.

That's why if it was the same jury, the same exact facts and one fellow who's white gets life and the other guy's is black and gets death, I would agree. That is a product of racial discrimination.

But we have different jurors and different facts. You cannot look at the outcome and say he got the death penalty and that's the reason why he got it. The jurors have to -- they are not there -- I think most fair-minded people are not going to put someone to death because they are of their race. They are going to say, This crime was horrendous. That crime was a bad murder, but I find a mitigating circumstances.

You know, Rob. You know this in your experience. It's hard getting a death sentence. You got to convince 12 people. Even when they say they are going to impose a death sentence, 12 people unanimously must agree beyond a reasonable doubt.

A lot of times they do find mitigating factors of mental illness. All those factors Rob brought up about the life of the defendant when he was a kid comes into evidence. I've been in cases where the jury came back for life because they found mitigating factors, including mental illness.

So to say that juries who are death qualified will automatically give a death sentence because -- and won't even look at mental retardation is not accurate because most of the cases are not death verdicts. They are life imprisonment. Mr. McCord's numbers show that.

Out of all the cases where a prosecutor asks for a death sentence, I would say the percentage where we actually get one is very low. That means juries are looking at mitigating evidence, that it's hard to get a unanimous verdict. I believe that they are not the product of racism or discrimination, particularly in Philadelphia, where you have a huge African-American population.

MR. DUNHAM: What is really interesting is in the videotape training where Jack McMann specifically instructs the other prosecutors, You don't want an all white jury. What you want is a racial mix. But what you really want is nine to three or eight to four. Because that produces the kind of dynamic in which he believed that people who have anti-black beliefs are not going to be articulating that and so they won't be irritating other jurors into being sympathetic toward the defendant because of his race. They will harbor the anti-black beliefs and not articulate them and vote on them and argue about death on other grounds, and that will be more persuasive, because they will not have come out and been overly racist.

The fact of the matter is, the prosecution wants to have -- in Philadelphia cases wants to have some blacks on the jury. Now, they have a separate set of rules for the blacks they will select, so the jury selection tape talks about you are going to want older blacks that came from the South because they have -- and this is the language from the tape itself, I think, if you pick up one of these handouts up top, I have some of the quotes from the tape in it.

But McMann likes older jurors from the South because they will go along. So he wants a particular racial mix, but he wants a mix that is going to result in death sentences and it's a race-based mix. The other thing is John was talking about how right-minded jurors wouldn't be making decisions on the basis of race. I agree. I agree

with John. And there are a whole bunch of right-minded jurors who, if they understood what they were doing was a product of race discrimination, wouldn't be doing it. We are talking about the role of subconscious discrimination triggered by all sorts of fears and also triggered by all sorts of defects in the system.

When mitigation gets presented and a thorough case gets presented, it is hard to obtain the death sentence. But guess what? In the typical capital case that's not what happens. In Pennsylvania there have been approximately 400 death sentences that have been imposed since 1978. In that time 210 death sentences have been overturned for a variety of reasons. One hundred ten of those 210 have been overturned because of ineffective assistance of counsel in failing to investigate, present evidence or failing to make appropriate legal arguments.

The reason there are so many death sentences is because there is not an effective advocate. And the Pennsylvania system has not over the course of years ever come up with a way of getting an effective advocate.

In a report that we just released -- in fact today it was released for the first time -- on Pennsylvania capital post-conviction reversals and subsequent dispositions, 56 of the cases that were reversed in post-convictions have gone back for subsequent proceedings.

Of those 56, guess how many resulted in death sentences? These are all cases that already got the death sentence once. Of those 56, four resulted in death sentences. Fifty-two did not, even though the ones that were taken to trial resulted in many more -- resulted in more life sentences than death sentences.

Why is that the case in post-conviction? Well, over the months it went to trial the clear difference was because when it's gone through the post-conviction process -- and most of the cases where we had worked up a case for mitigation that hadn't been worked up before there is an opportunity for counsel to present the story of the defendant's life that was not presented at trial, that is not typically presented because even if there are paper standards about who is death-qualified to handle capital cases, there is not enough resources to do it properly. When mitigation investigation has been done by somebody else, all they have to do is present the evidence.

We have found that the odds -- that in those 11 cases there were seven life verdicts and four death verdicts. Interestingly, of the four death verdicts, two of them were in cases that went back before our office had even begun handling capital cases. So if we take a look at the ones where there has been mitigating evidence developed in the interim, you are looking at nine cases.

Counsel makes a difference. Subliminal prejudice makes a difference. The absence of resources makes a huge difference.

QUESTION: I am a student from Lehigh University. I'm very glad that I could come here and listen to both of you speak today.

My question is to Mr. Morganelli. You mentioned at the beginning of your speech that to people who believe that the death penalty is just an issue, if someone gets it from moral or religious issues, you would not argue with them. And it was brought up that those moral people who are not religious people who are against the death penalty would not even be allowed to serve on the jury of a case. I want to know how -- what your feelings are about that.

MR. MORGANELLI: Here is the reason why people who are morally or religiously opposed cannot serve on a death penalty case: Because every juror has to promise that they are able to follow the law and carry out the law if the facts involved warrant it. So when we ask jurors, we will say, Ladies and gentlemen of the jury, if the facts and the law support a finding that a death sentence is appropriate, will you be able to impose that? They say, I'm sorry. I can't. That answer says, No matter what the law is, no matter what the facts are, I can't.

If you were in a drug case and I said to you, Ma'am, if you find that this person delivered drugs and you find it to be the truth that he did so and the law says he should be convicted, would you be able to convict the drug dealer, and you said, No, I couldn't, because I don't believe drugs should be illegal, you wouldn't be allowed to serve on the jury.

The fact of the matter is jurors will take an oath that they will apply the law. When we ask jurors and you say, I can't impose it, what you are telling us is, I am not going to follow the law. I don't agree with this law and I am not going to follow it.

Guess what? You would not be able to serve on any kind of jury if you said that, I can't convict a drug dealer because I think drugs should be legal. I can't convict a gambling defendant because I believe gambling should be legal. This is not a unique thing to death penalty cases.

QUESTION: The law also says that the jury should be a jury of your peers and about 64 percent of people are for the death penalty in Pennsylvania. That initially just excludes that other 36 percent. Then even of the people who would be for the death penalty, some of them wouldn't be able to actually impose that.

So how is that a jury of your peers?

MR. MORGANELLI: Well, because it's a jury of the people who live in the community, who have to apply the law. We have a society of laws and we don't get people on juries to be able to say, I don't think that's what the law should be. Therefore, I am not going to follow it.

So in every case -- not just death penalty cases -- the jurors have to take an oath that they will apply the law to the facts. If the juror tells us, No matter what the facts or law is, I can never find guilt on a drug case or I can never impose a death sentence, then they are not able to serve on a jury. That's just the way our law and system functions.

MR. DUNHAM: John is right on the law. That's an absolutely correct description of what the law is. That's also what one of the problems is. Because what makes this arbitrary is that on a subject that is this important, with stakes that are this grave, with that many people being taken out the equation, you end up with an ultimate verdict that is unreliable and doesn't reflect the overall views of society. That is what the verdict is supposed to do. When you have the drug case and other cases, the stakes are not as monumental and the depth of opposition to that particular law are not close to as great.

MR. MORGANELLI: Rob, you would agree with me about 90 percent of the cases that go to a verdict on a death sentence come back life? Isn't that about right?

MR. DUNHAM: I wish that were the case.

MR. MORGANELLI: Well, it's about, I think the last time I saw, 80 to 90 percent. It depends on what jurisdiction you are looking at. Across the country most cases that go to verdict on the death sentence end up in a life sentence. The majority are not death sentences handed out.

MR. McCORD: Nationwide -- I don't know about Pennsylvania, but the nationwide figures, most jurisdictions are between a quarter to a third of cases that get submitted to the jury end up with the death penalty. Some jurisdictions are higher. Texas, I believe, is more like 40 to 50 percent.

QUESTION: Mr. Dunham, you mentioned that an informed jury's rulings wouldn't hurt the defendant. What would you say the solution is to make sure there is a better informed jury?

MR. DUNHAM: Jury instructions that make sense. That's simpler to say than to do. Part of it is really easy. Pennsylvania is the only remaining state in the United States that offers sentencing options of life without parole or death, but doesn't explain that life means life without parole. So you have jurors who mistakenly believe that their choice is between sentencing someone to execution or possible return to the streets. That makes a huge difference in their sentencing deliberations.

The studies in Pennsylvania show that the median -- I hate to mix lawyers and math. It's a really bad idea. But the median point in jurors' beliefs about how long a life sentence is in Pennsylvania is 15 to 20 years. That is to say that fully half of all jurors who serve on death penalty cases believe that a life sentence is 20 years or less. And the studies showed that jurors who believe that life is less than 20 years are twice as likely to impose a death sentence as jurors who believe correctly that it is life without parole or, incorrectly, that it's a much longer period of time.

So one, tell them the truth. The second thing is, the other instruction is, do it in plain English. We have instructions that are just incomprehensible and it doesn't benefit -- you know, and the prosecutors want the juries' instructions to be in plain English, too.

MR. MORGANELLI: But, Rob, you have to agree, though, if a prosecutor argues to a jury that this criminal defendant is dangerous, future dangerous, then the juries do get instructed that it's life without parole. So in most of the cases I have tried the jury is told life without parole is what is here. Because the Supreme Court's ruled that if a prosecutor is going to argue that this man is a future danger, then they have to tell the jury he will never get out of the prison.

MR. DUNHAM: Yes and no. It's correct that if a prosecutor argues future dangerousness an instruction is required. But the way the Pennsylvania Supreme Court has interpreted what constitutes future dangerous, very little does. It has to be an overt argument. So that if you put in evidence that somebody had prior convictions, even prior homicide convictions, that fact does not count as evidence in arguing future dangerousness, as the Pennsylvania Supreme Court understands it. If you argue that the circumstances in this case are extremely vicious and you argue that the defense, who has presented mental health mitigating evidence, if you argue that this person is a psychopath, this person has behavioral problems so that they are going



to violate social norms, they can't control themselves, that doesn't constitute an argument for future dangerousness as the Pennsylvania Supreme Court understands it.

Now, I happen to think that we are going to succeed in getting those cases reversed later on in federal court in habeas corpus, but as the system works right now, prosecutors are still making those arguments. Those arguments aren't legitimate.

There is nothing that says that a prosecutor can't make the argument, but unless it's countered with an accurate instruction that life is life without possibility of parole, you end up with jurors sentencing people to death in part because they think the person is going to be released on the street when, in fact, they are never eligible to come out again.

QUESTION: When we look at football coaches like Joe Paterno's records of wins or losses, we say more wins are good and less losses, that's good, too. But if the jury is deciding guilt and innocence, why would a record of more convictions as opposed to a few convictions be good or bad before a district attorney that's running for reelection? Isn't justice served if a lot of people were declared innocent by a jury? Why would that be something to brag about, if we have a good record of convictions when you are running for reelection?

MR. MORGANELLI: I am not the one that brought that point up. Rob, you were making that point with Mr. McMann's DA --

MR. DUNHAM: He was running for DA in 1997. The tape was made in 1987.

MR. MORGANELLI: You are right. I believe in the system. I believe that jurors -- we have cases. They go to trial. The jury finds them guilty or they are found not guilty. We do our job. We present the case to the jury. And as long as we are presenting the case in a competent manner, we let the decision of the jurors and if the jurors says not guilty, when the press comes to me, you know what I say? We presented our case. I respect the jury's decision.

MR. SOBEL: I would like to state that I agree with Mr. Morganelli's statement that we need to be concerned about the process in criminal cases generally and certainly in death penalty cases and not the outcomes, because we can only control the process. We can't control the outcomes.

But I would like to see if we have an agreement about when we should become concerned about the process. It's my view that we should become concerned about the process when there are, for example, DNA exonerations or other post-conviction actions which establish that there has been a wrongful conviction which is attributable to some systemic flaw that occurred in the system.

Secondly, we should be concerned about the process when a series of appellate court cases come out and evidence of tattering, which suggest that there is a flaw in the system or some type of misconduct taking place in the system.

And third, we should become concerned about the process when we have evidence in the nature of reliable statistics which tell us that the outcomes are not consistent with what we would expect if the process was not flawed or there was no misbehavior going on in the process.

Then, when we become concerned with the process, we should look at the process not simply during the official trial court proceedings, but starting with the initial police investigation, the prosecutorial decisions that are made with regard to how the case should be pursued and plea bargaining that takes place to see if we can better understand why this evidence came to light that suggests something is wrong with the process.

Do you both agree or disagree with that or do you have a different take?

MR. MORGANELLI: Well, let me address your last point first. You know, I am not a big supporter of these outcome analysis stats. I will tell you why. Every one of these organizations who offer these studies has a predisposed agenda. They are already opposed to the death penalty.

I can get prosecutors to give you studies show the opposite. Our studies are pro death penalty. The ABA is against the death penalty. These are organizations, professors who have an agenda.

So what I do agree with you, Doctor, is this. We have to look at defects in the system and we recognize that. And I think that that's the reason why I serve personally on the new Pennsylvania Supreme Court's -- and I was asked by Justice Eakin to serve on this commission, supporting that there are problems that are recognized by the court system.

When the Supreme Court ruled and said, Here is a deficiency or we don't have adequate counsel in this case, and they overturn death sentence, it was not because he is innocent, but because we want to assure every person gets the optimal treatment in the system before we put someone to death. And if we don't give them that treatment, then they get life imprisonment.

When the decision is overturned on incompetent defense counsel or we didn't do a proper investigation, then we need to say, Okay, what can we do to assure the next case that comes in they do have competent counsel, they do have investigators, they do have resources so these mistakes aren't made again?

What I object to is to say because we have certain defendants on death row; therefore, all those decisions were based on race only. We can't get inside the jury. I don't believe we can compare apples and oranges unless it's the same jury, same facts. So that's what I have object to.

But I think the point you are making, we can agree all of us are fair-minded people. No one wants to see an innocent person executed. No one wants to see anybody deprived of due process. I don't want to see sleeping lawyers in the courtroom representing anybody, particularly someone who is going for a death sentence.

I like good lawyers like Rob Dunham. It's a pleasure to be in a courtroom when you have competent lawyers representing a defendant and you know what you are doing and they know what they are doing. There is a record in the case that goes to a jury or judge. You don't have to worry about incompetence, they didn't do a proper investigation, they didn't get the defendant examined by a forensic psychiatrist.

We try to fix those things. How we learn is when the courts throw out a case and they reverse a death sentence. We learn from that. Then we go back to work to try to fix the problem so we get better as time goes along.

A lot of the cases, Doctor, as you know, are 20-year-old cases where we weren't as good back then. We didn't have DNA. But now we do. It's not just DNA. We should never put anyone to death just based on one

ID. Guess what? Jurors have to make that call. Maybe we look at those cases more carefully.

Let me tell you something. The majority of people on death row, 99 percent of them are dead guilty. There is not this epidemic of innocence that Rob talks about. Point four percent, Justice Scalia. Those people were released.

So that's what we are dealing with here.

MR. DUNHAM: We already demonstrated eight in Pennsylvania, which is substantially higher. We are already at five percent.

MR. McCORD: We are at 4:33. What would you like me to do? Anybody who feels like they have put in their time can go.

Did you want to say more?

MR. DUNHAM: The other thing I want to say to Al is that fair-minded people want to improve the process. The recommendation in the American Bar Association report - by the way, the ABA is not an anti-death penalty organization. A lot of prosecutors think they are and, unfortunately, the prosecutors declined the invitation to participate in the evaluation, just as they declined the Pennsylvania Supreme Court invitation to participate with the Pennsylvania Supreme Court committee on race and gender bias in the court, which then itself recommended a moratorium on the death penalty because of the process problems.

The problem that we seem to have in Pennsylvania is a lack of recognition that there are problems with the process. As early as 1990, the joint task force in the Pennsylvania Supreme Court -- the United States Court of Appeals, Third Circuit talked about systemic problems in death penalty representation at all levels. Nothing was done. That's the problem.

The Pennsylvania Supreme Court committee on race and gender bias talked about systemic problem, indigent defendants, and all levels of defense in capital cases. That was in 2002. Nothing was done.

The American Bar Association report in 2007, there was not one recommendation in that report that hasn't previously been made. That's not their fault nothing has been done, despite the fact problems have been known for a generation.

We have process problems. The process is arbitrary. The process can be fixed. Outcomes are arbitrary. Hopefully, they will be fixed, too.

QUESTION: Mr. Morganelli, you had maintained that the process seems to be fair and I am wondering how it can be possibly be fair given that the prosecution is given such large resources to make their case compared to the defense. And for the sake of fairness, would you support a state system of capital defense?

MR. MORGANELLI: Well, I don't know what that means, a state system of capital defense. I have supported resources for qualified lawyers who are certified to be capital defense lawyers. I have supported that as a member of the Supreme Court's study group. So I believe that we have competent lawyers, lawyers who know what they are doing, like Mr. Dunham.

The question about resources, you know, I can tell you one thing. In the cases that I've had, I felt that the resources were much better on Mr. Dunham's side. He and I have had a few cases. Two of the cases he

cites in his report were my cases. When we had post-conviction hearings, Mr. Dunham had psychiatrists flown in from California, flown in from New York, the best that he could find. I could not afford to have these psychiatrists come on my side of the case because I have a budget.

The fact of the matter is, there is a lot of money out there to defend these cases and resources are there. I am not against that. I don't believe that we should have anyone put to death who has not had the benefit of the best possible defense and the evaluations that Mr. Dunham normally obtains.

But I see a lot of small prosecutor offices that get outgunned by the Capital Resource Center with expert witnesses, paperwork, expertise, and it's becoming more and more of a level playing field. It hasn't always been like that, but we are getting better.

I think Rob would agree, we've improved the ability, at least in this state -- I'm talking from my knowledge of Pennsylvania -- of giving adequate resources and ability for people who do have the knowledge that Mr. Dunham and his lawyers do to be able to evaluate the records and obtain the necessary psychiatrists and expert witnesses that they deem relevant.

So yeah. We should have a level playing field. I don't want to go into a game -- I like sports and I like to be competitive. I don't want to have a 20-point lead before the game starts.

MR. DUNHAM: I think that the counsels across Pennsylvania are getting better in recognizing that there is a need for some expert services, a need for investigators, and that's a plus. The level of resources that are being provided for pretrial investigation and for obtaining the expert assistance is still -- I was going to say pathetic, but that might be a little strong -- but it is still substantially inadequate.

QUESTION: I wanted to talk -- some of the points I wanted to raise have been raised recently, so I will just limit my question. There are lots of small measures that we could undertake to -- say, as a nation that would allow the process to be much fairer. If you are interested, the people who are prosecuting are interested in a fair trial, what is stopping us from achieving those dreams? If you were to become the Attorney General, would you be interested in supporting any of these initiatives?

MR. MORGANELLI: Obviously we would evaluate all the proposals, what comes to us. I can't speak for every prosecutor in Pennsylvania. I used to be the president of the DA's Association and they would give me authority to speak on behalf of them, but I'm not the president anymore. I can only tell you that I know all the prosecutors in this state and the Attorney General, and I believe that all the people in the system do not want to see any person at a disadvantage. We believe in an equal playing field.

Does that mean I support everything that comes down the pike, like the gentleman asked me about whether the determination of mental retardation should be by a judge rather than jury? No. We believe a jury should do it. Does that mean we are against resources or against having competent lawyers? No. We have to evaluate every proposal. All I can say is I have not seen any opposition by my fellow prosecutors to having adequate defense counsel, adequate resources for investigations for forensic evidence, et cetera. We have no problem with that. That's a fair playing field.

I understand the opposition and I personally support that. The reason I do is -- here is why -- because when you have lawyers and resources at the trial level, then we don't have to spend all this on the other end at the appellate process, because if we can cure the mistakes or we have the resources, it shortens the process. It makes it better for everybody.

Why don't we do more? I would suspect -- Rob, maybe you know better -- it's probably because of lack of money and resources and the legislatures have priorities. There are a lot of other priorities people are looking at across the state.

But I am not opposed to having a level playing field. Generally speaking -- I can only tell you what I do -- I advise every police department when we bring a defendant in, I want them on videotape. I want the jury seeing them confessing. I tell our police departments that I want videotaped statements. I think they are the best evidence and we should have them.

I don't know what other prosecutors think. I am only speaking for me, John Morganelli. Do I want a videotaped statement of the defendant? Absolutely, yes. I love them. Here is the defendant, sitting with a Coke and a hamburger and talking to the police and smoking a cigarette, saying, I killed that guy. Best evidence in the world for me. Love it.

You know why? When I don't have that and I get up there with a cop who says, Yeah. He told me he did it, guess what? Now I have a defense lawyer saying, You were intimidating him and you didn't feed him and you beat him and he didn't eat for two hours. So I love videotaped confessions.

MR. DUNHAM: I think we should have the confessions videotaped, but, more importantly, we should have the interrogation that leads to the confessions so there aren't any questions.

Now, there are some concern as to -- there is some legitimate police practice where you do good cop, bad cop and it doesn't look so good on the videotape. I think that we can trust enough in jurors that they will understand that this is a legitimate technique used. And the experience in New Jersey when they went to that has not been anything that's hurt the prosecution at all.

I also think we want to improve the reliability to put people like me out of a job. We would like to improve the manner in which witness identifications are done. The experience of the states that have gone to systems that no longer have lineups, that no longer have a sheet of pictures and ask you which one is it, but have gone to fairer systems that give a person the opportunity psychologically to say, No, it's not this person or that person, as opposed to seeing eight people and picking the wrong person who looks the most like the person they saw, that kind of correction helps everyone.

Where you have a bad identification or where you have a false confession or you have anything else that leads to conviction of a person who is innocent, whether it's a capital case or not, there are two injustices that are done. The first is that the innocent person is deprived of their liberty and perhaps their life. Secondly, the person who did it is still out there potentially doing more damage.

So I am in favor of any of the things that will make the system up front more reliable. Those are very low cost things that can be done. The only thing they produce is a better working system.

MR. McCORD: Last question.

QUESTION: Let me give you my bias first. My name is Tony Rosini. I am District Attorney in Northumberland County, which is just across the river. I just have a statement to make with a little bit of a question.

I think that this question needs to be restated, because there are literally thousands of executions going on in the United States. Last year there were 16,000 homicides. A large portion of those don't get solved.

I was in Philadelphia at the DA's Association and the head of the Philly homicide division painted an incredibly dire picture of the neighborhoods in Philadelphia. They clear -- I think he said they cleared the same number of homicides that have been cleared every year, which is about 250, except they had over 400 homicides.

So there are a lot of people being executed out on the streets without due process, without trials, without redress. I think the question should be what can we do to stop the homicides in our streets.

MR. DUNHAM: I think that's a fair question. Unfortunately, the mayor has his students, some sort of students within the Police Department, do redeployment. Hopefully this trend will continue. There has already been a 25 percent reduction in the rate of homicides in Philadelphia since they put those things into effect.

My God, if we could take the resources that are being used to pursue death sentences that we don't need and redeploy those resources into crime fighting and into preventing the circumstances that lead to crime and to homicides, I'm all for that.

MR. McCORD: So is everybody. And thank you all for coming.

(Whereupon, the panel discussion concluded at 4:50 p.m.)