

The Honorable Arlen Specter  
United States Senate  
711 Hart Building  
Washington, DC 20510

(via e-mail)

Dear Senator Specter:

Thank you for permitting me to address your questions.

1. In your testimony, you state that it is a "myth" that we are executing the innocent. However, while it is true that no one who has been exonerated [executed?] has been proven innocent, it is also true that our trial system is not set up to prove innocence. In fact, defense teams only attempt to create a small amount of doubt to prevent the conviction of the defendant.

- a. So aren't you asking for something that is not likely to ever be shown?
- b. Thus, isn't it still a possibility that we have, or we might, execute an innocent man?

Answer: At the outset, if the defense is unable to create even a small amount of doubt at trial -- enough to persuade just one of twelve jurors that the prosecution has not carried its burden of proof -- there is reason to wonder whether subsequently produced "documentation" of innocence, which often surfaces years later in the form of "recantations" obtained under circumstances not subject to the truth-finding mechanisms of a trial, really shows factual innocence at all. Instead, in a large number of these instances of supposed exoneration, what is shown, or allegedly shown, is that there may be a reasonable doubt about the defendant's legal guilt or the degree of his culpability. That might be sufficient to eliminate the death sentence, and in some instances the conviction itself, but it is not as a categorical matter the same as proving that the defendant had no complicity in the murder.

Because human beings are fallible, it is of course possible that we have executed, or in the future might execute, an innocent person. But several points should be made about that. First, just

as the judicial system is fallible, so is the penal system. What this means is that if we abolish the death penalty, killers who would have been executed will continue to be with us in fallibly administered prisons, creating the possibility that they will kill again. Thus, a murderer sentenced to life imprisonment could go on to kill a cellmate, a guard, counselor, teacher, doctor or nurse, a rival gang member, or a weaker inmate who refused him sexual favors. He could also escape or be erroneously released and kill once he was free -- something that happened most notoriously in the case of Kenneth McDuff, a sadistic Texas multiple killer whose death sentence was commuted after the Supreme Court effectively barred capital punishment in Furman. McDuff was eventually released and went on to murder at least four, and most likely twelve, additional innocent people. They would be alive today had McDuff been executed when he should have been.

In a perfect system, episodes like McDuff would not happen. But, as noted, penal systems are at least as subject to human fallibility as are courts. Thus, the possibility of government complicity in taking an innocent human life cannot be ended simply by ending the death penalty. Because killers can do it again, and because prisons make mistakes just as court do, it is a matter of trade-offs. With *either* life imprisonment or the death penalty, there exists the possibility that innocent life will be forfeited. The only realistic question is which of these punishments is less likely to have that result. Given the absence of any proof for decades that the death penalty has taken even one innocent life -- while murders by previously convicted killers number in the dozens -- the better tradeoff, simply in terms of preserving innocent life, is to keep capital punishment, as the great majority of our citizens want.

In asking for proof that we have executed an innocent person, death penalty proponents are simply asking their adversaries to demonstrate what they claim -- scarcely an unreasonable request. We are not seeking something that is "not likely to ever be shown." Indeed, in moments when they thought it would be propitious, *abolitionists* have made a point of their ability to "prove" that an innocent person has been executed. Their problem has not been with lack of opportunity, but with the

results when opportunity arrived. Thus, as Justice Scalia showed in his concurrence in Kansas v. Marsh, the abolitionists' "proof" that Roger Keith Coleman was innocent came to grief, not when abolitionists were denied the chance to make their case through DNA testing, but when the DNA test they demanded and obtained showed that Coleman was guilty. In addition to DNA testing provided by the state, as happened with Coleman, the family and/or the estate of an executed person alleged to have been innocent could sue the state for wrongful death. Finally, legislative hearings or commissions of inquiry established by the executive branch could also be devices for assessing claims of innocence. In other words, if in fact there are credible claims that we are executing the innocent, means exist in all three branches for examining them. Against this backdrop, it is stunning that there has not been a single proven incident for decades of an innocent person's having been executed. And it is powerful evidence that it simply is not happening.

By contrast, Kenneth McDuff and cases like his stand as compelling testimony to the possible consequences to innocent life if we do *not* execute those who have earned it. The execution of an innocent person remains a matter of conjecture. The murder of innocent people by previously convicted killers -- caught but not executed -- is regrettably a matter of fact.

2. **As several of our witnesses have mentioned, it is becoming exceedingly expensive to execute criminals. For one example, according to DPIC, the California death penalty system costs taxpayers \$114 million per year beyond the costs of keeping convicts locked up for life. (This may be exaggerated, of course.) Considering that all government spending operates at an opportunity cost, isn't it possible that it would be more economically efficient to forgo the use of the death penalty - whose imposition (both federal and state) is extraordinarily rare - in favor of life without parole?**

Answer: Those who have done the most to balloon the cost of carrying out death sentences are poorly positioned to rest their arguments on the public expense they did so much to create. This

would be true in any event, but it is especially true in light of the fact that the majority of these increased costs derive from years of mostly non-meritorious, and not infrequently frivolous, appeals.

In addition, and as your question suggests, abolitionist groups may tend to exaggerate the cost of execution while minimizing the cost of keeping convicted killers imprisoned for life. I am not an expert in this area and cannot offer dollar figures, but I am quite sure that you and other senators considering this question would be well served by seeking cost estimates from neutral parties, rather than taking at face value estimates provided by advocacy groups on either side. Having said that, I have to believe that the cost of imprisoning a convicted killer starting (say) at age 30 and keeping him locked up until he was roughly 70 -- a period of 40 years -- would be enormous, even disregarding the extra security measures that would be required for an inmate of that type, and the rapidly escalating medical costs the taxpayers would have to bear as he aged.

Lastly, while any responsible lawmaker must consider the burden on the public fisc that a given form of punishment would impose, cost cannot be the controlling factor. If, for example, it turned out to cost less to execute an inmate than imprison him for life, no serious person would say that this fact means that a life sentence, if otherwise justified by the facts of the case, should be foregone in favor of execution. At the end of the day, justice cannot be about money. No one promised that justice would be cheap, and it isn't. Whether the costs of keeping capital punishment as an option for the jury are worth the candle is ultimately a question for those who bear those costs, namely, the public. The public is aware that the capital punishment system is expensive, but nonetheless continues to favor the death penalty by a margin of better than two-to-one. Indeed, notwithstanding its costs and all the other arguments made against it, the death penalty enjoys a degree of public support virtually unrivaled by any other contentious issue.

3. You mention in your testimony that the increase in executions over the last 15 years is not *alone* responsible for the decreasing murder rate.
- a. What other factors might have been responsible?
  - b. To what extent did these other factors contribute to the overall decreasing murder rate?
  - c. To what extent can you isolate the role that executions played in decreasing the murder rate, as divorced from the other possible contributing factors?

Answer: (a). I am not a criminologist or a sociologist, so I cannot give answers in which I have great confidence. I believe, however, that demographics might also have been partly responsible for the decline in the murder rate over the last 15 years. Murder is a crime of violence, and therefore one that, in my experience as a prosecutor, tends to be committed in disproportionate numbers by persons from age 18 to about 35. I believe this group has declined as a percentage of the population over the last 15 years. The general aging of the population over this period, as the demographic bulge known as "the baby boomers" has reached middle age (or older), probably accounts for some part of the drop in the rate of violent crime from the early 1990's to the present.

(b) and (c). Again, because I am not a criminologist or a sociologist, I cannot say to what extent demographics, and perhaps other factors, contributed to decreasing the overall murder rate, nor can I isolate the effect of one factor versus another. Whatever the answer may turn out to be, however, the unvarnished fact remains that *when the number of executions goes up, the murder rate goes down, and when the number of executions goes down, the murder rate goes up*. These facts are so overwhelmingly established as to be beyond serious dispute, and at the hearing, in fact they were not disputed. To reiterate: In the 15 years between 1965 and 1980, when there was a virtual moratorium on executions (only six took place, I believe), the murder rate *doubled*, from 5.1 per 100,000 people to 10.2. I am not aware of any period in American history so short in which the murder rate increased so

much. On the other hand, in the 15 years from 1991 to 2006 (the most recent period for which figures are available) -- a period in which there were roughly 900 executions -- the murder rate was on a steady decline, from 9.8 to 5.5. That is a decrease of 44%. Given these figures, the notion that capital punishment does not significantly contribute to decreasing the murder rate is, not merely implausible, but preposterous.

Again, I am grateful for the opportunity to respond to your questions.

Sincerely,

William G. Otis