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RESPONSES TO ADDITIONAL QUESTIONS

1. Inadequate legal assistance is the number one cause of wrongful convictions of innocent people in death penalty cases. There is frequently prosecutorial or police misconduct in these cases or bad science, but these problems can only be overcome with adequate legal aid to the accused. Exonerations of innocent people sentenced to death have demonstrated the dangerousness of capital punishment when there is insufficient attention paid to adequate legal assistance. There has been an average of five exonerations per year—and in many cases, this is due to discovery of evidence that should have been presented at trial.¹

Due to the complexity of capital trials and the experience and training necessary to try a capital case, it is almost certain that inexperienced and underpaid trial counsel will make mistakes. Many states do not provide training for appointed counsel or ensure that appointed counsel has the experience inherently required for a capital trial. Many states do not provide adequate compensation for appointed counsel to conduct thorough investigations or hire experts. In 130 cases involving exonerated death row prisoners, it is highly likely that trial counsel made errors that led to their clients' convictions and sentences. While it is difficult to know exactly how many improper death sentences were a result of incompetent counsel, it is a huge problem. It has been estimated that the rate of "serious error" in capital cases is 68%.² This undoubtedly is due in a substantial way to incompetent counsel.

2. I believe there are hundreds of wrongly convicted or improperly sentenced people on death row as a result of inadequate legal defense. There are approximately 3,500 people currently on death row. This includes people on death row in Texas who were defended by attorneys whose investigative and expert expenses were capped at \$500.³ In some rural areas in Texas, lawyers have received no more than \$800 to handle an entire capital case.⁴ Defense attorneys in Texas today are often paid so little by the hour that they do not profit at all, and in many cases, end up effectively giving money to the State as their compensation doesn't even cover their overhead expenses.⁵

In addition, people still on Virginia's death row were provided lawyers who were effectively paid an hourly rate of less than \$20 an hour.⁶ In Pennsylvania, there are currently death row prisoners who were sentenced to death in the 1980s and 1990s when 80% of the capital cases were handled by appointed lawyers who received a flat fee of \$1700 plus \$400 for each day in court.⁷ Similar restrictions can be found in many states, especially in states where the death penalty is frequently imposed.⁸

It is inherent in the system that underpaid, inexperienced, and untrained counsel in capital cases will make errors and will not have the resources to conduct adequate

investigations and preparation. Many states do not have training for capital cases and will appoint lawyers to capital cases who have little, or even no, capital experience.⁹ Some states assign counsel for capital trials at random, without regard to their training or experience.¹⁰ Incompetent counsel is definitely the leading cause of wrongful convictions or death sentences.

3. The politics of death make it difficult for states to devote the resources necessary to protecting the rights of criminal defendants who are hated and demonized. All states must manage limited resources, and protecting the rights of powerless and unpopular suspects by allocating adequate resources to the defense function is extremely rare. State prosecutors, and in some situations elected judges, face much harder challenges in pursuing death sentences when the accused is represented by a strong advocate with adequate funding. Consequently, it is against the interest of pro-death penalty legislators, policymakers, and decisionmakers to invest adequately in the defense function. Moreover, too few leaders articulate the importance of a fair and reliable system as a value that does not simply protect the rights of the accused, but also the integrity of the entire system.

4. Yes, as evidenced by the number of exonerations, with competent counsel, the likelihood of conviction and a death sentence is greatly reduced. Many costly death sentences are imposed wrongly and needlessly because we have not provided adequate legal defense services. The expense to states is quite high as a result of this approach. The cost of the death penalty is very high. An unreliable death penalty that requires a lot of scrutiny and review is even more expensive. The California death penalty system costs taxpayers \$114 million per year beyond the costs of keeping people in prison for life.¹¹ Taxpayers have paid more than \$250 million for each of the state's executions.¹² Similarly, in North Carolina, the death penalty costs \$2.16 million per execution more than the costs of sentencing people to life imprisonment.¹³ The majority of those costs occur at the trial level.¹⁴

Furthermore, in Florida, enforcing the death penalty costs \$51 million per year above what it would cost to sentence all people convicted of first-degree murder to life in prison without parole.¹⁵ Based on the 44 executions Florida had carried out since 1976, that amounts to a cost of \$24 million for each execution.¹⁶ In Texas, a death penalty case costs an average of \$2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years.¹⁷

Of course, the cost of a wrongful execution is incalculable. Execution of an innocent person and condemnation of an innocent person imposes an inestimable charge on the integrity of our system of justice and threatens our core values and commitment to fairness. This cost cannot be avoided unless there is adequate funding of the defense function at trial and in the postconviction process.

ENDNOTES

1. See Death Penalty Information Center, Facts About the Death Penalty, <http://www.deathpenaltyinfo.org/FactSheet.pdf>, last visited Apr. 23, 2008.
2. James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850 (2000).
3. Until 1995, Texas, which has one of the largest death row populations in United States (currently at 370), capped the entire amount defense counsel could request for investigative and expert expenses at \$500. *Lackey v. State*, 638 S.W.2d 439, 441 (Tex. Crim. App. 1982)(discussing Tex. Code Crim. Proc. Art. 26.05 (1980)); see also Texas Defender Service, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY, 77-98 (2000), <http://texasdefender.org/state%20of%20denial/Chap6.pdf>, last visited Apr. 1, 2008; <http://www.texasdefender.org/facts.asp>, last visited Apr. 1, 2008; Death Penalty Information Center, *Facts About the Death Penalty*, <http://deathpenaltyinfo.org/FactSheet.pdf>, last visited Apr. 23, 2008.
4. See Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 799 (citing Marianne Lavelle, *Strong Law Thwarts Lone Star Counsel*, Nat'l L.J., June 11, 1990, at 34).
5. Talia Nye-Keif, "Capital" Punishment or "Lack-of-Capital" Punishment? Indigent Death Penalty Defendants are Penalized by a Procedurally Flawed Counsel Appointment Process, 10 SCHOLAR 211, 216-17 (Winter 2008) (defense counsel in Texas representing indigent defendants report that they receive, on average, \$39.81 per hour, and their overhead expenses are, on average, \$71.36 per hour).
6. See Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363, 366 (1993).
7. See Tina Rosenberg, *Deadliest D.A.*, N.Y. TIMES, July 16, 1995, at 22 (Magazine). Philadelphia represents less than 13% of Pennsylvania's population but over half of the state's death row population. See John M. Baer, *Faulkner, Mumia in Mix: State Senate Hearing Set on Moratorium for Death Penalty*, PHILA. DAILY NEWS, Feb. 21, 2000, at 7 (noting that, in 2000, Philadelphia is responsible for 55% (126/230) of the state's death row population; 88% (111/126) of inmates put on death row by the Philadelphia district attorney are African American or Latino).
8. For example, in Mississippi, counsel appointed to represent an indigent defendant faces a \$1000 cap on compensation. In a capital case, two attorneys can be appointed for total compensation not to exceed \$2000. MISS CODE ANN. § 99-15-17 (1980). Similarly, there are death row inmates in Kentucky who were represented by appointed counsel who faced a \$2500 cap on compensation. See Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1853 (1994)(citing The Governor's Task Force on the Delivery and Funding of Quality Public Defender Service Interim Recommendations, reprinted in THE ADVOCATE (Ky. Dep't of Pub. Advoc.), Dec. 1993, at 11).

9. Recommendation No. 107, American Bar Association, Feb. 3, 1997, available at <http://www.abanet.org/irr/rpt107.html>, last visited Apr. 28, 2008.

10. *Id.*

11. Rone Tempest, *Death Row Often Means a Long Life; California Condemns Many Murderers, But Few Are Ever Executed*, L.A. TIMES, Mar. 6, 2005, at B1.

12. *Id.*

13. Philip J. Cook, Donna B. Slawson, & Lori A. Gries, *The Costs of Processing Murder Cases in North Carolina*, Terry Sanford Institute of Public Policy, Duke University (May 1993), available at <http://www.deathpenaltyinfo.org/northcarolina.pdf>, last visited Apr. 23, 2008.

14. *Id.*

15. S.V. Date, *The High Price of Killing Killers: Death Penalty Prosecutions Cost Taxpayers Millions Annually*, PALM BEACH POST (FL), Jan. 4, 2000, at 1A.

16. *Id.*

17. C Hoppe, *Executions Cost Texas Millions*, THE DALLAS MORNING NEWS, Mar. 8, 1992, at 1A.