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By Peter Erlinder

The day before my daughter's 11th birthday, the death penalty stopped being a theoretical question for me. On Friday, May 22, the State of Texas executed Bob Black, a white, 45-year-old ex-Marine. He was my client.

Bob Black never killed anyone, except during his military service in Vietnam. The prosecution knew that John Hearn murdered Bob's wife, Sandra Kay. Hearn admitted that he committed the murder after Black said he “couldn't go through with it.” Hearn also admitted killing two other people for love and money.

Bob Black talked about getting rid of his wife for years, and no one in Bryant, Texas, took him seriously. But, when Hearn needed to get out of Florida after the first two murders, Hearn became deadly serious about getting rid of Sandra Kay for him, even if Bob didn't have the money to pay him. Bob Black did not tell the police that he knew who killed his wife, and he tried to collect on her insurance policy.

John Hearn testified against Bob Black after being offered a life sentence for all three murders. Hearn is still alive. He is serving a life sentence in a minimum-security facility in South Carolina.

Although Bob had a long history of attempted suicides, and chronic post-traumatic stress disorder from Vietnam, his attorneys presented no psychological evidence at trial, or at sentencing. The jury did not learn that there are thousands of veterans who, like Bob Black, suffer from a treatable, service-connected disability that can destroy their lives.

The jury did not learn that Bob Black had volunteered for Vietnam and that his commanding officer remembered him as a superb Marine, who suffered great emotional pain from the bombing of civilian targets and who was profoundly shaken by the deaths of his buddies. He returned from Vietnam with serious psychological problems.

The jury did not know that Dr. John Wilson, one of the original PTSD researchers, described Bob's psychological state as highly susceptible to domination by authority figures, like "Col. John Wayne Hearn." Psychologically, Hearn became his commanding officer.

The jury did not hear Bob's cellmate admit that he had lied in the death-penalty hearing about Bob's planning to escape from jail. The cellmate said that he had lied in exchange for being made a "trustee" in the jail.

These facts came to light because attorney Raoul Schoneman, and a few other dedicated death-penalty lawyers from the Texas Resource Center, uncovered evidence that should have been presented at trial.

I've had a rare opportunity to experience the death penalty in a way few people do. I knew the person who was killed. As a law professor, I also know that the death penalty is unique because it is the only legal decision that cannot be modified or rescinded . . . ever. The death penalty imposes an element of absolute finality that doesn't exist in any other area of the law.

An irrevocable penalty requires a legal system that is never wrong or, when that penalty is death, a society that is willing to kill at least some innocent people. Truthful judges and lawyers will admit that the legal system makes mistakes.
The legal system is not predictable. Lawyers win cases we think we should lose, we lose cases we think we should win. No responsible lawyer guarantees the outcome of any particular case, whether it is a divorce or an antitrust suit.

Not only is the legal system unpredictable, it isn't even fair. Judges and lawyers know that defendants who can afford to use the legal system to the fullest will do better, on average, than those who cannot match the unlimited resources of the government. The appointed attorneys for Bob Black had only the limited resources Texas was willing to provide.

At least Bob Black's lawyers were criminal attorneys; many other death-row inmates are represented by real-estate lawyers. Lawyers are assigned to handle death penalty cases who know nothing about criminal law. Assigned lawyers are not even paid more for lengthy cases, or for working harder. Most death-row inmates don't even have lawyers. The right to an attorney ends long before the execution.

Nor can anyone participating in the legal system claim to be immune from the influences of race, class and gender. Capital punishment statistics show that Bob Black probably would not have received the death penalty if his wife had been African-American. Our legal system doesn't usually execute people who murder African-Americans, no matter what the race of the murderer.

Should we get rid of the death penalty?

The answer depends upon the kind of society we want to leave to our children. On my daughter's birthday, I thought about the kind of society I wanted to leave for her.

Most of us want personal security for ourselves and our children. We want good schools, safe neighborhoods, good jobs, decent medical care and a financially secure future.

But today, cities are not safe; government doesn't seem to function; economic security is slipping out of our grasp. Most people know that the death penalty cannot solve any of these social problems, but, even if it could, what will it cost us to have a legal system that kills?

Are we prepared to defend a society that knowingly executes innocent people every year? Virtually all of those killed will be poor, most will be minorities, and all will have been poorly represented, or not represented at all. Those who are found guilty will be executed . . . or not executed, based on factors completely unrelated to their offense, like Bob Black and John Wayne Hearn.

Random government violence, unpredictably applied, can never deter crime. In other countries, random killing is used to reinforce the government's monopoly on violence, to keep the "underclass" in fear, and to divert attention from the real sources of social decay.

Death-row inmates are not the source of our nation's ills. Their deaths won't remove the fears we share about the future. Mass executions are likely to make our society even more brutal. If stability results, it will be a stability imposed by government-sponsored terror.

Executions in the face of this reality strip our legal system of the morality it needs to be respected. A mass-execution society is not the society I envision for my daughter. It is not the kind of society she has a right to expect from the nation that claims world leadership in democracy and freedom.

Bob Black's execution accomplished nothing that life in prison would not have accomplished. He never killed outside combat and he wasn't violent.
Sandra Kay’s family can take little solace from a legal system that doesn’t save the ultimate penalty for the actual murderer. Gary Wayne Black did not want his father to be executed. Another death will not change the terrible wrong that Hearn has done.

Soon, we will be executing hundreds of citizens every year. Some will be innocent; some will have done less harm than others whom the legal system allows to live. Bob Black’s case is not an aberration of the legal system; it is an example of how the legal system actually works.

My daughter’s colorful birthday balloons should have been black the day after Bob was executed. Celebrating her birthday will be even more difficult in the near future, when every child’s birthday is an execution day.

On the other hand, perhaps no one will ever notice that we live in a society that intentionally, and arbitrarily, kills its least influential members, every day of the year. That, it seems to me, would be far worse than birthdays with black balloons.

Then again, we could stop imposing the death penalty, like Europe, Japan and rest of the industrialized world.