CHAPTER 22

HANDLING CAPITAL CASES, AND THOUGHTS ON THE DEATH PENALTY

I came of age as a prosecutor in Utah in the 1980s, a period when capital cases exploded onto the evening news. Many of the men now on death row in Utah committed their crimes in the 80s, and many of the murderers from that era became household names. One way or another, I was to get involved in most of their cases.

State v. Joseph Paul Franklin

Franklin was an avowed racist and serial killer who was eventually linked to twenty murders across the country. Under cover of darkness, he hid in the back of a vacant field at twilight and shot and killed two young black men because they were jogging with white women in Salt Lake's Liberty Park.

State v. Ronald Lemoyne Kelly

Kelly broke into a young woman's house late at night and killed her with a butcher's knife in a murderous frenzy. When the police found her, the knife had been plunged into her chest with such force that the tip of the blade went completely through her and stuck to the floorboard beneath her body.

State v. Julio Gary Valdez

Valdez had fathered a child with the victim, his former girlfriend. Facing a paternity action and living with a new girlfriend to whom he was engaged, Valdez arranged to meet the victim and her baby late at night after he got off work. He then shot and killed the victim and dragged her body into some bushes, and threw the baby into the Jordan River.

State v. Elroy Tillman

Tillman stalked and terrorized his former girlfriend and her fiancé, then broke into the fiancé's apartment one night, bludgeoned him over the head into unconsciousness, and set his bed on fire.

State v. Frances Schreuder:

Schreuder, a New York socialite with expensive tastes living off of her parents' money, prodded her son Marc Schreuder into killing her father and Marc's grandfather, millionaire Franklin Bradshaw, so she could inherit his estate and support her lavish lifestyle.

State v. Michael Moore

Moore killed a business associate up in Millcreek Canyon in front of the restaurant where he worked as a manager. When a delivery man happened onto the scene, Moore killed him also, because, as he later told the police, "Dead men tell no lies."

State v. Arthur Gary Bishop

Over the course of four years, Bishop terrorized the Salt Lake community by kidnapping five young boys, sexually assaulting them, and then killing them. (See Chapter 18.)

State v. Ron and Dan Lafferty

The Lafferty brothers, based on a claimed religious revelation by Ron, murdered their sister-in-law and her baby. (See Chapters 16, 17 and 18.)

State v. Ronnie Lee Gardner

Gardner killed an attorney and wounded a bailiff in a shooting spree at the courthouse in Salt Lake City. (See Chapter 6.)

State v. Douglas Kay and Norman Newsted

Kay and Newsted robbed a bar in Cedar City, and shot to death execution-style two customers and a barmaid as they lay face-down on the floor of the bar. (See Chapters 7 and 8.)

State v. Mark Hofmann

Hofmann was a master forger of historical Mormon documents and a con man. He killed two people in successive bombings and then injured himself when he accidentally set off a bomb in his car as he was attempting to deliver it to an unknown third victim.

MY INTRODUCTION TO CAPITAL CASES

My first capital case assignment came within months of transferring downtown to the main D.A.'s office to handle felony cases. I was assigned to assist lead prosecutor Robert Stott in the prosecution of Joseph Paul Franklin, an avowed racist from Alabama who hated blacks and was particularly enraged by interracial mixing. On August 20, 1980, he took up a position across from Liberty Park in Salt Lake City, at the back of a vacant field. There, shielded by overgrown weeds, he pulled a high-powered rifle out of the trunk of his Camaro and shot and killed Lawrence Johnson and Tom Childs, two young black men, for the "crime" of jogging with two young white women.

The case against Franklin was entirely circumstantial, as no one could directly place him at the scene. We had witnesses who had seen a car in the field similar to Franklin's, and a hitchhiker who placed Franklin in the area of the park earlier in the day, and said he had made racist comments to her. We also were able to show that Franklin had stayed in motels in the area around the time of the killings, using false names and IDs. And we put in evidence that, four years earlier, on the East Coast, Franklin had followed an interracial couple in his car, forced them to pull over, and then sprayed mace in the black man's face as he yelled, "Nigger!"

Franklin was convicted of two counts of first degree murder, and could have been sentenced to death. For the penalty phase of his trial, where it would be decided whether he would be sentenced to death or to life imprisonment, he said he wanted to represent himself, and was allowed to remain alone in a holding cell area near the courtroom. As the penalty phase was about to begin and the judge and jury were in place, the jailor suddenly showed up at the door and gestured to us with an astonished look on his face. Bob Stott and I quickly walked back toward the hallway behind the courtroom where the jailor was standing. As we approached him, he looked around, shrugged his shoulders, and told us in a hushed and urgent tone, "He's gone!"

Franklin had gone up through a ceiling panel in the holding cell, and no one knew where he was. We quickly walked back into the courtroom and asked to approach the bench with Franklin's lawyers. We quietly informed Judge Jay Banks that Franklin had bolted. Banks, a crusty old former prosecutor with a penchant for smoking cigarillos in chambers and telling prosecutors after "not guilty" verdicts how they should have tried their cases, told the jury we'd be in recess without alerting them to Franklin's sudden disappearance.

About 40 minutes later, the police found Franklin hiding above the ceiling in a different part of the courthouse. The trial resumed, this time with defense counsel, rather than Franklin, presenting the evidence and making the arguments as to why he should not be sentenced to death.

Utah law requires all twelve jurors to agree "beyond a reasonable doubt" that the death penalty should be given. If just one doesn't, the jury cannot return a verdict of death. Franklin's attorney argued that since it was an entirely circumstantial case with no confession from the defendant, the jurors could not be absolutely certain of his guilt, and thus should not vote for death. At least one juror was persuaded not to vote for the death penalty, and Franklin was sentenced to life in prison.

MY GROWING DISENCHANTMENT WITH CAPITAL CASES

By the time I finished my third capital case, *State v. Michael Moore*, I decided I didn't want to be involved in any more capital murder prosecutions. There were several reasons for this. I didn't like the fact that capital defendants were given so much attention by the media that they were almost celebrities, and some seemed to bask in the limelight. I didn't like the fact that capital cases that ended in death sentences went on for decades on appeal, prolonging the suffering of victims' families. And I didn't like the fact that political factors could influence the handling of a capital case.

The *Moore* case was an example of that. Given Utah's high standard to obtain the death penalty -– all twelve jurors had to vote that death was essentially the only appropriate penalty, and had to be convinced of that "beyond a reasonable doubt" -- very few capital murderers were sentenced to death. While the *Moore* case clearly qualified as capital –- he had killed two people, which was one of the statutory aggravating factors for capital murder -- we knew the odds of actually securing a verdict of death were quite remote. Moore was relatively young and had no prior criminal record: not the type of defendant a Utah jury was likely to sentence to death.

About the same time, another capital case handled by another prosecutor in our office was also pending trial under similar circumstances -– the death penalty was a remote possibility at best. Under such circumstances, we generally would explore with the defense attorneys the possibility of having the defendants plead guilty as charged in exchange for our agreement not to seek the death penalty. But word came down the line that we should not even consider exploring the possibility of resolving these cases without the death penalty.

The reason? It was an election year, and Ted Cannon, the Salt Lake County Attorney, didn't want his opponent to make hay out of him plea-bargaining capital cases. He was afraid he would be pilloried for being soft on crime, soft on the death penalty, and he might have been right about that. Being accused

of being soft on the death penalty can be the death knell of elected prosecutors, particularly in jurisdictions with high-profile murders, like Salt Lake.

What bothered me wasn't so much that we had to take the cases to trial rather than work out a plea agreement. It wasn't improper to take them to trial or even to seek the death penalty, given what the defendants had done. What I didn't like was that political considerations could so influence the process.

Another factor in my growing disenchantment with capital cases was the experience of my father's cousin, Dr. Harold Horton, who had once been assigned to attend executions at the Utah State Prison, back when the prison was located at the present site of Sugar House Park in Salt Lake City. His job was to declare dead the prisoners who were executed by firing squad or hanging, and those experiences had shaken his belief that a civilized society ought to engage in executions, even of its most vicious criminals. I remember him giving me a book to read called *88 Men and 2 Women*,[1] written by Clinton T. Duffy, who had been the warden of San Quentin Prison in California during the 1940s and 50s. Based on his first-hand experience of presiding over the execution of 90 prisoners, Duffy came to believe the practice to be barbaric and ineffective, and became a strong advocate for abolishing the death penalty.

In any case, after I had been involved in three capital case prosecutions -- Joseph Paul Franklin, Ronald L. Kelly, and Michael Moore -- I went to Chief Deputy John T. Nielsen and told him I didn't want to be assigned to any other capital cases. We discussed my reasons, and John T. agreed that while I would be assigned murder cases, I would not be assigned any more capital cases.

And then the Arthur Gary Bishop case broke in July of 1983. Bishop had kidnapped, sexually abused, and murdered five young boys over a 4-year period, eventually confessing and leading the police to the victims' remains. By this point, I had become the office's resident expert at countering insanity defenses, and it appeared that mounting a mental defense was about the only way Bishop's attorneys

[1] *88 Men and 2 Women*, Clinton T. Duffy, Doubleday & Company, 1962

could run any kind of defense. John T. asked me how I felt about joining the prosecution team in the Bishop case. My friend Bob Stott was to be lead counsel, as he had been in the *Franklin* case. I told John T. that I would think about it.

I remember discussing it with my brother, Joe, and coming to the conclusion if there was ever a case that justified consideration of the death penalty, it was the *Bishop* case. The murder of any one of these young boys would have justified capital treatment, but five? Whatever ultimate sanction existed in Utah law, Bishop deserved to receive it. So the next day, I told John T. that I would be part of the team.

Bishop did, in fact, run a mental defense and call mental health experts to the stand. His defense was that as a homosexual pedophile with antisocial personality disorder, he should only be found guilty of manslaughter, rather than murder, because he acted under extreme mental or emotional disturbance when he committed the murders. We agreed with the diagnosis, but argued that while it may have helped to explain why Bishop did what he did, it in no way excused or mitigated his cold-blooded murders. The jury agreed, and Bishop was convicted of five counts of first degree murder and sentenced to death.

After the Utah Supreme Court upheld his convictions, Bishop voluntarily waived any further appeals, saying he preferred execution to spending the rest of his life in prison. He was then examined by a psychologist to determine if he was making a rational choice or was mentally impaired. Bishop was determined to be sane, and on June 10, 1988, he was executed by lethal injection. I had no regrets at the time of his execution about the outcome, or about my role in the prosecution. But it didn't turn me into a "true believer" in the death penalty either.

Fortunately, although I went on to handle other capital cases throughout my career (including several while at the Utah Attorney General's Office), after the *Moore* case, I never felt any of the others were being unduly influenced by political concerns. And in only one other case did I argue in favor of the

death penalty: *State v. Ronald Lafferty*. I felt Lafferty, like Bishop, had committed murders so horrendous that the death penalty was appropriate, for there was no doubt that he had orchestrated the execution of his sister-in-law and her 15-month-old baby.[2] Still, there was no sense of triumph or exhilaration when the jury returned the death penalty verdict in the *Lafferty* case. When asked for a comment by the press, I told them that we had done our jobs as prosecutors and the jury had done its duty, but there was no cause for celebration.

When I first transferred from the D.A.'s Office to the Attorney General's Office, one of the first cases I was assigned was a death penalty case in which the defendant, William Andrews, had been convicted of capital murder and was pending execution for his involvement in the infamous "Hi Fi" murder case in Ogden, Utah.

During this brutal crime, Andrews and an accomplice named Dale Pierre Selby had gone into an audio store just before closing to commit an armed robbery. There were five victims in the store, and Selby and Andrews herded them downstairs at gunpoint and forced them to drink Drano. They also kicked a pen into one man's ear so deep that it caused brain damage, and they raped a teenage girl before shooting her in the head. When the crime spree was over, three people were dead. Two other victims had somehow survived, but with severe injuries.

Torture, rape, multiple murders -- it was as bad a crime spree as anyone could remember, the kind that cried out for the ultimate punishment society could mete out: the death penalty. It was a foregone conclusion that anyone convicted of such horrific crimes would get the death penalty, and both Selby and Andrews had in fact been convicted of multiple counts of capital murder and sentenced to death.

[2] Lafferty had also intended to kill two other people on the same day, but one intended victim was out of town, and they missed the turn to the other's house.

After I got the assignment to represent the State in fending off attempts to delay Andrews' execution, I asked to meet with John Turner, the Chief Deputy Attorney General. I told him that I preferred not to handle the case, and that I had come to the A.G.'s Office partly because I was tired of doing murder cases, and capital murder cases in particular.

I wasn't sure how Turner would react to my turning down one of the first requests made of me as a recently-hired Assistant Attorney General. After all, my background as a capital prosecutor made me the logical choice to handle the case. But instead of pushing the issue, Turner conceded that he himself had been heavily involved in working to fend off last-minute claims on behalf of Dale Pierre Selby, Andrews' co-defendant, and that although there was no question in his mind that Selby was guilty or that he "deserved" the death penalty, Turner hadn't quite been prepared for how profound a hollow feeling set in when the execution finally occurred.

It paralleled what one of my other friends had told me. Dave Schwendiman, whom I had replaced when I joined the Attorney General's Office, described a similar feeling. He too had worked hard to be sure that the Selby execution went forward as scheduled. Dave described having to pull over to the side of the road on the way home, when he finally learned that Selby's date with death that he had worked so hard to preserve had actually taken place -- again, a profound sense of hollowness at the "victory" of an execution.

It also reminded me of what I'd read in the book by the San Quentin warden that my dad's cousin had given me many years earlier. Apparently those closest to the ground in carrying out executions often question whether their cause is truly a "worthy" one, even if they support the death penalty in principle and have no doubt that it is justified in a particular case.

MY THOUGHTS ON THE DEATH PENALTY

People sometimes ask me how I feel personally about the death penalty. Having had the experience of prosecuting over a dozen capital cases, I favor abolishing it. While I think that those who commit aggravated murders should never be allowed the opportunity to victimize society again, I find more negatives than positives in the capital punishment system. And I don't think it makes us safer as a society.

Deterrence is often cited as a justification for the death penalty. While it's certainly true that an executed person will never kill again, meaning that capital punishment does specifically deter the murderer from committing future crimes, evidence that it deters other potential killers seems lacking.

I suspect that all we can know for sure are the killers who *weren't* deterred, and there seems to be no shortage of them. The capital murderers I prosecuted were certainly not deterred, and it seems to me that people who are capable of committing these aggravated murders are unlikely to not act on their impulses, even if they know they could face capital punishment. Some may even be emboldened to commit crimes in death penalty jurisdictions, due to a warped sense of bravado. I don't know for sure whether this is the case, but it would be consistent with the fact that many states that don't have the death penalty have lower murder rates than those that do.

One of the reasons that deterrence doesn't seem like a compelling argument in Utah is that capital cases can go on for decades before executions occur, if they occur at all. It's hard to gauge any deterrent effect under those circumstances. And who really knows if potential killers would be more deterred by the fear of execution or the fear of rotting in prison for the rest of their lives, with no hope of release? Sounds like hell either way.

Another reason I believe the death penalty is not an effective deterrent is that so few murderers receive it. In Utah, despite all the horrendous murders committed over the past four decades, only nine men sit on death row, a majority of them for crimes committed back in the 80s. Victims' family members often

die before these murderers ever exhaust their round after round of state and federal appeals. Judges have no great appetite to move these cases forward, and capital appellate counsel have the opposite agenda. Every day they can delay post-conviction proceedings is another day their client stays alive. Some defense counsel have, apparently intentionally, sat on their hands for years rather than move a case forward.

And with a 2008 Utah Supreme Court decision, *Archuletta v. Galetka*, 2008 UT 76, defense counsel may have increased incentive to do nothing. The Court announced that, if no competent capital defense attorneys are able and willing to handle these cases expeditiously, the Court might have to step in and convert death sentences into sentences of life without parole. Sounds like a road map for defense counsel who can manage to delay post-conviction proceedings long enough for the Supreme Court to step in.

In the end, only the Attorney General's Appeals Division pushes to move death penalty appeals along, generally with very little success. It's gotten so drawn out that several years ago, Fred Voros, then Chief of the Appeals Division, went to the Utah State Legislature and announced that Utah in practice no longer had a viable death penalty system -- unless, like Arthur Gary Bishop, a convicted murderer volunteers to be executed after losing his mandatory appeal before the Utah Supreme Court.[3] In support of Voros' statement, family members whose loved ones were killed decades before described their anguish, wondering if they themselves would die before the murderers who killed their family members were executed.

I can't imagine how it would feel to live through the nightmare of having a loved one brutally murdered, endure a trial at which a jury returned the death penalty, and then have to live for decades with the

[3] In cases where defendants are sentenced to death, the Utah Supreme Court scrutinizes the evidence and trial record to be sure the convictions and sentences are appropriate. Since a convicted murderer who is sentenced to death cannot waive this process, it is known as a mandatory appeal.

possibility on any given day of opening up the newspaper or turning on the TV and finding out that new claims of error are being asserted by the killer's attorneys. For victims' families, years and years of that recurring nightmare can be torture, and can prevent them from ever achieving finality and being able to move on with their lives.

I have seen cases where victims' family members initially felt that no sentence less than death would be acceptable, but after suffering through years, even decades, of uncertainty in the post-conviction Alice-in-Wonderland world of death penalty appeals, they ultimately reached a point where they just wanted finality, whatever that might mean.

I understand the notion that some crimes seem to cry out for the death penalty – *Bishop* was such a case for me. How could any punishment less than death be appropriate for a serial killer of children? And what about mass murderers? Should they receive the same sentence as people who kill "just" one victim? Or what about killers who are already sentenced to life without parole, and who go on to kill guards or other inmates? Wouldn't another life without parole sentence be meaningless? How could that be justice? Is there nothing that deserves the death penalty?

I wonder if that is the question we should be asking. If it's an issue of proportionality, rather than a moral issue or even a practical one, what do we do with the unavoidable truth that sometimes jurors decide to impose the death penalty on defendants who kill one person, but don't impose it on some who kill many? If proportionality is the key concept, the justice system can't enforce it, and then the proportionality argument starts to cut the other way. If a man who cuts loose in a crowded theatre with

an assault weapon and kills a dozen people and wounds 70 more gets life in prison, how do we reconcile the death penalty for a single killer?[4]

I understand that wanting a murderer put to death is a natural human response to having someone brutally take away the life of someone you love, and I would probably feel the same if it happened to me. And so I don't come easily to the view that we as a society would be better off without the death penalty, but I still do come down on that side.

I have a good friend who prosecutes war crimes in Europe – crimes so staggering in scope and savagery that I don't know that I could do what he does. I think it would be too overwhelming. None of the war criminals he prosecutes will ever get the death penalty, because Europe has abolished it. With all he has seen, he still does not think the death penalty is the answer. Maybe there is no answer.

Over the last decade of my career, I came to feel that the most humane result for victims' families who wanted the death penalty was for a jury to return a sentence of life in prison without parole. Whatever dissatisfaction a victim's family might feel with that verdict, no matter how keenly felt, it would be far less agonizing than living with the fallout from a death verdict, which would likely result in their suffering for decades -- and in some instances, for the rest of their lives. That terrible uncertainty sometimes included not just the question of whether the murderers might not be executed, but also the question of whether the convictions themselves might be set aside, because capital cases are scrutinized with a fine-toothed comb.

Because of what I've observed through the years, I have become an advocate of full disclosure to victims' families in capital cases, and feel that it's a moral, if not a legal, obligation of prosecutors who handle capital cases. What I mean by full disclosure is this: After spending time building rapport with a

[4] In August of 2015, James Holmes was sentenced to life without parole for his shooting spree at an Aurora, Colorado movie theater – a spree which left 12 dead and 70 others wounded. http://www.cnn.com/2015/08/07/us/james-holmes-movie-theater-shooting-jury/

victim's family, I would level with them about the capital case and appellate process, and tell them that I wanted them to know what I would want someone to tell me if I were in their shoes. I wanted them to know the truth. And the truth is, if a case goes to trial and the jury returns a verdict of death, that pronouncement is probably the last satisfaction the victim's family will get for years, if not decades. From that point on, the delays and uncertainties of the death penalty appeals process are likely to take a terrible toll, keeping the wound open and preventing the victim's family from moving on.

Some victims' families decide either initially or as their cases progress that they don't want the death penalty -- that the best way of achieving justice is to have the defendant spend the rest of his life in prison. Some even believe that life in prison without parole is tougher on the criminal than the death penalty.[5] Others insist that the only way for justice to be done is through the death penalty.

Either way, the "lucky" ones are those whose cases result in life without parole, rather than the death penalty. In those cases, the murderers go to prison and, for the most part, no one hears about them again. Unlike defendants sentenced to death, those who receive life-without-parole sentences generally don't have lawyers coming out of the woodwork volunteering to take their cases. Nor am I aware of organizations whose sole purpose is to fight against sentences of life without parole. And so the murderers who are sentenced to life without parole serve their sentences in relative anonymity, and victims' families are able to move on with their lives.

So there are many reasons why I favor life sentences over the death penalty. And all of that is even without a final consideration. No system of justice is perfect, and so it's possible that an innocent person could be convicted of a capital murder and executed. This is not currently a factor in Utah, because there is no credible claim of factual innocence for any of the men on death row. But there have

[5] That's what Arthur Gary Bishop told a psychologist who was assigned to evaluate whether Bishop was making a sane choice by allowing his execution to go forward, and forgoing further appeals. Bishop said he viewed spending the rest of his life in prison as worse than death. The judge found it to be a rational choice, and Bishop was executed.

been cases in other states of innocent people being convicted of capital crimes, and being sentenced to death.

One of the most notable is the case of Kirk Bloodsworth, a Maryland fisherman who was convicted of the murder of a little girl in 1985, and sentenced to death. Kirk spent several years on death row before his case was reversed on appeal due to errors at trial. He was re-tried and convicted of murder again, but the second time, he received a sentence of life in prison rather than the death penalty. After serving nine years in prison for a crime he didn't commit, Kirk was exonerated by DNA evidence, which also identified the true killer. (For more on Kirk, see Chapter 24.)

And Kirk Bloodsworth is only one of many people around the country who have been convicted of murders they did not commit, and sentenced to death, only to be exonerated years later. But for the advent of DNA technology, Kirk and other innocent people like him could have been executed. When a mistake is made and the wrong person is sent to prison, there is at least the opportunity for exoneration and release. But when the wrong person is executed, there is no remedy or recourse, and the injustice is irrevocable.

FINAL THOUGHTS

In states that have the death penalty and use it frequently, such as Texas, there is no shortage of murders. If the threat of the death penalty really does serve as a deterrent for potential murderers, it's certainly not evident. While it may be that legislatures in pro-death-penalty states like Utah are unlikely to repeal the death penalty any day soon, I suspect that someday the United States Supreme Court will rule it unconstitutional.

The Court has already chipped away at the death penalty by prohibiting it in certain instances -– for example, they have banned it in cases of juveniles[6], mentally retarded defendants[7], passive accomplices who don't intend to kill[8], those who commit rape of adults[9], and those who are insane at the time of their scheduled execution.[10] The trend seems to be moving in the direction of one day recognizing a constitutional ban on the grounds that capital punishment violates the Eighth Amendment to the United States Constitution by inflicting "cruel and unusual punishment."

If the Court does decide to put an end to capital punishment in America, it will put the United States in line with the overwhelming majority of civilized nations, which prohibit the death penalty. I would like to see that day.

[6] *Roper v. Simmons*, 543 U.S. 551 (2005)
[7] *Atkins v. Virginia,* 536 U.S. 335 (2002)
[8] *Enmund* v. *Florida*, 458 U.S. 782 (1982)
[9] *Coker v. Georgia*, 433 U.S. 584 (1977)
[10] *Ford v. Wainwright*, 477 U.S. 399 (1986)