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PROSECUTING A CAPITAL CASE

BY JEFF THOMSON¹

INTRODUCTION TO STATE OF UTAH V. DOUGLAS LOVELL

On April 3rd, 1985,² Joyce Yost drove to her home in South Ogden, Utah.³ Joyce was a mother and a grandmother. Her daughter, with whom she worked, had three kids. Joyce adored them. She was close to her daughter and her grandchildren. Joyce had a son. He was in dental school in Virginia. She was so proud of him. Joyce was a classy woman. She accomplished so much even though she was a single mother and grandmother. This is a picture of Joyce.⁴

And on April 3rd, Joyce drove to her home. She lived in a four-plex, just down the street from a hospital. It was late. It was dark. She drove a 1975 Oldsmobile. And, as she parked her car under her carport, a man named Douglas Lovell pulled up in the stall next to her, got out of his car, walked over to hers, opened her door, and, without introduction, asked her if she wanted to have a drink with him. This is Doug Lovell (and that's the best picture I could find of him back in 1985).⁵

Joyce didn't know this man. She had never seen him before. But he had seen her earlier that day, and he had followed her to her home. She politely replied to him, "No, thank you. I don't know who you are. Who are you?" He didn't like that. So, he reached in, grabbed her by the throat, squeezing it, and told her that if she said one word, he'd rip her throat out. He then tore off her clothes and he raped her, there in her own car, outside her own home, threatening that he'd kill her.

¹ Jeff Thomson, a felony prosecutor for Davis County in Utah, has successfully sought the death penalty in a variety of criminal cases. These remarks were given at the Fall 2018 symposium "THE DEATH PENALTY: A Dialogue on Morality and The Law" at the St. Thomas Sch. of Law (Nov. 9, 2018).

² The following factual statements that were shared in this presentation were for the most part taken from the trial transcripts in the matter and the exhibits introduced into evidence in the trial. See generally *State of Utah v. Douglas A. Lovell*, Case No. 921900407, Trial Tr. vol. V-IX, XIII-XIV, March 16-18, 20, 23, 30-31, 2015. A few of the speaker's explanatory or clarifying statements, which may not have become a part of the record, were made based on the speaker's memory of the case.

³ South Ogden is located in Weber County, which is found in northern Utah.

⁴ Jeff Thomson, Deputy Davis Cty. Att'y, Prosecuting a Capital Case PowerPoint Presentation, Slide 1 (Nov. 9, 2018).

⁵ *Id.* at Slide 2.

After he finally got off of her, as she was laying there in her car, she was able to honk the horn, hoping that, perhaps, a neighbor would hear and come help her. No one came to help her. When she honked the horn, it made Doug Lovell even angrier. So, he then grabbed her again by the neck, dragged her to his car, the one that was parked next to hers. He threw her inside of it, her head down on the floor boards, her feet up in the air. All the while he was telling her that he had a gun and he'd kill her if she made one wrong move. He then drove her to his apartment.

After driving her to his apartment he blindfolded her. She begged and she pleaded with him, but he brought her inside his apartment. It was to no avail—her pleas. There, inside, he raped her again. After he raped her again, he then committed forcible sodomy on her and made her perform certain acts for him. Joyce continued to plead with him and she finally convinced him to let her go. He put a shirt on her and he took her home. She was able to convince him that she wasn't going to report it to the police. As they drove home, to her house, Doug Lovell tried to convince her of what a nice guy he was. That he normally doesn't do this kind of thing to women. He normally gives a girl flowers, at least that's what he told her as he dropped her off.

At home, she called the police. And the county that I now work for, which is Davis County, which is the county that abuts Salt Lake City directly to the north, ended up charging Doug Lovell with sexual assault and kidnapping. Now, Doug Lovell was angry at this. Sure, he told everyone, including his wife with whom he had just gotten back together, that it was a one-night stand and it was consensual. But Doug was angry. He was angry he had been charged with this. He was angry she reported it to the police. And he was not going to go down for what he had done. He was not going to go back to prison because he had been to prison before. So, he spoke to a guy named Billy Jack. And he offered Billy Jack money to kill Joyce. He didn't want Joyce testifying.

You see, a preliminary hearing had been scheduled in the case; Joyce would testify. So, Doug Lovell and Billy Jack had to do something. What they did is they went and found a home up in the valley in the Weber County area, and they burglarized a home and stole a bunch of guns. One of those guns was a shotgun. They sawed it off. Then they formulated a plan together about how Joyce was to be killed. This is a photo of Billy Jack.⁶ He has since died.

⁶ *Id.* at Slide 3.

Billy, on that planned day when he was supposed to kill Joyce, which was before the preliminary hearing, took that shotgun and waited near Joyce's apartment. He waited for her to come home. But Joyce did not arrive at the appointed time. So, Billy abandoned the idea of killing Joyce. He ended up burying the shotgun right near where Joyce's apartment was at, where he had been hiding, evidence, by the way, the investigators found some thirteen years later in 1998, and Billy took off. Here's a picture of the gun that we later found.⁷ You can see how it's rusted over. Some people that purchased the lot near Joyce's house had been out clearing weeds and trees and came across the shotgun shells and the shotgun that had been sawed off.

Doug Lovell then approached another man named Tom Peters, explaining to him that he did not want to go to prison and he wanted Joyce killed before the hearing. This second time, Lovell actually paid money to Tom Peters. Furthermore, he and his wife, Lovell's wife Rhonda, planned an alibi for Lovell: they would go up to Lovell's parent's cabin on the day Joyce was to be killed. Here's a picture of Tom Peters.⁸

But Tom was a fraudster, not a hitman. And, as Doug Lovell sat at his parent's cabin, listening to the radio for news of Joyce's death, Tom Peters took the money and he ran. Later, when the two were in the same Utah prison together,⁹ Doug Lovell came up to Tom Peters in the mess hall and threatened him if he ever testified against Doug, what would happen to him—something Tom Peters did, in fact, testify about. Tom Peters has since died. I am not saying he died at Doug Lovell's hands, he just died.

June 12th of that year then came. June 12th was the day scheduled for the preliminary hearing on the charges against Lovell for the earlier kidnapping and rape of Joyce. Joyce was still alive. Joyce testified against Doug Lovell. Her testimony was recorded. And, at the hearing's conclusion, a trial was scheduled for August 20th, 1985.

Knowing of the fast-approaching trial, Doug Lovell decided to take matters into his own hands—he'd do it himself. He had his wife, who was pregnant or had just had a miscarriage, drive him by Joyce's apartment. He scouted it out, like a hunter, because Doug Lovell was a hunter.

By the way, he was also a felon, previously convicted of aggravated robbery, where he had gone to prison. The interesting thing is what the Utah Board of

⁷ *Id.* at Slide 4.

⁸ *Id.* at Slide 5.

⁹ Tom Peters and Douglas Lovell were both incarcerated at the Utah State Prison, located in Draper, Salt Lake County, Utah.

Pardons and Parole previously did.¹⁰ Given the unique system that Utah has and, as has been mentioned today that every state is very different in how it addresses certain issues, in Utah, when an individual is sentenced to prison, it's an indeterminate sentence.¹¹ So, for instance, if you go to prison on a second-degree felony, the sentence is for one to fifteen years in the Utah State Prison. There's an agency called the Board of Pardons and Parole that ultimately makes the determination of how long you'll actually serve in the prison and when you can be paroled. So, before all of this, Doug Lovell had gone to prison for aggravated robbery, and the Board of Pardons and Parole decided to let Doug Lovell out early. Aggravated robbery was a first-degree felony, which is supposed to carry a sentence of five years to life in the Utah State Prison. But the Board let Doug Lovell out after just a couple years. He didn't even serve the minimum mandatory sentence required by law because the Board has the discretion to not honor the minimum mandatory sentence. If the Board had kept Doug Lovell in prison, he would not have killed Joyce Yost. But that's the system I work within in the State of Utah.

Anyways, Doug Lovell scouted out Joyce's apartment, and he ended up discovering that one of Joyce's windows would not lock. Just over a week before the sexual assault and kidnapping trial, on August 11th, 1985, Doug Lovell had his wife drive him up to Joyce's apartment, telling his wife that this was the night and that he'd give her a call. It was late. It was dark. He had a knife. Doug Lovell put on some gloves and a stocking over his head and hair and he climbed through that unlocked window. Joyce was asleep in her bed. The coffee machine was set on a timer for her morning brew. Lovell walked up to her, putting his hand on her mouth. She awakened and he cut her. She began to bleed onto the sheets and the mattress. This is a picture of that mattress.¹² The blood stain, you can see on it, is still there thirty years later.

Joyce pleaded for her life, offering to call the police and make a deal. She pleaded again and again. Doug Lovell told her he wasn't going to kill her, he was just going to hide her until after the trial. After wiping up as much blood as he could with a rag and gathering up the bloodied sheets, Doug Lovell then flipped over this mattress, hiding the stain. He made the bed. He force Joyce to pack a suitcase, putting some clothes inside that suitcase. And then he drugged her to kind of disable her or disorient her. He directed her to her car where they got inside and they drove to some unknown and remote location

¹⁰ Utah Board of Pardons and Parole, <https://corrections.utah.gov/index.php/family-friends/utah-board-of-pardons-and-parole> (last visited Feb. 12, 2019) ("The Utah Board of Pardons and Parole is tasked by State statute with determining how long an offender is incarcerated and on probation or parole.").

¹¹ Utah Code Ann. § 76-3-203 (West 2018).

¹² Thomson, *supra* note 3, at Slide 6.

in the Utah mountains in Weber County. That's the county where I used to work when I ended up trying this case.

There, in the mountains somewhere in Weber County, Douglas Lovell either choked her, stomping on her neck and killing her; or he raped her over a fence and decapitated her. The former is what he later said he did. The latter is what an informant told us that he said he did.

But he murdered her. He murdered her coldly. He murdered her maliciously. He murdered with premeditation. He murdered her to keep her from testifying against him. After leaving her body there in the mountains, he drove Joyce's car back down to the Ogden area and he called his wife to meet him. Rhonda came and met him at a theater in the Ogden area. She saw him in Joyce's car. He was still wearing the stocking and the gloves; and then Rhonda followed him to a place where they dumped Joyce's car and Lovell tossed the keys off into the mountain. With Joyce's suitcase in hand, Doug Lovell then got into his wife's car.

From there he directed Rhonda to drive to some different spots in two neighboring counties, Davis and Weber Counties, to get rid of evidence. They went to a campground where Doug Lovell burned Joyce's clothes, sheets, and whatever else was in the suitcase. They then drove to a river where they tossed the suitcase. Then, changing his own bloodied clothes, they went to another location and those were burned. Finally, not long but some time thereafter, he went back to the location where he had dumped Joyce's body and, to punctuate his depravity and his callousness, he stole Joyce's watch from her corpse to take it and go pawn it.

Unable to find Joyce, the jury trial scheduled for August 20th, on the sexual assault and kidnapping charges, was cancelled. And, for a time, Doug Lovell thought he had gotten away with some of the worst crimes a person could ever commit.

You see here a photo of John Adams.¹³ As the later-President John Adams told a jury long ago in 1770, just after the Boston Massacre, "Facts are stubborn things, and whatever may be our wishes, our inclinations, or the dictum of our passions, they cannot alter the state of facts and evidence."¹⁴ To this I would add, so is justice. Yes, justice can be slow, but she is resolute. She is undeterred. She will follow the evidence. And she will catch up to

¹³ *Id.* at Slide 7.

¹⁴ David McCullough, *John Adams* 52 (Simon & Schuster 2001).

those who offend her; and when she does, her wheels grind exceedingly fine.¹⁵

The jury trial against Doug Lovell was rescheduled to December of 1985. After all, Joyce had testified against Doug Lovell. He had confronted her earlier.¹⁶ Her testimony was recorded. Her broken fingernails and torn clothing had been gathered from the car where he raped her. Pictures were taken of her showing her bruises and injuries. A nurse had examined her, and other evidence was available.

Even though Doug Lovell thought he had avoided the reach of justice, the prosecutors went forth with the evidence they had, reading to the jury Joyce's preliminary hearing testimony, and allowing her to speak, as it were, from the grave, and presenting all the evidence they had obtained. And a jury, hearing the voice of justice calling out, convicted Doug Lovell of rape and kidnapping and sent him to the Utah State Prison where he has remained ever since.¹⁷

As justice continued to whisper in the ears of others, in the early 1990's, a South Ogden police detective, Detective Terry Carpenter, reopened the case into Joyce's disappearance. He visited Doug Lovell's now ex-wife, Rhonda Butters. With Lovell in prison and Rhonda's having since divorced him, the voice of justice had been weighing on her conscience. So, when the Detective visited with her, she surprised him greatly by unloading on the Detective everything she knew. She was trying to get it off her chest, as it were.

Rhonda agreed to be fitted with a device, a recording device, and she visited Doug Lovell at the Utah State Prison. While there, the two of them discussed the murder in great detail and everything that had gone on, corroborating what Rhonda had told Detective Carpenter.

At one point of the recorded conversation, Lovell asked Rhonda this: "Do you know what makes capital homicide?" Answering himself, he said, "I premeditated. I planned to kill Joyce. I planned to end Joyce's life. That's premeditated capital homicide." "Capital murder is the worst thing you can do. Probably the death penalty."

1992 came. The State of Utah charged Doug Lovell with murdering Joyce in the worst sort of way: to silence her from testifying against him, to keep her

¹⁵ See, e.g., *United States v. Firishchak*, 426 F.Supp.2d 780, 785 (N.D. Ill. 2005), *aff'd*, 468 F.3d 1015 (7th Cir. 2006).

¹⁶ U.S. Const. amend. VI.

¹⁷ See *State of Utah v. Douglas Lovell*, Utah case no. 851704954.

from receiving justice in her underlying rape and kidnapping case; to keep her from telling the jury what happened to her.¹⁸ This was the type of murder that, in all its arrogance, struck at the very justice system itself. The State of Utah gave notice back then of its intent to seek the death penalty against Doug Lovell.¹⁹ And that ended up being the sentence that was imposed back in 1992.²⁰

Doug Lovell sits on death row today.²¹ But it is for a second time, not a first time. You see, much has happened between 1992 and 2015 when Gary Heward, Chris Shaw, and I tried *State of Utah v. Douglas Lovell* to a jury on the questions of his guilt as well as the appropriate penalty for him. In 1992, when he was first charged with Joyce's murder, I was still in elementary school. Chris Shaw was a younger attorney in private practice. And Gary Heward was still cutting his teeth as a younger prosecutor, acting as a second chair to another prosecutor in this case, Bill Daines, who has since passed away. In fact, just to let you know, as an honor to them (because Gary Heward is the one who hired me as a prosecutor in Weber County), he tried this case with me and Chris Shaw for free. He had already retired. The government paid him nothing to do a month-long trial and a capital case. But he came back to do it. This is one of the cases he originally worked on as a newer prosecutor. It spanned most of his career as a public servant. Chris Shaw, by the way, will be retiring in January 2019.

THINKING LIKE A LAWYER ABOUT CAPITAL CASES

As all of you know, capital punishment is certainly a controversial issue with powerful arguments for and against it. The Vatican, just this year, for example, announced that the Roman Catholic Church has revised its catechism and now opposes capital punishment.²² So, there are many powerful and persuasive forces on both sides of the issue.

Before I talk to you a little bit more about this case and the particulars of prosecuting a capital case, as well as its generalities, I'd like to introduce, briefly, a principle that might be helpful to you in considering the topic of the death penalty. This principle can be found in the following statement: There is the Constitution . . . and the constitution.

Understanding the guiding principle behind this statement can be helpful to today's topic as well as in other areas you'll encounter as you venture out

¹⁸ See the Court record in *State of Utah v. Douglas Lovell*, Utah case no. 921900407.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² CATECHISM OF THE CATHOLIC CHURCH: MODIFICATIONS FROM THE EDITION TYPICA No. 2267 (2d ed., U.S. Catholic Conf. 1997).

into the world of the law as a lawyer where similarly divisive or controversial issues and laws may form a principle part of your client's claim or defense. The guiding principle, then, is closely tied to your learning to think like a lawyer and uphold the rule of law. And it is one of the reasons why a democratic society governed by the rule of law needs lawyers. So, I say: there is the Constitution . . . and the constitution.

But what do I mean? To illustrate what this guiding principle is meant to convey, I'm reminded of a 1942 Walt Disney Cartoon entitled "Donald's Snow Fight."²³ It refers to Walt Disney's iconic cartoon character Donald Duck. I first saw this cartoon as a kid, and back then its value to me was little more than simple entertainment. It wasn't until I again watched it, this time with my own kids—my wife, by the way, has come with me today, something I very much appreciate; and, by the way, we have five kids: four girls and a boy—but when I watched this cartoon again with my own kids, this cartoon took on a very new and profound meaning to me, believe it or not.

In this World War II era cartoon, Donald Duck and his three nephews Huey, Dewey, and Louie became embroiled in a snowball fight with each other. It is Donald versus his nephews and each side, as the cartoon shows, is trying to outdo the other in the type of attacks and counterattacks that they're using, each one upping the ante, as it were. At one point, Donald builds an ice-made battleship from which he forms, out of snow, some missiles. He dips these missiles into water, freezes them, and he then launches them at his nephews. His nephews then counter by creating their own missiles where they hide mousetraps inside of them and where they bomb Donald Duck, causing the traps to snap onto him.

Donald's nephews then launch a number of snowballs at Donald as he is hiding behind a wall, and one of the snowballs hits him in the head, knocks off his hat, spins his hair up—well, I guess his feathers, not hair; I don't really know what Donald has on his head—and causes him to turn around. Donald looks at his nephews and shakes his fist at them. While shaking his fist, he yells something. He yells "That's unconstitutional!"

So, Donald invokes the constitution in response to a situation he perceived to be wrong, unfair, or unjust. Never mind what he had done or the fairness or rightness of his type of attacks on his nephews.

Now, as you and I know, the federal Constitution really has nothing to say about the propriety of Donald's nephews' attacks on him. But in Donald's mind it had everything to do with the Constitution. In his mind, it violated

²³ *Donald's Snow Fight*, Walt Disney Product. (1942), available at https://en.wikipedia.org/wiki/Donald%27s_Snow_Fight (last visited Feb 12, 2019).

his sense of fair play, rights, and justice; so it had to be a constitutional issue. That would mean he was right and everyone else was wrong.

So, for the third time, I again repeat: There is the Constitution, the one with a capital “C,” and the constitution, the one with the lower case “c.” The former is what you and I as lawyers or law students recognize as one of the most legally significant documents in our society and country. For those of us who have actually read it, we know that there are areas where the Constitution speaks, the one with the capital “C”, and areas, even deeply personal and moral ones, where it simply does not speak, much to the chagrin of some.

The latter, the one with the lowercase “c,” is what many in society like Donald Duck and, at times, even you, me, some judges and some justices want or wish the Constitution would say. After all, many Americans want the Constitution to align with their own personal constitutions, meaning, their own moral standards, “visions,” “preferences,” as Chief Justice Roberts put it, politics, interests, or ideologies.²⁴

That is why the distinction between the Constitution, with the capital “C,” and the constitution, with a lower case “c,” is an important one. It is a distinction that is often lost on or forgotten by many.

But insofar as you and I accept “that ours is a government of laws, and not of men,”²⁵ a principle, by the way, first introduced into United States Supreme Court vocabulary by Chief Justice John Marshall in *Marbury v. Madison*,²⁶ a principle quoted by the United States Supreme Court at least three times this year alone,²⁷ a principle whose origin was the 1780 Massachusetts Constitution,²⁸ this is a distinction lawyers and jurists need to understand, value, sustain, and defend.

One of the ways lawyers learn to do this is by developing the skill of thinking like a lawyer. Not a lobbyist, not an activist, not a politician, but a lawyer. The ability to think like a lawyer and thus uphold the law the people have enacted is incredibly important in such a democratically diverse country like

²⁴ *Obergefell v. Hodges*, 135 S.Ct. 2584, 2611-12 (2015) (Roberts, C.J., dissenting).

²⁵ *U.S. v. Dickson*, 40 U.S. 141, 162 (1841).

²⁶ 5 U.S. 137, 163 (1803).

²⁷ *E.g.*, *Digital Realty Tr., Inc. v. Somers*, 138 S.Ct. 767, 783 (2018) (Thomas, J., concurring in part and in the judgment); *Sessions v. Dimaya*, 138 S. Ct. 1204, 1233-1234 (2018) (Gorsuch, J., concurring in part and in the judgment); *Murphy v. Nat’l Collegiate Athletic Ass’n*, 138 S. Ct. 1461, 1487 (2018) (Thomas, J., concurring).

²⁸ Mass. Const. art. XXX, pt. I (1780); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

ours where, as Justice Oliver Wendell Holmes once put it, there are “people of fundamentally differing views,”²⁹ people who sincerely but fundamentally differ with each other even though they may, to quote President Abraham Lincoln, “read the same bible and pray to the same God.”³⁰

One wonders what this country would look like if Justice Roger Taney had thought like a lawyer and upheld the Missouri Compromise instead of thinking like a Southerner—even though he wasn’t even a Southerner—when he wrote the infamous 1857 *Dred Scott* decision, reading a substantive moral view into the Due Process Clause.³¹

Anyhow, as a lawyer, you may be tasked with representing a client whose cause of action or defense implicates a law that encompasses these fundamentally differing views, a view, in fact, that may run quite contrary to your own personal views. This can be incredibly difficult to do, but it is also incredibly necessary for you to do it in order for you to preserve the rule of law and the fairness that flows therefrom in a democratic society governed by law.

As a prosecutor—I am a state prosecutor (I represent the State of Utah). I am also a S.A.U.S.A., which is a Special Assistant United States Attorney (so I also represent the United States of America)—as a prosecutor, I am tasked with representing the government in enforcing federal and state criminal laws. That doesn’t mean that every criminal offense that I have to prosecute is something I entirely agree with. I don’t. But my job is to uphold the law the people have enacted through their representatives, not to enforce the laws I prefer.

For my purposes today, then, in talking briefly about prosecuting a capital case, I’d like to consider the topic from the perspective of the Constitution with a capital “C”. That is, what is the law or what the law is, at least in the state of Utah and at least as a matter of federal constitutional law. So, perhaps, whatever your personal views might be about capital punishment, you can with me think like a lawyer for a moment and accept that capital punishment is constitutional and, in my state, it is the law. Perhaps, for a moment, you can consider the value of my remarks about prosecuting a capital case in that context.

BACKGROUND INTO CAPITAL PUNISHMENT

²⁹ *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Homes, J., dissenting).

³⁰ Abraham Lincoln, President of the U.S., Second Inaugural Address (Mar. 4, 1865).

³¹ See generally *Dred Scott v. Sandford*, 60 U.S. 393 (1857); *Obergefell*, 135 S. Ct. 2584 at 2617-18 (Roberts, C.J., dissenting).

If I may, then, let me give you some background and context on the legal landscape of capital punishment in the country.

The United States Constitution directly or indirectly references capital punishment at least three times: twice in the Fifth Amendment and once in the Fourteenth Amendment. So, you have the Capital or Infamous Crimes Clause of the Fifth Amendment,³² the Due Process Clause of the Fifth Amendment,³³ and the Due Process Clause of the Fourteenth Amendment.³⁴

As you know, the Fifth Amendment was ratified at the same time as the Eighth Amendment. Since then, there have been many who have argued—including Doug Lovell in the capital case that I tried against him—that the Eighth Amendment’s Cruel and Unusual Punishment Clause prohibits capital punishment because, as was argued, such a punishment is itself cruel and over time has become unusual.³⁵

As I noted in my reply brief when I addressed this claim, this argument would have been an odd one to the founders.³⁶ After all, the United States Supreme Court stated in *Gregg v. Georgia* that “[a]t the time the Eighth Amendment was ratified, capital punishment was a common sanction in every state.”³⁷

This argument, I also argued in the Lovell case, seems to conflict with the fixed-meaning canon³⁸ as well as Article V of the Constitution—that’s the

³² U.S. Const. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .”).

³³ U.S. Const. amend. V (“No person . . . shall be deprived of life . . . without due process of law.”).

³⁴ U.S. Const. amend. XIV (“[N]or shall any State deprive any person of life . . . without due process of law.”).

³⁵ See generally Def.’s Mem. in Supp. of Mot. to Declare the Death Penalty Unconst. as Cruel & Unusual Punishment (Nov. 15, 2013), State of Utah v. Douglas Lovell, Utah case no. 921900407.

³⁶ State’s Mem. in Opp’n to Def.’s Mot. to Declare the Death Penalty Unconst. (Jan. 31, 2014), State of Utah v. Douglas Lovell, Utah case no. 921900407; Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 406 (2012) (“No one would believe, for example, that the Eighth Amendment prohibited the death penalty, since that was the only penalty for a felony (it was the definition of a felony) when the Eighth Amendment was adopted.”).

³⁷ 428 U.S. 153, 177 (1976) (plurality opinion, although the foregoing proposition was accepted by all but Justices Brennan and Marshall).

³⁸ State’s Mem. in Opp’n to Def.’s Mot. to Declare the Death Penalty Unconst. (Jan. 31, 2014), State of Utah v. Douglas Lovell, Utah case no. 921900407; Antonin Scalia & Bryan A. Garner, *supra* note 35, at 78, 82, 403-414 (“Words must be given the meaning they had when the text was adopted.”); see also *Ford v. Wainwright*, 477 U.S. 399, 405 (1986) (“There is now little room for doubt that the Eighth Amendment’s ban on cruel and unusual punishment embraces, at a minimum, those modes or acts of punishment that had been considered cruel and unusual *at the time that the Bill of Rights was adopted.*”) (emphasis added); *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting) (“Words must be read with the gloss of the experience of those who framed them.”); *S. Carolina v. United States*, 199 U.S. 437, 448 (1905) (per Brewer, J.) (“The Constitution is a written instrument. As such its meaning does not alter.

provision that makes the Constitution a living one by process rather than judicial construction; the whole-text and harmonious-reading canons;³⁹ the presumptions of validity and effectiveness;⁴⁰ the supremacy of text principle;⁴¹ with respect to the Fourteenth Amendment, the later-in-time canon;⁴² and, finally, the much underused Tenth Amendment,⁴³ which suggests that this is a matter for the states to decide.

Nonetheless, the Eighth Amendment has been argued this way and it typically is in the capital cases that I have prosecuted, as it was in the Lovell case. And, as you've heard today, there's been quite a body of law built up around the Eighth Amendment. For my purposes, notwithstanding these arguments, the United States Supreme Court has, as recently as 2008, reaffirmed that "capital punishment is constitutional."⁴⁴ So, as a matter of federal constitutional law, that's the answer to the question. We'll leave it at that.

Certainly, and I don't want to minimize it at all, there are powerful policy arguments against capital punishment, as have been discussed or touched upon today. For example, society does not want to run the risk of wrongly punishing an innocent person. Second, many in society feel that the death penalty is morally wrong. The value and dignity of human life is so great that the government should never be justified in taking it. Civilized society is better than that. Third, it is unclear how much, if any, a deterrence the death penalty really has. In fact, I wonder if, based on the remarks earlier shared, if there was greater deterrence on others when the punishment was more openly and publicly administered and when the people were more aware of it than there is now. And then fourth, the economic burdens of capital punishment on society can be very great. As I'll show you in a minute, several states have found these arguments to be very persuasive and have abolished the death penalty in their states.

There are also powerful countervailing arguments in favor of capital punishment. "In part," the United States Supreme Court stated, "capital punishment is an expression of society's moral outrage at a particularly offensive conduct. This function may be unappealing to many, but it is

That which it meant when adopted, it means now."), *overruled on other grounds by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 540 (1985).

³⁹ Antonin Scalia & Bryan A. Garner, *supra* note 35, at 167-69, 180-82.

⁴⁰ *Id.* at 63-68.

⁴¹ *Id.* at 56-58.

⁴² U.S. Const. amend. IVX.

⁴³ U.S. Const. amend. X.

⁴⁴ Baze v. Rees, 553 U.S. 35, 47 (2008) (plurality opinion); *see also* Gregg v. Georgia, 428 U.S. 153, 187 (1976).

essential in an ordered society that asks its citizens to obey legal processes rather than self-help to vindicate their wrongs.”⁴⁵

Some other parts in favor of capital punishment include the purpose of, first, retribution, in all its philosophical forms, and proportionate punishment or proportionate justice; second, deterrence, specific to the person and general to society; third, incapacitation of the offender and community safety. You think of an individual like Joaquin “El Chapo” Guzman who is on trial right now in New York, who twice escaped from prison, and who, even while in prison, is alleged to have continued running the Sinaloa drug cartel and overseeing and ordering the kidnappings and murders of many individuals.⁴⁶ It is difficult to see how effective life without parole would be for a person like that. Fourth, capital punishment can be seen as affirming or reaffirming the value society places on the life, liberty, agency, humanity, and dignity of the victim, the innocent, and the law abiding. Fifth, it is the price an offender pays to redeem or restore himself from the debt he has incurred to society by his offense. The offender devalued an equally valuable human life by murdering that person. Doing so changed the offender’s own position in relation to society. This is related to the sixth part or idea, an idea behind self-defense. Capital punishment might be seen as the government’s retroactive and vicarious expression of self-defense on behalf of the victim who could not do what he or she would have been justified in doing when murdered.

So, the point is that there are cogent arguments for and against capital punishment. But in the end, capital punishment really is a moral question. And law, after all, said Oliver Wendell Holmes, “is the witness and external deposit of our moral life.”⁴⁷ This is especially true of criminal law.

Now, capital punishment has been around in the United States since the founding. Let me show you a slide depicting the United States.⁴⁸ Today, the States you see highlighted in blue permit capital punishment, except, I guess, based on today’s earlier remarks, Washington.⁴⁹ I didn’t catch that one. So that one may have since changed. You can see in this slide that thirty-one States, now thirty States because of Washington, the federal government,

⁴⁵ *Gregg*, 428 U.S. at 183.

⁴⁶ Barbara Tasch, *Mexican drug lord ‘El Chapo’ basically ran his cartel from his jail cell* (Aug. 20, 2015, 7:02 PM), <https://www.businessinsider.com/mexican-drug-lord-el-chapo-basically-ran-his-cartel-from-his-jail-cell-2015-8>.

⁴⁷ Oliver Wendell Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897).

⁴⁸ Thomson, *supra* note 3 at Slide 10; Nat’l Conf. of State Legis., *States & Capital Punishment* (June 6, 2018), <http://www.ncsl.org/research/civil-and-criminal-justice/death-penalty.aspx>.

⁴⁹ Merrit Kennedy, *Washington State Strikes Down Death Penalty, Citing Racial Bias*, NPR (Oct. 11, 2018, 5:13 PM), <https://www.npr.org/2018/10/11/656570464/washington-state-strikes-down-death-penalty-citing-racial-bias>.

and the U.S. military authorize it.⁵⁰ Delaware would still allow for it but for its own court striking it down, which seems to be similar to what recently happened in Washington.⁵¹ Nebraska had also abolished it briefly, that is, the legislature had, but the people reinstated it not long thereafter.⁵² This was all just a few years ago.

Now, it looks like it's been over a hundred years since Minnesota abolished capital punishment in 1911,⁵³ I think, the abolition of which was propelled by the botched attempted hanging of the high-profile murderer William Williams, I believe.⁵⁴ So, with Minnesota achieving statehood in 1858,⁵⁵ capital punishment lasted only about fifty-three years in Minnesota. And, from what I've been able to gather, as a result of a number of other high-profile murders over the years, there have been attempts at reintroducing it, but they have obviously failed.⁵⁶ And, in truth, that is how our system and the Constitution intended the question of capital punishment and other fundamentally differing hot button and moral issues to be addressed, by the individual states and the will and moral judgments of the people in them, acting through the political process. Democratically, in other words.

The State where I am a prosecutor, as you've gathered and as you've heard, is Utah. It achieved statehood in 1896.⁵⁷ And capital punishment has been in effect from even before then, when Utah was still a territory.⁵⁸ In fact, one of the first seminal cases to reach the United States Supreme Court on the question of the death penalty was *Wilkerson v. Utah*, a case where the United States Supreme Court upheld the death penalty under the Eighth Amendment and the use of the firing squad as a means of carrying the death penalty out.⁵⁹

And, speaking of means, then, just for you to be aware, let me show you this slide: on this map, which depicts the United States, the States colored in blue allow for lethal injection as the only means of execution.⁶⁰ The green States allow for lethal injection and one or more other means.⁶¹

⁵⁰ Thomson, *supra* note 3 at Slide 10; Nat'l Conf. of State Legis., *supra* note 47.

⁵¹ Thomson, *supra* note 3 at Slide 10; Nat'l Conf. of State Legis., *supra* note 47.

⁵² Thomson, *supra* note 3 at Slide 10; Nat'l Conf. of State Legis., *supra* note 47.

⁵³ Death Penalty Info. Center: Minnesota, <https://deathpenaltyinfo.org/minnesota-0> (last visited Feb. 12, 2019).

⁵⁴ *Id.*

⁵⁵ League of Women Voters Minnesota v. Ritchie, 819 N.W.2d 636, 677 (Minn. 2012).

⁵⁶ Death Penalty Info. Center: Minnesota, <https://deathpenaltyinfo.org/minnesota-0>.

⁵⁷ Utah History to Go, <http://historytogo.utah.gov/facts/index.html>.

⁵⁸ Harold Schindler, Salt Lake Tribune, *Taylor's Death Was Quick..... But Some Weren't So Lucky Executioner's Song—A Utah Reprise*, (Jan. 28, 1996).

⁵⁹ See generally, 99 U.S. 130 (1878)

⁶⁰ Thomson, *supra* note 3 at Slide 11; Nat'l Conf. of State Legis., *supra* note 47.

⁶¹ Thomson, *supra* note 3 at Slide 11; Nat'l Conf. of State Legis., *supra* note 47.

So, insofar as you might be curious, in addition to lethal injection, then, Utah allows for the firing squad.⁶² Washington and New Hampshire, hanging.⁶³ California, Arizona, Missouri, and Wyoming, the gas chamber.⁶⁴ Oklahoma and Mississippi, nitrogen hypoxia, electrocution, and the firing squad.⁶⁵ Alabama, nitrogen hypoxia and electrocution.⁶⁶ And then Arkansas, Florida, South Carolina, Virginia, Kentucky, and Tennessee, electrocution.⁶⁷ One interesting thing I saw just this week, in the paper, there was an article reporting that four death row inmates in Tennessee, I don't know if any of you saw this, have recently filed a rather unusual lawsuit, though I can understand it, seeking to be executed by the firing squad in the state of Tennessee.⁶⁸ They don't want electrocution.⁶⁹ So, that will be an interesting case from a legal stand point. Hopefully that gives you a broader sense for the state of the law concerning capital punishment in the United States, as well as the arguments for and against it.

PROSECUTING A CAPITAL CASE

With that background and context, let me return to the particulars of the capital case that I prosecuted against Douglas Lovell and a few generalities about prosecuting a capital case. If I can, let me reintroduce this by playing for you two Utah news stations' coverages taken from their websites.⁷⁰ The first one is KSL and the second is FOX 13; both are local news stations that covered the case.⁷¹ These reports will give you a good overview about how the trial unfolded, both the guilt phase and the sentencing phase of the trial.

⁶² Thomson, *supra* note 3 at Slide 11; Nat'l Conf. of State Legis., *supra* note 47.

⁶³ Thomson, *supra* note 3 at Slide 11; Nat'l Conf. of State Legis., *supra* note 47.

⁶⁴ Thomson, *supra* note 3 at Slide 11; Nat'l Conf. of State Legis., *supra* note 47.

⁶⁵ Thomson, *supra* note 3 at Slide 11; Nat'l Conf. of State Legis., *supra* note 47.

⁶⁶ Thomson, *supra* note 3 at Slide 11; Nat'l Conf. of State Legis., *supra* note 47.

⁶⁷ Thomson, *supra* note 3 at Slide 11; Nat'l Conf. of State Legis., *supra* note 47.

⁶⁸ *E.g.*, Bradford Betz, *Tennessee death row inmates ask for firing squad over lethal injection: suit*, Fox News (Nov. 6, 2018), <https://www.foxnews.com/us/tennessee-death-row-inmates-asking-for-firing-squad-over-lethal-injection-lawsuit-says>.

⁶⁹ *Id.*

⁷⁰ Thomson, *supra* note 3 at Slides 12-13.

⁷¹ Ben Lockhart, *Prosecutors in 30-year-old death penalty trial portray man as calculated killer*, KSL (Mar. 16, 2015, 7:52 PM), <https://www.ksl.com/article/33853712#IZKcpcyCsgzToXfht.01>; Carly Figueroa, *Defense attorney will focus on mitigating factors in effort to spare murderer the death penalty*, FOX 13 (Mar. 20, 2015, 9:57 PM), <https://fox13now.com/2015/03/20/defense-attorney-will-focus-on-mitigating-factors-in-effort-to-spare-murderer-the-death-penalty/?fbclid=IwAR00xGuZye6HjFdnckOuy2FsZKTX9cjY8B-ktAGTOFuRmURdJH552MaLgQ>.

There are many things I can talk to you about prosecuting this particular case, and prosecuting capital cases in general. In Utah, it is the only type of case that requires twelve jurors and allows the jurors to decide the sentence.⁷² It is broken into two phases, as you've heard, and the same jury hears both phases. As was the case, such cases often raise many unique issues and challenges. For example, there were fifty-two motions filed that we had to respond to and argue in court up until Douglas Lovell filed his notice of appeal after the verdict was read—the sentencing verdict from the jury.⁷³ And there have been many more motions filed since then, but they are handled by a different agency that handles the appeals in the state of Utah.

Prosecuting a capital case means that you will go through many motions. Among them, in addition to the boiler plate constitutional motions, there are some interesting ones that we encountered in our case that I will tell you about with my remaining time. Some of the issues we encountered included the passage of time, for one, which was a tremendous setback for us—it was an old case. Could all the witnesses be found? We now had to put on evidence of guilt and not just evidence supporting the appropriate sentence as was done in the earlier sentencing trial when Douglas Lovell was first sentenced to death. Some witnesses had since died; could their prior testimony given in the first sentencing trial be used? Could Joyce's testimony be used? Joyce's body was missing. That raised some interesting questions regarding the *corpus delecti* rule. I don't know if any of you have heard of that rule.

Additionally, during the first sentencing hearing in the 1990s, Douglas Lovell took the witness stand and was placed under oath, and he testified in great detail, subject to cross examination, about what he had done. Is what he did what we call allocution? That is what a defendant who is being sentenced is allowed to do just before the sentence is imposed. Or was it testimony? And could it be used against Doug Lovell in the trial that we did in 2015? Right after the murder, Lovell said many things to his then-wife, as they drove around and destroyed evidence. What effect would marital privilege have on Rhonda's being able to testify against him in the 2015 case? When Rhonda visited him at the prison wearing a wire, was she a State actor, or an agent for the State? Was Doug Lovell in custody? Was she required to give him his *Miranda* rights? Lovell committed a number of crimes for which he was never charged. For example, the conspiracies to commit aggravated murder when he hired the two hit men to do that. Or the burglary from that home where they stole the firearms and sawed off the shotgun. Could the jury consider those uncharged crimes? How do you keep the jury from becoming aware of his being on death row and his prior sentence to death? How do you deal with the intense media coverage? How do you properly death qualify a

⁷² Utah Code Ann. §§ 78B-1-104, 76-3-207 (West 2018).

⁷³ See the Court record in *State of Utah v. Douglas Lovell*, Utah case no. 921900407.

jury and perform jury selection? How do you prepare to address mitigating evidence?

In summary, there are many unique challenges that are raised in a capital murder case. There were in this case. And, as they should be, these cases are very closely scrutinized by the courts, which take them very seriously.

THE DECISION TO SEEK THE DEATH PENALTY

And, on that note, the last thing I want to talk to you about is—something that may be of interest to you that I can touch upon—is what goes through a prosecutor’s mind in deciding to file notice of intent to seek the death penalty. It’s a weighty and a very sobering decision to make. It’s a job a prosecutor has to do in enforcing the law, if it’s the law in the state where he or she practices. And in the state of Utah not every murder qualifies for capital punishment.⁷⁴ To even seek it, the charged offense and the resulting conviction has to be for aggravated murder, a very specific type of murder.⁷⁵ But that alone is not enough. The State bears the burden of proving beyond a reasonable doubt not only that the Defendant is guilty of aggravated murder, but that the aggravating circumstances in the case outweigh the mitigating circumstances, again, beyond a reasonable doubt, and that the death penalty is justified and is appropriate, beyond a reasonable doubt.⁷⁶

Thus, the decision to pursue capital punishment goes way beyond simply looking at the elements of the offense and seeing if there is a reasonable likelihood that the prosecutor can prove those elements to a jury. The prosecutor must assess the likelihood of capital punishment being imposed. So, in addition, what goes through a prosecutor’s mind, at least speaking from my experience and those that I work with—I don’t know in other states—the prosecutor considers such things as the weight and the quality and the admissibility of the evidence; the victim’s wishes and input; the impact of the murder on the victims and the community; the interests of the community; the nature and circumstances and brutality of the murder; the Defendant’s age, his criminal history, his mental state and health, his motive, his capacity and conditioning and culpability, his history, his character, his dangerousness, his behavior while in custody; the experience and economics of the prosecuting agency; the fact that closure would be delayed for many years during the appeals process, depending on how you define closure; and

⁷⁴ Compare Utah Code Ann. § 76-5-203 (LexisNexis/West 2018), with Utah Code Ann. § 76-5-202 (West 2018).

⁷⁵ Utah Code Ann. § 76-5-202 (West 2018).

⁷⁶ *Id.* § 76-3-207(5).

the potential for a retrial based on an error, as was the case in this particular case, and as might be the case again.

These are some of the factors weighed in making a decision to file notice of intent to seek the death penalty. It's a very sobering decision, as it should be. It's not to be taken lightly. And I can tell you this that no one took it lightly in the Douglas Lovell case, including the very deliberate and careful jury. After all, we sent out jury questionnaires to over two hundred people in Weber County. They had to fill out these detailed questionnaires. And the defense and the State then sat down together; we looked over the questionnaires and reached agreements on who should be removed for cause. The remainder of the jurors were then brought into court and put into a separate courtroom. And then each juror was individually brought into the courtroom, sat in the witness box, and individually voir dired by both the defense and the State, as well as by the court. Jury selection alone took a week just to get through. Once that was done, we then proceeded with the trial, which lasted approximately a month. After many hours, extending over two days of deliberation on the question of the death penalty, having to review many special verdict forms as was alluded to earlier, we presented evidence of uncharged crimes as well as other charged crimes as aggravating circumstances, the jury had to make specific findings beyond a reasonable doubt that those uncharged crimes had been committed by Douglas Lovell. So, they had to do a great deal of work. Their deliberations extended over two days. And, on April 1, 2015, that's when the verdict was read, which was a verdict of the death penalty.⁷⁷ When it was read aloud, two of the male jurors audibly burst into tears. Now, they were polled. This was their verdict and they said they stood by it, but the verdict was still very sobering, and this is as it should be.

Hopefully, as you've considered my remarks today, while thinking like a lawyer, you have gained some insight into capital cases and their prosecution, at least in the state of Utah and at least from the perspective I have shared with you. Thank you for your time.

⁷⁷ See the Court record in *State of Utah v. Douglas Lovell*, Utah case no. 921900407.