

DEATH PENALTY

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12/05

The death penalty process in New Jersey represents a violation of a crime victim's rights under the New Jersey Constitution to fairness, compassion and respect in the criminal justice system. In the cause of sparing unnecessary pain and suffering to future murder victims at the hands of the justice system, the death penalty in this State should be abolished without delay.

JoAnne Barlieb, the oldest of Cynthia Barlieb's four daughters, was 8 years of age on July 7, 1985. In the early morning hours Cynthia went to her job as a clerk in a Burlington County Cumberland Farms convenience store. As JoAnne and her sisters lay sleeping at home, Jacinto 'Joey' Hightower walked into the convenience store with a pistol and fired three shots at Cynthia at close range. The first shot missed the victim's heart by inches and entered her liver; the second shot lacerated her spinal chord and the third was fired point blank above her eye and lodged in her brain.

On July 7, 1985 JoAnne Barlieb and her family were thrust into the criminal justice system for the next 17 years of their lives because Joey Hightower murdered this young mother of four, and because three years earlier New Jersey had reinstated the capital punishment law.

There were three separate death penalty trials spanning this 17 year period. In the first in 1986, a jury convicted Hightower of capital murder, and sentenced him to death. The New Jersey Supreme Court reversed the death sentence in 1990. In next retrial Hightower once again received the death penalty. Another trip to the Supreme Court in

1996 produced yet another reversal; this time because one of the jurors became aware that Cynthia had children, and communicated that fact to other jurors. The Court concluded that this knowledge on the part of one or several members of the jury constituted impermissible victim impact evidence because apparently the jurors were not supposed to know that Cynthia was a real life human being with real life relationships such as children. A year earlier; however, the New Jersey Legislature enacted a death penalty victim impact testimony statute, and several months before its decision in *Hightower*, the Supreme Court upheld the victim impact statute in *State v. Muhammad*. In *Muhammad*, the New Jersey Supreme Court quoted from Justice David Souter's concurring opinion from the United States Supreme Court's 1991 decision in *Payne v. Tennessee*, stating, "Defendants who intentionally choose to kill know that their actions will destroy a unique individual who is likely to be a parent, child, spouse, brother, or sister." To this day, the Barlieb family has difficulty understanding the rationale for the Court's 1996 reversal in *Hightower*.

In January 30, 2002 JoAnne Barlieb sat quietly in a courtroom in Burlington County, and listened as Hightower testified that he was now a model prisoner. He could not; however, muster up an apology to the victim's family. A week later it was all over. The jury was deadlocked, and Hightower had escaped another penalty of death. JoAnne was now 25 years old, having spent the last 17 years of her life helping to raise her younger sisters, traveling to court more times than she could count, and praying that this nightmare in the justice system would end.

JoAnne's story is not unique. In my 15 years as a victims' rights lawyer I have represented many murder victim families in death penalty cases, and the additional

anguish caused to them by the justice process has been overwhelming. When I first see a client, I silently pray that the prosecutor will decide against pursuing the death penalty, but not because I am against that form of punishment. My prayers are for the victims and the hope that they will be spared the pain, isolation and despair that the death penalty process will inevitably bring to them.

In my first case as a victims' rights lawyer my client Florence Hoffman quietly sat in the back row in a courtroom in Sussex County during the death penalty retrial of her 17 year old daughter Amy's murderer, serial killer James Koedatich. Amy had been murdered 8 years earlier. Florence was sequestered from the first trial, and our hope was that the court would allow her to stay in the courtroom during the retrial. The victim's mother was forced to sit silently as Koedatich made obscene gestures to the victim and to her supporters while his lawyer asked the judge to remove Mrs. Hoffman, not only from the courtroom, but also from the street in front of the courthouse. Koedatich's lawyer described her as a "walking, talking victim impact statement" and an improper reminder to the jury that Amy was once a "living, breathing human being." The defense counsel further argued that Mrs. Hoffman was being "milked by the prosecution like so much emotional baggage." I sincerely believe that trial Judge Donald Collester changed the course of history for crime victims in the State of New Jersey when he refused to expel Mrs. Hoffman from the courtroom stating, "This is a public courtroom, which is open to members of the public, all members of the public."

The jury in *Koedatich* voted 11 to 1 for death. Several weeks later I received a letter from one of the jurors who said that this trial had been the worst experience of her life. The juror who voted against death was asked by the others to give a reason for his

vote. He replied that he was against the death penalty, and when he was questioned about why he told the trial judge that he could vote for death if the proofs were present, he responded to the other jurors, "I lied."

In 1997 Thomas Koskovich murdered pizza deliverymen, Giorgio Gallara and Jeremy Giordano. In the death penalty trial involving the murder of Jeremy Giordano, the defense requested of the court that they be permitted to question Jeremy's mother in front of the jury about her opinion on the death penalty. Why? Because she opposed it. The prosecution objected because the Supreme Court in *State v. Muhammad* clearly stated that such opinion evidence was not permitted. Nevertheless, the trial court permitted the testimony. When the jury came back with a death penalty verdict, the trial judge shocked everyone in the courtroom by stating that if the killer was not executed within five years, his sentence would be commuted to life. The victims' families, spiritually shattered and emotionally drained after having gone through two trials looked up at me, as beaten as any individuals I had seen in a long time and asked, "Can he do this?" I simply said "no", but how could my words of consolation have any meaning at the time? The trial judge was reversed on the five year commutation ruling and the death penalty was reversed, one of the reasons being that the victim's mother should not have been allowed to give her opinion against the defendant receiving death.

Since the death penalty was reinstated in 1982 there have been 197 capital trials and 60 death penalty convictions of which 50 were reversed. We have seen the New Jersey Supreme Court reverse death penalty verdicts because the prosecutor did not prove that the defendant *intended* to kill his victim in such cases as *State v. Gerald*, where the killer dropped a television on the head of the 89 year old victim and stomped his head so

hard that the defendant's sneaker was identified by the imprint he left on the victim's face, and *State v. Jackson* where the female victim was stabbed over 50 times by the killer. This rule of intent imposed by the New Jersey Supreme Court, which formed the basis for other reversals, was ultimately rejected in 1992 by an amendment to the New Jersey Constitution approved by 1.8 million voters.

In 1998 Governor Whitman's Study Commission on the Implementation of the Death Penalty released its findings, and proposed 13 recommendations to "improve the process." The County Prosecutors Association voted unanimously to support each of the recommendations. Assemblyman Guy Talarico introduced a package of bills in the Assembly to implement the recommendations of the study. The legislation never moved and to date, only two of these recommendations has been implemented by statute, court rule or administrative directive.

Many people mistakenly believe that the death penalty is a strong victims' rights issue. It is not. Victims' rights issues sometimes arise in death penalty cases such as *State v Muhammad* (victim impact testimony) and *State v. Timmendequas* (denial of change of venue based on impact on victim's family), but in reality victims have little to do with the issue of the death penalty. The Victim's Rights Amendment and Victims Bill of Rights (N.J.S.A. 52:4B-36) describe the civil rights that victims are entitled to receive in the criminal process. What victims need most from those who work in the justice system is to have these civil rights to fairness, compassion, respect and dignity recognized and respected. They do not need, nor do they want the vengeance of death, as too many surmise.

Victims say they want “justice”, but they have no say in what the justice will be. That is up to the court, the prosecutor and the defense counsel. Victims are placed in this adversarial system where justice becomes equated with winning and losing. And in death penalty cases in the State of New Jersey, the victim does not win. The families of Cynthia Barlieb, Amy Hoffman. Giorgio Gallara family, Jeremy Giordano families and the victims of Gerald and Jackson and so many others did not win justice in their long, painful trip through the criminal justice system. Many of these victims have common bonds without ever knowing it, and without ever knowing each other. The comments made by the defendant’s counsel about Florence Hoffman during the 1990 retrial in *Koedatich* were so egregious that they were transcribed and became a significant impetus for the passage of the Victim’s Rights Constitutional Amendment in 1991 which required that crime victims “shall not be denied the right to be present at public judicial proceedings.” A decade later in the third *Hightower* death penalty trial, JoAnne Barlieb entered the courtroom prepared to have her first opportunity to deliver an oral impact statement to the jury. The trial court incorrectly granted the defense counsel’s motion to remove her from the courtroom, but an emergent appeal to the Appellate Division reversed that decision, citing as authority the Victim’s Rights Amendment.

The death penalty in New Jersey is so broken that it cannot be fixed. The death penalty opponents advocate for life in prison without parole as an alternative. Bipartisan legislation has been introduced to enact this change (A-3569/S1212). I fully support it as do most victims and victim advocates. Let prosecutors, defense lawyers and judges focus their energies and talents on issues other than the death penalty to improve the justice system. Take some of the legal talent from the defense death penalty bar and

convince them to argue for the civil rights of crime victims. In calling for the abolition of capital punishment in favor of life in prison without parole, Ocean County Prosecutor Thomas Kelaher recently wrote to Governor Codey to say that a death penalty that is never used has become "a cruel hoax on the families of the victims and the citizens of this state."

A recent report by New Jersey Policy and Perspective states that since 1982 the 197 capital murder trials that have taken place in New Jersey have cost the taxpayers least \$253 million or over \$1 million per trial. While the justice system's efforts on behalf of Joey Hightower cost the taxpayers millions, the Barlieb family received a total of \$4,500 from the Victims of Crime Compensation Board. Imagine what we could do for victims' families with some of this death penalty money.

I cannot imagine a more devastating experience in someone's life than learning that their loved one has been murdered. For a murder victim, attending the trial is an exhausting and process of having to bear witness to the slow motion replay of the events of the murder in an intimidating place like a courtroom, where the victim must sit mute and learn that he or she has little say about the rules of the game. JoAnne Barlieb did it for 17 years. The pain caused by the murder of a loved one does not diminish over time; it is ever present for the victim's family. For a victim of murder to survive, the victim must focus on their loved one, not the killer. Otherwise the victim will self destruct from anger. That is why most victims of homicide are ambivalent about the death penalty.

The Senate recently voted 30-6 to approve a death penalty moratorium (S709). Forget the idea of a moratorium. It begs the question and postpones the inevitable.

Legislators must understand that supporting the demise of the capital punishment law does not mean they are soft on crime. It is time for the lawyers, judges, legislators and now our new Governor to collectively put their hearts and minds together to restructure the criminal justice system to achieve a more positive purpose.

The Interpretive Statement to the Victim's Rights Constitutional Amendment states that, it is designed to place victims on "equal footing" with the accused.

Eliminate the death penalty, and we just may have a shot at it.

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