

## CATHY AND KENNETH

by Steven Henderson

In 1994, Cathy Lynn Henderson and Kenneth McDuff were two people who shared virtually nothing in common. Kenneth was a lifelong, cold blooded, sadistic murderer. Cathy was a housewife who had never committed a felony or a violent crime in her life. Kenneth had murdered teenagers, been sentenced to death, had his sentence commuted, been paroled, been sent back to prison, been paroled again, and had murdered again. Cathy had merely struggled time and again to achieve the American dream as a suburban housewife. On January 21, 1994, Kenneth was sitting on Texas's death row for a second time; this time, it was for the calculated kidnapping and murder of women in Waco and Austin. On that day, Cathy was trying to make ends meet by babysitting three month old Brandon Baugh and his sister. She was about to stumble into a whirlwind of tragedy and greed that would land her on Texas's death row for women. The fact that an ill-fated person like Cathy Henderson was about to be sentenced to the same fate as a villainous character like Kenneth McDuff reveals the absurdity of the criminal justice system and capital punishment.

In the interest of full disclosure, I am not an impartial observer in this matter. I first met Cathy when she and her husband visited my parents' house one Christmas. Her husband, Warren Henderson (we knew him as Bubba), was my second cousin, and he was one of my younger brother's best friends in high school. When Cathy was placed on death row, I started corresponding with her, and she asked me to serve as her spiritual advisor. (We had to end that relationship several years later when I moved from Austin to west Texas.) I realize that there's a lot that I don't know about Cathy, but from our hours and hours of conversations through the plexiglass and metal barriers of the women's death row visiting area, I believe that there's a lot that I do know about her.

Moreover, I'm not naïve about criminal offenders. I'm not a "gullible bleeding heart" who believes that every offender is a poor, misunderstood victim of a bad upbringing. I have worked in the criminal justice system for over 25 years. From tutoring at a maximum security prison in Massachusetts, to being a corrections counselor in a pre-release center in Boston, to serving in the Texas adult probation system for over 20 years, I have met my share of truly dangerous people. I supervised a felon who joined his partner in holding a man as they took turns raping his girlfriend. For good measure, he swung a clothing iron by the cord to hit the boyfriend in the head. I've supervised a drug addict who grazed a man in the head with a shot from a handgun at point blank range. When asked for more details about her crime, she merely said, "He ducked." I've supervised a sex offender who took a mentally retarded girl out for a "date" and then sodomized her with a coke bottle.

I know what dangerous criminals are like. I also know that Cathy Henderson is nothing like those dangerous criminals. And yet it's Cathy who is on death row and facing execution in April of 2007.

I'm not saying that Cathy is blameless for what happened. She is, in fact, directly responsible for the death of three month old Brandon Baugh. She is also responsible for causing unimaginable,

heart-rending pain for Brandon's parents. However, there was nothing cold, calculated or intentional about Brandon's death. On the other hand, there was something very cold, calculated, and intentional in the effort to put Cathy on death row.

No one but Cathy knows what happened on that January afternoon in 1994. Cathy claims that Brandon was crying, so she was swinging him around to calm him. She says that the telephone rang, she stepped on a toy, and she accidentally let go of Brandon, who flew out of her arms to his death. The autopsy, which was critical to the case, indicated that the damage to Brandon's skull was too severe for a mere accident. There have been arguments about the autopsy, about Cathy swinging an infant vigorously enough to cause his death, and other particulars. In the end, it doesn't matter. Brandon died. He died before his parents got to know him, and Cathy's actions were responsible for causing his death. The essential question in a death penalty case, though, was whether Cathy intentionally and knowingly caused Brandon's death.

As terrible as Brandon's death was, and as inexcusable as Cathy's subsequent actions were, no reasonable person could claim that what she did was premeditated, malicious, or intentional. There was no motive. Cathy held no animosity towards Brandon's parents. There was nothing at all for Cathy to gain from taking Brandon's life. There was nothing that she did before or after Brandon's death that came close to suggesting that this was planned. On the contrary, all of Cathy's actions after the accident pointed to a panic-filled horror of irrational decisions. Nothing pointed to a cold calculated crime.

When Cathy realized that Brandon was dead, she did what many people do when faced with a dreadful set of decisions: she resorted to old, ingrained patterns she learned as a child. By all accounts, Cathy was raised by a welfare mother who kept on the move to avoid prosecution by the authorities. She juggled welfare accounts for her numerous children (who were fathered by numerous boyfriends), and when fraud investigators got too close, she quickly moved in the dark of night. A person who tried to write Cathy's biography had a difficult time trying to determine which of Cathy's step brothers and sisters were fathered by which of her mother's boyfriends. Moreover, as her siblings have attested, at least two of these boyfriends sexually abused Cathy, and Cathy ran away from home more than once to get away from the abuse. Running away from horror was a familiar way for Cathy to cope with trouble.

When Cathy had to face the dreadful reality of what had happened to Brandon, she didn't do what a rational person with good coping skills would do. She didn't simply dial 9-1-1 or call her husband, or call a friend. Instead, she ran. She left Brandon's sister Megan and her own youngest daughter with a relative, she pulled money out of the family's bank account, and she drove to an area near Temple, Texas, where she used to live. She buried Brandon in a wine cooler box and fled to her childhood home in Missouri. There was not much else Cathy could have done to make herself a more unsympathetic character.

On the other hand, if this had really been a calculated murder, Cathy could have done a much better job of making it look like an accident that didn't involve her. Babies die accidentally from household products all the time, from plastic wrap to small toys. A cold calculated murderer would have tried to stage the accident to get away with killing Brandon. In addition, cold-hearted sadistic killers don't bother with makeshift coffins and burials; they use dumpsters and

land fills for their premeditated victims. Everything that Cathy did pointed to a panicked-filled reaction to an accident and not to a deliberate killing.

Sadly for her sake, Cathy's alarmed set of bad decisions hurt her more than anything else she did. If Cathy had done things differently, the public and the law could have understood her for what she was: a tragic player in a terrible accident. Unfortunately, her actions made it easy for the media to create a distorted image of Cathy as an unsympathetic child killer. This virtually eliminated any chance of her being treated fairly. It's a media ratings winner when you vilify someone as a child killer. Worse, it's also a winning political formula, and there were people who had much to gain from portraying Cathy that way.

Political careers are often made through capital cases, and this has certainly been true in the effort to execute Cathy. Terry Keel was the Travis County Sheriff in 1994 who made a name for himself through Cathy's case. Since child killers are easy targets for the public's anger, Mr. Keel had no compunctions about pushing the limits of the law in her case. When Cathy did everything but put up a neon sign to make herself look dreadful, Mr. Keel made sure that no one could generate a lot of sympathy on her behalf. As a result, when he ran roughshod over the rights of attorney-client privilege, there was no public outcry against his actions. The name recognition he gained from this case helped him in his successful run for the Texas legislature in 1996 and then, in a mind-boggling irony, to run for election as a judge on the Texas Court of Criminal Appeals in 2006.

When the FBI arrested Cathy on February 1, she told different stories about what had happened. Ultimately, though, she admitted that Brandon was dead, and she provided a public defender with maps of the site where she had buried Brandon. The maps were then faxed to Cathy's attorney in Austin, Nona Byington. These maps were obviously critical to Cathy's case. They could serve as leverage for her defense in negotiating the charges that would be filed against her.

When Sheriff Terry Keel found out about the existence of the maps, he set out to remove them as bargaining chips. On February 3, two weeks after Brandon had been killed, he accused Cathy's attorney of being an accomplice to murder, and had her search automobile and office searched. Normally, the fundamental right of attorney-client privilege would have prevented this. However, Sheriff Keel contended that this was an ongoing crime (i.e., the baby could still be alive after being buried for two weeks), and a court (with a sly wink to reality) agreed. Therefore, Ms. Byington was eventually forced to turn over the maps. (Travis County would later agree to a \$100,000 settlement of a lawsuit brought by Ms. Byington against Mr. Keel for his actions.) In Cathy's appeals, the courts turned a blind eye to the trampling of the attorney-client privilege in her case. In its response to a legal challenge of the use of the maps, the Texas Court of Criminal Appeals once again slyly winked at reality and held that the maps had no role in her conviction. This little absurdity overlooked the fact that without the maps, Brandon would not have been found, the autopsy could not have been performed, and the prosecution would have had no case for capital murder.

To those people who know anything about the Texas Court of Criminal Appeals (the state's highest court for criminal cases), the ruling in Cathy's case came as no surprise. The court's history of bizarre decisions has made it a laughingstock, as even one of its own members has

admitted. After all, this is the court that didn't think it was a problem for a death sentence to be given to a defendant whose attorney slept through large portions of the trial.

It is tempting to characterize the Texas criminal justice system in general as a laughingstock when it comes to the death penalty (and a strong case can certainly be made for that belief). Unfortunately, the nature of this arbitrary and capricious system is no laughing matter because lives hang in the balance. People can face the death penalty in Texas based on factors that have nothing to do with the danger they present to society.

If a high-profile crime is committed in a Texas county where a district attorney is being challenged for re-election, you can be sure that the case will be prosecuted much more vigorously and with a much harsher sentencing recommendation than if the same crime occurred in a county without a contested race. After all, district attorneys run for election based on their number of convictions and for being tough on crime. Even Travis County's Ronnie Earle, who is often branded with the "L" word (liberal) by his conservative opponents, will tout his toughness at election time. Many Texans regard Mr. Earle as one of the more progressive DAs in the state, but when he is faced with a contested election, he is more than happy to parade the names and faces of the people he has sent to death row on his television campaign ads.

Geography plays another factor in capital cases in Texas. If a death that could be prosecuted as a capital murder is committed in a poor rural county, it's not likely that there will be a capital murder trial. Cases involving the death penalty are very expensive to prosecute because of the need for expert witnesses, security, and other financial considerations that poor rural counties cannot afford. If Cathy's accident with Brandon had occurred just a few miles away, the justice system may well have been more inclined to view this as the tragedy that it was, and not as a capital crime.

Of course, if Cathy's case had been prosecuted in another state entirely, she would have been even less likely to face the death penalty. There have been worse cases than hers when women have killed children, and obvious factors of motive, intent, and premeditation were present. Yet, these women have not been sentenced to death. One of the most infamous of these involved a murder that occurred just months after Cathy's case.

In South Carolina, only one woman has been sentenced to death in the last 35 years, and that conviction was quickly reversed. Therefore, when Susan Smith drowned her young sons in October of 1994, the chances of her being executed for a capital crime were much less than they would have been if she had lived in Texas. Ms. Smith's crime involved all the things that Cathy Henderson's did not. She had a motive because she wanted her freedom as she tried to work through problems she was having with her estranged husband and two other lovers. She had premeditated intent because she rolled her car into a lake after strapping her two young sons into the back seat. To top it off, in her effort to get away with her crime, she concocted a story that a black man had hijacked her car with her two sons in the back. Susan's racist fairy tale went across the national air waves for over a week until she confessed to killing her children. And yet, none of that was enough for a jury to give her the death penalty in South Carolina.

Even though the circumstances and outcome of Susan Smith's case bear very little resemblance to Cathy's case, the two women do share two dreadful things in common. First, like Cathy, Susan Smith had suffered through sexual abuse as a child. And second, like Cathy, Susan had never been able to get counseling to resolve the emotional damage that the sexual abuse caused. Unfortunately, that's where the similarities end. In Susan's case, her mental state and troubled past played a significant role in her defense and in the jury's decision not to put her to death. In Cathy's case, her childhood abuse and her troubled mental state were scarcely considered in her favor.

And yet, Cathy Henderson is scheduled to be executed on April 18, 2007.

Although my religious convictions compel me to oppose the death penalty, I can understand the rationale behind it. There are some people whose crimes are so heinous, who present such an overwhelming threat to society that they forfeit their rights to live in free society again. And this brings us back to Kenneth McDuff.

In August of 1992, Texas Monthly placed Kenneth Allen McDuff on its cover with a one word title: Monster. He had been sent to death row once before for the brutal murder of three teenagers, one of whom he raped twice – once with a broomstick. When the death penalty was declared unconstitutional, his sentence was commuted to life in prison, but he was released in 1991 due to prison overcrowding. He subsequently murdered a number of other people (some estimates go to eleven victims), including Colleen Reed from Austin and Melissa Northrup from Waco. In Colleen Reed's case, he told his accomplice that he wanted to take a girl and "use her up," so they grabbed the kicking and screaming accountant while she was at a carwash, took her to a remote place in the country, raped her, burned her with cigarettes, and murdered her. There is no doubt that Kenneth McDuff earned his title from Texas Monthly. The death penalty was meant for unconscionable, cold blooded killers like Kenneth McDuff.

But Cathy Henderson is not Kenneth McDuff, not even close to being like him. The death penalty was not meant for the Cathy Hendersons of this world. There is no arguing that the tragic accident that she caused created unimaginable pain and grief to the family of her victim, Brandon Baugh. Brandon's death, even though it was an accident, and Cathy's actions after that death can never be excused. However, the effort to put her to death, with its lust for advancing a political career, its cynical winks at reality, and its casual disregard for legal rights cannot be excused, either. The effort to put her to death does not pass the smell test, and it takes an incredible leap of logic to claim that she deserves the death penalty as Kenneth McDuff did.

As a result of Kenneth McDuff's murderous rampage, Texas tightened its parole rules. In addition, his case spurred Texas to increase its prison capacity from 60,000 beds to 145,000 beds in the 1990s. Just as Kenneth McDuff's case changed the face of criminal justice in Texas, it's time for Cathy Henderson to change its face once again. With no felonies and no violence on her record, and with emotional abuse that begged for a peaceful resolution through counseling, Cathy does not present an ongoing threat to society. The only reason to execute Cathy is a misplaced sense of justice that is based on naked revenge. If Texas truly believes that the purpose of its criminal justice system is to protect society, it does not need to execute Cathy Henderson.