

Lawyer Reveals Secret, Toppling Death Sentence



Pool photo by Sangjib Min

Daryl R. Atkins, third from left, in 2005. His case led to a decision barring execution of the mentally retarded. Thursday, his sentence was commuted to life based on prosecutorial misconduct.

By ADAM LIPTAK
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For 10 years, Leslie P. Smith, a [Virginia](#) lawyer, reluctantly kept a secret because the authorities on legal ethics told him he had no choice, even though his information could save the life of a man on death row, one whose case had led to a landmark [Supreme Court](#) decision.

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The Daily Press, via Associated Press

A bank camera captured an image in August 1996 of Eric Nesbitt between two men identified as Daryl R. Atkins and William Jones. The two were convicted in Mr. Nesbitt's killing.

Mr. Smith believed that prosecutors had committed brazen misconduct by coaching a witness and hiding it from the defense, but the Virginia State Bar said he was bound by legal ethics rules not to bring up the matter. He shared his qualms and pangs of conscience with only one man, Timothy G. Clancy, who had worked on the case with him.

“Clancy and I, when we were alone together, would reminisce about this and more or less renew our vows of silence,” Mr. Smith told a judge last month. “We felt that there was nothing that could be done.”

But the situation changed last year, when Mr. Smith took one more run at the state bar's ethics counsel. “I was upset by the conduct of the prosecutor,” Mr. Smith wrote in an anguished letter, “and the situation has bothered me ever since.”

Reversing course, the bar told Mr. Smith he could now talk, and he did. His testimony

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caused a state court judge in Yorktown, Va., to commute the death sentence of Daryl R. Atkins to life on Thursday, citing prosecutorial misconduct.

It was in Mr. Atkins's case that the United States Supreme Court ruled in 2002 that the Constitution bars the execution of the mentally retarded. But Virginia continued to pursue the death penalty against him, saying he was not mentally retarded. If Thursday's decision stands, that issue may never be resolved.

Mr. Smith had represented Mr. Atkins's co-defendant, William Jones. In a tape-recorded debriefing session with prosecutors on Aug. 6, 1997, Mr. Jones told his version of the 1996 killing of Eric Nesbitt, whom the two men had robbed and forced to withdraw money from a bank machine.

The crucial point was who had shot Mr. Nesbitt. Under Virginia law, only the triggerman was eligible for the death penalty.

"As he began to describe the positions of the individuals and the firing of the shots," Mr. Smith said last month, referring to his client, a prosecutor "reached over and stopped the tape recorder." According to Mr. Smith's testimony and a memorandum he prepared soon after the debriefing, the prosecutor, Cathy E. Krinick, said, "Les, do you see we have a problem here?"

The problem was that Mr. Jones's account did not match the physical evidence. "This isn't going to do us any good," Ms. Krinick said, according to Mr. Smith.

For 15 minutes, Mr. Smith said, prosecutors coaxed and coached Mr. Jones to produce testimony against Mr. Atkins that did match the evidence. They flipped over a table and pretended it was a truck. "We used a chair, or something like that, to simulate the open door," Mr. Smith testified, "because only one of the doors on the truck would open."

When the tape was turned back on, Mr. Jones's story bolstered the case against Mr. Atkins as the triggerman. The Atkins defense did not learn of the coaching session for a decade, when Mr. Smith was freed from his ethical obligation not to prejudice his own client's case. Mr. Jones was sentenced to life in prison, and his case is concluded.

Ms. Krinick, now in private practice, did not return a call seeking comment. Nor did the commonwealth's attorney for York County, Eileen M. Addison. It is not known whether the state intends to appeal.

In a court filing last year, Ms. Addison, who also attended the debriefing, called Mr. Smith's account "false and libelous" and said her office "adamantly denies" it. But there are only about an hour and three-quarters of material on the audiotape, even though a detective announced that it started rolling at 4:16 p.m. and stopped at 6:16 p.m.

In the court filing, Ms. Addison said the judge, Prentis Smiley Jr. of the York County Circuit Court, was not free to entertain a motion based on prosecutorial misconduct because Mr. Atkins's case was before him only on the question of mental retardation.

Mr. Smith has a modest legal practice, working alone. "I do criminal work, civil work, real estate," he testified last month.

He said he understood the reasoning behind the state bar's initial advice. "It certainly practically would have put in jeopardy all the things that had been done or that we had done for our client," he testified last month.

Mr. Smith wrote to the bar again in March, this time emphasizing that his client's case was over. A lawyer there would not give him an answer in writing, Mr. Smith said, but told him over the phone that he could "come forward and make known what had gone on at the meeting." Mr. Smith did not name the lawyer.

James McCauley, the state bar's ethics counsel, was out of the office on Friday and did

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not respond to a voice mail message seeking comment.

Ronald D. Rotunda, who teaches legal ethics at George Mason University, said the rules in Virginia were murky about what lawyers in Mr. Smith’s position could do. But if the bar’s initial advice was correct, Professor Rotunda added, “there is something wrong about the law, particularly if you are talking about execution or years in prison.”

Richard G. Parker, a lawyer at O’Melveny & Myers in Washington who represented Mr. Atkins along with Joseph A. Miglizzo Jr., praised Mr. Smith. “He had no dog in this fight,” Mr. Parker said. “Les Smith brooded on this and came out and said something to do the right thing.”

Executions in Virginia usually occur within seven years of the imposition of a death sentence, legal experts there said. So in a typical case — without the intervention of the Supreme Court — Mr. Atkins would be dead by now and Mr. Smith’s revelations would have done him no good.

In a brief interview, Mr. Smith said he did not think he should speak about his experiences because “there may be another forum for me to testify in.” He added, a little cryptically, “I did what I have done.”

At a hearing last month, Mr. Smith was asked whether “the concerns you’ve been thinking about for 10 years have been addressed in your own mind?”

“Yes,” he said, “in that whatever went on is going to be exposed and someone will have made a decision about what went on. But I was also prepared to keep quiet had the bar come back with an opposite answer in March.”

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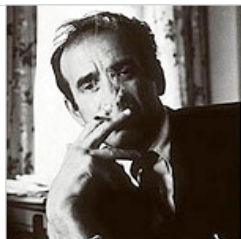
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