THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

Stephen B. Bright

Oral History Research Office

Columbia University

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PREFACE

The following oral history is the result of a recorded interview with Stephen B. Bright conducted by Myron A. Farber on May 24 and 26, 2009. This interview is part of the Rule of Law Oral History Project.

The reader is asked to bear in mind that s/he is reading a verbatim transcript of the spoken word, rather than written prose.

MJD | Session One

Interviewee: Stephen Bright | Location: New York, New York

Interviewer: Myron Farber | Date: May 24, 2009

Q: This is Myron Farber on May 24, 2009, interviewing Stephen Bright for Columbia University's oral history project on the movement to end the death penalty in the United States.

Can I call you Steve?

Bright: Absolutely.

Q: Steve, I was amused by your reference in your 1997 talk at the City Club in Cleveland to Justice [William J., Jr.] Brennan. You recalled that when he was appointed to the Supreme Court of the United States, he said that felt like the mule that had been entered into the Kentucky Derby.

Bright: Right.

Q: Now, you're not going to feign that kind of modesty on me today, are you?

[Laughter]

Q: Actually, you would be more like Sea Biscuit or Man O' War. You're a Kentuckian yourself, are you not?

Bright: Yes. Born there and grew up there.

Q: Tell me a little bit about that background. You went to the University of Kentucky, right?

Bright: I grew up on a little farm outside a little town called Danville, right in central Kentucky. My father was a farmer, farming the same land my grandfather farmed and his father farmed. I grew up on a little farm, went to country schools, and went to the University of Kentucky after I graduated from high school. I then took a year off and campaigned for George [S.] McGovern in 1972 and then went to the University of Kentucky Law School and graduated from there.

Q: In 19 --?

Bright: I actually started law school and went for one semester and took off all of 1972. Then I graduated from law school in 1975.

Q: What kind of farm was it? What was he farming, your father?

Bright: When I was very young we farmed everything. We were in Kentucky, so we farmed tobacco. But we also had cattle and sheep and hogs. As I grew older, my father increasingly took over the farm from my grandfather and it became more of a cattle operation. He eliminated the other animals and eventually even ended growing tobacco on the farm. It became pretty much a cattle operation. It's rolling hills in the central part of Kentucky. Pretty much you raised grass, you have to have cattle to graze the grass, and then you

harvest the cattle.

Q: They didn't want you to be a farmer?

Bright: Actually, they would have been delighted if I had become a farmer, particularly my grandfather. That was what the tradition had been, that each new generation was a farmer. But I broke that trend.

Q: This wasn't a farm where the kids, like yourself, had to get up at five o'clock in the morning?

Bright: We didn't get up at five o'clock in the morning, but I did work on the farm during the summers. Sometimes during the school year and at Christmas time and holidays, feeding the cattle in the wintertime and putting down solids, that sort of thing.

Q: When you went to the University of Kentucky as an undergraduate, had you any thought of being a lawyer?

Bright: No. In fact, my plan had been to be a journalist. I worked for the paper at home and enjoyed that a lot and that's really what I thought I was going to be.

Q: Why did you give that up?

Bright: Well, just the twists and turns that life takes. I ended up going to law school. I actually started majoring in journalism at the University and then moved to political

science, but in doing that I was still planning to be a journalist. I just thought that was going to give me a little exposure to things that would help in that regard. But I got involved in a lot of the civil rights and antiwar movement matters and I saw the role that lawyers were playing, particularly William [M.] Kunstler, and I thought there might be a place to play as a lawyer. But I still loved journalism and I loved to write.

Q: And you worked for McGovern during that campaign?

Bright: Yes.

Q: As I recall, it was not a very successful campaign.

Bright: That was when I decided I better go back to law school.

Q: How did he do in Kentucky?

Bright: Not very well, although I worked for him all over the country. I started off in January. I was all ready to go. I had my sweaters packed and I was all ready to go to New Hampshire and at the very last minute they sent me to Florida. So I spent January through March preparing for the Florida primary. After the Florida primary I went to Illinois, Wisconsin, Oregon, California. I came back to Miami for the convention, and then I was in Florida for the general election. I had made a lot of friends down there. It was a hopeless undertaking but I worked very hard in Florida and was somewhat deluded that we had a chance to win there.

Q: When you were in law school in Kentucky, do you recall having had any particular interest in the death penalty?

Bright: When I went to law school the death penalty was unconstitutional. I started law school right after the campaign. The death penalty was declared unconstitutional in 1972. I went back to law school right after that and my criminal law professor told me that there wouldn't be a death penalty in the United States anymore. I had thought about the death penalty before that. I remember, in connection with the Jack Ruby case, the person who killed Lee Harvey Oswald. When the death penalty was mentioned as a possible punishment for him, I remember fairly clearly, as a child, being absolutely astounded that there could be a death penalty in a modern society. It just struck me as bizarre. I don't know why, but I just thought it was absolutely barbaric. But I didn't have to worry very much about it. In law school we learned that the Supreme Court in *Furman v. Georgia* [1972] declared the death penalty unconstitutional. Our professor had said that most countries had done away with the death penalty and this was just sort of the logical thing for the United States to do and it was very unlikely that it would come back and we probably would not deal with it. Boy, was he wrong.

Q: Soon after you got out of law school the *Gregg* [*Gregg v. Georgia*, 1976] decision had brought it back, had it not?

Bright: That's right. I got out in 1975. I went into legal services to begin with. I was doing civil legal services at the Appalachian Research and Defense Fund in the coal fields of eastern Kentucky. Then I went to Washington and I was a public defender. I started there in 1976. I became sort of vaguely aware that the death penalty had come back but we didn't

have it in Washington. I was a public defender in what was the equivalent of the state courts in the District of Columbia. We didn't have the death penalty. Until I was asked to take a case in 1979, I really had not focused on the fact that the death penalty was back and that we had it.

Q: Did Kentucky have a death penalty statute at the time of *Furman* in 1972?

Bright: Yes.

Q: And after *Furman* did it rework its statutes so that it could pass muster?

Bright: It did at some point. Kentucky had a governor, [Edward] Ned Breathitt, who became governor in 1963 and commuted all the death sentences during his term. He got away with it; nobody paid any attention. But he was opposed to the death penalty and I believe that Governor Breathitt just here and there would commute a sentence. There weren't very many people under death sentence. And, of course, at that time there was a moratorium in the country. Nobody was being executed. I really didn't deal with it at that point in Kentucky. I don't know when Kentucky got a new death penalty statute.

Q: What was the name of the outfit that you went to work for after law school?

Bright: The Appalachian Research and Defense Fund.

Q: And that was based where?

Bright: In Prestonsburg, Kentucky.

Q: How long were you there?

Bright: I worked there in law school but then I was there 1975 to 1976. I left in 1976 to go to D.C.

Q: Do you remember a man named John [M.] Rosenberg?

Bright: Oh, sure.

Q: Who was he?

Bright: He was the director of the Appalachian Research and Defense Fund. He had been at the Department of Justice in the voting rights division when many of the battles had been fought to give voting rights to people in the South who had been denied them. He just decided that he wanted to come back to the country, away from the Department. And he came back to -- of all places -- Prestonsburg, Kentucky and took over this fledgling legal services organization and built it into a very effective voice for poor people in eastern Kentucky. It was quite an example. He stayed there for many years. Ultimately he was there for over thirty years as the director of the program.

Q: Inspirational sort of fellow?

Bright: Very inspirational. I mean, not just because of the longevity. What was impressive

about John was that he and his wife, Jean, became so much a part of the community there and he built up such an expertise in what he was doing. The program had such a hard time when it started out. It was thought to be a Communist organization with socialized lawyers and things that just seem ridiculous today but at the time were very serious in eastern Kentucky. I remember going to the Barbourville office along with some other lawyers and the Barbourville Bar Association, all twelve lawyers there in Barbourville, voting unanimously not to allow us to practice in the local court there. They had no power to do that, of course, so we went ahead and represented our clients. But it was a somewhat slap in the face to come to a place and open a law office and have the Bar Association vote twelve-to-nothing to prohibit you from practicing law there. A lot of judges and a lot of the lawyers really gave us a very, very hard time. As the years went by John overcame all that and became just part of the legal machinery there in eastern Kentucky. He did it just a world of good in all sorts of ways, in the courtroom and outside of the courtroom.

Q: Is this the area that Michael Harrington wrote about in the book that John [F.] Kennedy took up? Was it *The Other America*? Back in the early 1960s? It had to do with Appalachia.

But in any case, from there you went to the public defender's office in Washington?

Bright: Right, the public defender service.

Q: How long were you there?

Bright: I started there in 1976 and I stayed until 1979, although I took the cases I had and sort of segued over to the Law Students and Court program, which was a clinical program,

operated by five of the D.C. law schools. I stayed there until I went to Atlanta in 1982. So I was in Washington for a total of six years. While I sort of formally left the D.C. public defender in 1979, I continued to have cases and have some affiliation with that office, all the way to the end of my time in D.C.

Q: What was in Atlanta that you were going to?

Bright: I had taken death penalty cases by then and I had been asked to come down to this organization, then called the Southern Prisoners Defense Committee, which was basically falling apart. I agreed to come and that is what I did.

Q: Was that organization the precursor to the Southern Center for Human Rights?

Bright: Yes.

Q: Of which you are President, is that right?

Bright: Yes.

Q: Was it focused entirely on death penalty cases when you went there?

Bright: No.

Q: How wide a range of cases did they have?

Bright: What happened in 1976, the same year the Supreme Court upheld the death penalty, was that this group of preachers and prison activists created, much like the NAACP [National Association for the Advancement of Colored People], the NAACP Legal Defense Fund [LDF] to be its legal arm. They created this Southern Prisoners Defense Committee to do things. One was to fight the death penalty. The second was to deal with the terrible conditions and practices in Southern prisons and jails. There had just been the *Gates v. Collier* [1972] decision in Mississippi dealing with Parchman Farm, the notorious Mississippi state penitentiary. Judge [William C.] Keady had just ordered all sorts of reforms there. In fact, there was an organization called the Mississippi Prisoners Defense Committee that had brought that lawsuit. Some of the lawyers, John [C.] Brittain and David [M.] Lipman and others, had brought that lawsuit and had been successful in having a federal judge order these changes at Parchman.

The idea was that we would take this organization and expand it and make it not just a Mississippi organization but a regional organization. And we would go around to all these awful prisons and awful jails and file lawsuits to try to prevent the kinds of things that were going on in all these places -- tremendous overcrowding, lack of supervision of the prisoners, the brutality, the rapes, the murders, and all the things that were going on in these prisons that were really being run in just a barbaric fashion. So the idea was that the organization would do those two things and nothing else. It had a very clear goal, which was to deal with prisons and jails and the death penalty. That was the mission. The problem was that to do that and to have lawyers to do that requires money, which they did not have. They really struggled to try to do it.

Q: Is that when the name was changed to Southern Center for Human Rights?

Bright: No, that happened after I got there. Six years before I came, the organization had had two offices -- one in New Orleans and one in Nashville -- which really didn't make any sense given how little resources it had. It usually had one lawyer in New Orleans and one lawyer in Nashville and a secretary in each office. It really had a hard time paying the staff that it had. The decision was made by the Board to consolidate the offices and move to Atlanta. Both the lawyers quit or resigned and went on to other more stable jobs because literally it was an organization that had trouble making its payroll month-to-month. I know they could not find anybody to take the job and one of the ministers called me and said, "Will you please come down and take over this organization because otherwise it is just going to collapse?" I mean, it was just basically bankrupt. Although it didn't declare bankruptcy, its debt way exceeded its assets.

I came down and took a look at it and, sure enough, it was in pretty bad shape. It had a lot of cases and the cases were in some disarray and the lawyers were gone. I went back and convinced one of my friends in Washington that it really was something we ought to do. I had taken these three death penalty cases and we had seen how bad the lawyering was in these cases in Georgia and were just horrified. It seemed like this was an opportunity to go down there and set up a beachhead and try to do something about it. So we agreed to do it and I went down in September of 1982. It was not until three years after that that I prevailed upon the Board to change the name because I thought the name of the organization was somewhat off-putting. I suggested that we change the name to Southern Center for Human Rights, and we did.

Q: By that time how many of you were in the office?

Bright: The office, when I first started, was three lawyers and a secretary. Bob [E.] Morin, my friend in Washington who had been at the clinic with me, came down. And then Christine [A.] Freeman, who had worked for the Appalachian Research and Defense Fund in Kentucky, came down from the Columbia office. So there were the three of us and a secretary. That was the Atlanta office that started out in September 1982.

Q: But this organization, under whatever name, had been focused on prison conditions --

Bright: Right.

Q: -- as well as well as death penalty work. By the mid-1980s, was that still the case?

Bright: The organization always was much more focused on the death penalty than the prison work. There was just so much death penalty work and the death penalty work was emergency work. At that time and when I first came, judges or governors would sign, in Florida particularly, warrants or set execution dates on people that did not have lawyers. We would drop everything, get the record, race through it, prepare papers, go to courts, sometimes be turned down in trying to get a stay, go to another court. Sometimes we would physically go to three or four or five courts in succession, which might mean going to Jacksonville and trying to get a get a stay, then going to Tallahassee to the State Supreme Court, coming back to Jacksonville to the Federal District Court, then going to Atlanta to the United States Court of Appeals. The urgency of the death penalty cases seemed to always take priority over the prison and jail cases that we filed. The dynamics of the cases were exactly the opposite. In the death cases we were always trying to slow the cases down

enough that we could get on top of them and get our witnesses together and have our hearings. In the prison cases we were always trying to do something to fix a problem in the jail. The prison commissioners in the states that we were suing were always trying to slow the cases down and were always trying to avoid relief. The nature of the business was such that the death penalty cases were always the emergencies and the prison cases were always cases that could be put on the back burner.

Q: When you were scrambling around like that in these death penalty cases, who was paying for it?

Bright: We were trying desperately to raise money from foundations, primarily. Some people, but not very many. We got some attorney's fees. One of the things that the prison work did for us is that if we did win a prisoner case, particularly back at that time before Congress changed the law, we could get attorney's fees for that at market rates. One of the first law suits that we brought after we went to Atlanta was against all the prisons in South Carolina for a whole host of constitutional violations. Ultimately in 1985 we worked out a comprehensive consent decree and we got about $250,000 in attorney's fees, which for us was just a huge amount of money. That would happen from time to time and that was a way of supporting the overall work of the program. Of course, to get that money you had to be doing some of those cases and we weren't doing a whole lot. Basically the way it broke down when we first started is that Bob and I were doing all the death penalty cases and Christine was doing some prison cases but also doing some death penalty cases. Most of the work was death penalty work.

Q: Would you say that, in any respect, your feelings about the death penalty by the mid-

1980s had changed, had strengthened, had weakened? By the mid-1980s were you as committed an opponent of the death penalty as you ever had been or are today?

Bright: My original opposition to the death penalty was just a gut moral feeling that *surely* there was a more humane or decent or whatever way to deal with people than killing them. When I started looking at the actual cases, I must say, I was so shocked. The first case we got was the Donnie [W.] Thomas case and when I saw the record in the case it was just unbelievable to me. I was in the clinic then and I said to one of my colleagues, I said, "Gus, the students in the clinic try shop-lifting cases better than this capital case was tried." And when we got the William [A.] Brooks' case out of Columbus, I could identify the race of all the jurors just by reading the cold transcript. It was just a typed transcript of the judge and the prosecutor questioning the jurors. This was in a community that was about 30 percent African American but yet there were only eight African Americans in the jury pool of one hundred and sixty. But I could tell by the way they treated those eight people which ones were the blacks because they would lead them into answering the questions in a way that got them excluded from the jury. He was tried by an all-white jury. It was really shocking.

Q: You're reading the *voir dire*?

Bright: Yes, I'm reading the *voir dire*, the questioning and the selection of the jury. It was just dramatically different when certain jurors would come up. It was an incredibly high-profile case. They got a huge amount of publicity. It should have had a change of venue. When most of the jurors would come up and they would say they had read or heard something about the case, the judge would kind of cut them off before they could say very much about what they read or heard and would just simply give them a very conclusory

question about, "Despite that, don't you think you could be fair and impartial?" And they would say yes and they'd go on. But every now and then a juror would come up and say they had heard something about the case and they would get them to elaborate, and then they would lead them into saying that because they had heard that they probably couldn't be fair and they would probably consider that in their verdict. All these other jurors had been treated one way and suddenly these people are led into saying, "Well, I don't know. I didn't read that much and I'm not sure I remember very much about it." They would then be led into saying that they couldn't be fair.

Q: And these were the black jurors?

Bright: Those were the black jurors. I had made a guess that they were black. When we went back and looked through the voter rolls and determine what the race of the people, I got every single one of them right.

Q: What you were saying is that what had been a moral basis for your feeling was further strengthened by the reality of what the actual cases showed?

Bright: Absolutely. It was just outrageous, the lack of fairness. The poor quality of counsel was just striking. It was just unbelievable how bad the lawyers were and race discrimination was right there at the surface. There was nothing subtle about it. And this was in case after case.

Q: Was this only post-conviction work that you were doing?

Bright: At that time it was. Once we would get a case reversed we would stay with it and we would do the retrial. We stayed with William Brooks for fifteen years. We got his case reversed. We went back and we tried his case to a jury. We got a life sentence from the jury.

Q: Is it fair to say that the work of the Southern Center for Human Rights in the death penalty area has been largely on post-conviction?

Bright: Appeals and post-conviction. We have taken a lot of cases on direct appeal, right after trials. We've done some trials right from the start. People have been arrested and we have represented them at trial. But most of the cases that we have taken have been after people have been convicted. We have either done their direct appeal to the state supreme court and their post-conviction after that, or we have done the work throughout the post-conviction process.

Q: What existed before the Southern Prisoners Defense Committee, in terms of defense in the death penalty area in the South?

Bright: Well, that's what was so striking to me. When Patsy Morris, who was this volunteer at the ACLU [American Civil Liberties Union] in Georgia called me, she asked me if I would take Donnie Thomas' case and file for certiorari with the U.S. Supreme Court. He had been convicted at trial and upheld on appeal. I was like, "Well, why are calling me? I mean, I'm in Washington, D.C., I'm a trial lawyer. We don't have the death penalty. I don't know anything about it. I don't do post-conviction work and I don't have a Supreme Court practice."

Q: Maybe she had the wrong number.

Bright: No, she said, "We'll take anybody we can get," which was quite candid and less than flattering. And I said, "Well, why is that?" She explained to me that people had a lawyer only for their trial and one appeal. Basically the system in Georgia at that time was that Patsy had two shoeboxes and one had 3x5 cards that had the names of all the people on death row -- all the people that had been sentenced to death -- and the other had the names of lawyers that she had heard of or thought were potential volunteers who might represent these people for free. The state didn't do a thing. If the person didn't have any lawyer, they would be happy to go ahead and execute them. She would call people like me or people at law firms and would try to get volunteers.

The one exception to that is Millard Farmer, who was a lawyer in Georgia who was in private practice and took death penalty cases. He took some to trial and he took some at appeal. But Georgia did have Millard, a very colorful character and who was and is very brilliant, although he's not doing much death work anymore. Millard is absolutely one of the most brilliant lawyers I've ever seen. I don't know what would have happened if he hadn't been there because he was doing a lion's share of the work when I came down there. I mean, way more cases than he should have been doing. And otherwise it was just, “Could the NAACP Legal Defense Fund take a case? Could some law firm?” There were some law firms like Jenner & Block and a few others that would take a case every now and then. But it wasn't really a system. She just tried to cover the cases and some of them were well done and some of them were terribly done.

Q: That's going back.

Bright: That's in the 1980s.

Q: And in the 1950s or 1930s?

Bright: Back in those days there was no post-conviction for all practical purposes. Before *Furman*, I think basically what happened is you had a trial and an appeal and you got executed. I don't think that for most people, unless the NAACP Legal Defense Fund or some lawyer did your post-conviction, you had post-conviction review back in those days. And they couldn't do but a few cases.

Q: Was the Legal Defense Fund really active before the 1950s? Were they in existence before the 1950s?

Bright: No, they did not.

Q: They didn't have a position on the death penalty until around the mid-1960s.

Bright: Right. No, back in the old days you had your trial and your appeal and you got executed. If you go back far enough, you had your trial and you got executed. There are certainly cases where people were tried and executed within hours or days of the verdict. The post-conviction review through habeas corpus really came with the modern death penalty, that is, after the 1976 cases upholding the reinstatement of the death penalty.

Q: It hardly needs saying that the death penalty has been most in use, in this country, in

the South.

Bright: Right.

Q: Take me back far. Why was this the case? Why did it remain the case? Why was the death penalty so identified with the South?

Bright: I think the reason is slavery. That has been fairly well documented by people like Stuart Banner and his history of the death penalty [*The Death Penalty: An American History*] and David [M.] Oshinsky and his book, *Worse Than Slavery*, about the history of Parchman Farm and how the criminal justice system was used after the Civil War to sort of perpetuate slavery. This more recent book by Douglas [A.] Blackmon, *Slavery By Another Name*, about convict leasing and so forth. When the reform movements were going on in the North, and Michigan and Wisconsin and some other states were doing away with the death penalty altogether and most states were at least limiting the death penalty to homicide and not many other crimes, the Southern states, which had a captive population of slaves and in some states like Mississippi the number of slaves outnumbered the number of white people, you were depending upon a reign of terror to maintain order. The death penalty for even fairly minor crimes was fairly critical in order to maintain order and after emancipation it became extremely important. There was, of course, both a lot of lynching and a lot of executions, but I think that sort of violence and terror has been very much a part of racial control in the South. That has not been the same in the North.

But take Mississippi, after the migration of people to the North. There is no state that is the majority black state, but I think both Mississippi and South Carolina were at one time.

And in many other states, Georgia and Louisiana and these other states, had such substantial black populations that it had to be clear that if you got out of line you paid with your life. And of course, the goal of that was not so much to punish the person that did some offense but to scare the rest of the population into not doing anything.

Q: After 1976, Hugo [A.] Bedeau, the academic godfather of this abolitionist movement to end the death penalty, has written that the death penalty in the South "is as firmly entrenched as grits for breakfast."

Bright: Yes.

Q: And if one looks at the figures, let's say from 1976 to 2002, nineteen states carried out executions between 1976 and 2002. 86 percent were in the South. As you pointed out, at one point, five states -- Texas, Virginia, Oklahoma, Missouri, and Florida -- accounted for 65 percent of the executions.

Bright: Right.

Q: What about the vaunted New South? I'm not talking about 1930s, 1940s, I'm talking about the New South. These figures relate to 1976 to 2002. This is very recent. Why didn't things change with the New South?

Bright: The answer to that is that throughout the country, the criminal justice system is the part of society that has been least affected by the civil rights movement. I think that is particularly true in the South. If you go around the South and you go to the courtrooms --

Bright: -- they don't look any different today in most places. There are some exceptions, like Atlanta, but for the most part they do not look any different today than they looked in the 1950s and the 1960s. There is very little diversity on the bench, there's no diversity to speak of with the prosecutors, there are still all-white juries in communities that may be 25 or 30 percent African American, and so what is happening in many of these courtrooms is no different than what it was before.

You take any state and around the major metropolitan areas, there are the white-flight suburban communities -- Jefferson Parish, Louisiana; Douglas County, Georgia -- you can just go around the South and find them. Those are the places that are sending people to death row. They are all white juries. It's not discrimination in picking the juries. There are no black people there to *be* on the juries. These are communities where people have moved out to these wealthy enclaves. You've got to have several acres of land for your house. In Douglas County, for example, the prosecutor in his sixteen attempts to get the death penalty has only failed one time. He got fifteen out of sixteen times. And the values there, I would say, are not much different than they have always been. Houston is a very interesting place because Houston does have quite a bit of diversity, but there have been more executions carried out of Harris County, Texas, than any state in the Union, except Texas itself. Of course, Texas has carried out around 450 executions, whereas only one other state, Virginia, has carried out over 100 executions. That concentration is still there in the South and I think it's probably always going to be. You see that in the rest of the country, I mean the Northeast basically, there has only been one execution since 1976. The death penalty isn't really a factor at all.

Q: Is it possible for you to illustrate in today's world in the South, a hypothetical case from arrest to post conviction that demonstrates the problems in the administration of the death penalty or in the workings of the death penalty from beginning to end, starting with the arrest? Can we do that?

Bright: Sure. But I want to say one other thing about the New South, which is I think the New South is limited to certain places. If you go to metropolitan Atlanta, you've got some New South, you've got the Centers for Disease Control, and you've got the universities that are there. If you get outside of metropolitan Atlanta, if you get out to rural Georgia where they raise peanuts and cotton, things are not very much different. There is no New South out there.

Q: Well, you've got Jimmy [E.] Carter there, right?

Bright: Right. But there's not much. You go down around Vidalia, where the famous Vidalia onions come from, and the number of Confederate flags that you'll see flying is just staggering. When a governor gets beat when he runs for re-election because he changed the state flag from the Confederate flag to a flag that did not include the Confederate battle flag, it tells you that there may be some New South but there is also an awful lot of Old South.

But in terms of taking a hypothetical case, you could take a case in Harris County, Texas.

Q: There is an aggravated murder case. Is it fair to say, Steve, that the only capital crime today is aggravated murder on a state level, not federal?

Bright: Yes, I think that is true. At least that is true as far as we know so far. There are some other capital cases on the books but they have never been upheld or tested in the courts and so as experience and practicality teaches us so far. But when you say aggravated murder, for all practical purposes, any murder case is a capital case because almost all states say that any felony murder is a death penalty case. That's almost all murders because murders occur in the commission of a robbery, a burglary, some other crime. Somebody usually just doesn't go out and commit murder for no reason. And then almost all the death penalty statutes have some catch-all aggravating circumstance that the murder was heinous, atrocious, and cruel, for example, which gives prosecutors carte blanch because all murders are heinous, atrocious, and cruel. So for all practical purposes, any murder is capital. Now, that is a big difference from back in the pre-*Furman* days when robberies, kidnappings, rapes, those crimes were capital without any death involved. So it has been narrowed to at least murder cases.

Q: But as a corollary to what you just now said, that that was true basically in the South.

Bright: Yes.

Q: Not elsewhere in the country.

Bright: It could be elsewhere, but the South was the only place that was really imposing the death penalty. Even in the pre-Civil War era you had states in the North which were limiting the death penalty to murder cases and not imposing it for these other crimes, whereas the South was still giving death, particularly for the crime of rape. Interracial rape

was a classic death penalty offense in the South. A black man who had sexual relationships with, or even attempted sexual relations, with a white woman was going to be either lynched or given the death penalty.

Q: Right. I'm not sure whether this figures comes from Stuart Banner or not, but of the 771 persons known to have been executed in the South between 1870 and 1950, 701 were black.

Bright: Yes.

Q: Is that plausible?

Bright: Yes, I think that's plausible. Is that for rape?

Q: That's my question. I don't know whether he was referring just to rape there or not. I think he perhaps could have been. Because surely there were more than 770 people altogether who were killed.

Bright: Yes. The Department of Justice started keeping statistics in 1930. From 1930 until *Furman*, there were 455 people executed for rape. Of those, 405 were black.

Q: Another striking thing, the Death Penalty Information Center put out in the early 1990s a document called *A Texas-Size Crisis*, with regard to the death penalty in Texas. They referred to, of the 18,000 executions in U.S. history by that time, only 31 involved a white person being punished for killing a black person. Only 31 in 18,000. These are really striking figures.

Bright: Yes, they are very striking.

Q: One other figure here that caught my eye. Since 1976, since the *Gregg* decision, where there is a white defendant and a black victim, 15 of the white defendants were executed, whereas if there was a black defendant and a white victim, 235 have been executed.

Bright: Right.

Q: Now, I would like to see if we can't do this hypothetical from arrest onward. There is a murder in the South. An arrest is made. What then are the elements that are important in determining where this case is going? What is the first element?

Bright: I would say the very first element is going to be geography, where it is. Just parenthetically, the two most important decisions in any death penalty case are the two made by the prosecutor. First of all, is the prosecutor even going to seek the death penalty? Most of the time he's not. But some prosecutors are. If you are in Houston, it's probably going to be a death penalty case. If it's in Dallas, it almost certainly is not going to be a death penalty case. If it's in Philadelphia, it's going to be a death penalty case. If it's in Pittsburgh, it almost certainly is not going to be a death penalty case. By the same token, if it's in Douglas County, Georgia, it is going to be a death penalty case. If it's in Atlanta, it's not going to be a death penalty case. So the very first, most critical factor is going to be which side of the county line.

There was a case in South Carolina where a murder took place in a parking lot and it

wasn't clear whether it was in Columbia County, the state capital, or whether it was in Lexington County, the most Republican county in America. They actually had to get a surveyor out to survey to see which side of the county line the murder took place on, where the body was. Turned out it was on the Lexington side. Death penalty. If it had been on the Columbia side, it would not have been a death penalty case. Lexington prosecutors send more people to death row than any other county. As I said, there are these white-flight suburban communities all over the country that send a grossly disproportionate number of people to death row. Columbia County sends almost nobody to death row. In Lexington County, if it's a death eligible case, you are going to get the death penalty. You are going to be tried by an all-white jury, you're going to be very aggressively prosecuted, there's not going to be a plea offer and you're going to go to death row. So, the most critical factor is where did this take place, which side of the county line did this hypothetical crime take place on.

The second most critical factor is race of the victim. If the victim is a white person, and particularly if it is a person of status, then it ratchets it way up in terms of being a death penalty case. My William Brooks' case [*Brooks v. Kemp*, 1985], the victim was the organist at the Methodist church, young woman about twenty years old, absolutely gorgeous, beautiful, widely reported that she was a virgin. Her picture was in the papers over and over again, on the very front page. Her parents were prominent in the community. There was a week-long search for her body after she disappeared. That is going to be a death penalty case.

Q: Where was that?

Bright: Columbus, Georgia. You know, it really doesn't matter in that case whether the person who committed it is white or black. That's going to be a death penalty case. Now, when it turns out that the person arrested is black -- that makes it more certain that it's going to be a death penalty case. But that's going to be a death penalty case no matter what. On the other hand, if the victim in the case is an African American, and particularly a poor African American from a family that doesn't have any status in the community, some people on welfare or do menial work, or a kid of a single mother who has got two or three other children and she's not visible in the community, probably the prosecutors won't even talk to the family about the case. They probably won't get their input about what to do with it and probably will plea bargain the case out, without the family even knowing about it. That happens all the time. In Columbus, we did a study when we had William's case back on retrial. We found that in the cases where the victims were white, the prosecutor always talked to the victims' family and asked them what they wanted. If they wanted the death penalty, they got the death penalty or at least the prosecutor went for the death penalty and did get it most of the time. The black families were never contacted and the cases were pled out without their input at all.

So right there, those are the big decisions. Then of course, whether to plead the case. Most criminal cases, 95 percent of all criminal cases, plead out and most death penalty cases plead out or are resolved with a guilty plea. Particularly now, you've got life imprisonment without any possibility of parole. The prosecutor can save a huge amount of time, money, headaches, and the risk of losing, because the jury may go for life without parole. It's much harder to get the death penalty these days because the jury has that choice between life without parole and the death penalty. A lot of prosecutors are willing to offer life without parole and if the defense lawyer is a capable lawyer they talk the client into taking it

because that is the best they're going to do at trial. But if you are in Houston, you're not going to get a chance to plead to life without parole; you're going to go to trial and the prosecutor is going to try his best to convict you.

The other factor is, of course, the lawyer who is appointed to defend the accused. If you are in Houston you are going to get a really bad lawyer, almost without question. That's why they have so many people on death row there. They don't make plea offers.

Q: You're not talking about somebody who can hire his own lawyer?

Bright: No. Somebody can hire their own lawyer. If you're some wealthy guy who shot your wife or something like that, you don't have to worry about that. You'll hire [Richard] Racehorse Haynes or some really outstanding lawyer and you won't have to worry about the death penalty.

But all the people sentenced to death are poor. I don't think there's anybody on death row who did not have a court-appointed lawyer. There may be a few. There is occasionally the case, which is really sad, of these families who know how bad the court-appointed lawyers are and they mortgage the house or they sell the car, they do whatever. They scrape up $5,000 and they go hire a lawyer. Of course, for $5,000 you are going to get the absolute dregs of the profession and they end up hiring the same sort of lawyer they would get as a court-appointed lawyer. They get the same shabby quality of representation. It's really sad because they lose their money and they still get terrible representation.

But in Houston, if you get a court-appointed lawyer, you are probably going to get a very

bad lawyer. You're going to get a very quick trial, which is one reason why the prosecutors have no incentive to plead the case. If you're in Connecticut or Colorado, for example, where there are outstanding capital defender offices, if you're the prosecutor you are going to have to work. You are in for the nuclear war of litigation and you are going to be trying this case over a three-year period with months of jury selection. Everything about that client is going to be presented at the penalty phase and you are probably not going to be able to get the death penalty. You are probably going to plead that case. If you are going to try the case in Houston where the trial may last two or three days and the lawyer is going to be a pushover, what's the incentive to plead? So you try the case and you get the death penalty because the lawyer is just sort of a spectator in the case. And then, in Texas, you get an equally bad lawyer appointed to represent you on post-conviction. Texas does appoint lawyers on post-conviction.

Q: Let's stay with the trial for a second. You, as much as anybody in this country, have written and spoken about the poor quality of defense lawyers for those accused of capital crimes. Poor people, basically. I think someone, perhaps yourself, once said that if a mirror was held up to the lawyer -- what was the expression?

Bright: Yes, it's the mirror test. You put a mirror under the lawyer's nose and if it clouds up, that's effective assistance of counsel.

Q: Try and step back for me a moment and tell me how bad that was and whether that has improved. And I'm not talking about the Connecticut and Colorado situations that you just mentioned. I'm talking about in the South over the years. Has that not improved there? Aren't there different systems that the states have or the jurisdictions have in finding those

lawyers and appointing them?

Bright: It is improved in some places. They're willing to spend so little money. I mean, it's all about money. If you are paying lawyers way below market rates, you are not going to get the best lawyers to handle these cases. If you are handling a high volume of cases, like in Houston, there may be a few capable lawyers who will take a case every now and then but they're not going to take the forty or fifty cases that you're running through your system. And there are not that many good lawyers. There are just not that many death-qualified lawyers.

But if you are going to have a good system, the most cost-efficient way to do it is to have a capital defender office of lawyers who are dedicated to it, trained to do it, that's all they do, so that at least they bring that dedication, skill, and knowledge to it. Now, unfortunately, you can still ruin that by giving them too many cases, by hiring lawyers that aren't up to the job, even in those offices. That is what's happening in places like Georgia. But that's still an improvement. Georgia has done that and I would say it's been an improvement. But I would say in Alabama it is no better today than it was when I wrote my article in the *Yale Law Journal* in 1994 that said that you get the death penalty not for the worst crime but for being assigned the worst lawyer. I would say in Texas it's no better today, particularly in Houston. It's still a system in both Alabama and Texas, which are big death penalty states. These are states that while the overall numbers of death penalties being imposed every year has dropped significantly from around 300 a year to around 125 a year, these are the states that are still sending people to death row. And they are states that appoint a lawyer individually. You, Joe Schmoe, are assigned to represent the defendant.

Q: And you have to?

Bright: They want to because these are usually lawyers that need the business. In Texas, they maintain a list of lawyers to do post-convictions who are paid $25,000 a case. Flat rate, no matter how good, no matter how bad, you're paid $25,000 to do the post-conviction.

Now, if you're really unlucky, you may get a lawyer who doesn't even file the post-conviction within the statute of limitations, which means you get no post-conviction review at all in either the state or the federal courts. There have been six people executed in Texas who had no post-conviction review at all because their lawyers missed the deadline. There are three more waiting to be executed. Of the six that have been executed, three of them were represented by the same lawyer. The last time that one of his clients was executed, he gave us his reason that he tried to file the petition within the time but that the file stamp machine was broken at the courthouse. The judge, in rejecting that, wrote in an order, "Not only was the file stamp machine not broken, but you gave the same excuse last time you missed the statute of limitations and the file stamp machine wasn't broken then."

Now, my question is, how can any court continue to appoint this lawyer? This is as basic as it gets; this is disbarment, in my opinion. You miss the statute of limitations even one time in a death penalty case which somebody's life is at stake --

This lawyer is handling 400 felony cases, in addition to 8 death penalty cases. No wonder he missed the statute of limitations. And yet the judges in Houston are assigning him cases. This lawyer should not have a bar license. It's indifference on the part of the judges and the bar to allow something like this to go on. It's just disgraceful.

Q: Have some of these lawyers over the years been appointed under some kind of bidding system in places?

Bright: Yes. There have been low-bid systems. Generally, the low-bid systems have been to get the indigent-defense business in a place as opposed to take a capital case. In Georgia now, where the indigent defense system is literally, is run by a mule trader.

Q: A what?

Bright: A mule trader. He will negotiate deals with lawyers based on how little they'll charge to take cases. So it's not a formal bidding system but it is the equivalent to it. There is no concern at all. This guy wouldn't know the difference between a good lawyer and a bad lawyer because he doesn't know anything about the law.

Q: But if you looked at the situation in 1960 and the situation today and the question was, do poor people in capital cases in the South get better representation at trial today than in 1960, what would the answer be?

Bright: Well, the answer would be better than 1960. I mean, that was before *Gideon* [*Gideon v. Wainwright*, 1963]. That was when the only law was *Powell v. Alabama* [1932], which said the only cases you had to appoint lawyers in were capital cases. I would hope that the lawyers are marginally better than the pre-*Gideon* era but the lawyers that are being appointed to many people in capital cases -- it's almost pointless to have them, they are so bad.

Q: Even now?

Bright: Even now. There are people that are being appointed to capital cases that should not have bar cards. There is no question. They would be like this lawyer I just described. This lawyer should not be practicing law. If you can't meet the statute of limitations, if you can't file within the deadline, that's as basic as it gets. If you can't do that then, no telling what you're not doing at trial. You're not making the right objections, you're not asking for the right jury instructions, you're not objecting to the other side's jury instructions. You might as well have the janitor sitting at the counsel table.

Q: But the kinds of things that you have cited and others have cited over the years in your writings and speeches, about lawyers who were asleep during the trial or who never tried a capital case. In truth or is that exaggerated?

Bright: No. I mean, in Houston there have been three cases where the lawyer slept during the trial. Now, is this typical? Of course not, but it has happened. This is not the typical case but the Fifth Circuit had to go *en banc* and have the full fourteen-member court consider whether or not Calvin [J.] Burdine was denied a fair trial when his lawyer slept through the sixteen hour trial. He only had one lawyer, Joe Frank Cannon, who put ten of his clients on death row. That's the size of death row of the State of Connecticut. They had to go *en banc* to decide whether or not Cannon sleeping through much of that trial denied him his right to counsel. If we are at that level where five of the judges on the Court would uphold that -- what if a boy scout or a class of students had come in and listened to the Court?

Q: What year was that?

Bright: It was five or six years ago.

Q: And what did the *en banc* rule?

Bright: They ruled 9 - 5 that he was entitled to a new trial.

Q: What did the minority of five say? How could they excuse that?

Bright: It was hilarious during the oral argument. Judge [Rhesa H.] Barksdale wrote the panel opinion, 2 -1, upholding the conviction and sentence that would have allowed him to be executed. His argument was, "How do we know he was sleeping during any *important* part of the trial?" Of course, that's sort of a catch-22 because he would have to make the record of when he sleeping. He said, "We have upheld death penalty cases where lawyers have been under the influence of alcohol and drugs, and even a case where the lawyer had Alzheimer's. So you can't prove that Burdine was in any way prejudiced by this, so therefore, we can uphold his conviction."

Q: Who said that?

Bright: Judge Barksdale. He wrote the panel opinion upholding. When it went *en banc*, when the whole court took it, he then wrote that in his dissenting opinion.

Q: Upholding the conviction?

Bright: Right.

Q: And then that was reversed?

Bright: Then that was reversed. And then he wrote a dissenting opinion. Just bitter. I tell students, "Read the dissenting opinion." It's just unbelievable, this opinion that he wrote.

Q: Was the lawyer really sleeping?

Bright: Yes. You had the clerk of the court, you had jurors all testifying. This was an elderly lawyer who, by all accounts, had a tendency to fall asleep after lunch. He died not long after this.

Q: Some of the jurors knew he was sleeping?

Bright: Yes.

Q: And they still convicted the defendant?

Bright: Yes, sentenced him to death. This was a case in which the prosecutor argued that they ought to give Burdine the death penalty because he was gay and to give a gay man a life sentence would be like giving him a reward. He would be happy as he could be if he was in a prison with a bunch of men. And Cannon didn't object.

Q: And you say he has represented a number of capital defendants?

Bright: He represented a number of people that got sentenced to death. Ron Mock represented fourteen people who were sentenced to death. Ron Mock was a guy who operated out of a bar across the street from the courthouse and was another infamously incompetent lawyer who just got appointed to case after case after case by the judges in Houston.

It really is just remarkable. One of Cannon's clients, where he slept during the trial, has been executed. Carl Johnson. There's another case of a guy named George McFarland, where a *Houston Chronicle* reporter [John R. Makeig] wrote a story. He said he went into the courtroom, he says, "During much of yesterday's trial, lead counsel John [E.] Benn spent much of yesterday's trial in deep sleep." He described the lawyer being asleep and waking up. Over and over he asked the lawyer, during a break, “How could you be sleeping in a capital trial?” And the lawyer said, "It's boring.” He asked the presiding judge, Doug Shaver, "How can you be presiding over a death penalty case when the lawyer is sleeping?"

Q: Who asked the judge?

Bright: The reporter for the *Houston Chronicle*. And the judge says that the Constitution guarantees you a right to counsel but it doesn't guarantee you that the lawyer has to be awake.

Q: Come on, come on.

Bright: It's in the *Houston Chronicle*!

Q: He said that? The judge?

Bright: It's what he's quoted in the paper as saying.

Q: Have there been cases of defendants where the lawyer hasn't met the defendant until the trial?

Bright: There have been cases where the lawyer's meetings with the defendant have been totally superficial, like at the courthouse. They met him when they first were appointed, they met him when they came for arraignment, they met him where there have been no in-depth interviews and so forth.

Q: So, now we are at the trial. Would you say that in capital cases most defendants are really guilty?

Bright: If you say most and you mean 50 percent or more, then yes, the answer to that question is yes. But the issue in many cases is guilty of what, because some people are guilty of a lesser crime, some people are not guilty, some people are parties to a crime where their degree of culpability is an issue. Say that there are three people involved in an armed robbery or something like that. There are issues of culpability at the guilt phase in capital trials. But there are certainly issues of guilt or innocence in capital trials.

Q: What you were saying about the quality of lawyer, does that also pertain to the quality of the investigation done by lawyers?

Bright: Sure, and whether there is one done at all. You would be amazed at how many cases whether there is one done at all. You would be amazed how many cases there is no investigation of anything.

Q: Of the defendant's involvement in the crime?

Bright: Of anything. Including the defendant's involvement in the crime.

Q: Has that improved at all? Do you know? This relates, of course, to the quality of the lawyer.

The case goes to trial.

Bright: Right.

Q: By the way, generally speaking, in the South today are these still elected judges?

Bright: Yes, all.

Q: All?

Bright: All.

Q: And elected prosecutors?

Bright: All.

Q: Is that important?

Bright: It's extremely important.

Q: In terms of what you were saying about whether they will take a plea or whether they will go for the death penalty in the first place, the fact that they are elected, does it really still matter?

Bright: It matters if they are going to be challenged. If you are a new prosecutor and you think you may be challenged in the next election, you're going to take the case to trial if you think you can win. If you think you may take the case to trial and lose, you may want to plead because you not want to be embarrassed. But when there is no question, death penalty cases are tried by prosecutors. Cameras in the court, which we have very liberally now, are a prosecutor's dreams come true. To try a death penalty case and have it on TV is the best publicity you can possibly get. The same thing for judges. Judges like to try death penalty cases on television or have it on TV.

Q: Because?

Bright: It's free publicity for them. And in Alabama, where the judges can override, the

judges always override life to death; they never override death to life. That's all political. Particularly if they're coming up for re-election, it doesn't matter what the jury says. If at the guilt phase you are found guilty of capital murder, if you can't try it down to a lesser crime, simple murder or something else, if you go to the penalty phase, I don't care what that jury comes back with. With certain judges, you know. If you're before Ferrill [D.] McRae in Mobile, Alabama, you are going to be sentenced to death. No matter a unanimous life from the jury, it doesn't make any difference. Judge McRae is going to give the death penalty. He always does.

Q: Wait a minute. Isn't it the jury that decides life or death?

Bright: In Alabama the judge can override.

Q: That's rare.

Bright: Alabama, Florida, and Delaware are the only states now that have override.

Q: How about the racial make-up of the prosecutors and the judges? Does that make a difference, too?

Bright: I think it does. There are almost no African American prosecutors. Atlanta has an African American prosecutor. DeKalb County, which is part of metropolitan Atlanta, a majority black county, has an African American prosecutor that just got elected. There are very, very few black prosecutors, except in metropolitan areas that are overwhelmingly black.

Q: Right. So the trial takes place. I'm talking about defendants who are poor, generally speaking, and that's who you've got on death row and that is who has been sentenced to death. He has charged with this crime, he's got a court-appointed lawyer who hopefully is awake and not bored, and he's convicted.

Bright: Right.

Q: You then have --

Q: -- since *Gregg*, a second mini trial, a penalty phase?

Bright: Right.

Q: And is it fair to say that, across the board, the penalty phase is probably more important than the trial for guilt or innocence in the first place?

Bright: Much more. Much more important.

Q: Okay. The defendant has been convicted.

Bright: Right.

Q: Steve, what is supposed to happen in that penalty phase? Has it been happening?

Bright: In that I should say that there are still lawyers who have not learned that lesson, who put all their eggs in the guilt basket and spend their time cross-examining and carrying on and giving closing argument and all that as if they can win the guilt phase, of which they have zero chance. Then they have nothing to do with the penalty phase. A competent capital lawyer knows that you have got to do an exhaustive investigation of the history of the client. You have got to go back a generation or two because if this client is mentally retarded or has a mental illness or alcoholism, you are probably going to find that back a couple of generations, which is going to help when the state's person comes in and says it's malingering. You have got to find out what kind of life that person lived, whether they were neglected, abused, all their mental health records. Everything that happened to them because they didn't just get to this place in life accidentally, there were a lot of forces that acted upon them in getting there. The fact of the matter is that for twelve people to sit down around a table and make a premeditated decision to decide that another human being is going to be strapped down and put to death is fairly hard to do if you know that person and if you have some sense of the humanity of that person.

Q: You mean, if you have come to know that person.

Bright: Yes, that's right. If you have come to know.

Q: Not if you know them.

Bright: Right. If you have come to know them. If you know all the hills and valleys of their life and if you know how they got there, no matter how terrible whatever it was that they did. The alternative, after all, is life imprisonment without any possibility of parole.

Q: That wasn't always the case.

Bright: No. That's right. In fact, when I first came down to Georgia, the alternative was life or death. Everybody in Georgia thought -- although it wasn't true -- that if you got a life sentence you were paroled in seven years. The jury was sent out, they would be out for a while, the first note would come back and say, "When will he get out if he gets life?" The judge would send back or would tell them, "I can't answer that question." Within half an hour the jury would give the death penalty. Now the jury is instructed, "You've got three choices -- you can give the death penalty; you can give life imprisonment without any possibility of parole, which means what it says; or you can give life with the possibility of parole." That's a pretty good alternative to the death penalty.

Q: Well, I want to talk about that, but later. I want to stick right now for the point is that here is this new construct, new since the mid-1970s, of this penalty phase.

Bright: Right.

Q: And the question is, what should the jury give? Death or some sort of life? The point you were making is that a lot of incompetent or relatively incompetent lawyers spend too much time on the guilt phase, they're going to lose it anyway and don't do a damn thing for the penalty phase, which is the more important thing.

Bright: Right.

Q: And that if the juror comes to know the person and the often horrific background of that person, that he's liable to be more sympathetic.

Bright: There is always a story. There's always a story. It depends on who the person is. The person may be very mentally ill and you've got to show what the mental illness is. You have got to show it in great depth because they will always say that the person is malingering. I mean, there's a guy in Texas who read in the Bible that if your right eye offends you, you're to cast it out. Well, he gorged out his right eye and threw it away and then he read that verse again and he gorged out his left eye and ate it. That to me is pretty convincing evidence the guy is probably not thinking very well. But the state could still find a psychologist who said he was malingering. So there is always going to be that. But you want to go back and find all the people in school and family and hopefully as many objective people as you can who can talk about this person's behavior long before he ever got in trouble to show the jury that this is not just somebody who's gouging out their eyes to try to get some sympathy, this is somebody who really is profoundly mentally ill and that might be a reason not to give them the death penalty. Or the person who's had the horrific upbringing. There's always a compelling story. It's just a matter of the depth of the investigation, in terms of the lawyer's ability to put it on in a convincing way and tell the story to the jury.

Q: From your knowledge and in your experience, how often is that carried out by the lawyer for indigent defendants?

Bright: Very seldom. They just don't know what to do. First of all, they don't have mitigation specialists.

Q: Mitigation. For history, this could be read seventy-five years from now.

Bright: Right.

Q: In these penalty phases, the prosecution puts on aggravating circumstances to convince the jury, "Death." And there are a variety of aggravating circumstances.

Bright: Right. Some set out by statute and then other things that just make it worse. That just make it more reasons to give the death penalty.

Q: And just typically, aggravating circumstances could include -- give just a few examples.

Bright: It could include other crimes that were committed, it could include the prior record of the defendant, prior misbehavior by the defendant if he or she has a long record of endangering a great many people.

Q: In other words, this guy is a real bastard.

Bright: Right. And the crime was particularly heinous.

Q: Mitigating circumstances would be the kinds of things you were talking about before.

Bright: Right. The Supreme Court, in a case called *Lockett v. Ohio* [1978], said that mitigating circumstances was anything that the defense proffered as a basis for a sentence

less than death. So it is as broad as it can be. Anything that the defense proffers as a basis for a sentence less than death. In other words, the state can't restrict it.

If the defense wants to put on Grandmother to say, "I love my grandson," Grandmother goes on to say that. If you want to say the defendant is a drug addict, some people might say, "Well that doesn't sound mitigating to me," but if you want to put it on, you put it on. It's basically totally up to the defendant's lawyer to decide what to put on. It's got to be presented in a persuasive way, and explained in a persuasive way if it's going to really have the mitigating impact that you hope that it will have. But basically, it means it puts a huge burden on the lawyer to find out what is available and then craft it and present it in a way that is truly mitigating, that really results in the jury seeing it as factors that, in fairness and mercy, really mitigate for a life sentence.

Q: Have you any knowledge of how often that works?

Bright: I think if it's well done it works most of the time.

Q: Really?

Bright: Yes because, again, I just think it's hard for juries. If people are humanized, it is hard for juries to impose the death penalty. And we see, in some of the worst cases, juries do not impose the death penalty where a really good job was done putting on the case in mitigation.

Q: But you're saying that that really good job is seldom done. Across the board, it's seldom

done.

Bright: Right. Unfortunately, what a lot of lawyers do is they call “Mother” and have “Mother” say, “He was a good boy, some other kids got him in trouble, I love him, we don't want him to get the death penalty,” and cry for a while. Then they put on “Sister,” and put on “Girlfriend,” often without any preparation, and they call that the mitigation case. That's just a very superficial presentation and it doesn't really begin to tell the story of the client's life. Sometimes it works.

Q: Okay, but suppose one of these indigent defenders walked in this room right now and said, "You know, Bright, you're really crazy. Where do you think I'm going to get the money to get investigators to find these people and experts to testify? Who's going to pay for this?" What is the answer to that?

Bright: Well, the Supreme Court has said that where a person is indigent they've got a right, under the due process clause, to have experts, investigators, appointed to do the work.

Q: Separate from the fee the lawyer's getting?

Bright: Exactly. If you have a capital defender office, one of the most important people on your staff will be the mitigation specialist. They're more important than the lawyers. They will be the people that the minute the office gets a case, they will start gathering the whole paper trail of the person's life and will start going out and interviewing all the people to find out what's been going on in this person's life.

Q: Do you know the name Scharlette Holdman?

Bright: Oh, sure.

Q: Who is she?

Bright: Scharlette Holdman is an anthropologist who was in Florida at the Florida Clearing House on Criminal Justice when *Gregg* came down in the 1976 cases. She was much like Patsy Morris was in Georgia; she was a person who was trying to find lawyers for people who were facing the death penalty. She had the same problem. She didn't have any money, she was just looking for volunteers. And, like Patsy, she was helping the lawyers as much as she could and I would say she probably has done more than anyone to help lawyers understand some of the causal factors that put their clients in the position that they end up in -- fetal alcohol syndrome, brain damage, the effect of being born into an environment where you must be hyper-vigilant all the time because you grow up in an environment of violence, where you don't get nutrition, where you're neglected all the time, maybe physically, sexually, psychologically abused. All of those things. I think she has shown that you can't take at face value what you learn about a client or a family. That the more you dig and the more you investigate, the more likely you are to find out that sometimes there are some factors there that are not apparent. Scharlette has had a tremendous impact on all this over the years.

Q: Is she still doing that?

Bright: Still doing it.

Q: Whereabouts?

Bright: In fact, she just was involved in a case [*US v. Steven D. Greene,* 2009] that was resolved this week with a soldier who raped a fourteen-year-old girl and killed her and her parents in Iraq. The case was tried in Paducah, Kentucky. The jury was hung so it was a life sentence. I think Scharlette was involved as a mitigating specialist in that. She's based in New Orleans now.

Q: So, you've had the penalty phase now and the defendant isn't given life, but is given death.

Bright: Right.

Q: And we then proceed to what's called post-conviction, right?

Bright: We have a motion for new trial, which may or may not be of some significance, and then the direct appeal to the state appellate court. It usually goes straight to the state supreme court and that will be, let's say, denied. Petition for certiorari in the United States Supreme Court, let's say that's denied.

Q: I'm sorry. In the direct appeal, which generally goes to the state supreme court, and let's say the appeal is denied. Is it ever granted?

Bright: Yes. That is one of the most critical stages if you have a good issue and it's been

preserved, which is often not the case. But let's say the trial judge let in some evidence that shouldn't have been allowed or, more likely, kept out some evidence that should have been allowed, then the state supreme court may reverse the case.

Q: In which case?

Bright: You get a new trial; you start over again.

Q: Now, is it not true that in that direct appeal from the conviction, the defendant is entitled to a lawyer?

Bright: Yes, absolutely. You've got a right to counsel for your direct appeal.

Q: In your experience, is that typically the same lawyer?

Bright: It totally depends on where you are. In a lot of jurisdictions, I would say most jurisdictions, it's the same lawyer that did the trial.

Q: Let's say your argument is that the lawyer was incompetent or the lawyer didn't preserve something.

Bright: In that case it would be a different lawyer. But generally, that issue is going to be raised on post-conviction, later on. But it is possible and it does happen that you have the trial and then a new lawyer takes over and a motion for trial raises ineffective assistance of counsel. That issue is litigated around motion for new trial. That issue is going to require

evidence so it's got to be first litigated at a trial court level before it can be appealed. Because you are saying the lawyer was incompetent for not calling witnesses or not doing something.

Q: I guess I'm confusing the thing because you're not suggesting, or are you, that a defendant on direct appeal who raises the issue of ineffective counsel is entitled to a trial on that before the supreme court of the state rules on the direct appeal?

Bright: No. If the trial lawyer does it, he obviously can't raise his own ineffectiveness. He's got a conflict of interest. In my view, the ideal way that it goes and generally does, at least in the states I practice in, the same lawyer who does the trial does the appeal. There is no ineffectiveness raised.

Q: So then the state supreme rules on it and --

Bright: They rule on it. That's it now, in terms of your right to counsel.

Q: If you've won, you get a new trial.

Bright: Right. You go back and you get a new trial.

Q: And that happens, you say?

Bright: Yes. You can either get a new penalty phase or a whole new trial.

Q: If you lose, it goes where?

Bright: Well, you don't have a right to a lawyer for this but you can petition the United States Supreme Court to review the case.

Q: You don't petition the circuit court?

Bright: No. At that point, the state supreme court, from there you can only petition the U.S. Supreme Court for certiorari and occasionally you'll be granted. Two years ago I argued a case that the Louisiana Supreme Court ruled on and we petitioned the U.S. Supreme Court. It granted it and heard the appeal and they ruled in our favor and reversed the Louisiana Supreme Court. That's very seldom does that happen, but it can.

Q: That was *Snyder v. Louisiana* [2008].

Bright: *Snyder v. Louisiana*, right. But ninety-nine times out a hundred that's going to be denied. Sometimes there won't even be a petition because there won't be a lawyer to file one.

Q: You're not entitled to a lawyer beyond the right to appeal, is that correct?

Bright: Right.

Q: And so, again, for non-lawyers, if you want to petition the Supreme Court for certiorari, how do you do it if you don't have a lawyer? Who's doing it?

Bright: What has happened over the years is that in most states there is some organization or some group that looks after these. In some states, like Louisiana, they have a private non-profit organization, a capital appeals project, that does the appeals and it receives some state money to handle indigent appeals. But it also, on its own, does the petitions for certiorari. That happens in a lot of states, where there is an organization that does that. In other states, like in Alabama, Bryan [A.] Stevenson's organization keeps track and files them.

Q: In other words, it's not the defendant who's writing something in handwriting on a piece of paper, "Dear Supreme Court --"

Bright: No. But the defendants, as in *A Streetcar Named Desire*, are dependent upon the kindness of strangers. Somebody's got to do it for them because they're not entitled to a lawyer to do it. I think in Alabama at times there have been people who did not have certiorari petitions filed for them because there just wasn't anybody to do it.

Q: Okay. The defendant asks the Supreme Court to take the case. Typically, on grounds of what, would you say?

Bright: It just depends on whatever the issue in the case is. That this issue is that either the state supreme court decided the issue, whatever it may be, in a way that conflicts with other courts, other state supreme courts or federal courts and the Supreme Court should resolve the conflict, or that it presents an issue of exceptional importance that the Supreme Court should decide.

Q: Typically, as in other kinds of cases, the Supreme Court doesn't grant certiorari. So the defendant is entitled to do what? Or does what?

Bright: Then they file the state post-conviction.

Q: The state post-conviction? Didn't we just say a moment ago they had gotten a state appeal? They had gotten a direct appeal to the state supreme court. Now what are you talking about?

Bright: What we've talked about before is the direct appeal. This is referred to as the collateral attack on the conviction. This is a chance for the person, for any reason that could not have been raised on the direct appeal. Here we're talking ineffective assistance of counsel because now the person may have a new lawyer who says, "That trial violated the Sixth Amendment right to counsel because the lawyer was deficient." Or there may be a claim that the prosecutor hid evidence in violation of due process. In the case of *Brady v. Maryland* [1963] there may be a case of jury misconduct. Basically that there are issues that could not have been raised at trial at direct appeal and now those issues are presented to the state court and basically the person is saying, “I am being held in violation of the law and Constitution of whatever the state it is and the United States of America and I am entitled to have my conviction and death sentence set aside.”

Q: What court is he now before?

Bright: The state trial court.

Q: Not the same court?

Bright: It depends. In some states it's the same court that the conviction was in and in some states it's the court where the prison is.

Q: Is he entitled to a lawyer there?

Bright: No right to a lawyer unless the state gives him a lawyer. No federal constitutional right to a lawyer.

Q: If he loses there?

Bright: If he loses there he can appeal again to the state supreme court. In some states, the supreme court doesn't even hear the appeal, they just deny it on the papers. Then they can again apply for certiorari again and be turned down by the U.S. Supreme Court. Then they can file a petition for a writ of habeas corpus in the federal district court as the next step.

Q: Entitled to a lawyer?

Bright: They are entitled to a lawyer there by federal statute that says the federal district court can appoint a lawyer for federal habeas proceedings.

Q: Are you familiar with something about one-year limitation?

Bright: Yes.

Q: What is it?

Bright: They have a one-year time limit to get it into federal court.

Q: From when?

Bright: From whenever either the certiorari was denied on direct appeal or if certiorari wasn't filed whenever the direct appeal became final, that is, whenever the decision was handed down or the rehearing was denied. Just to make it complicated, that time that they spent in the state post-conviction is totaled during that time. In other words, let's say I got denied certiorari on July 1. If I waited six months and then I filed my state post-conviction on January 1 and I spent two years litigating that, when those two years were up I would have six months left to file in federal court.

Q: You're entitled to this federal habeas corpus and you go before a federal judge now.

Bright: Right.

Q: Arguing what?

Bright: Before the federal judge you basically are saying, “I'm being held at the state prison in violation of the constitutional laws of the United States of America.” You can raise any issue that you've presented to the state courts and basically you're saying the state court got it wrong, that there is a federal constitutional violation and it can be any issue that has

been raised in the case. It could be a jury instruction issue, it could be a failure to allow evidence in issue, it could be ineffective assistance of counsel.

Q: Could it be things you originally raised in the United States Supreme Court?

Bright: Yes. It doesn't make any difference. You raised it to the United States Supreme Court, they didn't hear it, you can raise it now in federal habeas.

Q: You lose. What then?

Bright: You appeal it to the circuit court in whatever circuit you're in.

Q: United States Circuit Court?

Bright: United States Circuit Court of Appeals. You have to apply for a certificate of appealability. In other words, you don't just apply as a matter of right. The government can appeal as a matter of right but not the petitioner, not the death sentence person. For example, you are in Texas. You file with the federal district courts your petition for writ of habeas corpus. You might not get a hearing on it; you may just get an order back in the mail that says, “Denied.” You appeal to the Fifth Circuit for a certificate of appealability. The Fifth Circuit says, “Denied.” You don't even get an appeal. You don't get to file briefs, you don’t get an oral argument, you don't have any issues worthy of appeal. You then apply to the Supreme Court saying, “I should have gotten a certificate of appealability in the Fifth Circuit.” The Supreme Court denies that. At that point, the execution will take place.

Q: Let me ask you about a case that has been much discussed in recent years that is, I understand, right now once again before the Supreme Court, perhaps for the last time. That is the Troy [A.] Davis case. [*Supreme Court v. Troy Davis*, 2009]

Bright: Right.

Q: That's out of Georgia, is it not?

Bright: Savannah.

Q: Have you been involved at all in that case?

Bright: I've only been involved to watch what has happened.

Q: But you're familiar with it?

Bright: I'm very familiar with it, yes.

Q: Now, that case has gone through all of these steps that we're talking about, has it not?

Bright: Yes.

Q: Do you remember when the crime was committed?

Bright: Not off the top of my head.

Q: This was a case where he was convicted of shooting a police officer to death in a parking lot of a Burger King restaurant in Savannah in 1989. This is twenty years later.

Bright: Right.

Q: That twenty years, is that typical, atypical, what would you say of the length of time these appeals go on?

Bright: I would say it's a little longer than most of the appeals go on. More than a little longer; it's longer than most of the appeals go on.

Q: This case has gotten attention time and time again.

Bright: Right.

Q: In Georgia, too.

Bright: Lots of attention in Georgia, yes.

Q: Since this case will be decided before anybody gets a chance to listen to or read this record, what do you think is going to happen? He was denied in the Fifth Circuit, was he not?

Bright: It's been an interesting case because it's what so often happens. He was tried,

convicted, sentenced to death, and then the subsequent developments, basically the recantation of so many of the witnesses against him and other revelations, have made the outcome so doubtful. And yet no court has been willing to give him even a hearing. He lost by one vote in the Georgia Supreme Court, 4 - 3. He lost by one vote in the Eleventh Circuit, 2 - 1, and now he's going before the Supreme Court in his very absolute last-ditch effort. It's the situation that courts find themselves in often, where there is a very compelling case and yet procedurally they've painted themselves in a corner where they can't hear the case. This was all done by Justice [William H.] Rehnquist and by the Congress in this effort to have finality. We've got to have finality, so we're going to make it harder and harder and harder for people to get into court with their claims. What they've done is literally thrown out the innocence baby with the bath water because now you have a case where everyone is very troubled by it and yet the courts and at least some of the judges are finding their hands tied. I think there is some chance the Supreme Court will take it because of the innocence issue. If it doesn't, I don't think Mr. Davis has anywhere else to go.

This is colored a little bit by the fact that last week a man named Paul [G.] House was released from prison in Tennessee. He was convicted twenty-four years ago after he was convicted of killing this woman named Mrs. [Carolyn] Muncey. At the time of his trial there was seminal fluid on her nightgown and it was argued during the trial that it was his. After the trial, DNA evidence showed that it wasn't his, it was her husband's. The United States Court of Appeals for the Sixth Circuit divided on whether he should get a new hearing on this evidence, 8 - 7, with the eight Republican appointees voting against him and the seven Democratic appointees voting for him. But he lost and he would have been executed except that the Supreme Court granted review of the case and voted 5 - 4, in his favor. The case went back down and the federal district court heard the case, granted him a new trial, some

more DNA evidence was tested, some hair that was in Mrs. Muncey's hands, and that DNA turned out to be neither Mr. House nor Mr. [Hubert.] Muncey. It turned out the semen had been Mr. Muncey's. The prosecution basically dismissed the case against Mr. House. Came very close to executing the man. Now they say they don't have a case against him.

Q: This is not *House v. Bell* [1990] is it?

Bright: Yes. These innocence cases are very disturbing to everybody. And, of course, there are a lot of cases that don't have any DNA in them.

Q: But when the Supreme Court had Troy Davis' case before --

Bright: Didn't take it.

Q: They didn't take it. Was the fact that the basic argument that this man is innocent presented then?

Bright: Yes. The only difference now is that it's absolutely the last resort that the case is there.

Q: He's gotten support from Pope Benedict XVI [Joseph A. Ratzinger], Desmond [M.] Tutu and Jimmy Carter, and all sorts of other people, former U.S. attorneys general. Does that hold sway with the Supreme Court?

Bright: I think what is most impressive is he's gotten support from Bob [L.] Barr, who is a

very extremely conservative former U.S. attorney in Atlanta. That kind of unlikely support, I don't know but I would think would have some sway. And some of the other unlikely supporters. The Pope is opposed to execution, so I don't think -- as much respect as people may have for the Pope -- they're not going to be very surprised by his support. But to have support from some of the people that are on that brief who are very hard-line prosecutors and former judges who don't normally take positions on things like this is fairly impressive.

Q: If the Supreme Court took the case, they would be deciding what?

Bright: Really, it's a very minor question. It's just whether or not he gets to have a hearing on this evidence that he has. It's not that he gets a new trial. That's not the issue at this point.

Q: But he's been maintaining his innocence since the beginning, has he not? So the new evidence you're talking about is new evidence of the same issue, innocence?

Bright: Right.

Q: When you argued *Snyder v. Louisiana*, for *Snyder*, it was last year.

Bright: Right.

Q: The issue was racial discrimination in jury selection, was it not? Can you sum up more specifically what the issue was?

Bright: Sure. The issue is whether when the prosecutor used all of his discretionary jury strikes against the five African Americans who were qualified to serve, whether he discriminated in striking them. He basically struck all five blacks in order to get an all-white jury.

Q: The Supreme Court agreed with you?

Bright: Yes.

Q: Granted him a new trial?

Bright: Right.

Q: Had you argued before this Supreme Court before?

Bright: Not as presently composed, no.

Q: Had you argued before that?

Bright: I argued before the Court about twenty years earlier.

Q: Lose that case?

Bright: No, I won that case.

Q: Excuse me, I meant to say won that case. What case was that?

Bright: That was a very obscure case called *Amadeo v. Zant* [1988].

Q: What was the issue in that case, *Amadeo*?

Bright: The issue in *Amadeo* was that we found out, after [Tony B.] Amadeo's trial, that the prosecutor had sent the jury a memorandum telling them to underrepresent black people in the jury pools. Our argument was that we should get a new trial and their argument was that we didn't raise it before trial. Our response was how could we have possibly raised it because it was a secret memorandum and nobody would be expected to know that the prosecutor had rigged the juries, which was a felony. The Supreme Court agreed with us.

Q: And what was the vote? Do you remember?

Bright: Yes, it was a unanimous opinion.

Q: And the vote in *Snyder v. Louisiana*?

Bright: It was 7 - 2

Q: Does it take any special talent to argue before the United States Supreme Court?

Bright: It just takes a determination to get totally on top of the record and the law. The Supreme Court these days is a very, very active bench and they ask a lot of questions. It

was like this twenty years ago, it has been ever since Justice [Antonin G.] Scalia came on the Court. You need to know where everything is in the record and you need to know the nuances of all the cases that are being cited in the briefs and everything, so it takes a lot of time to prepare, at least in my view, to be ready to deal with all the questions. Of course, you don't know what the questions are going to be. My way of preparing for both arguments was just to go and have as many practice sessions, moot courts, before as many different people that were really experts in the area as I possibly could in hopes that I would have surely been asked everything that I could have been asked by the time I got to the Supreme Court.

Q: And were you surprised by any of the questions?

Bright: No. I would say it worked.

Bright: I really felt like I was totally on top of the case by the time I got there for the argument.

Q: What is the United States Marine Corps motto? It's “Semper Fidelis.” Maybe it's the Boy Scouts, “Semper Paratus,” always prepared.

Bright: Right.

Q: Who were the two dissenting votes in *Snyder*?

Bright: [Clarence] Thomas and Scalia.

Q: You got [John G., Jr.] Roberts, though.

Bright: I got Roberts. And [Samuel A., Jr.] Alito wrote. As I was coming out of the courtroom after the argument, Barry [C.] Scheck ran up to me and he said, "You got Alito!" I shook my head and I said, "Barry, if I could just eke out a 5 - 4 victory with Justice [Anthony M.] Kennedy, I'll be happy." Lo and behold, Justice Alito did write the opinion. He called me to remind me of that.

Q: Well, this was not an innocence case, was it?

Bright: No.

Q: Why was Barry Scheck there?

Bright: He was just there as a friend. Just there for the argument.

Q: To finish today, this whole process that you were discussing from arrest through post-conviction proceedings, is it fair? Before you answer that, essentially -- although it's more nuanced than this of course -- the Supreme Court decided in *Furman* in 1972 that the application of the death penalty in the United States was arbitrary and capricious in violation of the Eighth Amendment. That first case, that *Furman* case, was argued by Tony [G.] Amsterdam. Tony Amsterdam also argued the *Gregg* case four years later where he lost. I believe both cases went 5 - 4. *Furman*, arbitrary and capricious closed down the capital punishment cause in the United States. After *Furman*, any number of states had

taken up the call of the minority in *Furman* to create what would be constitutional death penalty statutes, most of which in one form or another exist today.

But in *Gregg*, four years later and after these statutes have been created and the Supreme Court was going to rule, here you've got Amsterdam saying again that all these new statutes have done is merely “perpetuate the arbitrariness condemned in *Furman*. The exclusive capital sentencing discretions itself is only one of several mechanisms by which an arbitrary fraction of death-eligible defenders is selected to be actually put to death. Prosecutorial charging and plea bargaining discretion, jury discretion to convict one or another amorphously distinguished capital or non-capital crime, and gubernatorial discretion to grant or withhold clemency are all equally uncontrolled and uncontrollable," Amsterdam wrote, "In its parts and as a whole, the process is inveterately capricious and still unconstitutional under the Eighth Amendment."

When one takes into consideration the elements that you were talking about through most of the session today, is it still arbitrary and capricious? Is it fair, this system?

Bright: It's still arbitrary. It's as arbitrary as it can be and certainly as arbitrary as it was at the time of *Furman*. Justice [Potter] Stewart said, "It's like being struck by lightning,” and I think that's true, although it might be more like being hit by a tornado because there is sort of a Tornado Belt and there is certainly sort of a Death Belt. You know that if you're in Harris County, you've got a much better chance of being hit by it. But you can take every single death state and instead of seeing the capital cases spread out with the murders across the state somewhat proportionately, what you see is these concentrations in a handful of jurisdictions that account for a grossly disproportionate number of the cases.

So it's still as arbitrary as ever. Tony talks about all the different possibilities there of why it would be, but I think the one that really has turned out to be the important one has been the prosecutors. That's why some jurisdictions sentence virtually every eligible capital defendant to death and some don't sentence any. It's interesting that you have some jurisdictions where when the prosecutors change, they may go from not sentencing anybody to death to sentencing people to death or vice versa.

Q: Taking into consideration this long appellate process, which in Troy Davis' case has gone on for twenty years and often goes on for years and years, is that a fair process?

Bright: I don't think it's a fair process, no.

Q: All these judges, given all these opportunities to appeal.

Bright: That's said over and over again, counting the number of judges and things like that. The problem is it's a fairly hollow process. First of all, the thing that really matters, in terms of the arbitrariness of it, is the selection of cases for the death penalty. If you have prosecutors in different parts of the state and some think the case is a death penalty case whereas others think an identical case or even a much more heinous case is not a death penalty case, then you don't have any consistency. Some people say that doesn't matter and they don't care, but I would think that if you're true to *Furman* you would care because *Furman* says, and the Court has said many times since then, the death penalty must be imposed consistently and rationally or not at all. If that's true, then it can't be imposed because it's certainly not being imposed consistently and rationally in any state in the

union.

Q: You're saying it's infected from the outset?

Bright: That's right, in terms of the prosecutors selecting it. In terms of the fairness of it, it's interesting. If you get a bad lawyer who does a minimal job at trial and doesn't preserve any issues and doesn't really do anything, the case is going to get very little review. It's only going to get reviewed on ineffectiveness grounds because there is not going to be anything else preserved. So the irony of it is that here's a case where you had mediocre lawyering or bad lawyering, it's going to get virtually no review because there's not going to be anything to review. If you had a case that was well tried by a good lawyer, who objected to the right things and made the right applications and so forth, that case will get quite a bit of review and may very well get reversed because that lawyer was properly preserving the issues. The better the lawyer, the better the review; the worse the lawyer, the only thing that's going to be reviewed is ineffective assistance and the standard of ineffectiveness is so low that the likelihood that the case is going to be reversed on that is very, very, very slim, unless the lawyer is just a complete falling-down drunk. You're just not very often going to get a case reversed on ineffectiveness.

Q: Then, when we pick up in the next session, we'll focus on what you, Steve Bright, are going to do to change this entire situation. Fair?

Bright: What I've tried to do.

[END OF SESSION]

MJD | Session Two

Interviewee: Stephen Bright | Location: New York, NY

Interviewer: Myron Farber | Date: May 26, 2009

Q: This is Myron Farber on May 26, 2009, continuing the interview with Stephen Bright, President of the Southern Center for Human Rights.

Steve, do I understand that that was founded in 1976? It was founded in 1976 as the Southern Prisoners' Defense Committee.

Q: It became the Southern Center for Human Rights sometime in the early 1980s.

Q: Let me just make a reference to something that came up the other day. I had asked you about the figure of 771 persons of identified race known to have been executed in the South between 1870 and 1950, 701 were black. The figure is for rape.

Bright: Yes.

Q: Apart from everything else you do, you also teach at Yale Law School, is that correct?

Bright: Yes, since 1992.

Q: Did you ever encounter C. Vann Woodward or Robert Penn Warren?

Bright: No.

Q: They were on campus, but not at the Law School.

Bright: Right.

Q: Have you ever read the great novel based on the life of Huey [P.] Long?

Bright: *All The King's Men*? Of course.

Q: By Robert Penn Warren. Wonderful novel.

Bright: Yes. Oh, marvelous. I read that when I was in college.

Q: I read it, too, then. I still have my original copy of that. It's falling apart but I've still got it, even though it's been reissued. I don't want the reissue.

Bright: He's from Kentucky, I believe, Robert Penn Warren.

Q: Yes, I think so.

Bright: Down in western Kentucky.

Q: Let me go back to something that we were delineating in a hypothetical trial. There are a couple of things I want to ask about. In 1991, the Supreme Court okayed victim impact

testimony.

Bright: Right.

Q: It had previously not allowed it in, right?

Bright: That's right. In fact, it had held it was unconstitutional to allow it in just a very few years before that.

Q: In your experience and your knowledge, is victim impact testimony important? Does it make a difference?

Bright: It's very powerful. It's hard for the jury to know what to do with it. It's not really aggravating circumstances. I always ask my class, when we study victim impact, I say, "The jury asks you, 'What do we do with this evidence? What is it for? Does it tell us to give the guy the death penalty? Does it tell us not to? What do we use it for?" There's really no answer to that question. When the Court decided that case, which was *Payne v. Tennessee* [1991], which overruled the Court's earlier decision in *Booth v. Maryland* [1987], the Court said the purpose of the victim impact evidence was to give the jury a glimpse of the victim's life, let them know what the harm done was, who the victim was, what the victim meant to the family and the community. Now we have professionally produced video tapes with the musical background, which show very professionally-done photographs and cuts from home movies and so forth of the victim all the way from birth until whatever time they died. For at least some period of time, it turns the trial into a kind of wake for the victim. I mean, there's not a dry eye in the place because you have all these very moving pictures. Of

course, it's not a balanced picture of the victim's life. You just have all these touching things: the marriage, the tenth birthday, the high school graduation. One of the parents is usually on the witness stand narrating it and breaking down into tears every so often, so this is now a very common feature of the death penalty trials in many states.

Q: Is it only the prosecution that puts it on? Does it get cross examined?

Bright: It can be cross examined. If the victim is a drug dealer or is somebody who has not lived an exemplary life, in theory the defense can put on the evidence. But as a practical matter, the defense lawyer is not going to attack the victim -- somebody who is deceased, who has been killed by the defendant -- unless it is a self-defense case or something like that, which would have happened at the guilt phase anyway. The victim impact evidence pretty much can't be touched because it's just not strategically wise.

Q: Is it introduced in the trial or in the sentencing?

Bright: It's introduced in the penalty phase, in the sentencing phase. In theory it's to give the jury a picture of the harm that was done by the defendant.

Q: Undercutting the mitigating evidence in the penalty phase?

Bright: That's the theory, that it somehow levels the playing field. But, of course, the purpose of the mitigating circumstances is to tell the jury information about the person who it is sentencing. Literally, we already have death penalty, which is very much skewed in that it's imposed in cases of people who tend to be white people, prominent people. This just

makes it even more that way. If the victim comes from a family which is articulate and which expresses its grief and its loss very well and there are prominent people in the community who can also testify and do that, the death penalty is going to be much more likely than if you have a victim from a family that's not very articulate and that doesn't have a lot of community representatives who can come forward and testify. It just adds to the class and race influence in the death penalty.

Q: Is it routine or is it the exception that there is victim impact?

Bright: It's pretty routine. In the states where it's used, it's pretty routine.

Q: Are you familiar with a case called *Wiggins v. Maryland* [2003]?

Bright: Sure.

Q: What does that do?

Bright: *Wiggins* was a case which was tried in Maryland and the death penalty was imposed. Surprisingly, the Supreme Court granted a review of that case and held that [Kevin] Wiggins did not receive effective assistance of counsel -- that his lawyers had failed to properly investigate his background and put on all the mitigating evidence that was available in that case. It was a somewhat remarkable case in that even Justice Rehnquist voted with the majority finding ineffectiveness.

Q: Did that case order something called team defense for defendants?

Bright: I wouldn't say it ordered it, but reading that case, the lessons of that case are the importance of having a mitigation specialist because that was one of the mitigation investigations there. Secondly, it certainly elevated the American Bar Association's standards in terms of guidance to lawyers about how to go about preparing for a death penalty trial, which does advocate a team approach of lawyers and mitigating specialists.

Q: But it didn't entitle a defendant to a mitigation specialist and to investigators? In other words, to a team as opposed to just one counsel?

Bright: The Court's decisions rule on the one case that's before them and they ruled that Wiggins was denied effective assistance of counsel because his lawyers didn't do that. Now lawyers may come along afterwards and say to a trial judge, "We're entitled to a team because Wiggins didn't get one and it violated his Sixth Amendment rights so it would violate my counsel's Sixth Amendment right." What's so unusual, or so remarkable, about the case of *Wiggins*, and two other cases that the Court decided where the defendant effective assistance --

Q: Excuse me, Steve, can I interrupt a second. I think the President [Barack H. Obama] is making an announcement about a Supreme Court nominee that you wanted to see. Let me just put this on hold for a moment.

Bright: Okay.

Bright: All right, let me think. I was talking about *Wiggins*.

Q: Yes. Continuing. The point I was making with regard to *Wiggins* was that, relating to your remarks the other day about the quality of counsel in many capital cases and defense counsel, I was wondering whether *Wiggins* had helped to improve that situation at all. Maybe not. I was under the impression that it gave more resources to a defendant.

Bright: I would say there's three cases where the Court found ineffectiveness -- *Wiggins*; a case out of Virginia, the Terry Williams case [*Williams v. Taylor, Warden*, 2000] ; and a case out of Pennsylvania called *Rompilla v. Beard* [2005]. In all those cases, the Court found ineffective assistance of counsel. What is remarkable about those three cases is that there's nothing remarkable about them at all. They are garden variety ineffective assistance of counsel cases. There certainly have been cases in which lawyers rendered far worse representation, which was upheld, and the clients were executed. I have a very hard time finding where those cases have made a great deal of difference in the lower Federal Courts of Appeals going forward. We still see cases where lawyers didn't do much of an investigation. Certainly plenty of cases where lawyers didn't hire mitigation specialists and didn't do anything but a very superficial investigation into mitigation and yet, despite *Wiggins* and despite *Rompilla*, which came after *Wiggins*, the lower courts uphold those cases.

The problem is the standard that the Court adopted in *Strickland v. Washington* [1984], which was the ineffective assistance of counsel case where the Court set the standard. The standard is so malleable that it is really an eye-of-the-beholder standard. Conservative judges don't find any of the lawyers ineffective. In the Fourth Circuit there is no such thing as ineffective assistance of counsel. Some of the more liberal, moderate judges will find

lawyers ineffective. But you cannot square up the cases to save your life. Even if the lawyer didn't gather this evidence that Wiggins' lawyers didn't gather, and even if they didn't present it, if the judges conclude that there is a substantial probability that didn't affect the outcome, they can still affirm, which basically substitutes trial by judge for trial by jury. In my view that's terrible because how can a group of judges sort of shrug their shoulders and say, "We don't think there is a substantial probability it affected the outcome." How would they know? They don't know. It's an escape hatch which allows appellate judges to uphold cases, even when the lawyer's representation was grossly deficient.

Q: If you had a magic wand and you could wave it and bring into being the most important things that would level the playing field between prosecution and defendants in capital cases, what would it be? What could you do?

Bright: It would be to establish, in every state that has the death penalty, a capital defender office with full-time lawyers who specialize in defending people facing the death penalty, who carry case loads that are reasonable -- four or five cases at one time -- who have full-time mitigation specialists to work for them and who have the resources to hire expert witnesses, particularly mental health expert witnesses because there is almost always mental health issues. That would make the biggest difference. We're seeing that over and over. We see that in Colorado where they have such a system. We see it in Connecticut where they have such a system. We see it in states that are just bringing on such a system. When Georgia created its capital defender system in 2005 and got it up and running, not a single person was sentenced to death in Georgia in the year 2006. Not a single person. It's really remarkable. Obviously that's not going to happen every year, but the number of death sentences has declined to two or three a year as opposed to fifteen or

twenty a year. But you have to have lawyers that know what they're doing. And that's first and foremost. If you are just appointing lawyers, like in Houston, who don't have the special -- it's a specialty; it's a sub-specialty. You don't go get your taxes done by some lawyer who makes a living doing personal injury, chasing ambulances. You go to a tax lawyer. This is one of the most complex areas of the law and there have to be specialists doing it.

That I would say first and foremost is what would change this and make it better.

Q: In the speech you made at St. Louis University in 1995, you said that, “Many capital cases in this country today are tried as honestly as the wrestling matches on television. They are fixed."

Bright: Right.

Q: Would you modify that today, then?

Bright: No. I think in some cases, the defense lawyers that are appointed are so bad that the cases are a foregone conclusion before they ever start and the trial is just going through the motions. That's what I meant when I said that. Not all, but I think that certainly happens far, far, far too often and there is absolutely no excuse for it.

Q: In Troy Davis' case, do you know who his lead counsel is?

Bright: Right now?

Q: Who has been?

Bright: He's been represented in this post-conviction proceeding by the law firm of Arnold & Porter. His lead counsel has been Philip [W.] Horton.

Q: From Arnold & Porter?

Bright: From Arnold & Porter.

Q: Which is a large, significant, Washington law firm.

Bright: It's one of the leading law firms in the country.

Q: Now, Michael [A.] Mello, who died not long ago, wrote in 2003 in James [R.] Acker's volume, *America's Experiment With Capital Punishment*, a volume to which I believe you also contributed. Mello wrote that since 1980 when the LDF, the Legal Defense Fund of the NAACP, took itself, "out of the death work in a big way, the pool of lawyers willing to represent capital prisoners pro bono has run dry."

Now, this fellow, Horton, who's from Arnold & Porter, is he doing that pro bono?

Bright: Yes.

Q: Are they doing it pro bono?

Bright: Yes. That statement Michael made is not true.

Q: Is not true?

Bright: Not true. It hasn't run dry. I think it's fair to say it is diminished, but the American Bar Association still has a pro bono project and it has certainly been successful in finding law firms that have taken death penalty cases pro bono.

Q: I don't want to exaggerate this but if you had a hundred capital cases, how many of those defendants would be represented pro bono by law firms?

Bright: You know, I have no idea. It's not nearly as many as it used to be. I would just be making a wild guess, but my guess would be in the neighborhood of 10 percent.

Q: How does that come about, generally speaking? In other words, if you've got 70, 80 percent who are not represented.

Bright: What has developed in every state now that has the death penalty is there is some little group of people. When I was first called, it was Patsy Morris, a volunteer who was not paid anything at the ACLU, who tried to find lawyers. Today we have a resource center, barely funded but there is one, and they take cases and monitor all the cases and they try to find lawyers for people. I try to find lawyers for people. In Alabama it would be Bryan Stevenson at the Equal Justice Institute. In Texas it would be the Texas Defenders Service and it would be the clinic at the University of Texas Law School.

What all of those groups do now is they take most of the cases, or try to, or they recruit lawyers. The American Bar Association has an office in Washington that all they do is try to encourage law firms from all over the country to take cases. There's a woman, Robin [M.] Maher who I have, and other people, call Robin and say, "Robin, we just can't do this. We've got a case here and we really need a lawyer. This is fairly attractive for one reason or another. Maybe a pro bono firm would take it." She is always shopping cases to law firms. That's how it would happen. Sometimes she can find a law firm that will take a case and sometimes she can't. Sometimes she will find a firm that's willing to take a case and then she'll call people in those states, usually Alabama or Texas because that's where the need is the greatest, and they'll say, "Great, thank goodness." And they'll give the case to her and the law firm will take it. That's pretty much how it's done. She occasionally will even conduct meetings in Houston or Atlanta or Washington or New York and invite law firms to come and make a presentation about how great the need is and try to encourage partners at law firms to take cases.

Q: Another subject that we discussed in our first session the other day related to habeas petitions. Just to clarify it in my own mind again, today are convicts entitled to counsel in federal habeas petitions?

Bright: Yes, by statute.

Q: And in state?

Bright: No. Therein lies the problem because the state is in between. Unless somebody is

monitoring the cases, and usually there is some organization or whatever that is, a person who receives the death penalty and is denied on appeal and certiorari is denied by the Supreme Court, at that point a clock starts ticking and they have no right to a lawyer. That clock could run out in a year and their statute of limitations could run out. Hopefully, someone will find a lawyer for them and file in the state court, which will stop the clock while they are in state court. They could write to the federal court and the federal court could appoint a lawyer who could file something which would stop the clock. They would miss state court if that happened. It's a somewhat unsatisfactory system. For people who are not under death sentence, the year runs without them ever getting into court because they don't have lawyers.

Q: Again, because this may be read by non-lawyers a long time from now, habeas guarantees, or is supposed to guarantee, that your constitutional rights were not violated in the underlying proceedings?

Bright: Right. Historically the idea of habeas corpus was that you filed habeas corpus and it cut through to the heart of the matter. If you were held in violation of the Constitution, the only remedy the habeas court has is to order your release, pending the right of the state to subject you to a second trial, to retrial. Now, the Congress and the Supreme Court have put up so many procedural barriers in the way of habeas relief now, that habeas is just a procedural morass that it's almost impossible to get habeas corpus relief today. It's a procedural morass.

Q: You mean relief from the court?

Bright: Right.

Q: Right, but again, to go back to Michael Mello for a minute, in that 2003 article, when he wrote that since 1967 when the informal moratorium began on killing people by the state, he said that, “Since 1967, no death row prisoner who has wanted a habeas lawyer to fight his conviction has not had one."

Bright: I'm sure that was true when he wrote it. I don't think that is probably true today. I think there have probably been some people that did not. In a state like Texas where you just have so many people, ultimately you get somebody off that list they have.

Q: But when you say that it was only federally that you were entitled to a lawyer on the habeas petition, that's only been since 1988?

Bright: No. Let's see. That was part of the crime bill, I believe, in 1994. It may have been a part of the Anti-Crime Abuse act. It was one of those crime bills that passed. I can't remember which one.

Q: When he says that no one since 1967 who wanted a habeas lawyer failed to get one, that seems to undermine what you were saying the other day about the opportunity, at least in state court, to have a habeas lawyer. It's guaranteed in the federal courts, the habeas petition before a federal court, but there are also habeas petitions before state courts.

Bright: Right, and they are the most critical ones.

Q: They were available to people? That is, counsel was available on a habeas petition in state courts in this country, generally speaking? For people who had been convicted of a capital crime?

Bright: Either some organization provided counsel or a volunteer provided counsel. I think the truth of it is that somebody who was labeled a lawyer was usually recruited. Now the Mississippi Supreme Court made a finding, because when the Supreme Court of the United States denied the right to counsel in *Murray v. Giarratano* [1989], the Supreme Court made the same point, nobody has been without a lawyer, so we rule there is no constitutional right to one. Several years later, in a case called *Jackson v. State* [1997], the Mississippi Supreme Court said, "We find that there are people without lawyers on habeas, and we find there is, in Mississippi, a Constitutional right to lawyers." There is the answer to the question in Exzavious [L.] Gibson's case in Georgia [*Gibson v. Georgia*, 1992]. He did not have a lawyer and when he tried to get his case continued, to have a lawyer, the judge said, "No, you are not entitled to a lawyer," and went ahead with a hearing which was just a farce, in which the state was represented by an assistant attorney general who put on the evidence and the judge would ask Mr. Gibson, "Do you want to cross examine?"

And he would say, "Well, I --" First of all, he didn't know what a cross examination was.

And the judge said, "You can ask questions."

And he said, "I don't know what to ask."

And the judge said, "You can ask whatever you want to."

And he went, "I don't know what to ask. I need a lawyer."

And the judge said, "Well, you're not entitled to a lawyer."

So they go through this whole hearing, where this guy has got an IQ of about 75, trying to conduct his own hearing. The Georgia Supreme Court upheld that in the *Gibson* case. So there have been cases where people did not have lawyers. Texas now theoretically provides lawyers but it's somebody off this list of people who are paid $25,000 for the whole case. The whole post-conviction representation in the state courts. Some of those people, as we've discussed, nine of them, have failed to comply with both the state and federal statute of limitations. I would say those people haven't been represented. They did not have a state post-conviction hearing and they didn't have a federal post-conviction hearing, so I guess you could say technically they had a lawyer appointed in name, but the lawyer never filed any pleadings and never got into court in time to be heard. In my view that's no lawyer.

One of the problems we have in this, all the way back to the trial court, is this kind of lawyer in name only. One of the things that I'm now seeing in Georgia with the new head of the indigent defense system is that he wants some of the worst lawyers, people that I know from having seen them perform, people who should never handle a capital case, he wants them to go to these little training programs that they have for capital lawyers and get "certified." If you go to two days of training and you take all this, then you're certified. Of course that doesn't tell whether you're really capable, it just says you've been to two days of training. Get them certified so they can be assigned capital cases and therefore at least there is a "lawyer" on the case. This is total form over substance because these people are

lawyer in name only, they're not capable of trying a death penalty case, they have no business -- no business trying these cases. And yet, they're being assigned the case just so they can say there's a lawyer on the case.

Q: Generally speaking, when we've talked about the death penalty, we talked about it at the state level. There is also a federal death penalty.

Bright: Yes, there is. Much different.

Q: You have described the federal death penalty as the most arbitrary and racially discriminatory in the nation.

Bright: It is.

Q: You said that about ten years ago or so. You describe it as, "The most arbitrarily racially discriminatory system." It seems like it's hard to beat some of these state situations that you've described. Why did you say that about the federal, and is that still the case?

Bright: The federal death penalty has got the whole country and yet most of the death sentences are imposed in just a few federal districts. Federal death row is fifty-five people right now. I can't remember off the top of my head exactly what the racial breakdown is but it's predominately people of color. The six people that are in line to be executed right now are all black men. They're all men on federal death row, no women. The Justice Department has insisted upon trials in a lot of these cases where the local United States attorneys had wanted to plead the case.

The federal death penalty really proves what a difference competent counsel makes, because there has been a project with David [I.] Bruck and Kevin McNally and some other really competent lawyers who have made sure that, in the federal death penalty, the lawyers who defend the people are competent lawyers. There have been a few exceptions where local judges insisted upon appointing their own lawyers, but most of the cases have been very well represented and most of the cases the juries have not imposed the death penalty. The federal death penalty has been an absolute monumental waste of money in terms of the number of cases that have been noticed up as federal death penalty.

Q: What kind of cases are they, generally speaking?

Bright: There are a lot of RICO [Racketeer Influenced and Corrupt Organization Act] cases. But for a lot of them, you have to sort of search for the federal interest. They also seek the death penalty in a lot of jurisdictions that don't have the death penalty, like Massachusetts. One was a nurse, Kristen Gilbert, who was accused of having killed a number of her patients. Every now and then these cases come up where a nurse is accused of having helped along her patients. About eight, I think. The only federal connection is it was a VA [Veterans Administration] hospital. If it had been in a non-VA hospital, it wouldn't have been a federal case so it wouldn't have been tried in federal court. Some of the time the federal connection is pretty thin but sometimes the cases are drug cases where there's a number of killings involved in carrying out a drug situation. Sometimes it's on an Indian reservation or in a federal park or has some tenuous federal connection.

Q: Have there been executions?

Bright: Yes. Timothy [J.] McVeigh has been executed and there have been a few others besides that.

Q: Terrorism cases?

Bright: There have been some federal terrorism cases. There were a couple tried in New York before 9/11 for bombings of embassies in Africa. The juries did not give the death penalty in those cases. One of those cases involved 260 people being killed and the jury did not give the death penalty.

It's really quite remarkable. There have been some very terrible cases, like [Zacharias] Moussaoui, one of the several people called the "nineteenth hijacker," who was very mentally ill and who insisted upon trying his own case and all that. It went to trial in the Eastern District of Virginia, which is supposed to be -- and is -- one of the worst districts for a defendant to be tried in. He got a life sentence in his federal case. The lawyers advising him on that case and who sort of stepped in and helped him were very good.

Q: In the federal system, is there also, after the trial, the sentencing phase?

Bright: Exactly. It's the same everywhere. There's two phases.

Q: Federally or state?

Bright: No matter what. They have got to be bifurcated. One trial on guilt or innocence and

one trial on penalty.

Q: It's the same jury.

Bright: Same jury.

Q: Now, by the way, in the sentencing phase, a defendant who has not testified in the guilt phase, the so-called trial, is he entitled to testify for himself, in the sentencing phase?

Bright: He can testify in either phase or in neither phase. But if he testifies, he is subject to full cross examination.

Q: Herbert [H.] Haines wrote a book in 1994 called *Against Capital Punishment*. In that book he says that *McCleskey v. Kemp*, a 1987 Supreme Court case, was represented by the Legal Defense Fund. *McCleskey* was Warren McCleskey. That case, according to Haines, "represented the last gasp for a line of attack that it had used since first taking on the death penalty in the 1960s. Racial disparities in capital sentencing."

Bright: Right.

Q: Now, in your opinion, was it the last gasp of the effort by litigators going back to the 1960s to overturn the death penalty on constitutional grounds across the board? What was the nub of the *McCleskey* case and why did it fail before the Supreme Court?

Bright: The nub of the case was that the most sophisticated study that has ever been done

of the influence of race and sentencing. Most studies have been very sort of superficial, which have shown, of all the homicide cases, how many black defendants got the death penalty and how many white defendants did and how many white victim cases and all that. But in *McCleskey*, the study that was done was a multiple regression study that compared about 250 variables.

Q: This was David [C.] Baldus' work.

Bright: David Baldus and [Charles A., Jr.] Pulaski and [George] Woodworth. It was a very sophisticated study that coded all sorts of factors, and you could change the factors and compare the factors against each other. It's the most elaborate study of sentencing that's probably ever been done and probably ever will be done, because it was so expensive. It showed that race was a very prominent factor in determining who got the death penalty and that a person like McCleskey, who was African American and who was convicted of killing a white person, was four times more likely to get the death penalty than if he had killed a black person.

The argument was that this violated two constitutional provisions. One, that it violated equal protection of the laws in that it imposed a more severe penalty for killing white people than for killing black people. That was basically part of what the Equal Protection Clause was passed for after the Civil War, to protect black people and to see that the laws were enforced equally with regard to black and white people. Secondly, that it violated the Eighth Amendment in that it resulted in the arbitrary imposition of the death penalty based upon race, an arbitrary factor. It was a very close case. The Supreme Court decided 5 - 4 with Justice [Lewis F., Jr.] Powell writing that racial disparities were inevitable and

just because the disparity correlated with race, that the Court would not infer that it was invidious. Then with regard to the Eighth Amendment challenge, he said that there was, indeed, a risk that race entered into the reason that so many black people got the death penalty.

Q: Race of the victim, primarily?

Bright: Right, because the studies did not show much race of the defendant effect. It really is race of the victim that makes the difference. And there the Court did sort of a lawyerly maneuver. It basically said, "If there is a risk, the states have to guard against that risk by having certain procedures to minimize the risk." They went through all the different procedures that there were -- the way in which the jury was selected; the fact that there were guided discretion in imposing the jury; that aggravating circumstances narrow the class of people; the fact that the Court had held there could not be discrimination in the jury pools; the fact that you could *voir dire* the jury about their racial attitudes on an interracial case. The Court went through all these and basically said that if these procedures existed, the state had minimized the risk and therefore there was no Eighth Amendment violation. Now, the trick in this that you never ask the question whether the procedures work or not, you only look to see if the procedures are there. If they're there, then you have "minimized the risk."

That's just a slight of hand is what it is. Of course, that's been done case after case since and, in my opinion, it just totally ignores reality. This is what Obama is talking about when he is talking about judges who want to decide cases based on reality. Justice Powell said in retirement that if there was any case he could change, it would be the *McCleskey* case. I

expect that's why. But at any rate, that was how the Court got rid of it and Justice Brennan, in a very eloquent dissent, did point out what the impact was. He said at some point Warren McCleskey must have asked his lawyer what were the chances of getting the death penalty. He said the conversation that took placed would be very troubling because the lawyer would have to say that no matter what his record was, no matter what the crime was, his race and the race of the victim would have more to do with whether or not he got the death penalty than any of those other factors. The lawyer would have to tell him that the fact that his victim was white would make it four times more likely.

Q: Was part of the problem that the Legal Defense Fund was unable to convince the Court that no matter what Baldus' insistence showed, the intent of the prosecutor to carry out the death penalty in a racially discriminatory manner had not been demonstrated?

Bright: I always ask the class, "Who was discriminating here?" And LDF's argument was, "*Everybody* is discriminating. The prosecutor, the jury, the judge, the Governor of Georgia, the Pardon and Parole Board -- everybody is discriminating." But the Court zeroed in, as I think was appropriate, on the prosecutor because that is who makes the decision whether to seek the death penalty, whether to plea bargain and those are the most critical decisions. That got the Court very quickly into the selective prosecution cases and the Court has always had an extremely high -- I would say impossible – standard of proving selective prosecution.

Q: Based on race?

Bright: Based on anything. The Court has said because of the separation of powers, because of wanting to give prosecutors room to maneuver and not wanting to get in behind the sort of secrecy of the tactics and so forth. The main case on this is a case called *Wayte v. United States*, which was a First Amendment case. [David A.] Wayte burned his draft card. He and about thirteen other people ended up getting prosecuted. There are hundreds of thousands of people who had avoided the draft and only these people get prosecuted. So he files a lawsuit and says, "I've been prosecuted only because I burned my draft card. It's selective prosecution." The Supreme Court says you have got to prove that you're being prosecuted only because you burned your draft card and that you're being singled out because, not in spite, of that. It seemed pretty obvious that he was, but the Court turned him down and said he could not show selective prosecution.

Warren McCleskey was in even worse shape than he was. He couldn't say you can't say selective prosecution because there was a perfectly legitimate reason for charging McCleskey with the death penalty. He killed a police officer. There were aggravating circumstances. He committed a crime for which the death penalty could be imposed. Therefore, you can't say that he's being selectively prosecuted. That took care of the intent part of it. The other thing that they said was, "You can't say that the legislature is discriminating because we upheld this statute in *Gregg v. Georgia*. We found it to be racially neutral on its face." In *Gregg* the Court was only looking at if this statute was constitutional as written, not as applied. *McCleskey* was, "Let's look at how it's worked now for the first ten years or so." The Court was basically saying, "You cannot say the legislature was out to discriminate because we found the statute was perfectly fine. If the statute has been used in an unconstitutional way it would be the fault of the prosecutors." Then they let the juries off the hook because they said, "A jury is an ad hoc group; it meets

one time, it's gone. It's not like a government body that makes decisions over and over again. So you can't say that there is a pattern there of discrimination by juries if juries are fairly selected."

Q: But laying aside the constitutional arguments, has Baldus' work and statistics been confirmed or replicated or established as the truth over the years?

Bright: I think so. [Raymond] Paternoster has done some work in other states, in Maryland in particular. Baldus has done other work. The *Depaul University Law Review* about two years ago had a symposium on race and the death penalty and there was a piece in there by Baldus which sort of summarized and looked at some of the studies that had been done. There are a number of studies and they almost all come out with the same finding. Baldus did another study in Philadelphia which looked at both prosecutorial decision making and also looked at jury selection. He found in Philadelphia that there was both a race of victim and race of defendant effect and, of course, the great use of jury strikes against blacks.

Then there was a study that came out, I think within in the last year. It was just published in Houston, Texas, which found both race of victim and race of defendant. I would say just a little footnote on Houston. There was this big scandal that in January of 2008 resulted in all these emails --

Bright: -- of the prosecutor, Chuck [Charles A., Jr.] Rosenthal, being released to the public and Rosenthal resigning in disgrace. One of the very disturbing things about the emails was all these extremely crude racial jokes and so forth being in his emails. This is the man making the decisions in Houston.

Q: But when Haines says this was the last gasp of a direct attack on the constitutionality in the death penalty by its opponents, is that true?

Bright: I think you have to be far beyond the time and look back to say it was the last gasp. I don't know that it was the last gasp. No one expected the mental retardation issue. At one time there was not a single state that prohibited the death penalty for the mentally retarded. That wasn't, I know, an overall attack of the whole death penalty but at the same time I think the geographical arbitrariness, the fact that the death penalty is just like, Potter Stewart said, being struck by lightning. I wouldn't agree with that.

Q: Are you familiar with the term "deregulation of death"?

Bright: Yes.

Q: When people throw that term around, what do they mean?

Bright: In the first years after the Court upheld the death penalty, it did two things. One, it trimmed around the edges of how broadly the death penalty could apply. It held, for example, that it didn't apply to non-homicide cases. The most significant ruling, *Coker v. Georgia* [1977], said that you could not apply the death penalty to a rape case in which the victim was not killed. It reaffirmed that recently in the *Kennedy* [*Kennedy v. Louisiana*, 2008] case out of Louisiana, where it said even if the victim was a child, you could not impose the death penalty. In *Eberhart v. Georgia* [1987], they couldn't impose it in a kidnapping case if the victim was not killed and then in *Enmund v. Florida* [1982], you

couldn't impose it for the wheel man in an armed robbery if he was not directly involved in the murder, which they backed up a little bit on in *Tison v. Arizona* [1987]. But basically, there were a number of cases which sort of limited the death penalty to aggravated murders, no non-murder cases.

The other thing the Court did that at least appeared to be requiring enhanced procedures for the death penalty was *Gardner v. Florida* [1977], the Court held that the use of secret pre-sentence reports could not be used, that the defendant was entitled to see them and have a chance to rebut them. In *Green v. Georgia* [1979] the Court held that an evidentiary rule in Georgia couldn't be used to keep evidence out. There were a number of other decisions that came down and the deregulation was that I think some people felt like at a certain point the Court sort of stopped in that line of cases and let the states more decide for themselves how they wanted to operate their death penalty statutes.

Q: Exactly. Its is like when Hugo Bedau said, “It is as though the Court had decided that it no longer wants to use constitutional law to foster legal formulas for regulating moral choice at the penalty trial." Or when Haines says that in the first seven years after *Gregg*, the Supreme Court ruled in favor of fourteen of the fifteen death sentence inmates whose appeals were argued before it. But suddenly in late 1982," he wrote, "The Court reversed itself in a series of decisions that continued through that decade and into the next. The Court essentially announced that it was going out of the business of telling the states how to administer the death penalty phase of capital murder trials."

Bright: Right.

Q: What was the impetus for that, do you think? Was that some collective decision by the members of the Court that they had had it with the death penalty, let the states handle it?

Bright: For awhile it was just too good to be true. They were deciding case after case and the cases were all going our way, as you pointed out there. At some point, the Court obviously decided to put the brakes on that, to put it mildly, and pretty much got out of the business.

Q: And did that continue for some time?

Bright: It continued for some time, and then the Court came back into some balance where it was reversed in some cases and affirmed in some cases.

Q: Is it fair to say that Amsterdam was the guiding light behind the Legal Defense Fund's strategy in attacking the death penalty in *Furman*?

Bright: Yes.

Q: And attempting to hold onto it, unsuccessfully as it turned out, in *Gregg*?

Bright: Right.

Q: Tony Amsterdam, he knows his stuff, would you say?

Bright: Absolutely.

Q: So last November Tony Amsterdam goes down South and he gives a talk. He says that since 1976, the Supreme Court has systematically dismantled every one of these supposed protections, protections having to do with the kinds of things that one hoped were going to come out of *Furman* and protections that supposedly were going to occur after *Gregg*. He writes, "Since 1976 the Supreme Court has systematically dismantled every one of these supposed protections, diluting some to utter insipidity and disregarding others, until there's nothing left of any of them."

Where do you think he gave that talk? He gave it at the Southern Center for Human Rights.

Bright: I was going to say, at our dinner.

Q: Despite what he said, and he said these kinds of things in even tougher language in other forums in recent times, you have won some cases. You got mandatory death sentences thrown out in *Woodson* [*Woodson v. North Carolina*, 1976].

Bright: Right.

Q: You've got protection for the insane in *Ford v. Wainwright* [1986]. You've got protections for the juveniles in *Roper* [*Roper v. Simmons*, 2005].

Bright: Right. And the mentally ill in *Atkins* [*Atkins v. Virginia*, 2002].

Q: It's unconstitutional, the Court found just recently, that to kill someone who had raped a

child where the victim was not killed. For any crime where the victim was not killed!

Bright: Besides that the most important decision the Court decided, as we talked about last time, was *Lockett v. Ohio*, where the Court said that anything the defense offered as a basis for a sentence less than death had to be admitted and considered in mitigation. That is the absolute biggest victory that the defense ever won because if the states were ever able to limit that, if they were ever able to do what the sentencing guidelines do in the federal courts and say that only a few things, could be considered in mitigation -- which is what Ohio had done in *Lockett* -- it would change the sentencing trials considerably. Although Thomas and Scalia would certainly take that back in a heartbeat, the Court has reaffirmed *Lockett* over and over and over, even requiring Texas to rewrite its death penalty statute.

Q: I guess what I am really asking you is if it is hyperbolic to blast the Court like that, even at a dinner before an august body like the Southern Center.

Bright: Well, I don't know how august the body was.

Q: Or is it more nuanced than that? If one were trying to predict what the Supreme Court does or would do in death penalty cases today, what is the answer?

Bright: My view about is that the most precious thing that the Court has ever given or decided that has affected the modern death penalty is the *Lockett* case, which came out of the *Woodson* case. The *Woodson* case struck down the mandatory death penalty, saying that you must consider the diverse frailties of human kind. The Court picked up on that in *Lockett* and Justice [Warren E.] Burger, of all people, wrote the decision saying anything

the defense proffers is acceptable. That has been attacked and the Fifth Circuit had held, and some cases out of Texas, that no, there to be a nexus between the mitigating circumstance and the behavior, and secondly, that it has to be substantial. They had affirmed some cases where people had tried to offer limited intelligence. Maybe not mentally retarded but they were limited in intelligence and they had affirmed it and the Supreme Court in the *Tennard* [*Tennard v. Dretke*, 2004] case granted certiorari. Justice [Sandra Day] O'Connor wrote, "We have never held there had to be a nexus and we've never held it had to be substantial. We have been totally expansive in our ruling on mitigation. You have got to reverse these cases and these people get a right to put on anything that they want to put on in mitigation." That is *everything*, practically, for the trial lawyer defending a capital case -- the ability to put that evidence before the jury and argue it means everything.

Q: If the trial lawyer is not asleep.

Bright: Of course you've got to have a decent trial lawyer. The second big thing is the quality of lawyers. My view about the Supreme Court is that now it's sort of a case-by-case fight in the Court and we win some surprising cases, like the *Williams* case and the *Wiggins* Case and the *Rompilla* case. I would have never predicted winning any of those cases because they're just like lots of other ineffectiveness cases. The *Williams* case was particularly surprising, coming out of Virginia. But the Court at least put a little teeth in the *Strickland* standard, which hadn't been there before. Some courts have followed it, most courts have not.

In my case, the Louisiana case, *Snyder v. Louisiana*, the courts were just completely ignoring *Batson* [*Batson v. Kentucky*, 1986]. The judges were letting people strike blacks right and left. They granted cert in *Snyder v. Louisiana* and they disallowed the strike of the juror and since then a lot of state supreme courts have been using *Snyder* and reversing strikes of blacks where people struck all the blacks and didn't give very good reasons. It has breathed a little life into *Batson*. But it's sort of case by case.

Q: Is it your feeling that this Supreme Court, under no circumstances, would declare the death penalty itself unconstitutional?

Bright: No, absolutely not.

Q: Would not?

Bright: Would not. Not this Supreme Court, no. Twenty years from now, if the death penalty continues to be imposed as little as it's being imposed now, 125 a year by juries, if more states repeal the death penalty like Connecticut just voted to repeal -- the governor vetoed, or is going to veto. Colorado came within one vote. It passed in one house, lost with one vote in another. We are seeing a lot of action in the legislatures and if we got to where less than half the states had the death penalty on the books and it was actually only being imposed in Texas and Oklahoma and Alabama and it was really down to less than a hundred, maybe even fifty death penalties imposed in a year, you could imagine the Supreme Court revisiting the issue then. But that is so far into the future, who knows. I mean, it's not out of the question that the Supreme Court some day could revisit this and decide that but I don't think that's going to happen in the next ten years.

Q: You mentioned David Bruck as a competent lawyer.

Bright: Yes, very.

Q: After *McCleskey*, which Amsterdam described as the *Dred Scott* case of our time --

Bright: Yes, I would, too.

Q: -- Bruck wrote that, "*McCleskey* cannot be seen as a defeat in its own right. Rather, it's a ratification of the defeat that the abolition movement has been suffering in the United States ever since 1972. But I suspect that *McCleskey* will also prove to be the rebirth of abolition."

Now, would you tell me, do you regard yourself, with regard to the death penalty, as an abolitionist? How long that's been the case, what is the abolitionist movement and, as long as you've known it, whether it's changed at all? What the quality of its leadership is, who is it? What is this abolition movement?

Bright: I don't know that I've ever really thought of it that way. I certainly -- abstract and in the big picture -- hope that someday the death penalty will be abolished. The time that I've been doing this, that's never seemed at all likely to happen in my lifetime.

I have seen what we have been doing as fighting a legal battle against the death penalty case-by-case. I sometimes compare it to the Underground Railroad, getting one person by at

a time and you're hoping that someday the ultimate problem will go away; that is, the death penalty. But you don't know when that day's going to be and how long in the future it's going to be and so you're dealing with it and at the same time you're documenting the problems with it. As I was saying the last time we met, I had no idea how bad the lawyers were until I started doing the work. I really had no idea how at the surface the race discrimination was. I knew there was race, of course -- but just how blatant it was, and just how on the surface a lot of the problems are. The more you work in it the more you see that and you document it and you put it out and hopefully people will get interested in it and it contributes to greater public knowledge and greater knowledge on the part of the courts. That information gets together and then somebody like Jim [James S.] Liebman or some historian puts it all together in a study. What I have felt like we've been doing is representing clients in their cases and trying to keep them from being executed, and shoring up them and their families in the process of doing that.

Q: Not part of a movement?

Bright: I guess it depends on how broadly you describe a movement. The Civil Rights Movement was a lot of different people doing a lot of different things and not necessarily all being coordinated. Dr. [Martin Luther, Jr.] King was a de facto head of that movement or Roy Wilkins, or the NAACP without it necessarily being coordinated. I guess there is an abolition movement in that there are lawyers all over the country whose motivation is that it should be abolished. I don't think many people would be working on the death penalty if it were not for their belief. There's not much money in it. Not many people are working on it because of financial rewards, which is usually what motivates people to do work. So I think there are people motivated by their views about the death penalty and against the death

penalty. It's primarily a group of legal organizations and lawyers, paralegals, mitigation specialists, and so forth, but there are also some activists as well.

Q: Ever heard of the National Coalition to Abolish the Death Penalty?

Bright: Yes.

Q: Know what they do?

Bright: They put out information and engage in various activities. That organization has struggled a great deal over this time just because it's had trouble getting funding.

Q: Remember Henry Schwarzschild?

Bright: Of course.

Q: He ran the capital project for the ACLU from 1977 to 1990.

Bright: Right.

Q: When he was doing that, he wasn't trying cases.

Bright: No. He was doing a lot of public education.

Q: With sort of a moral hue to it, that this killing was morally wrong.

Bright: Right.

Q: If you talk to some of the leaders of the so-called movement, like the National Coalition, they think you have to be more pragmatic about things and that's what David Bruck was saying after *McCleskey*.

Bright: Yes.

Q: But you don't see yourself as part of it? Your phone doesn't ring and somebody is saying, "Come to this meeting where we can talk about how to end the death penalty," representing some of interest among people other than lawyers? Your phone doesn't ring with those people? You're not summoned to meetings of the National Coalition to discuss how to approach legislatures or that sort of thing? Are you called in by any religious groups?

Bright: I have been over the years. I would say more in bits and pieces than in a grand strategy. I meet with people about legislation, the last eight years about how to defeat bad legislation. Hopefully in the next eight years about how maybe to repair some of the damage that's been done. I certainly have been talked to about some of the repeal efforts that are going on around the states. I haven't been really very involved in them but I would certainly be happy to be. I was going to testify in Maryland before the legislature there and just schedule-wise we just couldn't coordinate it. So, yes, I am in touch with the people working on those things about that.

Q: But would you or wouldn't you compare the efforts of abolitionists regarding the death penalty to the Civil Rights Movement or the feminist movement? In visibility and grassroots quality?

Bright: I think the problem is this. I may be taking off now and I hope so and I certainly want to be a part of it by speaking and organizing to help move it forward. In the last thirty years or so that I've been involved in this, one of the big problems that the Coalition has had -- and that we have all had -- is that with regard to the Civil Rights Movement, you were talking about people. When you read Taylor Branch's books or any of these things, the thing that's just so mind-boggling to me is that people are getting beaten up and they're getting killed and they're being treated horribly and all they want is to vote and to go to school, which are pretty innocent things. *We* are talking about people who have hacked people to death with hatchets or shot three people and robbed a bank. It's not an attractive group of people. I think for the death penalty, a lot of the innocence cases have certainly changed the debate tremendously and have certainly gotten a lot of people involved that weren't involved before. When people trot out the John Wayne Gacys and the Timothy McVeighs, it's not like the innocent black child who can't go to school or the African American who can't vote or the person who's being denied housing. It's a much tougher organizational battle for the death penalty.

Q: You mentioned this activity in the states. New Jersey recently repealed the death penalty at the end of 2007. New Mexico did it in March.

Bright: Yes, absolutely. Maryland almost did.

Q: Almost did?

Bright: Maryland compromised on a bill that effectively abolishes the death penalty.

Q: Colorado came within one vote in the Senate there, the House, having passed it. There had been movement in New Hampshire.

Bright: New Hampshire I think is going to pass it. I think the governor is going to veto it.

Q: That happened once in New Hampshire, previously, where the governor vetoed it.

Bright: Right.

Q: But when you look back at the last large activity around the early twentieth century on the progressive period and then some in the 1950s, and you look today, you see that although the states may differ somewhat, you're still stuck with thirty-five states still with the death penalty and fifteen against.

Bright: Right.

Q: Is that progress? If you have got the same number of states holding on to the death penalty even though the names of the states or the states themselves change somewhat? There have been plenty of times in American history where states have abolished the death penalty, only to bring it back.

Bright: We're down from thirty-eight to thirty-five. We're making progress. We're moving in the right direction. All the movement is in this direction and I think there is a lot more movement. The question is if we can ever get to sort of a tipping point. If you look at the financial disaster that is California today, the first and easiest thing they could do to save millions of dollars would be to abolish their death penalty. They've got six hundred and some-odd people on death row. Since *Furman*, they've only executed ten people. More of those people are going to die of old age than are going to be executed. They are spending millions of dollars going through the appellate review process and so forth. It's a monumental waste of money. They'll see the same thing New Jersey saw. It's expensive, it's re-victimizing the victims, it's not getting them anywhere. If a state with that big a death row, as opposed to New Mexico, which only had three people on death row -- New Jersey had a fairly substantial death row -- if we start seeing some states like that repeal the death penalty, then some momentum may pick up on it. But you start with the low-hanging fruit and I think that states like Colorado that have but one or two people on death row aren't getting anything out of the death penalty, it's not serving any purpose there. It is a tough job for the abolitionist people. But there are very active people in these states and that's a big change.

One thing I would just say is that after the Willie [R.] Horton experience with [Michael S.] Dukakis and with [William J.] Clinton putting to death Ricky [Ray] Rector right before the New Hampshire primary and with all the Democrats just afraid of crime as sort of the third rail and you just can't touch it, I think everybody was just afraid to get involved in any criminal justice reform. Now you have Martin [J.] O'Malley, the Governor of Maryland who's right out front on the death penalty. Now we have a few other people who are. It used to be that Mario [M.] Cuomo was about the only leader on this. But we need some leaders.

Hopefully we'll have one in [Jon S.] Corzine up in New Jersey, who was a leader on this, and hopefully we'll have some others.

Q: You just mentioned there were 667 in California, where there is a moratorium imposed by a federal judge because of the nature of their use of lethal injection -- the protocol for that.

Bright: Right.

Q: But isn't it a fact that about two-thirds of the people convicted and given the death penalty are never executed? And of those people whose cases were vacated by the courts after they were on death row, about 82 percent of them were never resentenced to death? Perhaps it's overlooked sometimes, a lot of these people who get on death row, they never are executed.

Bright: Right. It's all very symbolic. Right after the crime happens and everybody's upset and it's all on TV and there's all this passion -- the worst time to try to make a decision about a case, that is when the people get sentenced to death. They get reversed, they come back five, ten years later, everybody's moved on to something else. The case often is settled with a pretty reasonable plea bargain long afterwards. If the guy was a death penalty the first time, why wouldn't he get the death penalty the second time? But prosecutors change, it comes back, it's a new prosecutor. It's like --

Q: --the new milieu.

Bright: Right. Nothing, I find, prosecutors hate more than getting back an old case that their predecessor tried. They don't want to get up to speed on it; they want to get rid of the case. In Georgia now, we have at least five of the people that were under death sentence at one time who are now out on parole, none of whom have had any problems out on parole. It's quite remarkable. Here are these people that were so dangerous we had to hold them in solitary confinement until we could execute them and now they're living among us and doing quite well. And it's quite remarkable in my opinion that we could have been so wrong.

Q: You hear critics, people who are pro death penalty, argue that it is a deterrent. They've been arguing this for years.

Bright: Right.

Q: Is there any credibility there?

Bright: I don't think so. John [J.] Donohue [III] at Yale, who knows a whole lot more about this than I do and has published some articles about it, concluded that there is just absolutely none and that these economists who are putting out articles saying that every time there is an execution it saves eighteen lives, this is just quackery. I just don't see how it could possibly be.

I talked to one of these people. We were testifying before a committee of the U.S. Senate with Senator [Karin] Brownlee and I said to him before it started, “I don't know anything about all this but it seems to me that in order to be deterred you would have to know, wouldn't you? You couldn't be deterred if you didn't know something.”

The whole idea of deterrence is you know that you might get executed. You have to think it through, “if I commit this crime and I get caught, I might get executed.” You've got to both anticipate being caught and being executed. And I said, “The executions get almost no publicity anymore. Even in Texas it's not news now.” They've executed 450 people. It's never in the papers anymore unless it's out of that particular jurisdiction. Most people probably don't even know when they're in a state whether that state even has the death penalty or not. I've never represented a person who thought they were going to get caught. They wouldn't have done the crimes if they thought they were going to get caught because they wouldn't want to do any time, not to mention get the death penalty. How can you really figure this if you don't sort of take those things into account? And he really didn't have an answer to that.

To me, it just seems if it does have deterrence, Houston, Texas, would have to be, by far, the safest place in the world to live because they have had over a hundred executions of people sentenced to death in Houston. If it saves eighteen lives every time, there would just be almost no murders ever in Houston. It might even be a negative number.

Q: Do you remember there was something called the Capital Jury Project?

Bright: Yes.

Q: The Capital Jury Project, at least around 1997, says that the thing that jurors consider most important in whether to give life or death was not the defendant's criminal history or

background or upbringing, but whether the defendant, if allowed to live, is likely to pose a danger to society in the future.

Bright: Right.

Q: Those people are worried about deterrence then, aren't they? They are worried about whether if they give this guy life it's going to be a deterrent.

Bright: A lot of prosecutors argue that regardless of whether there is any general deterrence, there is certainly specific deterrence. If you give this guy the death penalty, he's not going to give anybody else any problem because he won't be around. The future dangerousness feeling or determination that jurors often make is whether based on everything they know about that person, his psychological make-up, is he the kind of person who's going to go out and kill again?

Q: If he escapes from prison or something?

Bright: Right. The odd thing about the future dangerousness, which of course is an aggravating factor in Texas and in Virginia and a few other states, is that with life without parole, those people are never going to be out in society. But the courts don't define future dangerousness as whether it's in society or in prison.

Q: Do you know when life without parole got started?

Bright: Louisiana has been sentencing people to life without parole since way, way back when. It didn't become modern in most states until fairly recently.

Q: Is it in most states now?

Bright: It's now with the death penalty states. It is the alternative to the death penalty in every state now that has the death penalty. The only exception was New Mexico, which no longer has it. Every state that has the death penalty, the jury's alternative is life without parole. Some states have additional alternatives, like life with parole.

Q: Georgia has it?

Bright: Georgia has that. Three. You can give the death penalty, life without parole, or life with parole.

Q: But some people, people like Paul [G.] Cassell or Joshua Markowitz, would say, "Well, life without parole? Who are we kidding? Ten years from now the laws are liable to be changed and apply to these people or something and all of a sudden all these people who had life without parole at one point, are now going to get out of prison, or may get out of prison! Or they may escape!"

Bright: The people that make those arguments. I think one reason the death penalty --

Bright: -- is employed is because of people's lack of trust in almost anything about government. Even when there was life with parole, people gave the death penalty because

they didn't trust the parole board to do their job and keep people in prison long enough. In my view, life with parole makes a lot of sense because I think parole boards can look at somebody's development over time and make decisions about who to let out and who to keep in. But nobody trusts parole boards. But, in my view, it makes perfect sense because you cannot predict how somebody's going to be twenty years from now. At any rate, we've got all these people serving life without parole. Of course, in a lot of non-death cases people get life without parole. A lot of three strikes get life without parole. You've got all of these people, all of these geriatric prisons and people with all sorts of health problems. It's costing a fortune and these people just don't need to be in there all that length of time.

Q: Are you saying that you are not so impressed with life without parole?

Bright: I think that you almost have to have life without parole as alternative to the death penalty, but it's like everything else. When you're talking about the death penalty, people say that we are only going to have it for the most vicious crimes and the most heinous crimes. Then you get it on the books and you don't limit it to those crimes; you end up giving it to the 7-Eleven robbery cases. Every murder is a terrible thing, but those are not the most heinous crimes and you end up giving it to people on those cases. People say the same thing about life without parole but once you have it, it starts being given out to lots of people for whom, at least in my view, it is just a ridiculous sentence. But you've got every little local prosecutor and judge who wants to get this guy out of town and doesn't want to ever see him come back again, so he gets life without parole.

Q: Well, but if you're trying a case?

Bright: If you are facing the death penalty, you want life without parole because that is your only way to avoid the death penalty. But that is how the death penalty distorts everything in the criminal justice system. The Supreme Court took certiorari to decide next year whether or not you can give a thirteen-year-old child life without parole for a non-homicide crime, which is just remarkable. To give up on a child at age thirteen when you don't know what will this child be like when he's fifty? Nobody has the foggiest idea.

Q: Being in Atlanta, you couldn't have escaped notice of the case involving Brian [G.] Nichols.

Bright: No, you sure couldn't.

Q: What did Brian Nichols do?

Bright: Brian Nichols raped his girlfriend and it went to trial and hung the first time and it came back for retrial. As he was being escorted into the courtroom, he pulled the deputy's gun out of her holster and walked into the courtroom and shot the judge, killed him dead, shot the court reporter, killed her, escaped the courthouse, met a deputy as he came out the door, shot and killed him. Fled. Atlanta was in complete terror for the time he was at-large. He encountered a federal agent at some point that afternoon. Shot and killed him. And then turned himself in the next day after spending the evening with somebody that he ran into.

Q: Right. Surely, he has been given the death penalty?

Bright: That is what the district attorney wanted. It made the case into sort of the trial of

the century.

Q: This was last year.

Bright: That's right. Georgia's fledgling capital defender office first started representing him, then got kicked off the case, but made sure that he had a very good lawyer and a very good team of lawyers. The short version of it is that the jury could not reach a verdict and under Georgia law that meant that he got life without parole. That is his sentence.

Q: How many people he shot in broad daylight there in the courthouse?

Bright: Four people. Two in the courthouse and two outside. It's as bad a crime as anything.

Q: Why?

Bright: Because his lawyers did not move the case from Fulton County, which is Atlanta, because they knew the racial breakdown of the jury would be about 50-50 black and white. They knew they would get a better jury there than if the judge granted a change of venue and sent him out to somewhere in the state where he would probably get an all-white jury, which was a very wise thing to do

Q: Was he black?

Bright: He was black. In Georgia it's interesting because the two most heinous murders, since the new statute passed are Wayne [B.] Williams, who was convicted in the Atlanta

child murders and supposedly killed over twenty-two little boys, and Brian Nichols, who killed a judge, sitting on the bench in open court, and the court reporter and deputy sheriff and this federal agent. Neither of them got the death penalty. It makes it seem somewhat odd that people that killed one person end up getting the death penalty when these multiple murders don't end up with death sentences.

Q: And the reason is?

Bright: The luck of the draw with regard to the jury.

Q: The fact is that in the United States in 1935 there were 199 people executed within the United States. That had gone down to about twenty-nine a year in the decade before 1967.

Bright: Yes.

Q: And then it rose again, peaking at ninety-eight in 1999. By the way, sentencing has also gone down. It is now thirty-seven in 2008. What do you think accounts for this decline in recent years?

Bright: It is hard for me to explain the number of executions going down because there are three thousand some-odd people on death rows waiting to be executed. There have been a lot of executions this year and I think the number for 2009 is going to be significantly higher because the Supreme Court has made it so hard for people that are on death row to get relief that the time just ultimately runs out on people. In Georgia, very few people are being added to death row, but there are people who are at the end of the process who are

being taken off death row by execution. There are going to be and there have been more executions. There have been executions this year, there are going to be more. That's true in some other states as well.

One reason there weren't more last year was because there was a moratorium. The Supreme Court granted the review in the case of *Baze v. Rees* [2008] to decide lethal injection. But that ended up with a bunch of cases piling up there and waiting for action. Those people now are being executed now that there is no longer a stay. But it is interesting -- there are these various log jams that get created either in a state or sometimes in the whole country that will sort of hold the executions up for a while. In California right now, there is the stay because of the issues with lethal injection there. That is going to stop any California cases from going this year.

Q: But still, those figures have been going down since the end of the 1990s. You don't see this as a trend?

Bright: What I see as the really important trend is the number of death sentences being imposed each year, which has gone down from around 300 in the late 1990s to around 125 in the last five years and I think only about 115 last year.

Q: Averaging. You don't mean 115 over years, you mean each year.

Bright: Yes. Each year. Like for the last few years it's been like 125, 130, 115. It has been much less than half and that tells you what's going on right now. Some of these people were sentenced to death in the 1970s and are being executed now.

One of the things the slowness tells you is that there is not as much enthusiasm for executing people. In Florida, for example, the governor has to sign a warrant in order for people to be executed and governor Jeb [E.] Bush signed very few warrants while he was Governor of Florida. I don't think [Charles J., Jr.] Crist is signing a whole lot of warrants. So there are a lot of people in Florida that, if the governor went and just sat down one afternoon and signed a bunch of warrants, they could execute twenty people, but he's not doing it.

I do think those numbers show some improvement. Back in the old days, they just raced those cases through if they could.

Q: With respect to the decline in sentencing, if you had to predict where that's going to go, despite the fact that there are warrants that could be signed, would you imagine it's still going to continue that way?

Bright: The sentences being carried out?

Q: Yes.

Bright: I think it is going to spike up this year.

Q: No, I'm sorry. I meant with the sentences being opposed.

Bright: I hope and I think what is going to happen is that it is going to continue to either

stay about where it is or even go down a little.

Q: Isn't the basic reason for that is the availability of life without parole?

Bright: Yes. I think three reasons. I think that all the publicity about innocence has made jurors more careful and less likely to impose death. I think life without parole as the alternative. I think better lawyers in some places.

Q: With regard to innocence, any question in your mind that these people who have been found to be innocent who have been in prison, has an impact?

Bright: It has had a tremendous impact. It's just made people from Sandra Day O'Connor to the average person on the street have a whole different way of looking at the criminal justice system.

Q: Just the other day, there was a debate going on in Missouri regarding what to do about the death penalty and, in particular, in one case having to do with lethal injection.

Bright: Yes.

Q: And here's a statement by a representative during the debate, "I still favor the death penalty. I just want to make sure we put the right people to death."

Bright: Right.

Q: Here is another state representative, "Whoa, let's take a step back. I'm not soft on crime but we can't redo this once we've executed this person."

Bright: Right. I think that's changed the debate because who can argue with that?

Q: Some people argue with it. Justice Scalia might argue with it.

Bright: He would.

Q: He might say, "Wait a minute. In our system, which is wonderful on the whole, it is inevitable that somebody is going to get killed." And there are other people who will say, “God bless them. Some people with the right resources have been found to be truly innocent and have been left out of prison, but nobody has shown that anybody who's innocent has been killed, actually executed by the state."

Bright: Right.

Q: Is it a fair argument?

Bright: Well, I don’t agree with it. It's a fair statement. Nobody can prove with DNA certainty that people that have been killed have been innocent, but there are certainly cases. You've got the former district attorney of San Antonio saying, "I'm fairly sure that Ruben [M.] Cantu” -- one of the people that he prosecuted -- “was not guilty." You've got an arson case in Texas where all the evidence seems to indicate that the fire was accidental and wasn't arson. There are cases that certainly people can argue about but unless you've

got DNA evidence people can argue about cases until the cows come home. There is not a case of anybody who's been executed where you can conclusively prove with DNA evidence that the person is innocent.

Q: Over the course of the years of your work, you must have had a lot of contact with newsmen and newswomen.

Bright: Yes.

Q: Journalists, perhaps as much as anybody outside the legal system, have pursued cases where people have been convicted of crimes and subsequently found to be innocent. Is that correct?

Bright: Right.

Q: A couple of days ago, on May 21, the *New York Times* carried the story, "Death Row Foes See Newsroom Cuts as Blow." That was the headline. The lead sentence was, "Opponents of the death penalty looking to exonerate wrongly accused prisoners say their efforts have been hobbled by the dwindling size of America's newsrooms and particularly the disappearance of investigative reporting at many regional papers."

What this story goes on to say is that the reporters who used to do this work when few other people were interested in whether this person was actually innocent and who were often steered to these kinds of potential situations by people like Steve Bright, these reporters are dying on the vine.

Bright: Absolutely.

Q: You agree with that?

Bright: What's happening to the newspapers is just terrible. Henry Weinstein out in Los Angeles, who was the lead reporter there, left. The *Los Angeles Times* has gone to hell in a hand basket. He has gone to teach at the new law school, that new University of California Law School. I've asked to people in my office, if we lost the legal reporter to the *Atlanta Constitution*, Bill Rankin, who writes so much about these things, "What would happen?" It would be like the proverbial tree falling in the forest. Nobody would know anything about these things. A lot of times he's the only person in the media that covers them. A lot of times then the radio and the other media will follow, based on his reports, but they don't get out there and cover it themselves.

As these newspapers cut back their staffs to just bare bones, there is no investigation. The *Atlanta Constitution* two or three years ago ran this incredible series on the death penalty. They spent like two or three years on it, devoted four or five reporters to it. It was one of these things that ran over like four days. Ken Armstrong and Steve Mills did this incredible reporting for the *Chicago Tribune* when the innocence cases were coming to light there. They did a comprehensive study of the death penalty in Illinois that ultimately had led Governor [George H.] Ryan to commute the sentences of everybody on death row in Illinois. It's just not going to happen now because those papers just don't have the money to devote five reporters to work on a story for two or three years.

Q: How about in the blogosphere? Places like that?

Bright: The people in the blogosphere go out and do the work like that. They don't have the money. At least I don't think so. I don't follow blogosphere that closely but I don't think that they have the resources that these great newspapers had, the *Chicago Tribune* and the *Los Angeles Times* and the *Washington Post* and the *New York Times,* to devote to these issues. It's really very troubling.

Q: I mentioned James Acker earlier. You know him?

Bright: Yes, I know him.

Q: In his review of Stuart Banner's book on the history of the death penalty he wrote, "The steady historical trend of reserving capital punishment for narrower and narrower facets of crime and forever winnowing categories of offenders has exposed a fragile vulnerability of this sanction. Death, a punishment once thought necessary and appropriate for a vast number of crimes, has now been discarded as unneeded and unacceptable save for a select few offenders convicted of the most aggravated forms of murder. This progression is destined, eventually, to arrive at its logical conclusion, which is compete abolition."

You, a year later, made reference to the fact that the constitutional court of South Africa in one of its first decisions had thrown out the death penalty in South Africa.

Bright: Right.

Q: And you ended your article by saying, "The American people will ultimately reach the same conclusion, deciding that, like slavery and segregation, the death penalty is a relic of another era, and that this society of such vast wealth is capable of more constructive approaches to crime. And the United States will join the rest of the civilized world in abandoning capital punishment."

I ask you, at bottom and after all the work you've done and all you've seen, do you still have that kind of optimism?

Bright: Yes. You have to have some optimism and it's shaken from time to time. I think that we have really gone through a time here with the dark side of the American spirit and a lot of fear mongering by the Bush/Cheney administration. I hope that President Obama will speak to our better instincts and will bring those out. If that's done, which seems to me that it is happening and it's starting to happen, over a substantial period of time, we could start to think more.

I think I said in there somewhere about the death penalty really comes down to what kind of society you want to have. Do you want to have a vengeful society? These are the questions being asked now about torture and about some of these other things. The question about torture and when you're talking about torture, you are not talking about them, you're talking about us. You demean yourself and what it says about you to other people. I think the same thing is true of the death penalty. If you kill people in your society, if that is one of your ways of punishing people, it is not only very demeaning to the people that you kill, but it is extremely degrading to the society that does it. Arthur [J.]Goldberg said that it was the ultimate degradation of a human being. It coarsens the society and it

says something about how the society resolves conflict. It's interesting to me that of all these sort of primitive punishments that we've had, cutting off fingers and putting people in the stocks and branding people, the only one of those we still have is the death penalty, which seems like that would be the first one you would want to get rid of.

My hope is that we will think about that and we'll come to the conclusion that we can be a more compassionate country than that and that we can punish crimes in just more humane and constructive ways.

Q: If that were to come about, is the more likely course not from the Supreme Court initiating the matter but through people perhaps working in what could be called an abolitionist mode, if not an abolitionist mood, with the help of people like yourself, persuading state legislatures?

Bright: I would love to see that. I think it would be much, much better if it were done through state legislatures. There is a lot of resentment on any issue when the courts just come down and tell people what to do and what they can't do. If this were like in Connecticut, the legislature takes it up, it has hearings, it hears from everybody and then votes. Everybody has been heard and it's decided that way. It does a lot of public education about it because they hear from the religious community, they hear from various and sundry people. It's just amazing the people that come forward, victims' families who come forward and say, "We don't want the death penalty." Innocent people come forward and tell their stories about their narrow scrape with death. People come forward and say why they want the death penalty, but it's an opportunity for everybody to have their say about it. It's democracy and healthy to have.

Q: If enough states did it, enough states repealed, is it possible that along with the Supreme Court's thinking as a matter of evolving standards of decency, that they themselves might then conclude, "The states have decided for us."

Bright: Right.

Q: Finito!

Bright: That's what I'm saying. If enough states were to repeal, the court could ultimately reach that conclusion.

Q: Hopefully, then when that happens, this drum major for justice, Stephen Bright, will still be around to see it.

Bright: I hope so.

Q: Is there anything more that you want to add to this interview today?

Bright: No. I think this is good.

Q: Thank you so much.

Bright: All right. Thank you. I've enjoyed it.

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