

THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

Richard H. Burr

Oral History Research Office

Columbia University

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PREFACE

The following oral history is the result of a recorded interview with Richard H. Burr conducted by Myron A. Farber on December 10 and December 11, 2008. 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.

RH

Session One

Interviewee: Richard H. Burr

Date: December 10, 2008

Interviewer: Myron A. Farber

Livingston, Texas

Q: This is Myron Farber on December 10th, 2008, interviewing Richard Burr in Livingston, Texas for Columbia University's oral history on the death penalty. Dick, should I call you that, is that what you prefer?

Burr: That's fine.

Q: We're here in Livingston, Texas. Isn't Texas's death row here in Livingston?

Burr: It is. It's at a prison called the Polunsky Unit, which is part of the Texas Department of Criminal Justice, which is what corrections is called in Texas.

Q: Right, why did I think it was in Huntsville?

Burr: It used to be. Well, there are two connections to Huntsville. Death row used to be in Huntsville at a unit called the Ellis One Unit for many, many years, but executions are all carried out in a prison in Downtown Huntsville. That's where the death chamber is.

Q: Right.

Burr: And that's where they've always been carried out.

Q: But the men on death row are here in Livingston?

Burr: Yes.

Q: How many right now, do you know?

Burr: Between 350 and 380. It used to be over four hundred but the number of executions is outpacing the number of new death sentences now so death row here is shrinking.

Q: Well let me mention with regard to Texas before beginning -- a few figures -- just to place Texas in the order of things. Is it fair to say that Texas is and has been for a long time the nation's leading executioner?

Burr: Absolutely.

Q: Okay. Of the 1,136 executions since the *Gregg* decision in 1976 [*Gregg v. Georgia*], some 400 have been in Texas.

Burr: Yes.

Q: And this year 2008, since the *Kennedy* decision [*Kennedy v. Louisiana*] in March some thirty-seven people have been executed in the United States, half of them in Texas, and of the last thirteen, nine in Texas. So I suppose it's appropriate for this discussion to be in Texas, because unfortunately or fortunately this seems to be where much is happening, or has

happened.

Burr: Oh, it's been the execution center ever since execution started after *Furman* [*Furman v. Georgia*, 1972]. Texas had the second involuntary execution after *Furman* -- Florida had the first, John [A.] Spenkelink. Texas had the second. It was in 1980, I don't remember the man's name.

Q: Well at some point in our conversation I'd like to talk a little bit about why that's the case, what it is about Texas that has resulted in these kinds of figures here. Now, in *The New York Times* on November 26, Tim [F.] Geithner, the Secretary of the Treasury-elect, was talking about Larry [H.] Summers who used to be Secretary of the Treasury. And he said, that "I find that five minutes of talking to Larry is often more valuable than an hour of talking to somebody else." So that's why I'm here to talk to you, because you are widely regarded as one of the leading practitioners in this country on the death penalty, representing defendants, especially post-conviction I suppose one could say.

Burr: I've done much more in post-conviction than trial. I've done some trial work and since 1997 I've been a member of a small project funded by the federal courts to consult with lawyers on federal capital trials, so I do a lot of trial consulting but my actual direct work is primarily post-conviction and federal habeas.

Q: Okay. Let me take you back to yesteryear, as they say in the Old West. After you graduated Magna Cum Laude from Vanderbilt, you went to law school at The University of Kentucky.

Burr: That's right. Not immediately.

Q: Not immediately.

Burr: I had visions of being a labor organizer when I got out of college, and it didn't work for me, and then I --

Q: You tried it, though?

Burr: I tried to get into it in the way that I thought I should, which was to be a worker. I went to the carpenter's union in Nashville, Tennessee and took some tests and took a loyalty oath and was hired as a union apprentice carpenter. And I lasted three days on that job. It was very hot and I was not very tough, and I was working in a hole in the ground in the middle of downtown that later became a twenty-five story building and I couldn't do it. But I felt like if I was going to be an organizer I first had to be a union worker and it didn't work.

Q: Well you graduated law school in 1976, so that's a five-year period in between that.

Burr: Yes, I then spent about three years doing various things around the media. I learned photography and learned to operate what was then the first version of portable video cameras and decided I wanted to do film-making. But I came out of the 1960's sort of --

Q: When were you born, Dick?

Burr: I was born in 1949.

Q: Where?

Burr: In Lake Wales, Florida in Central --

Q: Pardon me?

Burr: A little town in Central Florida called Lake Wales, W-A-L-E-S.

Q: Okay, right.

Burr: But I came out of college as sort of hard New Leftist, and I didn't want to make Hollywood films. I wanted to make films that would help raise the consciousness of working people and poor people. I loved the political philosopher from Brazil named Paulo Freire who wrote a book called *Pedagogy of the Oppressed*, and the central thesis was that class consciousness can be raised if people can have their lives reflected back to them with some clarity. And I decided that doing video and small films would be a way to do that. So I ended up in a film program at a university that didn't work for me, and after feeling like nothing was working I went to law school. So I sort of backed into law school. It was a realization that I'd had a privileged educational background and what I needed to do was to develop some skills that a person with a privileged background could develop and then put those skills to the benefit of poor and working people.

Q: Well, while you were an undergraduate at Vanderbilt there was a lot of turmoil in the country on campuses.

Burr: There was.

Q: Also at Vanderbilt?

Burr: Oh, yes. I actually was one of the anti-war movement leaders at Vanderbilt. I suppose the height of our work -- well there were two things. There was a moratorium in the fall of 1968, and we had organized a march of twenty-five thousand people that went from the campus to downtown Nashville. It was a candlelight march at night. And then after Jackson State and Kent State happened in the spring of 1970, we took over the administration building and closed down the campus for a couple of days.

Q: At Vanderbilt?

Burr: Yes.

Q: Right, who was chancellor at that time?

Burr: [G.] Alexander Heard.

Q: I had a very funny experience with Alexander Heard, a very memorable moment in my life, but I'll tell you later. In any case, do you want to deny now that you were hanging around with Bill Ayers?

Burr: [Laughs] I hung around proudly with counter-parts of Bill Ayers who never did

anything violent, but I actually connected with some old Communist Party members in 1969 and 1970, and for a couple of years I was a card-carrying member of the Communist Party USA.

Q: Oh, really?

Burr: I gave that up pretty readily, but I came out of the anti-war activity and civil rights work. I was equally involved in both in Nashville -- did a lot of work with students at Fisk University and Tennessee State University, which then was a primarily African-American state school. Fisk was a private school. I was one of the local organizers for the Poor People's Campaign that Dr. [Martin Luther, Jr.] King started before he was killed and that came through Nashville after he was killed, met Dr. Abernathy and was very active with him. The civil rights work was more in the community and not so much on campus. The anti-war work was almost all campus-driven. Nashville has a long history of civil rights activism. There were sit-ins in the 1960's in, at the Woolworth's in downtown Nashville.

Q: Right, right, right. You went on to The University of Kentucky Law School, did you find that fulfilling or meaningful?

Burr: I found it useful. By the time I decided to go to law school it was too late to get into the class for the fall of 1973. I decided sometime probably in the summer of 1973. I found that just in canvassing places I might go that some students could start in the middle of the first year at University of Kentucky, so I actually started in January of 1974, never took a summer off and finished as if I had started in September of 1973. I liked it. It was dirt-cheap. Tuition was \$250 dollars a semester. I had a temporary clerical job for six months before I started law

school and I paid for all of my tuition and books and school expenses out of the little bit of money I made as a temporary clerical worker.

Q: It cost that even though you were not a Kentuckian?

Burr: I became a Kentuckian. I moved to Kentucky in June of 1973, and you only had to live there six months to establish residency. So when I started paying tuition I was a Kentucky resident. So it was the best fifteen hundred dollar investment I've ever made.

Q: Right. And while you were in law school was there much focus, for you anyway on or in the curriculum, on criminal law that could have touched on capital punishment?

Burr: Not really. *Furman* was in 1972. The states and everybody reenacted death penalty statutes in late 1972 and early 1973, who wanted them. So I was going to law school in the time where those new statutes were being tested, but before the 1976 decisions. I was out by then. So I was in a period where the death penalty was not really an issue. I mean it was, but law school curriculum didn't pay any attention to it then, at least mine didn't. So I took you know criminal procedure and criminal law classes, there wasn't much advanced criminal procedure or law at The University of Kentucky. I gravitated towards all the constitutional law-related classes, civil rights classes, advanced constitutional law seminars and labor law. Those were the things I was really interested in.

Q: Right. If you thought about it at all what did you think you were going to do with this law degree?

Burr: I still wanted to work with the labor movement, I wanted to come out and you know become a junior member of a general counsel's office for a labor union. And my last year in school I started sending out resumes, and the union I wanted to work with the United Electrical Workers, UE, which was in my view the most progressive and left-leaning labor union there was. I got a very kind letter back from the general counsel, a two-page letter praising my interest and what I'd told them about myself, but regretfully saying that they had a waiting list that was fifteen years long for people to get into their office.

Q: People or fifteen years?

Burr: Fifteen years. He'd said they had some people waiting fifteen years to get jobs with them. So that was pretty discouraging for somebody who was eager to get on with practicing law. So my then-wife was going to go to graduate school at The University of Rochester in upstate New York. So I just started looking for jobs there and found a job with a solo practitioner who did virtually all of the Title VII plaintiff's work in Rochester. Title VII is of the Civil Rights Act of 1964, prohibiting employment discrimination. So I got a job with her and worked there for almost three years doing plaintiff's discrimination, employment discrimination work. It was a great entry job for me. I learned a lot about civil litigation, class action litigation, and losing. Because we lost a lot of cases. We were a small operation. We did pretty good work, but the biggest firm in Western New York defended all the people we sued and they papered and discovered us to death, and we sort of limped through trials. And we were waiting to get paid by getting judgments, or at the end of the case getting attorney's fees and we rarely won, so most of the work that we did was uncompensated. It was a real struggle. My boss kept our practice going by taking matrimonial cases for people who had a lot of money and liked to fight, so that's what kept us going. But I learned a lot about civil

practice and began getting a realistic view of how the courts operate in relation to wealth and power.

Q: Right. But from there you went to Atlanta.

Burr: Well I went to a group -- it wasn't in Atlanta -- it was then called Southern Prisoners Defense Committee, and the offices were in Nashville and in New Orleans. And I went to the Nashville office. That was in 1979.

Q: March 1979.

Burr: Right. They were primarily a prisoners' rights litigation organization then, and they hired me because I'd done class action civil rights litigation. At about the time I got there the emphasis began to shift towards death penalty defense work.

Q: But why did you go there? What was your interest that took you to that place?

Burr: I was drawn to prisoners' rights litigation, and I knew that they did some death penalty work. Both kinds of work sort of appealed to my concern about working with poor people. Because I knew enough to know that most of the people in prison were not people of means, they were poor people and people of color. I didn't know much about the death penalty but I figured it operated in the same way. And in thinking about the death penalty --

Burr: -- I realized that in an overall view of government dealings with poor people, if the government sought to kill you if you did something violating the law, then that justified any

other means of mistreatment of people for *less* than killing people. So it seemed like it was important to take on the death penalty and to try to fight it because of the effect it had on punishment throughout the criminal justice system, a system that I had already to come to believe, though without much knowledge, was a system skewed towards controlling and repressing poor people.

Q: But the idea of going to a prisoners' defense organization was something that was germinating in Rochester -- just sprung out?

Burr: No. No, at the point my wife finished graduate school in Rochester. We didn't like living in Rochester, it was too cold. And it was too northern. I was a southern kid and my wife then grew up in Southern Indiana and her family's roots were in Kentucky. And we met and married in Nashville, so we learned about this job from a friend in Nashville. We delighted at the fact of going back to Nashville.

Q: Right.

Burr: And I found this job which seemed like a suitable job to me. Prisoners' rights was not something I thought about until I heard about this job and then realized it did fit with the little bit of work I'd done so far, at least in procedural ways. My wife got a good job and so it was those combinations of things. There was nothing about prisoners' rights work or death penalty work that drew me intrinsically to that. It was a combination of this seeming like an acceptable job given my world view, and we were happy to go back to Nashville. We loved Nashville.

Q: Right, right. But particularly as it relates to the death penalty what did you do and what did you learn in Nashville in those three years?

Burr: I started out doing mostly prisoners' rights work, class action law suits at prisons in that region. But I gradually was drawn into the death penalty work because sometime not long after I got there -- I believe I'm correct about this, I know I was there when this happened -- the John Spenkelink execution moved forward in Florida. And my organization was not directly involved in representing John Spenkelink but we were very aware of what was going on. The only death penalty defense organizations there were then were Southern Prisoners Defense Committee, Millard Farmer's project based in Atlanta called Team Defense, and then LDF, the Legal Defense Fund. And the Legal Defense Fund folks were the people involved in John Spenkelink's case [*Spenkelink v. Wainwright*, 1979], so I ended up on phone calls and meetings about that case, met some people at the Legal Defense Fund -- Jack [C.] Boger, Joel Berger, Deborah Fins -- and Millard Farmer. In our little office there were just three lawyers in Nashville and I think two in New Orleans, and various ones of us did small pieces of work in relation to the case, but --

Q: In relation to the --?

Burr: To John Spenkelink's case.

Q: Even though it's a Florida case?

Burr: Yes. But the real lawyers in the case I think were Jack Boger and Joel Berger. And so I started learning death penalty issues in relation to that. I began to get a glimpse of the

power of the state in action, and the tendency of courts to capitulate to state power. In that series of events, one heroic thing was done by a Fifth Circuit judge. There was no Eleventh Circuit then, the Fifth Circuit split a couple of years later into the Fifth and the Eleventh Circuits. But a judge named Elbert [P.] Tuttle who I learned in the course of that was a very honored sort of pro civil rights judge --

Q: In New Orleans?

Burr: He was --

Q: Atlanta?

Burr: I think he was in Atlanta, but he might have been in New Orleans. The court was based only in New Orleans. But anyway he granted a stay and it was later dissolved either by the whole Fifth Circuit or the Supreme Court, I'm not sure which. I thought it was just very heroic of him to do that.

Q: Isn't this when Tuttle granted a stay in the middle of the night at his house?

Burr: Yes, and I think Millard Farmer went to his house with the stay papers, and he granted the stay.

Q: I think [William] Ramsey Clark may have been there also.

Burr: I think Ramsey might have been, I hadn't met Ramsey at that point.

Q: Yes, but he's sort of a legendary figure, Elbert Tuttle.

Burr: Yes..

Q: So here you are in Nashville and yet with your fingers a little bit in that *Spenklink* case in Florida.

Burr: Yes, you see the Southern Prisoners Defense Committee was the legal arm of a larger south-wide group called the Southern Coalition on Jails and Prisons that was a prisoners' rights advocacy group. And it started this legal project to do class action prisoners' litigation. And it had been in existence for probably a couple of years, but our province was the entire south. Florida was within our province. We didn't have any cases in Florida at that time, although I think somebody had been doing some prison work there. But the death penalty had not become a part of the work of the Southern Prisoners Defense Committee until *Spenklink*, and then it sort of dawned on us, LDF and Team Defense, that we were starting to move into a new era. The 1976 cases got rid of everybody's statues except Florida, Texas and Georgia, so death row began to start building up in those states. And by 1979 you know Florida was ready to execute somebody -- although the Florida statute had been actually reenacted at the end of 1972, but it was sustained. We had nothing to do with Texas at that point, or really ever, that organization, but then *Lockett v. Ohio* was decided in the summer of 1978 by the Supreme Court. That decision along with the 1976 decisions, *Gregg* and other decisions sort of set the parameters for the issues that would be litigated for the next few years.

Q: What did *Lockett* hold?

Burr: *Lockett* held the Ohio death penalty statute unconstitutional because it precluded the consideration of mitigating circumstances except for a very narrow few circumstances.

Q: Okay. For the purpose of this discussion, and just in its barest bones for someone looking at this record years from now maybe at Columbia, just if you mind saying simply what *Furman* held in 1972, and what *Gregg* held in 1976?

Burr: Sure. *Furman* held that the death penalty as it was then being applied in the United States was unconstitutional. There was no single ground for that because there were nine separate opinions, but the collective sense of it was that the death penalty was being administered in an arbitrary, capricious, and discriminatory way.

Q: Which was violative of --?

Burr: Violative of the Eighth Amendment and the Fourteenth Amendments because it was cruel and unusual.

Q: Right.

Burr: But the operative words were arbitrary, capricious, and discriminatory. In the wake of -
- and *Furman* set aside - - they voided every death penalty statute in the United States and the federal death penalty statutes.

Q: Right, and also it resulted in commutation to life of some 631 people on death row at that time.

Burr: You know the numbers better than I, but everybody on death row had sentences commuted to life at that point.

Q: Right. And then there was a period of a few years there.

Burr: Yes, there was a period. Gradually states began reenacting different death penalty status, trying to draw from *Furman* what kind of a statute would be constitutional. Florida, Texas and Georgia each enacted statutes that separated the guilt determination from the penalty determination -- they bifurcated the trial. That turned out to be an appropriate thing to do in the Supreme Court's eyes later on.

Each of them dealt with the penalty phase in a little bit different way. Florida had a list of aggravating factors and mitigating factors. Both lists were limited to the specified factors. The jury was instructed to weigh the factors and recommend a sentence. The judge didn't have to accept the jury's sentence, but you know generally did, and generally was supposed to, but the judge could reject it. It was a recommendation. In Georgia there were statutory aggravating factors and a few statutory mitigating factors but sort of open-ended consideration of mitigation. Again there was a weighing process but there the jury's decision on a sentence was binding, it was the sentencing verdict. Texas took a different approach. They created three issues called Special Issues to guide the jury in the penalty phase. One was whether the crime was committed deliberately; the second was whether the person was likely to be dangerous in the future; and the third, which was rarely an issue, was whether there was some provocation

by the victim that led to the murder. No specific consideration of mitigation.

All three of those statutes were found to be constitutional by the Supreme Court in 1976. All the other statutes had not followed that model and did not bifurcate guilt and penalty. What they had done to try to deal with the question of sentencing discretion was to make the death penalty mandatory upon conviction of capital murder. And in the five cases that were decided, North Carolina and Louisiana had that kind of statute, and their statutes were struck because of the mandatory nature. The Supreme Court said that the problem with uncontrolled discretion and arbitrariness simply was pushed back into the guilt decision by that kind of a system. And so at the end of the Supreme Court turning in 1976, only Florida, Georgia and Texas statutes passed muster. Everybody else's statutes were unconstitutional.

Q: Well is it fair to say, Dick, that in subsequent years the other states that had the death penalty basically followed the set-up that had been approved in Georgia and Florida?

Burr: That's right, they tended to follow sort of a Florida model in terms of listing a bunch of factors, aggravating and mitigating, but the Georgia model in terms of making the jury's sentencing verdict binding on the court. And the other problem that got addressed just two years later in the *Lockett* case was whether or not the mitigating factors could be limited to just a few specified factors, and the Supreme Court said no they can't be -- you have to be able to consider any circumstance of the offense and any characteristic or part of the history of the defendant as mitigating, and mitigating is whatever a sentencer thinks is mitigating. And so ultimately the Florida statute fell but not until 1987 did the Supreme Court strike the Florida statute.

Q: Because?

Burr: Because it had a long list of mitigating factors but it limited consideration of mitigation to those factors.

Q: Okay.

Burr: And finally the U.S. Supreme Court struck that down, but nine years after *Lockett*.

Q: Okay. Is it worth underscoring that these developments by the Supreme Court brought into being something unique in American history, no? And that was a two-trial set-up in a way, I mean you had a trial for whether the person was guilty or not, and if found guilty you then had another mini-trial on the question of death or life.

Burr: That's right.

Q: But with the same jurors?

Burr: Yes.

Q: The same jurors?

Burr: Yes. Sometimes the second part of the trial started immediately after the guilt verdict, sometime there was a day or two interval, but it was presumptively the same jury.

Q: Right. This kind of second mini-trial, had that even been true in American History previously?

Burr: Not to my knowledge.

Q: Okay. .

Burr: I think the framework might have come from recommended sentencing procedures by the American Law Institute, which is an organization that proposed model statutes for various areas of the law. And I believe they had had a proposal for a bifurcated process. I don't know if it was just for capital trials or criminal trials in general, but I don't think it was just made up out of whole cloth by Texas, Florida and Georgia.

Q: Right, okay. And then, actually, you went to work in Florida in mid 1982 from Nashville, and you went to work for the Office of the Public Defender, Fifteenth Judicial Circuit of Florida in West Palm Beach, Florida. Now that was a pretty special office, wasn't it?

Burr: It was. There were, I think twenty -- as I remember Florida was divided.

Q: Excuse me, but in the history of the fight against the death penalty that was a special office.

Burr: It was. It was the leading public defender office in Florida dealing with death penalty cases, and probably in many ways at that time the leading public defender office in the country dealing with death penalty cases. There were twenty judicial circuits in Florida. There

were twenty public defenders and West Palm Beach was one of the twenty. But it set the standard for how people ought to be represented both at trial and in post-conviction cases for Florida, and I think in many ways for a lot of other places because at that point the cases were moving faster towards execution in Florida than any other state. Texas had not caught fire at that point, nor had Georgia. I think at the point I went there, Florida may have been the biggest death row in the country. I'm not sure. Texas may have been about the same size then. In the work that I did with Southern Prisoners Defense Committee that included Georgia and Florida, I started getting many more cases in Florida and getting to know people working there because I always tried to co-counsel with people who lived where I had a case. I got to know people at the West Palm Beach office and they offered me a job and I was delighted to go there. It was a terrific place.

Burr: The public defenders are elected in Florida, just like district attorneys are.

Q: Oh, really? Were at that time?

Burr: Yes, and are still are. They're called state attorneys in Florida. Public defenders are elected every four years, and the person who had been in that position in West Palm Beach was Dick [L.] Jorandby. By the time I went he'd probably been there twelve years. He really enabled this work to be done as well as it was in that office. He had an extraordinary First Deputy named Craig [S.] Barnard, and Craig and I had gotten to know each other through conferences. But Dick Jorandby made money available to do the capital work that nobody else made available. I don't know how he found it, where he took it from other parts of his budget or how he got it, but he was a Republican. He was a Republican and a Libertarian, but he never ran for office in any sort of anti-criminal defendant way that some public defenders have

in Florida. But his program always was, "We are going to provide the best defense for people that we can provide, we are going to provide the defense they're entitled to, and the chips will fall where they fall." But he was a very strong constitutionalist, and he believed in doing the death penalty work out of that office in the best way possible. And we never lacked for money for investigation or for experts. His office had one-twentieth of the counties in Florida for trial purposes.

Q: I'm sorry, say that again?

Burr: It has one-twentieth of the trial cases. Five of the twenty public defenders in Florida also had appellate jurisdiction, and so his office's appellate jurisdiction was far broader than the trial jurisdiction: it included one-fifth of the state. It went down to Fort Lauderdale and up to Orlando, and so the appellate part of the office was where the post-conviction and federal habeas cases were. When I was there, I represented people in state post-conviction and federal habeas and we had cases in 20 percent of the state. The number of cases was actually the second largest in the state though because we did not have Miami but we had Broward County which is Fort Lauderdale and up to Orlando. And we probably had half of the active post-conviction death cases.

Q: When you were there between 1982 and December 1986, were you doing only capital work?

Burr: Yes.

Q: And largely post-conviction?

Burr: Only post-conviction.

Q: Only post conviction. Now, was it during that time that Craig Barnard succeeded Dick Jorandby, is it?

Burr: No.

Q: He did not succeed him?

Burr: No, Dick Jorandby remained the public defender for several years after I left.

Q: Oh, really?

Burr: He was defeated ultimately in the late 1990s, and retired, but Craig Barnard actually had a tragic end to his life. He died in 1989. Craig had epilepsy, a seizure disorder, and he had a seizure in the shower one morning and collapsed. His body blocked the drain and he drowned to death.

Q: He's portrayed in David von Drehle's book about the Florida experience with the death penalty, *Among the Lowest of the Dead*. Craig Barnard is portrayed rather heroically, is he not?

Burr: Oh, and he should have been. He was and he should have been. He deserved that kind of portrayal.

Q: Not just because he was Number Two in the office?

Burr: No. He and Dick Jorandby had a very special relationship. Dick trusted Craig with all the decision-making about the capital cases. He trusted his judgment. He trusted his sense of where resources ought to be deployed. I don't mean to suggest that Dick simply rubber-stamped whatever Craig did, he didn't. He thought about it himself, but Dick took his lead from Craig, and occasionally they would disagree, but not very often. But had there been somebody else in that office besides Craig Barnard, the office would not have been what it was in terms of setting the standard for representing people in death cases.

Q: Correct me if I'm wrong here: this is more concentrated work on the death penalty than you had in your experience in Nashville?

Burr: Oh, yes, I always had at least one prisoners' rights class action case I was doing in Nashville, and in part I wanted to move to West Palm Beach because I wanted to concentrate entirely on death penalty cases by then.

Q: Why?

Burr: I found every aspect of death penalty representation utterly compelling, and it spoke to every aspect of me. It was intellectually challenging, it was spiritually challenging, was emotionally challenging -- it was physically challenging. And the value of the work to me, from very early on, was in working with the clients and learning about their lives and coming to understand them as full human beings and then seeing how they were portrayed in the press, portrayed in the courts, treated by the courts, treated by prosecutors, treated by police

officers. There was a book written by a political radical named Frantz Fanon called *The Wretched of the Earth*, and that book had been one of the things that influenced me a lot. I had found my role in working with the “wretched of the earth,” because these were folks for whom life had never worked. I realized fairly early on they were being killed because their lives hadn’t worked. They were an inconvenience to everybody else because of how their lives had unfolded and the violence that had come out of their lives. And I found a kind of work that called for every resource and talent that I had and more, working with the people who needed my help the most.

Q: Well, they had done some terrible things these people, had they not?

Burr: They had, there’s no question about it. Killing somebody is a hideous thing, it’s the worst that we can do to each other. They were hated by everybody for that reason. The state and the public wanted people killed for that reason, and I very quickly realized that this wasn’t happening to people of means or a lot of white people who killed people. It was happening mostly to people of color, all of whom were poor and all of whom who had been born into poverty, who never had a chance of any sort, and didn’t have the ability to make unusual and historic jumps out of poverty like some people can. They weren’t born with the ability to do that. And so I focused on the inequity involved in it, and it was an inequity that seemed wrong to me. I moved to the point where I thought killing was wrong entirely, but my first realization was that the inequities that put people’s lives in jeopardy and that led to them killing other people was a kind of inequity I didn’t think we should tolerate.

That was a lot of the fuel that drove me, especially early on because later it became more complex as we learned as a community how to investigate people’s lives, how to develop all the

many facets that mitigation has in understanding a person's life and why they shouldn't be killed and why they've committed the crime they have. Well before we learned how to do that and that information became the powerful driving force in cases, it was my sense about the profound inequities involved. And the ultimate inequity of putting people to death whose crimes were no different from murders committed by people of means, people from more privileged backgrounds who have had lives work for them -- none of those people got prosecuted for capital crimes even though they committed capital crimes.

Q: Well if there had been no death penalty, if these people who were convicted of murder the most they would have faced would have been life in prison. Would you have had a problem with that at that time?

Burr: I don't know. That is not how the world was defined. If there were no death penalty in the United States, and the worst punishment was spending your life in prison, I might have been drawn to attacking in the same way for the same reasons. I don't know. It's impossible to answer because that wasn't the situation, and there is something unique about killing people. So maybe not, maybe I would not have been drawn because the state wasn't actually killing people.

Q: Well in fact have you ever defended someone at trial or post-conviction who was convicted of murder which shook your faith that the state should not be killing anyone?

Burr: No, I've never had a case that shook my faith in that principle. I represented Tim [J.] McVeigh in the Oklahoma City bombing [*United States v. McVeigh*, 1996]. As a Federal Death Penalty Resource Counsel, I was virtually co-counsel in the *Moussauoi* case, the one person

prosecuted for 9/11 [*United States v. Zacarias Moussaoui*, 2006]. I was deeply involved in the victim outreach work in that case and in challenging Zacarias Moussaoui's competency.

Q: Let's go back to your experience in Florida though. When you came to Florida you were around thirty-years old or so, right? Thirty-three, maybe?

Burr: I came in 1982. I thirty-two or thirty-three.

Q: And you had these strong feelings already that you had enunciated, and in that lively and effective office in West Palm Beach you had some able colleagues.

Burr: I did.

Q: Including one who died this week, Mike [A.] Mello, is that correct?

Burr: Mike Mello was there, yes. I was there in 1982. Mike probably came in 1985, maybe 1984.

Q: Right. And Scharlette Holdman was there?

Burr: Well, Scharlette wasn't in the office. Scharlette was the director of the Florida member of the Southern Coalition of Jails and Prisons. She directed something called the Florida Clearinghouse on Criminal Justice in Tallahassee. But she and Craig Barnard were very close working colleagues. By the time I got to Florida, Scharlette was doing a lot of work in death penalty cases, primarily recruiting lawyers, but she also was beginning to develop the whole

specialty of investigating mitigation.

Q: We'll talk about that at a later time. She was certainly a lively figure, was she not?

Burr: Absolutely.

Q: And effective?

Burr: Very effective.

Q: And controversial, no?

Burr: Well, I guess she was. She was never controversial to me. Scharlette spoke her mind and stepped hard, and if you didn't agree with Scharlette and got in her way you might have thought she was controversial.

Q: Right.

Burr: Scharlette and I have had disagreements but we worked through them, and sometimes she would change her mind, sometimes I would change my mind. I consider Scharlette a sister.

Q: Wasn't she fired from her job one time?

Burr: I think she's been fired on occasion, yes.

Q: And have you stayed in touch with her over the years?

Burr: Yes. We've been thirty-year friends and colleagues.

Q: Let me mention one other person in connection to Florida. There was on the other side of you, facing you was the dark visage of the state's attorney, the legendary Ray Markey.

Burr: Yes.

Q: What do you remember about Ray Markey?

Burr: Scharlette called him a "bantam rooster." Ray was a small guy -- he was a small, energetic, hard-driven person. He was smart. He was very smart, he was very capable. We considered him ruthless. We probably considered him unprincipled. I can't think of any specific thing to support that but just remembering my impressions of Ray. He was the assistant attorney general who headed the group within the Florida attorney general's office that handled death cases. And as I remember the division of work was when you were in the state trial court in post-conviction, the state's attorney's office was your opponent. As soon as you moved to the Florida Supreme Court the attorney general came in and then throughout federal habeas, the attorney general's office represented the state.

Q: Right.

Burr: I had a few cases against Ray, maybe only one, but his hand was in everything. He was

smart. If you step back from it a little bit that office did pretty good work.

Q: Do you remember having a conversation with Ray Markey in which you tried espouse your view of the death penalty and he told you his?

Burr: I don't remember that. Did I?

Q: No, I don't know that you did. But you never sat over a beer?

Burr: No. That was something I was about to get to.

Burr: You know, the adversarial system, which is what our justice system is, is not a system that I like very much. In death cases in particular, and particularly in this period of time – and it may be just that as I've gotten older I've mellowed some -- this was a life and death battle. I considered the other side the enemy and I didn't like them. I'm not sure. I tried not to hate them. But when executions started, it was war. And there was no collegiality between my side and their side. None. To my knowledge nobody fraternized or had a beer together and sort of took off the adversary clothing. We always wore it in relation to each other. It was bad. We dehumanized each other. We were adversaries in every respect, human and legal, and it was unpleasant. As I think about it now it was unpleasant. I do have cordial relationships with prosecutors and attorneys general now. I don't socialize or fraternize though. There was one time after a hearing in federal court somewhere that the attorney general and I -- it was in Texas -- were waiting for the same plane and she invited me to have a beer with her and I did. But I was excruciatingly uncomfortable. And I feel the same way about courts. I feel that throughout my career, courts have generally been the tools of prosecutors and attorneys

general, and the authority that has accepted their arguments almost invariably and done their bidding and done their work.

Q: Let me go back to that for a second. Worked hard in Florida?

Burr: Yes.

Q: Long?

Burr: Ever since I have done death penalty work full-time, I have often worked seven days a week and probably up to a hundred hours a week. A typical week when there's not an execution looming, even now I'll still get up at five or six in the morning. I'm at my computer by six thirty or seven and I don't leave my computer until seven or seven thirty at night. I'm not working non-stop during that period of time but I'm probably working ten or twelve hours a day.

Q: But in Florida when you were in your mid-thirties you had a lot of stamina, no?

Burr: I had a lot more stamina then than I have now. But I also had young children. I had a son who when I moved to Florida was four and a daughter who turned one. And they were very important to me. But what I tended to do when my children were young was to get up earlier, you know get up at four and work for two or three hours until they got up, be with them and help them get to school. When they were young I tried not to work late, I tried to get home by five thirty or six and have some evening time with them. Sometimes when they went to bed I would start working again, but I tried to compartmentalize my life enough that I

really spent time with them.

Q: Were you still married at that time?

Burr: I was.

Q: Was your wife working?

Burr: Yes. She was a family nurse practitioner.

Q: What did she think of the work you were doing?

Burr: She was very supportive. Over time, though, the amount of work that I did became corrosive to our relationship. We moved to New York in late 1986 and by 1993 we were separated and then divorced. And it had had to do with my work, in her perspective: she didn't want me to work as much and she wanted me to change jobs. She felt like I was not being as good a father as I could be. It was very corrosive to our relationship. The marriage was a casualty to the intensity that my work took.

Q: Okay. Now correct me if I'm wrong here, but before you left the office in West Palm you handled a case that became to be known as *Ford v. Wainwright*, is that correct?

Burr: Yes.

Q: Tell me what that case was and why you were involved. You argued that case ultimately

before the Supreme Court of the United States, right?

Burr: Yes.

Q: And you must have been maybe thirty-five, thirty-six years old, right?

Burr: Let's see, it was argued in April 1986.

Q: Your mid-thirties.

Burr: Yes, mid-thirties.

Q: Right. Had you ever argued a case before the Supreme Court of the United States?

Burr: No.

Q: Did you know where it was?

Burr: Well, yes. I knew it was on the other side of the Capitol.

[Laughter]

Q: Right. Tell me a little bit about how you became to be involved in that case and what was entailed in preparing a case like that for like for the Supreme Court and arguing it, and whether or not you won.

Burr: I actually started representing Alvin [B.] Ford when I was at Southern Prisoners Defense Committee. I came into his case as I did a lot of cases. He had an execution date set and he had a very well meaning but not very experienced Florida lawyer.

Q: It was a Florida case?

Burr: It was a Florida case.

Q: Who was Alvin Ford?

Burr: He had killed a police officer in Fort Lauderdale, and been convicted and sentenced to death -- I don't even remember when the conviction or sentence was. I came in late 1981. There was an execution date in December. I helped get a stay of execution for him, I worked with the local lawyer -- I really did the work and we got a stay ultimately in the Eleventh Circuit. It was Fifth Circuit Unit B by then. The federal district judge denied a stay. We got it up very quickly to the Eleventh Circuit and they granted a stay.

Q: Excuse me, when you use the word "circuit" in these cases, you are talking federal.

Burr: Yes, this was all in federal habeas.

Q: Right. United States Court of Appeals.

Burr: Not only had the federal district judge denied a stay, but he denied the federal habeas

petition that we'd filed which had been fairly quickly put together.

Q: Right. And habeas meaning -- ?

Burr: Habeas is a post-conviction review procedure. In federal court, federal habeas reviews any federal constitutional issue that was preserved at trial on direct appeal or in state post-conviction proceedings, so all of those constitutional issues can be collected and raised in a federal habeas proceeding. We had done that for Alvin. I got into his case just less than a month before his execution date. We worked very hard and got a habeas petition together, but the federal district judge denied a stay summarily. We then went up to the Eleventh Circuit, they granted a stay and put us on a fairly expedited briefing schedule -- briefed it, argued it, lost it before the panel in probably the summer of 1982. I moved to West Palm Beach in the course of this proceeding and I brought the case to the office in West Palm Beach. It was natural because Alvin Ford would have been represented by the office because it was in their jurisdiction. Filed for a petition for rehearing en banc before the entire Fifth Circuit Unit B and they granted it. And at that point that was the first en banc case for the Fifth Circuit out of Florida, and I had gotten to know people at LDF prior to that when I worked with Southern Prisoners Defense Committee.

Q: LDF being --?

Burr: The NAACP [National Association for the Advancement of Colored People] Legal Defense Fund.

Q: Right.

Burr: I went to New York and worked considerably there on the rehearing en banc brief, and that was when I first met Tony [G.] Amsterdam. I had conversations with him before but I actually met with Tony. Tony helped us frame and construct the en banc brief in Alvin Ford's case. We then had an oral argument and ultimately lost again and cert was denied. That was over 1982 through 1985.

Of course I stayed in touch with Alvin because I was beginning to realize that we were running out of legal remedies and we had to do something more. And over the course of late 1984 and all through 1985, his mental health deteriorated pretty steadily. He started writing really strange letters to me and then they got stranger and longer, and when I would see him conversations got off track and started to be very tangential and didn't make much sense. And by -- actually this is in 1984, I think -- was it? No, I'm getting my years mixed up.

Q: Well, that's all right.

Burr: In 1985, we realized he was seriously mentally ill. He started talking about getting ready to leave the prison. That led us to talk with him about why he thought he was there and whether he thought he was going to be executed. He said, "No, I don't have a death sentence. I've just been staying here to help people, but I'm through and I'm ready to go. I'm leaving." That then led us to research, because the whole notion of competence to be executed had never occurred to any of us in the small death penalty community.

Q: Stop right there and try to remember where you are. Up until that time, from the time you represented Ford, going back to even when you were based in Nashville. Up until this time

you're talking about here when he's writing these letters and telling you these things -- was there an issue in your mind about his mental capacity?

Burr: One of the issues that we raised in the federal petition that ultimately went to the en banc Fifth Circuit was the failure of his lawyer to develop mental health evidence. He did have, as many clients do, some trauma in his background and some sort of undefined emotional and mental difficulties -- no specific mental illness, nothing like a psychosis. It was impulsive behavior, bad judgment, repeating mistakes.

Q: Were you raising this in the context of ineffective counsel?

Burr: Yes. It was an ineffective assistance of counsel claim and failing to present that sort of evidence in mitigation.

Q: Along with a lot of other I suppose issues with regard to ineffective counsel?

Burr: Yes. And a lot of other ineffectiveness and other issues about the Florida statute.

Q: Right.

Burr: You know I'm sure we were raising the *Lockett* issue about the Florida statute. We raised it in every case about limiting the consideration of mitigation. But all of my interactions with Alvin were relatively normal. He did not strike you as a person who had a mental illness of any sort. The mental illness that we were looking at was more out of his history and his behaviors throughout his life which had been you know marked by impulsivity and poor

judgment primarily, and he'd had a rough, a rough childhood. But there was no issue about competence to be tried, never raised and we did not raise one.

Q: Was competence to be tried an issue previously in the courts?

Burr: Yes. Competence to be tried had been a matter of due process right for many years. The Supreme Court decided a case in 1960 called *Dusky v. U.S.* that had held that you have to be competent to be tried and set out the standard for determining competence to be tried, so for decades there had been a requirement that you be competent to be tried.

Q: Right, in other words, if you had discerned his profound mental retardation earlier, it could have been a legitimate issue *years* earlier?

Burr: Oh, sure, but it was mental illness not mental retardation.

Q: Mental illness, excuse me.

Burr: Yes, it could have been. In fact, in another case that was going on a little bit after Alvin Ford, the same issue was developing about competence to be executed, the case of a guy named Freddie Goode. I was not counsel but worked with the lawyers who did represent Freddie Goode. He had competence to be tried issues that were litigated throughout his case, and when he raised a competence to be executed issue in a successful federal habeas petition, the Eleventh Circuit found it procedurally defaulted because it hadn't been raised before. He'd been litigating competency to be tried throughout his case. That turns out to have been a wrong decision based on Supreme Court decisions twenty years later, but at the time that was

how they viewed it -- competence of any sort needs to be litigated and if you're litigating competence to be tried, there's no reason you should not have recognized a question about competence to be executed.

Q: Right.

Burr: But for Alvin there'd never been such an issue. It had never been raised, never questioned, never litigated.

Q: Right, but this is now facing you in 1984-1985, and he's writing these strange letters. What was your reaction? What did you do about it?

Burr: At the point at which it dawned on me that he was seriously mental ill, he was psychotic. And he didn't seem to believe that he had a death sentence or could be executed anymore. I started doing research and found an old Supreme Court case from 1950 called *Solesbee v. Balcom* in which the issue had been raised and the U.S. Supreme Court said, "This is a matter that's entrusted entirely to the executive processes of states. There is no constitutional prohibition against executing incompetent prisoners."

Q: And when you use the word "competent," you mean --?

Burr: Competency in criminal law has a cognitive component and an assist counsel component. The cognitive component is, "do you understand whatever proceeding that's facing you, do you understand that proceeding and do you have the ability to deal with it in a rational way?" The assist component is, "do you have the ability to assist your counsel in

representing you?” Competency always has had those twin components, and competency when facing execution means, “do you understand what it means to be executed and why you are going to be executed?”

Q: Is that what it *had* meant of what it comes to mean?

Burr: We brought the notion of competency from trial into the execution -- I supposed we made that jump. It wasn't a big jump, but the notion of competency to understand and rationally respond to whatever you're facing and to assist counsel at that time, and so we brought that into the execution process and made both arguments. In researching this issue and in going back through the common law, we found that there was a long history in England of not executing people who were incompetent. They called it “insane” at the time. The notion of competency had not been developed at that point. But it was the same idea. The English common law for several centuries had said that the insane should not be executed. The underlying notion was that madness is punishment enough. And so we found this curious history of the common law, which usually was not as humane as the law that developed in the United States. In the twentieth century, the Supreme Court had said it was okay to kill people who are incompetent. And yet there was this centuries long history of law from England, starting as early as the 1500s, that said you don't kill people who are insane.

Q: As you looked at Alvin Ford in 1984-1985, did you give any thought to the idea that maybe he's engaged in some sort of ploy to fool you?

Burr: Yes, that occurred to me. I didn't think it was a ploy because of the way this unfolded. It unfolded very gradually, just something in a letter that was just a little bit off. And it was not

a steady decomposition. Over time if you drew a line it would be steadily down but every letter wasn't different from the previous letter in that it had two sentences and then four sentences. It just got progressively more bizarre, moving towards the bizarre and then got very bizarre.

Q: Did you feel that you had to have him examined?

Burr: I was in Dick Jorandby's office by then in West Palm Beach and we did have him examined by a psychiatrist from Washington D.C. named Harold Kaufman. I can't remember how we settled on him, but he came to see Alvin.

Q: He wasn't recommended by Alvin?

Burr: No. Alvin had no insight into his condition.

Q: Right.

Burr: But I'm sure he was recommended by somebody -- I don't remember the chain of how we got to him. But at that time we did not know how to do life histories the way we have learned to do them better and better. We had, for that period of time, a pretty decent life history for Alvin. By then we had understood you had to have a good life history to have a decent forensic psychiatric evaluation. That was really the key component to psychiatric evaluation. The clinical interview was a critical component but not nearly as important as the history. So we had a pretty good history, Dr. Kaufman came and spent a considerable amount of time in clinical interview with Alvin. He read all of his correspondence that showed the progression of his mental illness, and he examined the question of malingering. He

determined that he was not malingering and that he was psychotic. He diagnosed him as having paranoid schizophrenia and documented through the letters and through his history the factors that led to it. And on the basis of that we crafted an incompetence to be executed claim and raised it in a state post-conviction pleading.

The response was a little peculiar. Florida had a statute that said that if the warden of the prison raises a question about competence for somebody to be executed -- I think the word then in the statute was 'insanity' -- then the governor would appoint a commission of mental health experts to examine the prisoner and determine whether he was insane or not. No provision for input from the lawyers who might represent the client, no provision for a hearing, nothing. The decision was ultimately to be made by the governor on whether he was competent or not. And so we filed our post-conviction motion. The response was that the warden told the governor and the governor appointed a commission of two psychiatrists to examine Alvin. We were actually allowed to observe the examination. It was done in a small courtroom at Florida State Prison in Starke, Florida, which is where death row is.

Q: I've been there.

Burr: The two psychiatrists sat at what would have been counsel table and Alvin was in the witness chair and they examined him. [Laughs] And we couldn't say anything. And we observed it, and then when that was all over, we gave them the reports from Dr. Kaufman. We gave him all of his letters, we gave him the history. They wrote their report, sent them to the governor. Their reports totally ignored everything we gave them and the governor decided Alvin was competent, was sane, and the execution was going to go forward. We then complained in the state post-conviction court about the procedure, we lost, and then the

Florida Supreme Court denied our appeal. We moved into the federal district court back in Fort Lauderdale.

Q: They were saying he's sane?

Burr: They were saying that he was sane and that our objections to the procedure were of no merit. We brought all those complaints about how he is not competent to be executed and Florida's procedure for determining competence violates due process, and all of this violates the Eight and Fourteenth Amendments. We brought it into federal habeas before the same judge in Fort Lauderdale who had denied us four years before that. He denied a stay of execution.

We went up to the Eleventh Circuit and had an oral argument. The Eleventh Circuit in that period of time was granting oral arguments pretty routinely on motions to stay execution, and it was an essentially emergency briefing and a motion to stay. We had a very extended argument, I think it was a two-hour argument. But the panel ultimately ruled against us because of this controlling Supreme Court decision and denied a stay. We then filed a cert petition and a motion to stay in the Supreme Court. I had been in Atlanta for the oral argument. We prepared cert papers and a stay motion before I went to Atlanta. As soon as the court ruled at the end of the argument, Craig filed the papers in the Supreme Court late in the afternoon, and the execution was set for 7:00 a.m. the next morning. I was flying back from Atlanta to West Palm Beach, and when I landed in West Palm Beach I learned that the Supreme Court had granted a stay. It was late at night, the night before the execution the next morning. They not only granted a stay, but a few days later they granted cert, and then we were put on a briefing schedule that led to the argument and the decision in 1986.

Q: The issue is that you claim that Alvin Ford is insane and unable to appreciate that he faces the death penalty and could be killed, let alone assist in his defense, and the predicate there is that he's insane.

Burr: Well we used the word "incompetent."

Q: Right.

Burr: But the common law had used the word "insane."

Q: That's right. To accept your argument, does the Supreme Court have to be convinced that this particular inmate is insane?

Burr: They have to believe that the evidence is such that he may well be insane.

Q: Before they get to the question about whether --?

Burr: The factual part of this case had to convince them that he really might be insane. We had not had any procedure for making that determination. In fact, the only procedure that there had been was the governor's procedure and the governor had decided he was not insane. So part of our argument to them was, "Look the evidence that exists -- here it all is -- the weight of the evidence is that he's insane. You know our expert's analysis of the evidence is far better than theirs because they don't even take into account his letters, they hadn't read his letters, all they did was talk with him for an hour in a courtroom."

Q: Did you encourage Alvin Ford to write to the Supreme Court?

Burr: No. He'd written plenty of letters to me and all of those letters were on the record. There was a very long appendix.

Q: Right. Now, who decided you were going to do the oral argument?

Burr: I don't know that there was ever much discussion. Alvin was my client. I'd brought him to the office in West Palm Beach from my previous job. The office had taken the case as an office case and Craig Barnard was helping me, and I'm sure others were too, but it was my case. We never even thought about whether somebody else would do the argument.

Q: Okay.

Burr: We probably should have.

Q: And looking back, did you feel you were up to arguing before the Supreme Court?

Burr: No. I'd been a lawyer for about ten years. I'd finished law school in 1976.

Q: Yes.

Burr: And I had been admitted to the Kentucky Bar in October of 1976, so I had been a lawyer almost ten years. I'd done a number of federal appellate court arguments, all in death

cases. So I didn't feel inadequate enough to think that I should find somebody else with a lot more experience to do this. Nobody around me suggested that, and that's not only people in West Palm Beach but people at the Legal Defense Fund. People at LDF, Tony Amsterdam, and the West Palm Beach folks never said, "Who do you think should argue?" The question was never raised.

Q: Right, and did you do any prepping on how to argue for the Supreme Court?

Burr: Yes. One of the things that LDF started early on -- I'm sure with *Furman* and before -- LDF always helped people get ready for oral arguments in the Supreme Court within their domain, including death cases. And the process involved an extensive moot court argument, usually wherever Tony Amsterdam was. Tony was the primary person you wanted to moot you. And I did that in Alvin's case. Tony was at NYU Law School by then, and we had a moot argument at the law school, with several people acting as justices of the Supreme Court. And you'd present the formal argument. You would prepare a lot for the moot.

It's really a practice argument: you present your argument and you argue for the thirty minutes or twenty-five minutes saving some time for a rebuttal. You do an actual Supreme Court argument -- they ask you questions, interrupt you, harass you, harangue you. Then you spend three hours afterward dissecting it, and thinking what worked, what didn't work, how to rephrase this, how to open differently. I was told that "you are not going to get that long to open, you need to say something more concisely and here are the three sentences you might get out before the first questions comes." So there is that kind of strategic thinking and re-planning the argument. With Craig Barnard's help I got ready for the moot and had my argument ready and gave it, so that it was then taking apart that argument and putting it

back together in a way that had the input of all these other people.

Q: Right, right, and who was Chief Justice at that time, was it [Warren E.] Burger or is it --?

Burr: Burger was.

Q: And did you do any reading up on who the justices were or?

Burr: I didn't really. I simply wanted to be sure I could say their names if they asked me a question, so I wanted to visually -- I don't think I even actually went to an argument to observe another argument before mine. So, I knew their names. I looked at pictures.

Q: How did the day of oral argument go for you? I mean, after you wiped the sweat of your brow?

Burr: Once I stood up to start arguing and the first question was asked, I relaxed and felt better and felt like I found a rhythm and was able to make the points that I wanted to make either through questions or by argument between questions. As I remember it was a pretty active bench. I remember Justice [Thurgood] Marshall who was still on the court then. I thought he had given me a hard time. I thought he'd be supportive. But he was not very friendly and asked some very hard questions.

Burr: His manner was more a little antagonistic.

Q: Was [William J., Jr.] Brennan on the court then?

Burr: Brennan was on the court, White was still on the court, of course Burger, [William H.] Rehnquist. [Sandra Day] O'Connor was on the court by then.

Q: When you finished this oral argument -- which goes for how long?

Burr: It's thirty minutes per side, so it is just an hour.

Q: Yes, who was representing Florida? Not Ray Markey?

Burr: I don't think so.

Q: No?

Burr: I think it may have been a woman named Joy Shearer. She was almost as senior as Ray Markey was.

Q: Okay, well in any case, at the end of the oral argument you must have felt a little relief, felt high?

Burr: Oh, I felt huge relief. And I felt like I'd done all right. I didn't feel like I'd screwed anything up. One of the things that in the course of getting ready for this, that I was reassured by when we dissected the moot court argument, was the notion that you don't really lose cases at the oral argument. You might win them there, but you win or lose pretty much on the briefing. The oral argument is a time for the justices to test where they're going. But you

generally are not going to change the direction that any particular justice has already decided to go on the basis of the briefs. I kept repeating myself, "This doesn't matter that much. This doesn't matter that much." But of course when you stand up, you think it matters totally.

Q: Did Alvin Ford know that his case was before the Supreme Court? Did he know and understand that?

Burr: I don't know. We certainly told him, but I don't think he did.

Q: Okay. You won the case.

Burr: We did.

Q: What was the vote, do you remember?

Burr: It was a divided court. We had four justices on an opinion written by Justice Marshall holding that the Eighth and Fourteenth Amendments prohibited the execution of an incompetent person and setting out a pretty extensive test for competency that included the ability to assist your lawyer prior to your execution. Justice [Lewis F., Jr.] Powell agreed in principal with the outcome under the Eighth Amendment. But he wrote a concurring opinion that crafted a much narrower test for competency and excluded the ability to assist counsel, because on the facts in *Ford* there was nothing more he could have done to assist us. We'd had his assistance and his competence during the period we'd litigated, everything up to this point. And so he said that as a factual matter it's not really in dispute, so we shouldn't really be deciding that. And so he crafted a test that was, "Does the person understand that they're

going to be put to death and do they know what it means to be put to death.” So it was a pretty narrow test. And his was the fifth vote on Eighth Amendment grounds so his decision actually became, in subsequent cases, the decision of the court, even though three justices joined Justice Marshall. The rule is that the narrowest ground of decision becomes the ruling.

Q: Yes, but was it a 5 to 4 vote?

Burr: No, we had two votes for us on due process grounds from Justice [Byron R.] White and Justice O’Connor, and then we did not get Justice Rehnquist or Justice Burger. They dissented.

Q: Right.

Burr: And so it was 5 to 4 on Eighth Amendment grounds, 7 to 2 on due process grounds.

Q: Now, did this victory usher in a new period of the use of mental health professionals in the death penalty arena?

Burr: I wish I could say it did but I don’t think it did. The watershed for that was - -

Q: *Atkins* [*Atkins v. Virginia*, 2002]?

Burr: No. It was the decision by the Supreme Court a year before called *Ake v. Oklahoma*.

Q: The year before?

Burr: The year before *Ford*. It was decided in 1985.

Q: Okay.

Burr: It was a death penalty case out of Oklahoma. In the penalty phase there was evidence that the client had a very difficult childhood, a lot of abusive treatment, had had mental health problems, and that was his mitigation evidence. He was indigent and he tried to get funds for a mental health expert before trial and they were denied.

Q: But what I want to get at is did there come a time when mental health professionals came to play a much larger part?

Burr: Yes, it really started in probably 1982 or 1983 and then evolved. It got more and more every year after that.

Q: Let's talk a little bit about that, later.

Burr: The beginning of the evolution of the new use of mental health experts began in a case that we did in Florida. Craig Barnard saw a New York University psychiatrist named Dorothy [O.] Lewis interviewed on the CBS Morning Show some morning in 1982. We were working on a client's case in that office named William [D.] Elledge, Bill Elledge, and he had mental health problems. He had had a typical evaluation pre-trial by a state expert and a defense expert, both appointed by the court, and they just went by and talked with him for an hour and that was their interview, and they made an evaluation based solely on that, no history,

nothing else. Dorothy Lewis on that CBS Morning Show was talking about some research she'd been doing on violent behavior and talked a lot about the necessity for histories and how without a history you can't tell a thing about somebody and a light came on for us.

That same day I found Dorothy Lewis at NYU and told her who I was and that we had a client on death row in Florida and we needed her help, that we sensed that there was a quite different way to go about doing mental health evaluations of people that we wanted to learn, and we wanted her help. And she came. And she did evaluate Bill Elledge, she taught us the kinds of things you've got to get in a life history, the kinds of documents you need, and the kind of examination that needs to be conducted, and she allowed me to sit in on the evaluation that she did. She conferred a lot with us after the evaluation. Before she wrote her report she wrote a draft report and asked us to look at it and raise any questions with her we had about it. We did, and then she finalized her report. None of us had ever had any experience like that with a mental health expert. Before that we just found people that had a good reputation with other criminal defense lawyers and asked them to go evaluate our client, and kept our fingers crossed hoping they'd come back with something helpful.

Q: When did you have your first contact with Dorothy Lewis?

Burr: I think it was 1982. Our work with her began in earnest in late 1982 and 1983 when she came to see Bill Elledge.

Q: But she wouldn't have been evaluating the *Ford* case?

Burr: I don't think she did, no.

Q: But the *Ford* case did not really turn on his life history. It was his current condition, isn't that correct?

Burr: Yes, and the most valuable history was all those letters he wrote.

Q: Yes.

Burr: But that really was the start of it, and then we brought her into a second case, a guy named Henry [P.] Sireci from Orlando who'd had the same kind of pre-trial evaluations. She came in and did the same kind of examination here. We also brought in a psychiatrist from North Carolina named Seymour [L.] Halleck who was very reputable in the mental health community. The *Ake v. Oklahoma* case was decided when we were doing this, which held that as an indigent capital defendant, you have a right to a competent mental examination, or a mental health examination by a competent expert funded by the state. And we put that together with the process of evaluation we learned and worked through with Dorothy, and Sy Halleck blessed it, and in the *Sireci* case [*Henry P. Sireci v. State of Florida*, 1987] we argued that the evaluations done pre-trial were incompetent. We developed a standard of care for forensic psychiatric evaluation, working with Dorothy and Sy Halleck, and put that together with the *Ake* language that said you're entitled to an examination by a competent psychiatrist, and we said he was denied due process because he got an incompetent evaluation. So *Sireci* made the leap to what a competent mental health evaluation requires.

Q: Did you win that?

Burr: We won it. We won it in state post-conviction in 1987. We persuaded the state judge that our legal theory was right and our evidence supported that.

Q: Well did that become --?

Burr: The Florida Supreme Court affirmed it, and then thereafter people started making this argument all over the country and it lost everywhere else on the theory that *Ake* did not entitle you to a competent evaluation -- it entitled you to a qualified expert, not to having the expert perform competently. Because the courts were afraid that we were going to start raising ineffective assistance of expert claims, and so they shut it off. But the first time it was tried we won it in Florida. We talked about it at the Airlie Conference that next summer and it started being raised in dozens of cases and it lost everywhere else, because the courts suddenly realized that this was the opening up of a whole new horizon of ineffective assistance claims and they weren't about to go there. So what ultimately has happened is the right to effective assistance of counsel now encompasses counsel assuring that competent mental health evaluation is done, so that if incompetent evaluation is done it's the lawyer's fault and not the expert's fault. So it had a happy ending.

But that was the start of it, and in the course of that and I think it was in 1983 or 1984 I took a semester long graduate course in neuropsychology at a university just south of West Palm Beach, because I felt like I needed to learn more. I did a lot of research at the University of Miami Medical School library, looking at lots of mental health texts. I was trying to discern what the standard of care was for psychiatric evaluation. So all of that work went into developing the standard of care, assimilating what was in the medical text, and saying, "Here is a four-part standard of care for a forensic psychiatric evaluation." And it has now become

standard. You can attack state experts for not following this standard of care, you bolster your own experts because they follow it. No one has ever disputed it. Doctors have now embraced that standard of care and written articles about it. But it started in 1983-1984 and was propelled into existence really by the *Ake* decision by the Supreme Court -- then the *Sireci* decision by the Florida Courts made it a real issue.

Q: After *Ford* you became Director of the Capital Punishment Project of the NAACP Legal Defense Fund?

Burr: Yes.

Q: By the way, that fund is sometimes called The Legal Defense Fund, sometimes The Legal Defense and Education Fund.

Burr: Yes, the full name is NAACP Legal Defense and Educational Fund, Inc.

Burr: Incorporated.

Q: Yes.

Burr: And sometimes it's called the Inc., Fund.

Q: That's right, but it's never correct to say the NAACP Legal Defense Fund without saying "Educational?"

Burr: Well the acronym that's used is LDF, which is Legal Defense Fund.

Q: Right, right. "Educational" got lost there.

Burr: I mean LDF is the acronym that's been used in the capital defense community.

Q: All right, briefly today, to finish off -- this was an important job, right?

Burr: It was. At the time I went there, LDF was the --

Q: Was there an opening?

Burr: Yes. Jack Boger had been the Director of the Capital Punishment Project and he had been asked to start a new project at LDF on poverty and justice, and so he stepped aside. Joel Berger who'd been in it for a long time moved into education work at LDF -- Debbie Fins was leaving LDF at that time, she had planned to. Jim [S.] Liebman, who had been a part of the project, had gone to Columbia to teach law. So the project had been four people, and suddenly two of them moved collaterally within LDF, one was planning to leave and one did leave, and so they invited me to come direct the project and as it turned out when I got there, I was the only staff person.

Q: Oh, my Lord!

Burr: I persuaded Debbie Fins to stay for another year.

Q: You mean you were the director and staff?

Burr: Yes. It went from four people to one.

Q: Oh, my Heavens!

Burr: And as a four person project it was powerful, you know they were the leaders of death penalty defense in the country.

Q: Still?

Burr: They were then. Probably once I got there they couldn't be. In this sense, they were at that point there still were not very many people in the country doing death penalty defense work. West Palm Beach was a center. Team Defense was still a center. Southern Prisoners Defense Committee was an important center. By the time I moved to New York, Southern Prisoners Defense Committee had moved to Atlanta and only had one office. I left in 1982. Steve [B.] Bright came in to direct Southern Prisoners Defense Committee and within a few months he closed New Orleans, closed Nashville and consolidated everything in Atlanta. And so it was still there and larger but all in one place in Atlanta. There was good work being done out in California in various public defender offices, some good work being done by the Maryland public defender, some pretty good work being done by the Oklahoma County public defender -- *Ake v. Oklahoma* was their case. That was about it. And there were no resource centers -- federally funded resources came a little bit later. There were individuals doing death cases here and there all over the country, but those were the organizations. And LDF was at the top of that pyramid, simply because it was the only organization that was really

national in scope; it had been around a long time. Tony was sort of “of counsel” to the LDF Death Penalty Project --

Burr: - - which gave LDF preeminent status as sort of the think tank for death penalty litigation, and kind of played a resource counsel role, did a lot of consulting with people on cases, always you know tried to help people prepare Supreme Court briefs in death cases and get them ready to do arguments, prepared amicus briefs or got amicus briefs done. LDF people had been my mentors. The first execution death penalty case I got in was in 1980 in South Carolina when I was at Southern Prisoners Defense Committee, and Jack Boger and Joel Berger flew to -- not to South Carolina. I lost in the federal district court, went to the Fourth Circuit and had an argument on a stay, and they flew in the night before and helped me get ready for that argument. So that was the role that people at LDF played.

Q: Right, but in short is it fair to say from your knowledge of the history, that the legal challenge that was made in the 1960s into the 1970s that led to the *Furman* and *Gregg* decisions was inspired by, mounted by, funded by the NAACP Legal Defense Fund?

Burr: Yes, it was, no question about it. And again Tony was affiliated. Tony was always a law professor, but Tony worked hand in glove with LDF throughout the 1960s into the 1970s with a case called *McGautha v. California* in 1968.

Q: In 1971?

Burr: Was it 1971?

Q: It was decided in 1971.

Burr: Okay, it was *Maxwell v. Bishop* that was 1968. There were a couple of precursor cases to *Furman* that started raising the arbitrariness and discrimination claims, but neither *Maxwell* nor *McGautha* was a sweeping decision, and *Furman* was. Tony had helped craft all of that working with LDF. LDF had been counsel in some of the cases, or had been of counsel to whoever had the cases.

Q: Right. By the time you got there in 1987, had the LDF really accomplished something for opponents of the death penalty? If you had to sum up, if you were standing before the Good Lord, and he said, "Look, Burr, you've only got a few minutes, sum up -- what in the hell had they gotten done by the time you came?"

Burr: Well, because they had saved 614 lives in 1972 -- LDF deserves responsibility and credit for that. In 1976 they were unable to stop the reenactment of the death penalty, and that was a failure. In retrospect it was a profound failure. At the time it seemed like it might have been a partial success because a lot of statutes were voided. But the Supreme Court upheld a procedure that it believed would address the problems that were addressed in *Furman*, and our side's argument was that it's not going to do any good. In 1976 our attempt was to end capital punishment once and for all. That failed. We did argue a fallback for the position that the court embraced, which was a guided discretion process. We won *Lockett* in 1978 -- Tony argued *Lockett* and won it. Tony argued one of the 1976 cases as well. So I'd say that we nearly got there. We ended the death penalty in 1972. We saved all the lives of people under sentence of death then. But we failed in 1976.

Q: When you came did they say to you, "Look, Burr this is the situation -- we wanted to get rid of the death penalty and we haven't been able to do it. We had our highs and some lows, so you do it. You get rid of it for us." Is that what your charge was?

Burr: No, that wasn't the charge. There had been nine years since *Lockett* and eleven years since the 1976 Supreme Court decisions. It was very clear that the death penalty was here to stay, at least for the foreseeable future, and that the job of death penalty lawyers and people who sought abolition through the legal process was to try to narrow the reach of the death penalty, to make it applicable to fewer people and to question the procedures by which death was imposed and to challenge them. It was clear that was the charge because we were litigating to whittle away at the death penalty, to bring its reach back from broad to small, and in every case to be sure that the application of the death penalty in that case was fully challenged. We were to whittle away the scope of the death penalty case by case.

There were some broad issues that we think might have chances. We thought that people with mental retardation might be eventually excluded. We thought that kids might be excluded, at least people under eighteen. We thought that people with severe mental illness might be excluded. And so that by the time I got there the agenda was trying to shrink it and whittle away at its application case by case. And by then we were understanding that the need for resources was vast and that death penalty cases were under-resourced in huge ways: lawyers weren't paid nearly enough and there weren't nearly enough resources for investigation and experts. So part of the agenda too was to pull back the reach and expand the resources and funding for counsel in these cases.

Q: Let's continue tomorrow.

Burr: Okay.

Q: Thank you very much.

[END OF SESSION]

RH

Session Two

Interviewee: Richard Burr

Date: December 11, 2008

Interviewer: Myron A. Farber

Livingston, Texas

Q: This is Myron Farber on December 11th, 2008, continuing the interview with Richard Burr in Livingston Texas for the Columbia University oral history project.

Dick, let me quickly finish up with a matter we were discussing yesterday. You were with the NAACP Legal Defense Fund until 1994, and after a brief stint at the Texas Resource Center you went into private practice.

Burr: That's right.

Q: With your wife. Is she a part of that practice?

Burr: She is, she came about a year later. In 1995 I was just solo and then in 1996 Mandy Welch joined and we created the firm of Burr & Welch.

Q: In Houston?

Burr: Yes.

Q: Right. Your practice since that time has been entirely capital and defense work?

Burr: Yes, and it was before then. Since 1979 I have done entirely death penalty defense work, except for three years from 1979 to 1982 that I also did some prisoners' rights litigation. But since 1982 it has been entirely death penalty work.

Q: Have you any idea of how many lawyers there are in this country doing exclusively capital defense work?

Burr: Now?

Q: Yes.

Burr: I need to think a moment. I would guess there are between three and four hundred.

Q: And one of the people that you represented in your capacity as a private lawyer was Timothy McVeigh. Is that correct?

Burr: Yes.

Q: Did you represent him at trial or only post-conviction?

Burr: I represented him as one of the trial lawyers. I also was one of the two direct appeal lawyers, and then I came back in to represent him in the last month and a half of his life to do some more post-conviction work for him. There was a revelation of a lot of files that the FBI [Federal Bureau of Investigation] had failed to disclose to us pre-trial, and I came in as part of a newly constituted post-conviction team to address those issues and to try to stop the

execution.

Q: It's often said that the cost of trying and executing a prisoner is a lot more than putting a person convicted of murder in prison and keeping him there all his life. Perhaps you could clarify this for me. In one article I saw a reference that the federal court system spent more than \$6 million dollars on McVeigh's defense, and in another article around the same time, a couple of years ago, it said the federal government spent in an excess of \$13.8 million for attorneys and to cover other costs of McVeigh's defense until his execution. So we got \$6 million on one hand and \$13.8 million on another. Have you any idea what the actual figure was?

Burr: The second figure, the higher figure is closer to being correct. That was lawyers, paralegals, investigators and experts. But yes that was the cost, and that's only the defense. The Department of Justice has never disclosed their costs, but generally their costs run three or four times the defense costs. In this case I'm sure it was much higher because at one point they had five thousand FBI agents working on it.

Q: How many?

Burr: Five thousand federal law enforcement agents in the first several weeks after the bombing.

Q: Right. The bombing occurred on April 19, 1995.

Burr: Right.

Q: McVeigh was convicted on June 2, 1997, on all counts and was executed by lethal injection on June 11, 2001. Looking back on it now, from a distance since he bombed the Alfred Murrah Building in Okalahoma City, killing 168 people, injuring 450 -- would you had done anything differently in that case than was done either by you or by his lead counsel Stephen Jones?

Burr: Yes.

Q: What would you have done differently?

Burr: If I had been lead counsel I would have had a very, very serious discussion with Tim, over a long period of time, with the possibility of entering a guilty plea and having the trial be totally about sentence. I don't know if that would be where we had come out, but it was an alternative that was never seriously considered. I thought about it at the time without pursing it with Tim, and I still think that it might have been the better strategy in terms of trying to save his life. There was no doubt in the government's evidence that Tim had a role in this. The little bit of doubt that there was, was who else was involved. The government withheld a lot of information about that, and still may have withheld it. What they unloaded on the defense team about two months before Tim's execution was thirty boxes of more investigative materials that pointed to a lot of other people.

Q: A lot of other people?

Burr: A lot of other people. Nothing definitive about it, but there was enough there that we thought the judge would stop the execution and explore it. The strange dynamic of this case

was that the government didn't appear to be interested in holding other people accountable other than Tim McVeigh and Terry [L.] Nichols, and I don't know why that is. There were other people involved. There were people who helped transport the materials for making the bomb to the little state park in Kansas where it was put together. There was a very, very credible father and son fishing on the lake who saw ten or twelve people and several vehicles, and the government didn't pursue those leads very much. So it's a mystery to me, but there's no question Tim would have been convicted of the conspiracy. In light of that I thought if we had spent all of our time working with Tim in light of his life history and his individual qualities we might have made headway with him moving towards a statement of remorse and acceptance of responsibility and a full explanation of why he thought this had to be done. And I don't know if that would have saved his life but it would have come a lot of closer to it. As it was, our penalty phase put on a lot of evidence about Tim and his life history. We put on as much evidence as we could about the two things that weighed on Tim the most: the First Gulf War and Waco.

Q: Why the First Gulf War?

Burr: Tim, as people may remember, was an extraordinary soldier. He went into the army not long after high school, and he rose through the ranks very quickly. He was first in everything he did -- he got all the commendations that anybody could get rising up through the ranks of enlisted people. He was deployed to Kuwait. His unit came in from Kuwait and moved from the northwest towards Baghdad. They had been psychologically and strategically prepared to encounter huge resistance and they encountered none. They encountered soldiers who were desperate to surrender because they were out of water and out of food and they had no fighting spirit. They had one or two incidents where they were fired upon but only very

briefly. They took a lot of prisoners and along their route towards Baghdad they witnessed horrific scenes of destruction from the bombing -- mangled bodies, corpses, burned out cars with people in them, destroyed villages, occasionally wandering children. And that experience turned him upside down.

Q: What bothered him?

Burr: He thought that the United States military had misled him and his comrades, and that the United States government had committed atrocities.

Q: Okay. How about Waco? When I say Waco we're talking about the siege of the Branch Davidian compound at Waco, Texas in 1993. Is that correct?

Burr: Same date, April 19, yes.

Q: Same date, right. A lot of people lost their lives at Waco.

Burr: Yes. Seventy-six.

Q: That also troubled him?

Burr: It troubled him deeply. Prior to the Gulf War he had been scheduled for a try-out for Special Forces. After the Gulf War he was given a short leave, came back for the try-out and didn't even complete it because he had no zeal for it. And he decided not to reenlist. His enlistment ended not long after that and he left the army.

When he came back he saw the world entirely differently. He had seen the federal government as the protector and beneficiary of the United States people before. When he came back, he saw the federal government as the oppressor. And he started seeing oppression everywhere, especially in ATF [United States Bureau of Alcohol, Tobacco and Firearms] raids on people's houses, killing people unnecessarily, coming to the wrong house. He became very Second Amendment conscious, gun rights. He slipped in and out of various far right organizations, never was really a member of any, but was a fellow traveler of a number. And then two things happened -- what's called in that community, Ruby Ridge. It was a little place in Wyoming where Randy [C.] Weaver and his family were under siege by the FBI and the ATF, and Randy Weaver's wife and son were killed. It was seen by people like Tim as just an extraordinary and public display of the power of the United States government used against its people. And then just a few months later Waco happened, and that was the cataclysmic event for Tim.

Q: He was down in Waco around the time of the siege, wasn't he?

Burr: He was. I don't know if he had visited the Branch Davidians before or he just came after in the wake of the siege, I don't remember, but he did travel there.

Q: What was he like to talk to?

Burr: Tim was a very bright young man, not the smartest person I've ever met, but well above average. He was a smart young man. He always had a military demeanor about him -- flat topped, crew cut haircut, square shoulders, erect.

Q: Hostile to you?

Burr: No, never hostile to his defense team. He was always very respectful and conversational with us. There were some things he did not reveal. He would never talk about anybody else being involved, never. With us and in some public statements after his trial, he took full responsibility. There was a lot of disagreement within the defense team about a lot of different things, but none of us disagreed that there were other people involved. But there was no way to get to that through Tim. Tim, as a human being, had a lot of curiosity and wonder about the universe and about things of the spirit. There were times when we were talking about evidence or about the bombing and its aftermath, the horrendous toll of life that it took and injury, and there were moments that he got very close to the precipice of falling into the emotional abyss that would be there for anybody who had done that. It is there for anybody who commits a murder. He always backed away from it. He came from a family of people who repressed emotion, and the military strengthened that ability. And he thought of the people killed simply as collateral damage -- the target was the U.S. government. He believed that the statement would be stronger if people were killed, and that was the necessary cost of the war that he was trying to start.

Q: You say if you had your druthers you would have pled him and then gone to the penalty phase and worked that on his behalf as hard as you could, exclusively.

Burr: And the penalty phase would have looked different. Being able to do that would have assumed Tim's ability to go to that precipice and at least look into it and feel it, and then come back from it and talk about it and accept the transformation that looking into that emotional

abyss would have done for him. If he could not have done that, then the strategy that was pursued may have been the best strategy for him.

Q: Did he testify?

Burr: No.

Q: Could he not have seen it in his interest to testify, to make his case against the government that he felt so strongly about?

Burr: He did not feel strongly about making his case as a witness and nobody on the defense team thought he should testify.

Q: That's the approach that you would have taken. Would anyone have been sympathetic to that approach?

Burr: I don't know. I think that the dynamic of the defense team was sympathetic. Stephen Jones shared many of Tim's anti-government views -- not nearly to the extreme that Tim held them, but he was sympathetic to them. Stephen came of age in the Nixon administration. He was on the Nixon staff -- not prominent but he was in the Nixon White House. Stephen always played his cards very close to his vest. So that was one end of the team. On the other end were Mandy and I, and some other death penalty folks who we brought in to help us, and we connected with Tim emotionally. Stephen connected with Tim ideologically. Tim accepted that our ideology was entirely different from his but he responded to the compassion and the love that we felt for him. So our bond with him was emotional -- Stephen's was cognitive. And

anytime Tim moved in our direction Stephen pulled him back, and divided between us and him and said, "They're just soft-headed liberals."

Q: What common ground did you have with him?

Burr: With Stephen?

Q: No, with Tim.

Burr: With Tim? The common ground we had with him was we respected him.

Q: Why would he bond emotionally with you? After all, he viewed what he had done as legitimate, and the deaths as collateral damage. Isn't that correct?

Burr: He did.

Q: Yes.

Bur: Because Tim, with us, softened. Those edges softened and he occasionally would look towards this emotional abyss of the bombing, and anytime we talked about Waco he wept for the people who died in Waco. Tim had a lot of emotional capacity that was under the lid and repressed, and we could not have made any sort of transformative journey with Tim without a lot of help and unified team relationships with him and some serious mental health guidance in moving along the path that we might have moved on. I think he had the potential to do that.

Q: Well look, did you ever say to Jones, "Look, Steve, this guy's gonna be convicted as sure as the sun's going to come up tomorrow. We are not gaining anything by that. Let's do it the way I think we ought to do it."

Burr: We talked about it a lot. We never made any progress in moving in my direction and Stephen said, "If you can't go with the way we're going then you need to leave." And I felt too strongly about staying in the fight with Stephen and I thought the penalty phase could at least be better if Mandy and I did it, than if Stephen did it.

Q: How did you come to get in this case in the first place?

Burr: I was asked to come in about a month after the bombing as the death penalty lawyer on the team by a Federal Death Penalty Resource Counsel, Kevin McNally and David Bruck. I later joined that project -- they asked me if I would come in and do it. I don't think I was the first choice to be the death penalty lawyer for Tim, but I was probably relatively high on the list.

Q: Why didn't they do it themselves, Bruck and McNally?

Burr: Everybody knew that it would be a full-time undertaking and it could last for several years. Most people who were invited to come in knew that and nobody was willing to make that transition.

Q: After he was convicted and the second phase, the question of life and death -- the mini trial

as I call it -- what is the more technical term for it?

Burr: The penalty phase.

Q: You presented that?

Burr: I took the trial role. I did the opening and I put on most of the witnesses. Mandy Welch and I really split them. Rob [R.] Nigh was a wonderful co-counsel. Rob and I came in second and third into the case. Stephen was appointed first. Stephen brought Rob in because he knew Rob, and then I came in. Rob and I became fast friends and still are. Rob turned into a death penalty lawyer in the course of this case and has done a marvelous job in cases since then. But we were the three who put on the witnesses.

Q: And this case had been transferred to Denver.

Burr: That's right.

Q: So there you are in Denver launching and mitigating for this man who whether by himself or with others had committed this horrendous crime. The prosecution had already put on aggravating witnesses.

Burr: They started the guilt phase case with ten or twelve family members. They put the victim impact testimony in the beginning of the guilt phase.

Q: Right, and that's thirty-eight witnesses, I think.

Burr: No. There were twelve of those folks at the very beginning. They put on thirty-eight victim impact witnesses in the penalty phase.

Q: Okay, and you heard all of that.

Burr: I did.

Q: And did you watch the jury during that time?

Burr: I did. We were all crying.

Q: We? You're not on the jury.

Burr: Everybody in the courtroom was crying, including the judge.

Q: Including the judge?

Burr: Yes. At times.

Q: Right. So that's a pretty tough job you've got there. Conceptually, what did you think you could do?

Burr: I knew that we could not get a life sentence in any traditional way. Traditionally we put on a full case of mitigation that is as explanatory of the crime as possible given whatever the

circumstances are. That humanizes our client and shows that he has some redeemable qualities and is worth sparing. In a typical case -- when I say typical I mean something less than hundreds of bodies -- that can, if done well and if the jury's selected well, can get life. It happens in more cases than it doesn't. We knew we couldn't do that here because the magnitude of the crime was too big. It would not matter how much classic mitigation there was out of Tim's life, it couldn't begin to count in the balancing process. So we knew that we had to change the framework to some extent.

We wanted to try Waco in the penalty phase of our case. We wanted accurate information about what happened and the government's responsibility for what happened. The theory that we had was if the jury could come to understand that the federal government did have some accountability, some responsibility, some culpability, some blame-worthiness for Waco, then they would at least realize that the government who wanted to kill Tim McVeigh did not have clean hands. They might strike a balance between that culpability and Tim's culpability by settling on a life sentence.

The judge would not let us put on the truth about Waco. He said that it was independent evidence. He did not want the case to become a trial about Waco -- he wouldn't let it happen. He did let us put on evidence that demonstrated to the jury what Tim believed about Waco, but it was a far cry. We had a high ranking person on the staff of *Soldier of Fortune* magazine who went through dozens of issues of *Soldier of Fortune* magazine about Waco, because those articles reflected how Tim thought about Waco

Q: I understand what you're saying, but are you suggesting that you thought you could make an argument that this horrific crime in Okalahoma City was excusable?

Burr: No.

Q: Because of Waco?

Burr: It was not excusable at all. That wasn't the guilt phase -- the guilt phase is about whether things are excusable. The penalty phase is simply about whether you kill somebody or put him in a cage for the rest of his life. We did believe that if the jury understood the culpability of the federal government for killing seventy-six people in Waco, and the impact of that on a person with Tim's unique history and set of values and personality, then they might think that the government should not have its whole pound of flesh. They should have Tim McVeigh for the rest of his life but they shouldn't have his life. That was the hope.

Q: Right, and as a corollary, that in Tim McVeigh's mind that made it justifiable for him to take action?

Burr: That's what he thought. He was delusional about that, but that's what he thought.

Q: Let me ask you something. Typically you are dealing with clients who have in many respects been failed by society since they were born, maybe even while they were in gestation.

Burr: Virtually all of my clients were that way.

Q: Would you say that was true of Tim McVeigh?

Burr: To a lesser extent, yes -- it was not as true with Tim. Tim was born in a working-class family in upstate New York. His father was in the automotive industry. There were a lot of psychological and emotional problems in his family. His mom was not well. Tim had a serious paranoid quality to his perception of the world, either learned at the knee of his mother, who was very paranoid, or that he was born with it. He had a strong level of paranoia.

Q: Did you think of making it a psychiatric case that he had gone off the rocker?

Burr: Yes. We had him fully evaluated. Stephen Jones quashed all of that.

Q: Would you have used that?

Burr: I would have, but only had I worked through it all with Tim.

Q: Right. Didn't there come a time when after he was sentenced to death when he said, "No more appeals?"

Burr: Yes. He took the direct appeal to the Tenth Circuit. We filed a cert petition with a Supreme Court after that, both of which were denied. He then took the first step in the federal post-conviction process which was to file a post-conviction motion in the federal district court, and when that was denied he refused to go any further. He had a right to appeal that ruling to the U.S. Court of Appeals and then a cert petition thereafter to the Supreme Court. He did not do that. And he did not want a clemency petition filed.

Q: He was being convicted of the federal death penalty, not under a state?

Burr: That's correct.

Q: So any clemency would have gone to the president?

Burr: It would have gone to President Clinton.

Q: But when he said, "Okay, no more of this appealing," did you talk to him about that?

Burr: Yes. I always stayed in touch with Tim. Rob and I both did, even though there were two other lawyers who were appointed for his post-conviction proceeding to look at the effectiveness of trial and direct appeal counsel. But Rob and I always stayed in touch with him. I probably saw Tim every two or three months in Terre Haute, which is the United States penitentiary where the federal death row is located. We continued to have a very good relationship with Tim. Rob and I both tried, in a manner that was respectful of Tim, to persuade him to keep appealing.

Q: What did he say?

Burr: He just finally said no. He thought about the arguments we presented to him and ultimately he said, "I just don't want to do it."

Q: Why?

Burr: Tim knew from the very beginning that in doing this he was forfeiting his life. It does

not mean he was suicidal -- it does not mean he wanted to die. He knew that that was part of the military operation that he participated in. From the moment he became engaged in it and it took place, he was not very attached to life. That is different from being suicidal. And by the time he had finished the first step of the federal post-conviction process he was weary.

Q: How old was he at that time? Do you remember?

Burr: He was twenty-eight when the crime happened, so he would have been thirty-two. He was in his early thirties.

Q: He was worn out at that time?

Burr: Yes. He didn't want to deal with the conditions of life on death row, and he had utter certainty that he would be executed. The only question was when.

Q: Were you present at his execution?

Burr: I was not. I was present at the prison. I was doing press interviews outside the prison for that entire morning, and Rob Nigh was with Tim inside.

Q: Okay. When he was sentenced, he spoke very briefly. He said, "If the Court please, I wish to use the words of Justice [Louis D.] Brandeis dissenting in *Olmstead* to speak for me. He wrote, 'Our government is the potent, the omni-present teacher. For good or for ill, it teaches the whole people by its example.' That's all I have." Now, you probably could say the same about many of your cases, right?

Burr: Yes. Yes.

Q: You're up against the government. You believe the government doesn't have a right to kill anybody, isn't that right?

Burr: Of course.

Q: The victim impact testimony --

Q: -- that you presented in *McVeigh* --

Burr: But I didn't present victim impact testimony in *McVeigh*.

Q: The mitigation, excuse me.

Burr: We put on a lot of mitigation.

Q: The mitigation that you present is the other half of the victim impact testimony. Tell me a little bit about the legal history of this victim impact testimony. It must have been approved by the Supreme Court at some time.

Burr: At first it was not. It was first considered in a case called *Booth v. Maryland* in 1987. The court said it cannot come in. There was great fear that it would have a class and race effect, that surviving victims who were white or people of means or status, that the loss of

their loved one would be taken more seriously than the loss of loved ones of people of color or people who were poor. And the Supreme Court said victim impact testimony violates equal protection of victims. And so they said, "No. It is unconstitutional and you can't present it." They held that line in a subsequent case called *Gathers v. South Carolina* in 1989.

Then in 1991 in a case called *Payne v. Tennessee*, the court reversed itself. To this extent, they said that a limited portrait of the victim who has died and information about the impact on the survivors is permissible. Victim witnesses were not allowed to say what they think of the defendant or what they think the punishment ought to be, but from *Payne v. Tennessee* forward, victim impact testimony was admissible.

Q: What existed like that before in the penalty phase before victim impact was approved? After all, you had penalty phases since roughly 1976, right?

Burr: Right.

Q: So what existed between 1976 and 1991 in terms of the aggravating phase?

Burr: The aggravating phase all focused around the circumstances of the murder. Some murders are more horrific than others -- some people suffer more than others before they die. That has always been a very important part of the aggravating phase. Then the past criminal record of the defendant to the extent there were violent prior offenses are considered, either adjudicated or unadjudicated -- those are powerful. Then there is the whole question of future dangerousness, whether this person is likely to be a danger in the future. Those capture most of the considerations in the aggravating phase.

Q: Right. And the admissibility of victim impact testimony, in your judgment, was it really consequential -- did it change the ball game? Is it fair to say in your experience that the penalty phase is usually the main event in a death penalty case?

Burr: It is, yes. In terms of total time of presentation it's probably less time, but if a capital case goes to trial, it is rare for the person not to be convicted of capital murder, so there is almost always a penalty phase. That is the place where the defense has a chance to prevail.

Q: Right. And having said that, how important was the introduction of victim impact testimony?

Burr: Extraordinarily important. Penalty phases before *Payne v. Tennessee* were primarily about the defendant. The only aspect of it that was about the victim was how horrific the crime was -- everything else was about the defendant, even the aggravation. It was about his or her history of criminal activities or convictions and an assessment of future dangerousness. And then all the mitigation was about the person. The introduction of victim impact testimony changed that because it created another center of human focus at the trial. Now, under the radar and under the words of penalty phases before *Payne v. Tennessee*, I'm sure there was always a huge concern for the victims and their family. But there wasn't any information about them. The jury was told in the penalty phase to weigh the aggravating circumstances against the mitigating circumstances and decide what the penalty ought to be.

Q: Did it have to be unanimous?

Burr: It does now. The finding of aggravating circumstances has to be unanimous and beyond a reasonable doubt. The government has to prove those. The finding and mitigation is by preponderance and that requires no collective agreement. Each juror can decide what mitigating circumstances exist and what don't, and then they collectively put it together. In the sentencing decision itself, there is no requirement of unanimity or beyond a reasonable doubt, except statutory. There is no constitutional requirement yet. There probably will be. Most death penalty statutes require unanimity at that point, although there are some that do not.

Q: All right, so it was important, remains important.

Burr: Extremely. It adds an emotional level to a penalty trial that cannot be matched by any other evidence that has emotional quality to it. In the three and a half days that the thirty-eight penalty phase witnesses testified in the *McVeigh* case, the atmosphere in the courtroom was grief stricken, heavy, tearful, profoundly sad. It even had a physical component. It was hard to get up out of your chair at the end of the day. Your body felt heavier. Mine did anyway. Others' did too. And when survivors of murder testify, and prosecutors put on their testimony --

Q: By survivors, you mean --?

Burr: "Survivors" is the term of art for the family members or the people who had loving, caring or close relationships with the person murdered. They are the victim impact witnesses. By the time trial happens it has usually been a year or two since the murder. We know from people who work with traumatized people that over the course of that time, most people regain

a little equilibrium in their lives and begin living again. It's a life altered by the murder, but they find ways of regaining a foothold in life, and they find a way to memorialize and honor the loved one that they've lost in the way they live. And people like to talk about that because it's sort of part of their recovery. There is never anything called closure. It never ends. People's lives are altered permanently by a murder, but most people do learn to live again, in a relatively full way with tremendous differences from before.

What prosecutors do when they put on victim impact testimony is to leave that part out. They put on the part about the moment that they learned about the murder, the immense emotional and physical suffering that followed from that, the grief, the loss, the horrible consequences for the lives of this person and their family, and they end the story there. But virtually every one of those people has a second half of their story that doesn't get told, and *if* the second half of this story is told then there is a much more complex feeling in the courtroom. The leaden, desultory, grief-stricken, horrified feeling of loss that you have when the first part of that comes -- if the whole story is told that becomes much more complex. You have tremendous sympathy for the losses and suffering that people have endured, but you then begin to have extraordinary wonder and awe about their resilience and their ability to find ways of living with this horrendous event and regaining some meaning in life. You end up thinking how remarkable human beings are rather than how sad it all is. But victim impact testimony as presented by virtually all prosecutors leaves out that. It just focuses on the loss. It has an enormous emotional impact in the way that juries go about deciding criminal penalties.

Q: Can you not in the mitigating aspect bring in some people who might be prepared to testify that they have recovered somewhat?

Burr: We did that for the very first time in the *Moussaoui* case, the Zacarias Moussaoui trial. He was the only person who has been charged, tried -- and sentenced to life in prison -- for the events of 9/11.

Q: Sentenced to life?

Burr: To life. He was sentenced to life. The vote was 11 to 1 for death, and it has to be unanimous in the federal system. He pled guilty and his trial was only a penalty trial, but he was sentenced to life.

Q: In that case you --?

Burr: I was the Federal Death Penalty Resource Counsel for that case. I was almost a co-counsel. I did a lot of work around the competency issues for him, and then a huge amount of work planning for and carrying out the victim impact work. By the time that was tried in 2006, we had come to realize what I just told you about survivors of murder having a whole story and that prosecutors usually only present the first half of it. We realized that that needed to be done in *Moussaoui*, and the first realization came when fifteen or twenty families approached the defense team and said, "We don't want the death penalty for anybody. We're opposed to it, our loved one wouldn't have wanted it. We don't want it." Nobody looked for them -- they came to the defense team. Because of work we'd done from the defense with victims for a number of years before, it became very apparent that these whole stories needed to be told. So a decision was made to put on the testimony of a number of these people as defense victim impact witnesses, and their testimony simply told the whole story. It told the

story of shock and horror and unspeakable grief and suffering and pain, but it also told the story of this person's recovery, to the extent they had made recovery. In keeping with the *Payne v. Tennessee* decision they did not testify about the defendant, what they thought about him or what they thought should happen to him. I don't know what it meant to the jury.

Q: Well, no, no that's what I want to ask you. What did it mean to the jury?

Burr: It may well have meant to the jury that these people weren't for the death penalty. I mean you can figure whoever is putting a witness on, that witness is --

Q: Well, that's right, but the net result was 11to 1 for death, right?

Burr: Yes. We learned a lot about the forty victim impact witnesses that the government called, and had done a lot of work through public records and newspaper reporting and television stories, and we developed files on each of these people. In the month or two before the trial, we spent a couple of days working through all those people's records and files and identified about half of them as candidates that might talk to us. We approached them and many of them were willing to talk to the defense team. The purpose of that was entirely to get the rest of their story. And so what happened was when about half of the government victim impact witnesses were called, the defense stood up and did a very gentle cross-examination that allowed them to tell the rest of their story, the story about recovering life rather than losing life. What we were able to do with the government witnesses, what we did with the defense witnesses, cancelled out victim impact as a factor in the case.

Q: Well, the vote was 11to 1.

Burr: Yes.

Q: Do you know anything about the holdout?

Burr: The holdout didn't think that Moussaoui bore enough responsibility to be put to death, but we've also done juror interviews. All the jurors felt that the victim impact testimony as a whole was neutral. It didn't weigh for death.

Q: Well that's a plus for you, right?

Burr: It's a huge plus for us. But the fact that determined the one holdout vote was absolutely accurate, Moussaoui wasn't anywhere close to the middle of this. Al-Qaeda wouldn't let him in. He wanted to be a part of Al-Qaeda.

Q: Well as far as you know sitting here today, what was his responsibility for 9/11?

Burr: None.

Q: None?

Burr: None. The closest the government came was to show that he knew some of the people who were taking flying lessons in the United States who ended up flying the planes. And when some federal agent was investigating this several months before 9/11, Moussaoui was asked about it because Moussaoui was in the same flight school, and he denied knowing the

people. That was his culpability. He was held culpable because he insisted on pleading guilty. Zacarias Moussaoui so much wanted to be in the middle of the conspiracy that he pled guilty against the advice of his lawyers and went to a penalty phase.

Q: Right, he pled guilty to --

Burr: -- to the conspiracy to do everything that happened on 9/11.

Q: In 1997, the year that McVeigh was convicted, the Capital Jury Project reported -- and they had been at work on this for some time -- that jurors consider most important not the defendant's criminal history, background and upbringing, but whether the defendant, if he's allowed to live, is likely to pose a danger to society in the future. Now doesn't that sort of render unnecessary a lot of the mitigating testimony? If the idea is the juror's sitting there thinking, "Look if I give this guy life, he's liable to --"

Burr: I think that's right.

Q: And eleven of the twelve states without the death penalty also have life without parole, as does the federal government, does it not?

Burr: Yes.

Q: Now, the average Joe might think, "Well life without parole means life without parole." How could anybody be thinking about future dangerousness? Can you solve this for me? Do you believe what the Capital Jury Project said, and how do you interpret it?

Burr: Well, I do, but understand that of the jurors that the Capital Jury Project has interviewed, I don't know what portion of them were in penalty trials where the option was life without parole. It may not have been at that time, because the movement towards life without parole has been a feature of the early 1990s through the present. And I think a number of these jurors were from before that period of time. I don't know for sure. But assuming they were in life without parole trials --

Q: -- or just assuming that future dangerousness is important to jurors?

Burr: It is. It's unquestionably important.

Q: How can that be? I mean if you're giving a death or if you're giving life without parole?

Burr: Because you worry about people killing people in prison or somehow getting out and escaping, the law changing and suddenly they do get out, or a commutation from a governor. Life without parole, even though it means what it says, is not believed by people who serve in juries. Many of them just don't believe it.

Q: But does life without parole mean life without parole?

Burr: Yes. I mean it does to the extent any of us can mean it. Thirty years from now when you have prisons brimming over with people doing life without parole sentences, legislatures may as a practical matter say, "We've got to change this." Everybody understands that could happen, and so you can't guarantee with absolute certainty that the sentence will stay that

way. As imposed, that's what the sentence means.

Q: Okay, but can you explain to me -- is it not true, or is it true that most death row inmates are never executed, and that eventually most are returned to the general prison population or even released?

Burr: I don't know what the data is about that. I can tell you anecdotally this: I do a lot of work in the federal courts in and outside of Texas on federal capital cases, but all of my direct representation work for the last few years has been for people sentenced to death in Texas. Most people who get sentenced to death in Texas are executed -- I don't know what the percentage of people is that are not, but it is a very small percentage. And so that's the case in Texas. You could not say that most people in Texas are not executed -- it's the reverse. Most people are executed. Now, California is the polar opposite. California has about twice as many people now on death row as any place else and there have been fewer than a dozen executions in California.

Q: Many death sentences are vacated --

Burr: They used to be.

Q: -- by court action. Isn't that correct?

Burr: Well, the studies that Jim Liebman and others have done were looking at what happened to death sentences prior to about 1995. There's been a big shift since 1995 or 1996 in the relief that people get from death sentences. Prior to then, you are right: most people

who were sentenced to death ended up, at some point when their cases were finally over and no more judicial proceedings were going on, with something less than a death sentence. That is no longer the case, at least in my experience -- I haven't seen data from 1996 to 2008.

Q: Right.

Burr: But my experience tells me that it has to do primarily with [William J.] Clinton era legislation called the Antiterrorism and Effective Death Penalty Act in 1996.

Q: That's right. The consequence of that was what?

Burr: Most of the relief from death sentences was coming in federal habeas corpus proceedings. When state convictions are fully reviewed in the state courts they can then move into federal court for federal review of constitutional issues that are preserved. And most of the relief for people was coming in the federal courts.

Q: Would you call that habeas?

Burr: Yes, federal habeas corpus. In 1996, federal habeas corpus was changed with the Antiterrorism and Effective Death Penalty Act. The federal courts were required to give much, much greater deference to state court decisions and fact-findings. And it is almost impossible now to overcome a bad state court decision on a federal constitutional issue in federal habeas proceedings. It happens sometimes, but it's very, very rare.

Q: You mean it's tougher on the habeas now?

Burr: It is much harder to get federal habeas relief.

Q: You've seen that.

Burr: Yes.

Q: Was that also something that the Supreme Court wanted?

Burr: The federal courts are sick of the death penalty, but instead of getting rid of it they simply try to move the cases through without it bothering them very much. Their approach has been to want to have less litigation in federal court. A number of decisions led to this 1996 federal habeas amendment that I've been talking about. The federal courts, led by the United States Supreme Court, have been moving in the direction of cutting back on review of state convictions, particularly state capital convictions. So there is less review in the federal courts and that's fine with the federal court system. They're sick of death cases. They don't want to see them anymore, and the way that they have taken to not see them anymore is to cut back the level of review that they can give them, not to get rid of the death penalty.

Q: Right, that's what Robert Weisberg has called the "deregulation of death?"

Burr: Yes.

Q: Right. Some people say that the death penalty in the South is as entrenched as grits for breakfast. And we mentioned yesterday that Texas is the nation's leading executioner. Have

you some impression of why the South is so dominant in all of this, in fact overwhelmingly dominant?

Burr: I think it has to do with slavery. Lets step back from it: what did slavery do to the culture that thrived with it, and used it? It allowed the wholesale dehumanization of a whole class of people. When slavery was later abolished, that wholesale dehumanization continued. It continued through the Jim Crow laws, through lynchings, through mob violence, and then it continued through discrimination in education and in employment and in every social and cultural aspect of our lives. And that embedded process, a centuries long phenomenon in all of the ways that it reaches into the fabric of life has led to southern states having a much higher tolerance for the death penalty than anywhere else because human life has less value in the South. Now certain human lives have equal value -- white people or people of means. You don't see white people and people of means in extraordinary numbers being sentenced to death in any southern state. The percentage of African-Americans in Texas is about 14 or 15 percent and the percentage of African-Americans on death row in Texas is close to 50 percent.

So I think that is the absolute existential reason -- the South was the slave states, and slavery has brought us the death penalty. That is my own view after doing this for so many years. Now there are other things that contribute to that: southern states tend to be poorer than other states and they tend to provide indigent defense less money and provide fewer resources. So you get lousy lawyers doing lousy work. That is a utilitarian reason for it happening.

Q: But you know some people say, "No, that's a lot of hogwash about this ineffective counsel. It's all anecdotal, it's saturated, what have you seen?" You have been around these cases so long -- do you see ineffective council? Mike Mello wrote in 2003 that, "You can make more

money flipping burgers at McDonalds than you would make trying capital cases in many southern states.”

Burr: If you do your job right as a capital lawyer, that’s right.

Q: You know he says, “You could make more money flipping burgers at McDonalds!”

Burr: Yes. If you as a capital lawyer do the kind of work you should do on a capital case, your hourly wage is about five or six dollars an hour. But nobody does it. Nobody with a law office can afford to work at five or six dollars an hour. You can’t do it. And so they don’t, and the result is the amount of money that’s available to pay for poor people’s capital defense has a direct relationship with how much work is done. All the national studies about providing quality representation to people in a death case say that on the average a lawyer is going to need to put about two thousand billable hours into representing somebody in a capital case, if they’re gonna do an adequate job. Over the course of the case, spread over two or three years, including the trial. And if the state or the county will provide no more than forty thousand dollars for that two thousand hours of work, that is twenty dollars an hour. Every lawyer’s overhead is a lot more than twenty dollars an hour. You can barely pay your staff or your secretary for that. You can’t pay your rent, you can’t pay utilities, you can’t pay your other office expenses. And so people don’t do two thousand hours worth of work. They do three hundred or four hundred or five hundred, because that is what they can afford to do. And forty thousand dollars is probably about what the average that people get in Texas for capital cases. You don’t get to bill at ‘X’ dollars per hour and bill for all the hours you work. It doesn’t work like that in Texas or many other southern states.

Q: Are you talking about trial --

Burr: Trial counsel.

Q: Trial counsel. By the way, in the United States today, is the death penalty only eligible for people convicted of murder and aggravated murder?

Burr: Yes. So far. Death used to be available for other crimes. The Supreme Court in 1977 said, "No." There is some effort by the states to get that reversed, and the effort now involves a person who is convicted of rapes of children. Some states now make that a capital offense. The U.S. Supreme Court overturned that statute a few months ago.

Q: Right, in *Kennedy*.

Burr: But it was very close. It was a 5 to 4 decision.

Q: Right. Are you entitled in the United States to a lawyer post-conviction as you are entitled to a lawyer in capital trial?

Burr: No. You're entitled to a lawyer in federal habeas corpus proceedings in capital cases, as a matter of statute not as a matter of the constitution. But there is no constitutional or uniform state requirement for counsel in state habeas or state post-conviction proceedings, which are where federal habeas proceedings are shaped.

Q: Right.

Burr: If issues are not raised in state habeas they can never be raised in federal habeas proceedings.

Q: Right, and you're saying it's a grab bag around this country?

Burr: Yes. Texas requires that a lawyer be appointed for state habeas, but affirmatively says that "those lawyers do not have to provide effective assistance of counsel." So you get a lawyer, but you get no safeguard against the lawyer's poor performance.

Q: Once again this whole thing about ineffective counsel for capital defendants, which is raised time and again by opponents of the death penalty.

Burr: No, by people representing people in death cases, many of whom are not opponents of the death penalty.

Q: Well, when people who are opposed to the death penalty talk or write about it they say, "Look, people can't get a decent counsel."

Burr: That's true, but the people who raise those claims in cases are lawyers doing their job.

Q: Right. But altogether, once again you're standing before the Good Lord and he says, "Burr, you've only got a couple of words to answer this question: by and large has this whole job about ineffective counsel for capital defendants been exaggerated *today*? I'm not talking about thirty years ago, today, and especially in the South, and particularly in Texas. Is it overrated?"

Burr: I don't know who's doing the rating now. It has not been overrated in the past. Every state, including Texas, is making progress in providing more funding and better lawyers to poor people facing the death penalty. That is happening. It is happening because of all the ineffective assistance claims that have been raised in the past. It is happening because the American Bar Association [ABA] has repeatedly said, "Here are the standards by which capital defense counsel have to perform," and the U.S. Supreme Court has begun to embrace the ABA standards. There has been a recognition that ineffective assistance of counsel is a terrible problem, and it is beginning to be remedied now. It's not there yet, but it's beginning to be, except in the arena of where you have no right to effective assistance of counsel in state habeas proceedings, as it is in Texas and perhaps elsewhere. That in my own experience is where fates are sealed. Because state habeas is the only opportunity to do new investigation, or find new evidence that the trial lawyers didn't know about, find evidence that the prosecution has hidden, or to develop new evidence based on the evolution of science. You can raise those issues, and then have them decided by a somewhat fairer court, perhaps in federal habeas, although with great deference given to the state courts.

Q: I hear you. But in summing up with regard to the Supreme Court, since *Gregg* there have been some wins and some losses, right? Maybe the Supreme Court wanted to deregulate death to the states, maybe as [John A.] Powell once said, "We were up all night with these constant habeas petitions." But there have been some wins. Look, your own case *Ford v. Wainwright*.

Burr: If you drew a graph of death cases in the Supreme Court since *Gregg v. Georgia* in 1976, for the thirty-two years since then, the line from 1976 to 2008 goes up in terms of favorable decisions to capital defendants. It goes up to about the mid-1990s, and from the mid-1990s forward then it levels off, and since about 2000 it's coming down. That's the pattern,

and the reason for that is the Antiterrorism and Effective Death Penalty Act changing federal habeas corpus in 1996, and George Bush and the U.S. Supreme Court. The appointment of [John G., Jr.] Roberts and [Samuel A., Jr.] Alito, concomitant with the retirement of Justice O'Connor, has made the Supreme Court a 5-4 court against capital defendants much more than it used to be. Since Justice Brennan and Justice Marshall left the court, it's pretty much been a 5 to 4 court, but it could go either way in death cases.

Q: Well, when it upheld lethal injection last March in *Baze v. Rees, Kentucky Department of Corrections* [2008], it was 7 to 2 was it not?

Burr: Yes. But lethal injection is a frill issue.

Q: A frill issue?

Burr: Yes.

Q: Why do you say that?

Burr: Because the states can change it. The value of lethal injection was what came of it, which was a de facto moratorium for seven or eight months while *Baze* was pending. Anywhere where a court upholds that lethal injection is cruel and unusual or somehow in another way somehow illegal, the states will simply change how they do it. It is not going to end the death penalty. It is a peripheral issue that has nothing to do with who gets sentenced to death and who ultimately gets executed. It is simply a matter of when and how that happens.

Q: You know it's interesting you should say this because the man who is sometimes referred to as the "academic godfather" of the death penalty opposition, Hugo [A.] Bedau, wrote back in 2004 that each of these Supreme Court victories on a particular area actually tends to undermine the campaign against having the death penalty because people see it as, "Well, we're getting along."

Burr: They see it was somehow getting fairer or getting better.

Q: That's right. That's right. Do you agree with that?

Burr: Hugo has a far better perspective on the politics of the death penalty and abolition than I do. I see the death penalty from the litigation trenches perspective. What I see is since I've become involved in death penalty cases in 1979, the mode of death penalty defense work has become guerilla warfare, which means finding opportunities and seizing them and exploiting them to the extent possible in an overall effort to reduce the reach of the death penalty and in an individual effort to stop death for one person at a time. My view is that whenever a door is shut, we can open a window somewhere else. That's why I think of it as guerilla warfare. It is not believing that any one thing that we do is the brass ring. Occasionally things such as mental retardation and youthfulness will be a bit of that, but there's no brass ring here. There are multiple ways of trying to save the life of each person who faces a death sentence, pre-trial and post-trial. There are no across the board ways that are going to save any one person that are available and reachable, not at this period of time in the courts. In the thirty-six years since *Furman* and dealing with increasing numbers of death penalty cases, the courts have become sick to death of death cases. They hate them, they don't respect or at least they do not

act with respect towards the lawyers who represent people in death cases. They would like it all to go away. And the way they have settled on pushing it in that direction is to restrict review and to say “no” more than they say “yes,” and to compromise the ages old meaning of constitutional rights. It has had that effect on the judicial system.

The logic of the Supreme Court decision in 1976 was, “We’re going to bless procedures that we believe will reduce the arbitrariness, the capriciousness, and the discrimination in imposing the death penalty and make it a fairer process.” That promise has never been actualized. The systems that were blessed in 1976 are still arbitrary, capricious, and discriminatory -- it’s just a little less visible. People get sentenced to death because of the horrific nature of the crime, the class and status and race of the victims, sometimes the class and race and status of the defendant, and fear about crime and how it manifests in this particular case. You can guide people with aggravating circumstances and guide the juries with mitigating circumstances, but that’s how they make decisions. Now, mitigation does work in the sense that the better we’ve developed the craft of mitigation, of investigating and putting on mitigation the more likely it is to get a life sentence, but it’s all --

Q: Individual by individual?

Burr: Exactly. There is nothing in the judicial system or in the legal process that’s going to get rid of the death penalty as far as I can see the horizon.

Q: Okay, now one of the things that people like yourself have thought up, maybe you yourself, is something called Defense Initiated Victim Outreach, or DIVO. What is that?

Burr: It really is a system that started with our work in the *McVeigh* case. In *McVeigh*, I realized coming in that the magnitude of what had happened, how many people were killed and how many people were hurt, was something that we in the death penalty arena had never faced. It simply spoke very loudly that we as the defense needed to do something about all that harm that was done. I didn't know what to do about it but I was I was drawn in that direction, and I'd been a capital defense lawyer for many, many years at that point, but I still had that feeling.

There was great difficulty within the defense team of moving that forward. About two months, three months before the trial started, when we were just helter skelter getting ready for trial, the penalty phase people were able to bring in some experts to talk with us about the trauma experienced by survivors of murder and to begin to think with us about how we as the *defense* team might put a hand out towards those folks, because we knew a lot of them would testify in the penalty phase of this trial.

We crafted a very modest strategy of sending out letters to the forty people who were identified as the victim impact witnesses, expressing our deep sympathy and explaining that we were likely to meet them in court and we would like to meet them ahead of time. We would like to have a chance to talk with them about their experiences and not in any way to be disrespectful or to be hurtful. If they were willing to do that we would like to do that, and we would have a person call them to follow up. And the person who did that was this young woman, Tammy Krause, who was a graduate student with an Eastern Mennonite University professor named Howard Zehr. He had been one of the founding figures in the system of restorative justice in this country. Tammy made contact with people and I talked by telephone with a half a dozen or so victim impact witnesses, not for very long. It was awkward and

uncomfortable on both ends of the phone calls. We did not learn that much about those people. In fact the people I talked to ended up not testifying, and as a result we had no cross examination and did not ask one question of *any* victim impact witness in the proceeding.

Q: But what I'm getting at, has this developed into something that other lawyers are doing?

Burr: It has evolved since then and is based on restorative justice principles -- restorative justice as opposed to retributive justice. Retributive justice is how our system works, in which the focus is on punishing the offender. The victim of whatever crime it is is collateral to that, the community that the crime came out of is collateral to that, but the sole focus is punishing the offender. Restorative justice, the primary focus, not sole focus but primary focus, is the harm done. So you are looking at who has been victimized by a crime. You then look to the offender who's responsible for it, and the community that the crime and the victim and the offender came out of. The primary effort is try to restore and put right the harm done rather than primarily to punish the offender. There is punishment, but the whole process seeks to bring offenders into accountability in relation to victims.

We recognize that capital defense teams must now address the hot molten core of a capital case which is the murder. Now, before this we had always sort of danced around the murder -- the closest we ever got to it was to try to counter the most aggravating aspects of a murder. That was the most we ever did. What DIVO does is to say, "We've got to recognize this pulsating hot core of the case which is the horrendous harm done to people by a murder, not only to the direct victim but the survivors. And we as a defense team understand that when a murder happens an involuntary relationship is created, it's put into existence between the offender and the survivors. There is a relationship because "I've taken somebody from you and

the relationship arises because that makes me owe you something, and you need something from me.” That’s where the relationship comes. And it’s unique to the defense team as the proxy for the offender and the victims or survivors. We realize there is this magnetic field between victims and offenders, and we are in the middle of that because we are the proxies for the offender, or who victims perceive as the offender.

Q: And the utility of this, for the defense?

Burr: Let me first speak about the outreach, because the utility is absolutely serendipitous and collateral. What we’ve learned is if we offer a relationship between us and victim survivors, very often they engage in a relationship. They have questions for us. They have needs that can only be met by the defense, needs for information about what happened primarily, but also needs for resolution.

Burr: Many victims would like, at some point, to meet face to face with offenders so that the offender can know what has been done to them, so that they can eyeball this person and figure out from whatever he or she is and how they answer questions, *why* this happened. And so we offer this relationship. It often comes to us -- we have learned that we cannot ask anything of victims. We simply have to offer a relationship and offer to provide any response to questions they have that we’re able to respond to and try to meet any other interests they have that we as a defense can provide.

Q: Don’t you run the danger of the offender, if he is willing to cooperate, admitting guilt?

Burr: Well, you do it all within your obligations to represent your client. So if a question

comes back that you can't answer you explain to the victims why you can't answer it. And it leads them towards a conversation at some point to saying that for this to happen, the legal case has to be resolved.

Q: All right, so let me go again to the point of then, even if the utility is serendipitous, what is the utility?

Burr: The utility is that victims' family members can become a force for life.

Q: Even in the courtroom?

Burr: Either in the courtroom or, more powerfully, outside the courtroom. They can become a force for resolving cases by plea bargains, because their interests can be better satisfied through a plea bargain -- most of their interests -- more often than through a trial and a death sentence. Because a plea bargain can take into account the things they want, it can silence somebody who's been talking in the press because it requires them to be silent. It can keep the person from benefiting monetarily from any stories done.

Q: The offender?

Burr: Yes, because the money would go to a foundation that they set up. It obligates the offender to meet with them should they ever want to meet with him. It provides information. It can provide for a heartfelt apology and a statement of remorse.

Q: And it can have an impact on what the prosecutor is going to do?

Burr: Exactly. If victim family members want to settle a case with a plea bargain, it's very hard for prosecutors to say no to them.

Q: Okay, let me ask you about another area that you may have some view of. People who are for the death penalty argue time and again that it is a deterrent to crime. And they'll say, "Look this whole idea that it hasn't been a deterrence is hogwash." For example, Joshua Marquis, the District Attorney of Clatsop County, Oregon and leading light as it appears in the discussion of the pro-death penalty. He cites a 2004 Emory University study of more than twenty years of data suggesting that for every execution in America, eighteen murders are prevented, plus or minus almost nine other lives, and he goes on with other studies. The federal judge Paul [G.] Cassell, in Utah, argues that deterrence is supported by logic, first-hand reports and statistical studies. He wrote in 2004 that "all these sources suggest a specific incremental saving of lives from implementing the death penalty over and above long-term imprisonment."

On the other hand, you can find experts who are opposed to the death penalty, or maybe neutral even, who argue that study after study over six decades has shown that the presence of the death penalty has no impact on deterring crime, that it's a neutral thing actually.

What's your own --?

Burr: Some studies have even shown that it increases violent crime. When executions are carried out, the murder rate goes up.

Q: Right, but have you gathered any sense of that over all these years?

Burr: My own view of it is I don't think this is a phenomenon that can be studied empirically with any precision either way. I think the studies are sort of a wash, although there probably are more studies that say it is not a deterrent than there are that say it is. But the notion of saying you're saving eighteen lives is just poppycock. I mean, that's silly. The reason is this -- most capital murders do not happen in a planned, thoughtful, deliberate, calculated way by somebody who is weighing the risks and benefits of their decision to kill somebody.

Q: Like Tim McVeigh?

Burr: That's right. Tim's was.

Q: Yes.

Burr: But virtually none are. They are impulsive. They are crisis-driven. They are panic-driven. They are at the other end of the scale from thoughtful.

Q: You've seen this?

Burr: Virtually everybody I've ever represented for thirty years has committed that kind of murder, or they're by people with limited intellect or limited education, who've never read a newspaper in the last ten years. They don't think about the death penalty as a part of the calculus in deciding to kill somebody because there is not a calculus in deciding to kill somebody in most capital cases. And if there is no calculus then the existence of a death penalty in a jurisdiction doesn't matter. If you just look case by case by case, that is what

capital murders are: they are not calculus-based acts at all.

Q: All right, Dick, let me ask you this. What is the anti-death penalty movement? Who is it? I mean when you were running the Capital Project at the NAACP -- and by the way Mike Mello was one who had written that the NAACP Legal Defense Fund got out of the business of capital punishment in the early 1980s. But what I want to get at is that you've been with these organizations.

Burr: Well, I've just been with legal organizations.

Q: That's right. But some people say, "Look, the anti-death penalty movement consists of national legal organizations, national religious organizations, a lot of local and regional groups that are associated with them, like the National Coalition to Abolish the Death Penalty." Do you have a sense of who they are and what they're getting done?

Burr: I know a lot of the people. I've known the people who've been around as abolitionists for a while in Texas and other states and nationally. They are a collection of people who have no single abolitionist ideology. Some are driven by religious and spiritual values. Some are driven by the belief that the death penalty can never be fair and non-discriminatory; some are driven by the belief that it is an utter waste of human and financial resources. Some, like law enforcement people, believe that it diverts valuable resources away from the whole spectrum of law enforcement needs into a very, very small niche and wastes a lot of resources. It is all of those folks, and because it is so diverse and there are so many divergent people and constituencies, it is gradually beginning to have effect. I think that is why New Jersey abolished the death penalty this year. I think it is why Maryland is likely to in the near

future.

Q: I thought a Maryland commission recommended the abolition just last month.

Burr: It did. That's right. It hasn't happened yet, but I think it will. I think it's likely to happen in New Mexico. And I think all of those reasons are why it's happening. I think with the current financial crises that every government faces as well as all of us face, there will be hard decisions made about whether to continue to throw lots of financial resources into that very small niche. It makes no sense from a policy perspective in terms of managing limited amounts of money for vast amounts of need. It is an utter waste of money to spend that kind of money. You can incapacitate people who murder very effectively by putting them in a cage for the rest of their lives. And so I think that as the financial crisis continues and as surplus funds dwindle and become non-existent, there will be more of an imperative to question and get rid of the death penalty in the states that have it. That is my belief.

Q: From time to time one sees a citation to the Gallup Poll conducted annually on the death penalty. Have you ever seen that?

Burr: I've seen it occasionally and I don't know what it says now.

Q: Well, I'm looking at the one that just came out on November 17, and in 2002 there was 68 percent approval of the death penalty. Today it is 64 percent. Not in favor: 2006 it was 26 percent -- today, 30 percent. And it has various sub-divisions, but let me read you something from the long-term trend:

Although the current 64 percent support for capital punishment is high, support is a bit lower than it has been at other times over the past decade when 69 or 70 percent were in favor. These readings in turn are lower than the ones from the 1980s and 1990s when support averaged 75 percent. The highest individual measure of public support for the death penalty in Gallup's records is 80 percent, recorded in September 1994. Over the years, Gallup has consistently found lower support for the death penalty when it is offered as an alternative to life imprisonment with no possibility of parole. Most recently in May 2006 Gallup found 47 percent naming the death penalty as the better penalty for murder versus 48 percent preferring life imprisonment. Bottom line, the majority of Americans continue to support the use of the death penalty as the punishment for murder. Most Americans, 71 percent, also say the death penalty is used either about the right amount or not often enough.

Now this doesn't show a collapse, does it?

Burr: Oh, no. But I suspect in New Jersey that you would have had public opinion numbers relatively comparable to that. There's always been a sense in the death penalty abolition community that support for the death penalty is a mile wide and an inch deep. That it's just not that important to people, but its approval is pervasive. And so when you get to a certain level of lack of support, and it doesn't need to be a minority -- it can be as low as 64 percent -- there is more room for policymakers and decision makers in a jurisdiction to commission somebody to examine the death penalty, to come up with findings, and to present compelling public policy reasons not to have it anymore, and it's acceptable. And that's the phenomenon I see, and I think maybe the death penalty now is a mile wide and three quarters of an inch

deep. Because that's what you see happening. You see governors such as Tim [M.] Kaine in Virginia, who doesn't believe in the death penalty. You see politicians getting into office now, whose views about the death penalty are not in favor of it, and they still get elected, and that did not happen until relatively recently. So my instinct is that we are moving towards abolition, not from the courts, but from policymakers. All of the forces are converging in that direction, and not the least of which is the current financial crisis that we're all facing. The more you need to cut spending, the less appealing the death penalty is going to look to any place where it's very active.

Q: Just organizationally if you know of it, do you know whether The Legal Defense Fund, the ACLU, Amnesty International are very active in the death penalty today? Do you have any sense of that?

Burr: I think it differs organizationally. The NAACP Legal Defense Fund is doing less with the death penalty now than it did when I was there. I left in 1994. My successor was George [H.] Kendall and the commitment continued pretty much the same under George. George left in probably 2004 or 2005, and now the new director is a woman named Christina Swarns. Since Christina has come, the commitment has measurably been reduced. What was the Death Penalty Project at the Legal Defense Fund is now the Race and Criminal Justice Project, and their purview is broader and the death penalty is just one portion of it. But now they are looking much more in a much more focused way on race issues in every criminal justice arena, not just in the death penalty. So I think there has been a change in commitment from LDF in the last three to four years, it's probably been coming. There were reverberations about it when I got to LDF, and in fact, what happened when I got to LDF was the Capital Punishment Project shrank from four people to one.

Q: Yes, you mentioned that yesterday.

Burr: But I got more resources along the way.

Q: How about the ACLU? Didn't the LDF and the ACLU have some sort of bones of contention among them about how to proceed? If it doesn't ring a bell forget it, but do you know whether they're much active today?

Burr: The ACLU about three or four years ago funded a National Death Penalty Defense Project. It has a full-time director and two or three staff people, so it's a very small project, but I don't remember it having that kind of focused death penalty defense project before. Henry Schwarzschild was always there, and the litigation --

Q: Right. He is dead now.

Burr: Yes. The litigation part of the National ACLU organization would take a hand in a death case here and there but didn't have any death penalty litigation docket. They'd do an amicus brief in the Supreme Court or they'd work on a case if we asked them to. The other thing ACLU is doing now is funding private counsel and investigators and litigation specialists to work on the Guantanamo cases that are the most in jeopardy. The ACLU is doing a lot of funding because the government will only pay for military lawyers.

Q: How about Amnesty?

Burr: I think Amnesty has cut back some, I'm not sure how.

Q: But they were never very deeply in litigation?

Burr: No, never in litigation.

Q: Never in litigation.

Burr: Amnesty U.S.A. had a national organizing staff around the death penalty for a while. I don't think they're doing that anymore.

Q: Historians will tell you there was a time when the LDF, perhaps others as well, created a major transformation in the anti-death penalty movement by shifting from state legislative politics to a legal assault that began in the late mid-1960s and ran through, from and in *Gregg* and up to *McCleskey* [*McCleskey v. Kemp*, 1987]perhaps. But today there seems to be a diminution of focus on this and an increased interest in going toward legislatures and toward the kind of people you were describing before, the political leaders, who may be more open to doing something than the courts, and including the Supreme Court. In fact a very prescient article along those lines was written in the *University of Missouri-Kansas City Law Review* in 1990 by one Richard Burr, who talks about the need for a new politics of advocacy, in which you say the old model is sadly inadequate. Do you recall that article?

Burr: I do, but I haven't read it in a long time. I do remember having authored it.

Q: Okay. Okay, you don't deny it.

Burr: No, I do not deny it.

Q: Like you denied yesterday palling around with Bill Ayers.

[Laughter]

Burr: By the way, Bill Ayers was interviewed last night.

Q: In this article you say, "We also have to begin to learn how to work in legislatures and advocate for people who are condemned to death." You go on to say, "Another thing we have to do is to develop politically sensitive abolitionist advocacy, speaking to the constituencies with whom we've had a chance to build alliances, but also with people who might have less than a progressive kind of view than someone like yourself would have. We have to talk in several different ways. We have to talk about the death penalty as a dismal failure in fighting crime," etc, and that finally, "We need to talk about the death penalty as a wasteful crime fighter." In other words the burden of this article is that just litigating case by case isn't going to do it, now we've got to open ourselves up to a general discussion including political involvement.

Burr: That was a pretty prescient article.

Q: Well, that is the way you see it today more or less?

Burr: Yes, and I had forgotten that I had begun to see it that way back then.

Q: This career that you have, fighting for the rights of the condemned, can you look back and say, "I remember myself when I first went to work for the Southern Prisoners Defense Committee." Has it turned out to be pretty much what you expected?

Burr: I have no idea. I took that job when I was thirty-years old. I took that job because my then wife and I wanted to get out of Rochester, New York and back to the South. We met each other and fell in love and married in Nashville. We went to school together there. We loved Nashville -- we'd lived there another year after we got out of college. And so when we heard through friends from Nashville about this job for me, and then Carolyn, my then wife, explored a job for her and she found something to her liking, we were just excited about getting back to Nashville. The impetus for us was getting back to Nashville and finding work that fit our values. But we were thirty years old and I thought I'd probably be a lawyer the rest of my life but I still probably had some notion of being a labor lawyer.

And I was not at all prepared for the current in the river that I got into. And that's what it was. I came in to do prisoners' rights work, and that was an extension of class action and employment discrimination work. It was civil rights litigation, and within a few months the death penalty began to move forward. That is the current that I found myself in and it swept me along. There was a point at which it swept me along from job to job, and I think sometime when I was in Florida as a public defender doing death cases. I started thinking, "Well this is what I'm going to do the rest of my life because I don't know how to do anything else." I'd done it long enough that that was where my expertise was and I felt good about it, I found tremendous satisfaction in the work despite all of the counter feelings to satisfaction. The arc of my life was in that direction and the longer I have done it, the less I've thought about doing anything else.

And maybe that's how most people experience careers, but certainly in 1979 when I went back to Nashville and started doing this work, I had no idea what I was getting into. But the work itself swept me along and grew me and challenged me and inspired me to think of new things to try to innovate and to work collaboratively with other people. I can't imagine a career that could have been more satisfying in those respects. I mean, how lucky can you be to have a career that challenges you in every aspect of your being, that encourages you to innovate, that rewards you for innovating by the response of your peers, that gives you colleagues who are smarter than you and still love you and work with you and help you be better? How could you have a better job than that?

Q: Well some people might say, "Who's he kidding? He's dealing all the time with the worst of the worst." Now that I say "the worst of the worst," one of the arguments of the people who are still for the death penalty, people who are actively involved, is that only 1 percent of the people who commit murders annually in this country are ever put to death, and they are the worst of the worst. And their view is that those people deserve to die. You, in this career that you just described, have met many of "the worst of the worst." Is that not oppressive to you?

Burr: No, because that view is uninformed and at a distance. It is like looking at something out on the horizon and describing it as something, and then when you get closer to it you realize it's entirely different, that's what that is. The "worst of the worst" is simply something that somebody would describe that is way out on the horizon -- the closer you get you understand why people have gotten to where they are and you understand fundamentally that they're people. And they're people that because of the work that you do with them and the investigation you do into their lives and into the circumstances of their crimes, you begin to

understand why that happened and why this set of factors could have produced the same behavior in many people.

And so you get to where you don't condemn. We condemn that which we do not know. Maybe that's something from the Bible, I don't know, but it sure is true in my experience. We condemn that which we do not know, and being a death penalty lawyer, you *know* people, and you know that this human being is fully human, has a lot of impairments, has a lot of deficits, has a lot of tragedy and trauma and horrible experience in his life but also has done a lot of neat little things -- he's been kind to people, he's aspired to be a football player or a basketball player or a good student, and failed but kept aspiring, he loved somebody and was loved by somebody else. Someone who did lots of good deeds over the course of their lives, and did some really horrible deeds as well. And you get perspective on your own life from working with folks like that and you realize you're not perfect and that you've done a lot of shitty things to people. And you begin to understand that there is a connection between the quote, "worst of the worst" and the rest of us, because they are us. And that probably is the coda for me in this thirty years of work.

Q: You have never met the devil in any of these people?

Burr: I don't think the devil exists.

Q: Never met someone who you represented or you came to know on death row who was simply evil and did a terrible thing?

Burr: No. I think evil again is what we call something that we do not understand.

Q: And the prisoners that you have known -- did they ever show what you and I might think of as remorse?

Burr: Absolutely.

Q: In what way do they show that?

Burr: I had a client executed at the end of October here in Texas named Eric [C.] Nenno. Unlike most of our clients, Eric did not have a traumatized childhood. He came from a middle-class family in Northern Pennsylvania, and did pretty well in school. He had a pretty good life. I mean, not the best but it was all right. He went to the Navy, did well in the Navy. When he came out of the Navy some impulses in his life changed. His sexual interests began changing. He was still heterosexual but he began being attracted to young girls. And he never acted on that. He worked in a management position in a wholesale business very successfully for ten years, moved to Houston to take care of his sister's house while she was in the military. This was after he got out of the Navy, all of this. And one day there was a little girl he saw in front of his house and he was drawn to her incredibly. He persuaded her to come into his house and he tried to have sex with her. She started screaming and struggling, crying. He killed her and then he had sex with her. That was his crime. He'd never committed a crime before.

In our investigation, which came way too late to be of any benefit to him, we learned that a very important reason his life turned that way was because of his exposure to neurotoxins when he worked as a plumber in the bowels of ships in the Navy. He waded through water that was infused with chemicals that changed his brain and had a peculiar affinity to

changing the part of your brain that controls how you feel and what your emotions are. So there was a reason that that happened that nobody knew at trial and nobody cared about once we learned it.

But Eric, from the moment he was arrested to the moment of his death, thirteen years later, never had one disciplinary write-up adjudicated in the jail or the prison. He was a trustee in the Harris County Jail the year before his trial. He innovated a number of things on death row, a little welcome wagon system. Whenever a new guy came to death row a little brown bag appeared on their cot that had toilet articles, writing materials, a few little canteen supplies, snacks, and a note that said, "We're sorry you're here, but this is a community." Eric started that and every new guy on death row for the thirteen years he was there got that. On death row here prisoners worked when they were at the Ellis Unit. That changed when they went to the Polunsky unit. Eric worked double shifts in the garment factory the entire time he could, and he was always commended as the best worker they had ever had. Eric took under wing some other death row inmates who were limited. He took under wing Johnny [P.] Penry who had mental retardation. He read his letters for him and wrote for him and wrote to his lawyers when he had a problem that nobody would otherwise know about.

He had enormous remorse from what he done virtually from the moment he did it, and he decided that to live with that remorse the best thing he could do to try to make things right was to live an exemplary life in prison, and that's what he did. He wrote a profoundly moving letter to the parents of the child that he killed, apologizing in every way imaginable. It was the most heartfelt letter I've ever seen anybody write about anything. He came under the wing of various pastors who declared him to be the most remarkable prisoner they'd ever encountered.

Q: Couldn't save him in the end?

Burr: All of that was presented to the Board of Pardon and Parole in Texas, which is where clemency starts. It is a seven member board. It got no votes.

Q: No votes.

Burr: No votes. That is one example. But the people who I have represented who have been executed have grown towards remorse, have dealt with it in different ways in their lives -- they have educated themselves, have improved themselves in a variety of ways, have become kinder, gentler, more compassionate people, often more learned people. They've lived lives and evolved.

Q: Any of them ever said thank you to you?

Burr: Oh, yes, all of them. I have only had one client who did not. He never did. All of my other clients have been grateful to me, yes.

Q: All right, that's pretty much what I have on my mind, is there anything that you want to add before I close it out?

Burr: No.

Q: Thank you.

Burr: Thank you for doing this.

Q: Thank you, Dick Burr.

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