

THE RULE OF LAW ORAL HISTORY PROJECT

The Reminiscences of

Clive Stafford Smith

Oral History Research Office

Columbia University

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PREFACE

The following oral history is the result of a recorded interview with Clive Stafford Smith conducted by Ronald J. Grele on June 28, June 29, and June 30, 2010 in Symondsburry, England. This interview is part of the Rule of Law Oral History Project.

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

MJD

Session One

Interviewee: Clive Stafford Smith

Location: Symondsbury, Dorset, England

Interviewer: Ronald J. Grele

Date: June 28, 2010

Q: This is an interview with Clive Stafford Smith. The interview is being conducted in Dorset, in England. Today's date is June 28, 2010. The interviewer is Ronald Grele. This is an interview for the Columbia University Oral History Research Office. I thought where we would begin is where you begin your book [*Bad Men: Guantánamo Bay and the Secret Prisons*], and that is with 9/11. It is pretty detailed, your first memories of 9/11 being in Louisiana. But I have a couple of questions to ask you.

Smith: Sure.

Q: It isn't clear in there whether or not you watched the buildings collapse.

Smith: Well, when it actually happened, no. I was driving around. I was actually trying to find a pathologist who I had an appointment to meet that morning on a death penalty case. I was driving around and it was just ghostly. This was Lake Charles, Louisiana, and there was nobody, anybody. It was just really weird. It must have been about a quarter to nine, or something -- maybe a bit earlier. I can't quite remember. There was just no one around. I went to his office but there was no one there. Finally I gave up and went back to the little house that we rented in Lake Charles. That was when I started seeing the pictures on television.

Q: By that time the buildings had collapsed.

Smith: I don't think they had collapsed at that point. It may be that before I went out I saw the first pictures, where everyone thought it was a small plane that had flown into it, so it was a little dramatic but no big deal. I had work to do, so I was getting on to do what I had to do. I think that's the way it worked.

Q: Do you recall having any premonitions about what this might mean or where the world was going to go? What kind of a moment it was?

Smith: I remember Emily [Bolton] and I drove back from Lake Charles to New Orleans that evening. And I remember watching television and watching Tom Brokaw and he was saying "Why do people hate us?" And I remember that very vividly because I thought, "Well, that's a very good question, of course. That's what we should be looking at and answering. Why is it that people around the world want to do these horrendous things to us?" At that point I thought, "Wow, maybe people are going to respond sensibly to this."

I didn't have any sense, I don't think, on that first day, what a dramatic thing it was. In fact, I misjudged that for a long time. I think in retrospect it's because having been born and raised in Europe and having grown up with my parents -- my dad was in the RAF [Royal Air Force] in World War II and my mother used to tell us stories about doodlebugs and being bombed in World War II's blitz and all of that stuff. I underestimated what an enormous emotional impact this would have on Americans, because in Europe this wasn't unique. It was unique in the sense that it was a very dramatic, televised experience. But it was not nearly unique in the sense of the number of people who were killed and so forth. It

took me a long time to work out. When you think about it, how many times has the continental U.S. been invaded, so to speak? It is a tiny number. You, as a historian, would probably correct me if I tried to tell you the exact number of times.

Q: Yes, right. No, it's pretty clear. In the book you say 1812. 1812 it is.

Smith: 1812. You can't really include Pearl Harbor because it wasn't really the continental U.S. And you can't really include the Mexican Wars, because I think we probably are the ones who started all that.

Q: It took place in Mexico.

Smith: Yes. And so, yes, this was it.

So that took me a while to work out the psychological impact it was going to have on the U.S.

Q: Do you remember your initial responses to [George W.] Bush's "war on terrorism"?

Smith: Yes. I mean, I remember that very clearly, from the beginning.

Q: What did you think that was going to mean?

Smith: Well, I had always had a thing about the "war on drugs." I thought the war on drugs was an incredibly stupid title and the idea that we are going to solve the problem of drugs

by banging up a bunch of people in prison was just silly.

When he came out with this "war on terror," I thought it was ridiculous. But it was interesting because before that the core of the American left was so anti-Bush and anything Bush would say people would say, "Oh, you ridiculous thing. How could he possibly --" and whatever. I had exactly the same reaction to Bush's response to 9/11. I just assumed that everyone else would, of my friends. My colleagues. But actually, they didn't and I was very surprised by that. I think that was my mistake, totally. I just misjudged that. I guess this goes forward about three or four months. No, before that, there was the question of Afghanistan. I remember clearly, again, having my own thoughts and discussions about Afghanistan. You can laugh at me if you like, but I still believe this. I had these conversations that we should just go to Afghanistan and talk to [Osama] bin Laden --

[Interruption]

Smith: It struck me at the time, immediately, that it was a crime. It was a criminal offense. I remember this. I had conversations with people who thought I was an idiot, of course, that I thought that this is a criminal offense. There was the whole palaver over whether Mullah [Mohammed] Omar was going to allow bin Laden to be kicked out of the country and to face justice, or whatever. It struck me that the thing to do was to go talk to the guy and say, "Look, we'll put you on trial, we'll do it in a Sharia court. I thought that would be a great solution because we Westerners are very ignorant of that. I was very ignorant at the time. Slightly less than now, but still I thought this was a great opportunity. He can put his defense on, why he thought he was justified in doing this horrible thing. We would learn a lot about Sharia law, which would certainly condemn what he had done. Everything would

be resolved the way it should be resolved, as a criminal offense, and let the cards fall as they may. And do that in an international location.

Now, look, you laugh, but that was clearly the right thing to do. I think it's plausible that he might have agreed to that, because no one could have anticipated how foolish Bush would be and how Bush's actions would aggrandize, if you will, bin Laden. I think if on September 15, 2001, you had talked about that, I think you could have convinced someone in bin Laden's position that it was in his best interest to go become a martyr in a court and educate the world about his religious faith and about Sharia law. That was my initial reaction. I was against the invasion of Afghanistan because I thought that it was, again, stupid. I did not anticipate the fact that the coalition wouldn't even ever be able to capture bin Laden. I mean, that's extraordinary. But on the other hand, anyone with the slightest notion of history and the slightest idea of what the British had done in Afghanistan knew that it was going to all end in tears. So that was my thing back then. I didn't have anyone on my side. I still think it was right, but I don't expect to win that particular argument.

Q: Then when he announced that prisoners were being brought to Guantánamo , do you recall your reaction at that point in time?

Smith: Yes, I do. I think there were mutterings before Christmas but this really happened in the beginning of January 2002. It was a very sudden thing and he announced it and it was all done in like seventy-eight hours or something, seventy-two hours. And I thought, "Oh, my goodness, this is ridiculous." I don't want to say typical but it was an overreaction. Or not an overreaction, because I think people were entitled to react very negatively. On the other hand, it was a stupid reaction to a criminal act. I have always had this thing

about hypocrisy, that hypocrisy is what gets us all in trouble. We go around the world preaching this and that. The British did it all the time, and the Americans do it and so on and so forth. We preach about democracy and then we violate it. I mean, it's fascinating the way the British did it in Pakistan. I was there recently. They talk about democracy and all of this and then they had a separate code for Europeans because you couldn't treat them the same as Pakistanis. Now, is there anything more designed to aggravate the local population than something like that?

When Bush announced the fact that we were going to put people in Cuba, of all places, which we have, as Americans -- and I'm sorry, I do speak schizophrenically because I have both British and American passports --

Q: That's okay.

Smith: So when I say we, I might alternatively mean the Americans and I might mean the English. The British. So we, the Americans, have rather banged on about how Cuba has no human rights, no democracy, no rule of law, no nothing. And so what were we going to do? We were going to take people to Cuba in an enclave that I was somewhat familiar with because of the sort of work that Michael [Ratner] actually had been much more involved in, the whole Haitian Refugee Center work. So I was aware of Guantánamo, but not terribly aware of it. Here was this little enclave, that we should not have in the first place, and we were going to hold them there without any legal rights. It was just so wrong. It was just obvious to me this was just going to piss everyone off.

Q: In your book you say that you began an email correspondence with various lawyers,

especially death penalty lawyers. Had you been part of a network of lawyers prior to that time?

Smith: Yes, because I had done death penalty work at that point for almost twenty years. There is a group of death penalty lawyers nationwide and we come together for the yearly conference in Virginia each year. Everyone gets there and we all tell each other what good people we are and whatever. I knew pretty much everyone in that group. I thought that no one could anticipate more pleasure than to go sue George Bush over Guantánamo Bay. I thought, "Why not? This is obviously a ridiculous thing to do, and it will be fun."

And I was really shocked -- and, again, I had misjudged this very much -- I was very shocked by the response of most people. They just didn't want to know. I still don't quite understand that, myself. I mean, because there were people like Joe Margulies and Michael Ratner who clearly immediately got it. Joe I had known for years. He had worked doing death penalty work in Texas. But I didn't get to Joe until quite later. I didn't know him terribly well back then. I knew a lot of other people better who I had called or emailed. I ran a little death penalty charity out of New Orleans at the time called the Louisiana Crisis Assistance Center. The people there were solidly on side. Now, we were very much exposed in the sense that we did very unpopular death penalty work.

Q: Now the people there were lawyers or were they paralegals?

Smith: At that point, in 2001 and 2002, we had about twenty people, half lawyers, half investigators.

Q: So you had a cadre you could rely on.

Smith: Right. But on the other hand, we were constantly at odds -- seriously at odds and in very ugly ways -- with the state because we took on capital trials and they were just the most hostile of trials. So we were very much exposed. I ran that office and one thing I was very aware of was that I did not want to put us in the line of fire more than we necessarily had to be. We were in the line of fire all the time. In terms of our funding, we got some state funding for representing people at capital trials. The last thing I wanted was to give some of these prosecutors, who were out to get us, the excuse to go after us because we were using the funding we got from the state to go represent terrorists in Guantánamo .

We had a discussion at the office and people were totally on side. They recognized what it was all about.

[Interruption]

Smith: In the office we agreed, basically, that I would be the only one who would do it. I would keep my hours, time sheets, very carefully so that we could justify what we were doing and show that none of this was being funded by anything other than just volunteer work. But in the meantime we needed some help. I was calling around to all these different friends, trying to figure out who wanted to do this. People just didn't want to know. And they were still very surprisingly for the sort of death-penalty-defense type people, they were very much, "Oh, the hell with them. These people have attacked us and I don't want anything to do with it." They said things like that. I was taken aback by that, I must say. Then I finally hooked up with Joe, through email. I think I had put out a thing on listserv,

or he had, or one of us had, asking who wanted to do this, because it was just a habeas case. It was one that we, as death penalty lawyers, were well positioned to do.

Because at the moment I think that it all happened there was a group called The Coalition of Clergy out of California --

Q: With Ramsey Clark.

Smith: Ramsey Clark and them filed a challenge, which I applauded. It was a good thing to do. But they were clearly doing it the wrong way and this was just because they did not have the experience of the sort of cases we dealt with.

Q: They were doing it a way in which --

Smith: Well, when you are doing next-friend litigation -- we do it in death penalty cases a lot -- and you've got a guy who wants to die, he wants to drop his appeals. And the question is whether he is competent to do that. You need someone to represent his best interests. The closer a link you have between the prisoner and your next friend, the more likely you are to succeed. You really want a family member. You want, a brother, sister, mother, father, something like that. They were using clergy. Admirable, no reason why you shouldn't, really, but I thought as a matter of law, they were going to lose on that. That was a shame. What you've got to do is take as many of the procedural barriers away as possible.

While they were doing that I got in touch Joe and then Joe was the one who was in touch with Mike, because I didn't know Mike at that time. I had never worked with CCR [Center

for Constitutional Rights].

Q: I was going to ask. You said earlier something about Michael Ratner -- where had you met him? Did you ever work with the Center at all?

Smith: No, I really didn't know CCR at all. I've got to say that in the early days there were really three involved in this, so there it was Joe, Mike, and me, and there was a couple of other folk who helped out a bit. But of those, I had the greatest admiration for Mike because I wasn't putting my charity on the line for this. We were in far too dangerous an area already, and I was going to do it, just me. Joe wasn't associated with any charity. He was just in his law firm then in Minnesota. CCR was willing to go out and put their necks out, which I thought was very impressive because there was not a peep coming from any of the other NGOs [Non-Governmental Organization]. For all the fact that people came out later -- and I'm glad they did and I don't mean to be critical -- but there was no sound from the big NGOs -- ACLU [American Civil Liberties Union], Amnesty [International], whatever.

People forget now, it was really hostile when we filed back then. We filed on February 19, 2002, so it was only a month and a few days after it all happened. Actually, the British contacts didn't come through me, surprisingly, because since I'm British you would think they would. They actually came through Michael. Michael had been in touch with Gareth Peirce here in London.

Q: I was going to ask.

Smith: Yes, because we needed family members to act as next friends and in the early days it was all a matter of hearsay in the newspapers. There were all these rumors swirling around and an enduring problem of representing the prisoners was finding out who the prisoners were. This was what was so Stalinist to me about this whole process; that the government wouldn't even tell us who they had. What system do you have where a democratic government locks a bunch of people up and won't tell you who they are? It was just unfathomable to me. But in that context it was really the British government who were told by the Americans that they had these British prisoners. The British government then told the families and the families then told the media and contacted the lawyers.

So they contacted Gareth and that's the way we got --

Q: She would have been known to people broadly?

Smith: Yes, Gareth was very well known. You should really talk to her. She goes back a long way in this and she represented a lot of the IRA [Irish Republican Army] people, the Birmingham Bombers and the Guilford Four, all of whom were not the Birmingham Bombers, of course. They were just people with Irish accents. So Gareth was, indeed, an extremely important -- if slightly confusingly named -- solicitor here in Britain. It was through Gareth that we got the authorizations for [Shafiq] Rasul and the Tipton lads [Ruhul Ahmed, Asif Iqbal, and Shafiq Rasul]. They were our first plaintiffs. And then it was through the Australians we got David [M.] Hicks.

It was then just the three of us, basically first on an email discussion and then telephone. We were trying to figure out how to pursue. It was interesting, actually. I remember the

discussions because there was a lot of stuff going on about how people were being abused in custody and it was very much rumors at this point. We were now four or five months into the whole Afghan process. There were all these rumors about abuse of prisoners and this that and the other.

We were faced with a decision, when we filed the lawsuit, of what do we put in it? First, we can't talk to the clients, we can't ask them, a) what they're charged with, or b) whether they did it or whatever. And, also, we were seeing all these rumors about people being tortured and abused, but we can't ask the clients, again. So do we say anything about that? I remember my position, which was, "Let's just plead it all." If you put it in the pleading, the government is put in the position that they either have to admit it or they have to deny it. The only way we were going to find out what was true and what was not was by pleading as much as we could, saying these guys were innocent, saying that they were being abused and tortured, and then see what the government says in reply. And I must say I expected a) the government to say they're guilty as sin, and b) to say no, no, no, we don't torture people. And of course, they never did either of those. What was sad, and intriguing, was as the days unfolded, days and months, it became clear that our worst expectations were actually true. I must say I didn't even expect it. Right up to the time I went down to Guantánamo -- and this was much later, in November of 2004 -- I expected to find a bunch of guilty people who had been running around and fighting in Afghanistan. It's an interesting issue. What have they done against us? Why shouldn't they, if that's what they want to do? I think it's stupid -- I wouldn't do it myself. But on the other hand, is it really a crime against America for a bunch of misguided people to go firing guns at each other in Afghanistan when it's the Taliban against the Northern Alliance?

I thought we would have some interesting legal debate as to whether America had any sort of dog in this hunt. I thought most of the guys surely were captured on the battlefield, just like Donald [H.] Rumsfeld was saying. And then again, I turned out to be very wrong on that, too. I just said, "Oh, well."

Q: A couple of things. Given what a juggernaut the legal defense now is, with six hundred people involved, it is interesting to me to hear you describe it as so fragile at that point in time. Just the three of you working this out.

Smith: Well, we couldn't get local counsel in Washington. We had a terrible time. None of us were members of the D. C. bar and we were trying desperately to find someone willing to sign off on the papers, because we couldn't do it.

Q: And it had to be D. C.?

Smith: Had to be D. C.

Q: Because of Guantánamo .

Smith: Well, we chose D. C. The reverse place, as you remember, the Coalition of Clergy sued in California.

Q: Right. That's right.

Smith: And that was another mistake. I thought that there was a very tenuous

relationship to California. They were simply trying to pick the most favorable court, whereas we had two real choices -- northern Virginia, because that is where the Pentagon is, versus D. C. because that is where the government is. We chose D. C. as being marginally better than northern Virginia, but both were legitimate venues, in a way. We were going to do it in D. C. but we had to have a D. C. lawyer, and there was no one willing to do it. I mean absolutely no one. Until we finally found this chap [Jon W. Norris] -- and I am ashamed to say, I am forgetting his name right now. I should go back and look. And he was very nice and he agreed to sign on. He was an old friend from a friend of a friend from PDS, the Public Defender Service. And I remember, we met in his office, on probably February 18, to finalize things. We filed it the next day. It was all this next friend stuff and we had to think through things like, could we file it *in forma pauperis*? These guys all banged up in Guantánamo obviously don't have any money, but we couldn't prove that they didn't have any money, so the government, if we filed it without paying the costs, they would argue about that. So we paid. Then it was only five dollars so that wasn't a big deal.

But we went down and did that in the court and we talked to the press a bit on the steps but that was it. The press started calling and wanted people to go on TV. I never used to do much of this media stuff back then because in the death penalty world it just doesn't help. A very rare case. Normally you want to keep quite quiet in the death penalty world. It's one thing in England, where people love to hear you bash and banging on about the death penalty, but in America it by and large hurts your clients more than helps. I wouldn't do very much. I never watched TV. So I knew nothing about television. They were asking for people to go on TV and both Joe and Michael knew better. And they told me, "Why didn't I do it?" So I said, "Fine, all right, I'll go do it." So I went to the studio. And I can't remember -- I always thought it was Fox but I'm not sure it was. But anyway, I go on this TV show

and the guy, the interviewer, called me a traitor, thirteen times as I recall it.

Q: This was one of the commercial stations?

Smith: Yes, yes. And I think I'm right in saying it was ABC, actually. I don't think it was Fox. Although I thought it was Fox because it was just the way you got treated. It was just incredibly hostile. He asked me thirteen times if I was a traitor and I said thirteen times, "No, this is the American tradition of justice. Personally, I think what is going on in Guantánamo is an anathema and that we will all live to regret it." But this was really hostile. I flew back to New Orleans that night. I had an unlisted number there. Not that I really cared and was not desperately keen to have a listed number. And even so, someone managed to track down my home number, more than one person, and in the middle of the night I remember we got this -- it didn't wake me up but I listened to it the next morning -- message on the machine saying, "You're a traitor and we're coming to get you." There was a whole bunch of this very, very hostile stuff. I decided I wasn't going to do any more of that media stuff for a while.

It's quite interesting, even then, for all the sort of passiveness of the Europeans later. No one in Europe was interested either. I mean, there was no positive publicity in Europe as well. That was a long time coming. That didn't come until June 2003 -- for reasons I can explain -- but anyway, it was very, very hostile to begin with. It was not fun. Anyway.

Q: That habeas was rejected by Judge [Colleen] Kollar-Kotelly.

Smith: Well, it took a while, though. It took a bit. The government responded and we had

argument on it. She denied it. I think she denied it. I can't remember how long it took. It took a while.

Q: One of her points was that Guantánamo was not American. Had you included that in the habeas?

Smith: Yes, of course. One thing that Michael was very familiar with was -- because he had been involved in the Haitian Refugee Center cases -- that that was clearly their thinking. As you look in the longer panorama -- and I'm sure we will get to this -- it was quite clear what the thinking of the Bush administration was. Guantánamo illustrated that very effectively -- that they were looking for a piece of property that was totally run by America, totally under American control, but technically it could be argued was not American soil, so that they could keep lawyers and the media out of it. That became useful, that analysis, later when we were trying to identify other secret prisons around the world.

Q: You've probably seen it, there's a -- I've forgotten the authors -- *Guantánamo Lawyers* [*Inside the Prison, Outside the Law*] and a number of them make the point --

Smith: Oh, I think it's out there. I've not read it, actually.

Q: Yes. A number of them make the point there that they had never done habeas work and this was strange to them. But the three of you had done that because --

Smith: No, Michael hadn't. But Joe and I had done a lot of that.

Q: Right.

Smith: Yes, I mean, look, it's no big deal. Habeas work is not a big deal. Joe made it seem --

Q: But for a young lawyer who has never done it seriously --

Smith: Well, maybe. It is a lot simpler and a lot more sensible than most of the rubbish we always get involved in.

But I remember in the early days when Joe and I would discuss this the way we discussed most things, which is in a pub. Joe made the comment -- which I think always directed what we did -- which is that we thought from the very beginning that the purpose of Guantánamo was to distract people's attention and have a showplace where the government could say, "Look how hard we're fighting this war on terror. All these guys are terribly evil." And Joe made the comment that, "They want to keep it all secret and our strategy has to be to open it up because if we open it up they will close it down because it will have lost its purpose." That was a statement Joe made very early on and I think it was totally right.

In doing death penalty cases it is clear what it is. It is about taking a small group of people, who you inspire society to hate, passionately, and by doing that hating you divert their attention from what's really going on. The American crime catastrophe as it is -- and it really is a nightmare, compared to a gentle little place like Britain. I've been held up at gun and knife point seven times in America. There is no one in Britain that has been held up that much. So you have got a huge crime problem, what do you do? You either take some

difficult and long-term solutions such as welfare state, health service, deal with drugs effectively, get rid of guns and so forth, or you do something fatuous that is designed to divert people's attention from the real problem, and that is the death penalty. That was always my analysis of the death penalty and it is exactly the same with Guantánamo. Guantánamo was designed to divert people's attention from the fact that no one was doing anything effective about the whole thing.

[Interruption]

Q: I sense from just reading, at that point in time, that your death penalty interest was waning a bit?

Smith: No, not at all. I was incredibly busy at the time, in fact. One reason that from 2002, the whole of that year, I did not do much on this, was that I was tied up in a lot of trials. I left my office there in mid-2004. It was not because my interest was waning. In fact, I now do a lot more death penalty work than before. It's that that my wife and I were going to move back to Britain because our parents -- all of our parents -- were getting very old.

Q: Yes, I had seen articles, or some writing, that you were considering moving back to Britain.

Smith: So that was it. It was actually this whole Guantánamo thing, in a way. I never stopped doing death penalty work because this was a great addition to that. It was something I thought I could do, actually effectively as part of the team, from Europe. Because -- well, I'll explain why if you like. We needed a much more global approach to this

than just sitting around in America.

Q: You mentioned the fact that no one knew who was there. How did you go about finding out who was there?

Smith: Well, I look back on that and it makes me laugh. Although I am terribly disorganized in some ways, I am very anal-compulsive about my cases. And so from the very beginning I thought we needed to build a table of everybody who is in Guantánamo . There is so much I learned from this because I had never experienced anything like this before. I had nothing to do with the secrecy business. So from the beginning I started a table of the names of people and we were trying to identify the relatives so we could contact the relatives. At one point the table I was doing had like almost a thousand names on it, which just goes to show it was rubbish. There were never a thousand people in Guantánamo. The problem was it all came from the media and from those types of sources. There are so many challenges when you are dealing with prisoners in Guantánamo because everyone has Arabic names and they have Arabic kunyas and nicknames and you would have ten different spellings of a particular name in English, and then you would have ten different kunyas. You might have one person on the list twenty times. Anyway, it was chaos and there was no way of finding that out.

Q: Well, you had the two Britons and David Hicks. And then Tom [B.] Wilner came in with the Kuwaitis.

Smith: Well, that was true. That's worth mentioning because I remember when the Kuwaitis came in we had a meeting at Tom's office.

Q: Had you ever met him before?

Smith: No, no. I mean, I had done a lot of work with pro bono firms, because you always have them in death penalty cases. Not always, but a lot. And there are two types of pro bono firms. There are the firms who are totally useless, who are an incredible pain in the neck, who are really much more trouble than they are worth, and there are the firms who are really a huge benefit. And I am glad to say that Tom fell into the second category. The ones who were a huge benefit, I will never forget, Sam [B.] Johnson's case [*Johnson v. Mississippi*, 1988], I retried. We got it reversed in the Supreme Court and I did the retrial in Mississippi. It was so much fun having Cahill, Gordon [& Reindel] involved because they helped -- they just deluged the prosecutor with papers. They spent millions on the case. It was the only time in my career, at that point, that we had totally outgunned the prosecution. It was just fun because the poor prosecutor had much less power than we did.

Now, with Tom, I remember the first meeting we had, which would have been -- I don't know what the date was and I'm not sure -- April 2002? It was in his office and we had gone up to Washington for it. Joe and I had flown in and Michael too. And there were the three of us and like eight partners and associates from Shearman & Sterling. They had this very lavish breakfast brunch they had laid on and I was sitting there listening to these guys and I was counting up the amount this was costing, with each of them. The senior partners would bill about three or four hundred dollars an hour and the junior ones probably a couple of hundred. And I was thinking, "Joe, Mike, and I were billing nothing and probably that brunch cost the Kuwaitis goodness knows how much in the thousands and thousands!"

There are two ways of looking at it. Some of my death penalty colleagues sneer at that, but I don't. I think it is very helpful and it brought immense credibility to our little team because before that it was just a bunch of Commie, pinko liberals. And then we had a big-time firm and they had a good attitude. Tom, as you will know from meeting him, is not a wallflower. He was very aggressive and was willing to go along. We had the discussion of, what do they plead? Do you want to plead in your pleadings that these guys are being abused or not? And so on and so forth. They were sensible and they clearly recognized the benefits of pleading the worst-possible-case scenario, although actually what we pled was not as bad as reality. So they were good and getting them involved was great.

But to go back to your original question, this business of identifying clients was a huge one. In the end that was the part of it I took on. Honestly, the intellectual stuff about habeas minutiae does not really interest me, any more than it does in capital cases. It is important to do and I have always loved being on a team with Joe, because Joe's obsessed with that stuff, whereas I am obsessed with facts. I think, as a combination, we are much stronger than either of us individually. So Joe focused very much on the legal stuff and I started focusing on trying to identify additional clients. That was very difficult -- you had no idea who they were. To begin with, the first way we began was we did the British. That was easy because I had lots of contacts there and we knew who they were because of the media, and so forth.

Then, it was December 2002. I was back for Christmas in England so I went to Cresta, France, and I met with some French lawyers who were helping the French prisoners. So we got authorizations for the French. That was relatively easy, too. But then you had --

Q: They had names of people?

Smith: Yes, they had names produced in the media. The French were never very positive. I mean, the French government was always incredibly unhelpful and at this point no one was being very helpful, except a very small group of European lawyers. After that I started scheduling flights, trips, to the Middle East. One, the first one, actually was an Amnesty thing I managed to get myself invited on, to go to Yemen. The idea was we would just show up in Yemen, hold a press conference and say we are here to help and try and get people to come out. The way I viewed it, your problem was if you are a Yemeni and you have a relative who you now know is in Guantánamo because the Red Cross was doing Red Cross postcards and so forth, then what are you going to do? I mean, I looked it up on the Internet and the Yemeni per capital annual income was \$330 dollars a year. That would buy them one hour of Tom Wilner's time. If they had enough know how to know how to contact a lawyer in America, they could hire him for an hour. And if they don't speak English and they don't have any way of contacting people, so what are they going to do? They must be sitting there in Yemen, absolutely hopeless.

So the only way to deal with this was to go there. But then when you go there, I don't know who the people are in Yemen. I don't speak Arabic. So what do we do? It was very helpful going with an Amnesty thing. It wasn't about Guantánamo -- it was about human rights in Yemen in general.

Q: This is Amnesty International?

Smith: Yes. What we did was showed up -- I was there just to take part in that conference,

but I held a little press conference the moment we got there. Actually on the way down, I met, for the first time, Khalid al-Odah. Khalid was the father of Fawzi al-Odah, one of the Kuwaitis. Khalid had organized the Kuwaiti [Family] Committee. Khalid is a gem. He is a former fighter pilot for the Kuwaiti Air Force, speaks very good English, and was just very sensible and organized. He came to this conference in Yemen and he was terribly helpful, acting as translator and persuading family members to sign up to give us authorization. So on that first trip I met with a whole bunch of Yemeni families, and took statements off them.

I made a big mistake then, actually. This was one of the early-day things that I learned later.

Q: Well, I'm trying to imagine how someone in rural Yemen would have found out about this press conference -- they don't have television, do they?

Smith: No, I -- no, no, look, they do have television --

Q: Oh, they do?

Smith: No, the point was that you would arrive in Yemen -- and I did this in all these different countries -- you would fly in, you would hold a press conference, you would say, "Hello, I am an American. I'm here to help." I would always begin by apologizing for Tony [C. L.] Blair and for George [W.] Bush. I would say, "Look, I'm very sorry." That actually went over very well because all they had heard up until that point, from Westerners, was, "You're a bunch of terrorists." And so I would begin by apologizing and saying, "This is

terrible and there are a bunch of us who want to try to make things right. So I am here to offer free help. What we want is for any family member to come to this hotel and we will help you how we can."

So they did. They came in droves. I was there for like only three days and I was up from eight a.m. until two a.m. every day talking to these people. There were one or two other folk who helped out, from Amnesty. We would get authorizations. It was very much the first time I had done it so there were all sorts of mistakes. I didn't have people's names properly. Because at that time they would not give us a list of prisoners in Guantánamo, they wouldn't let us -- for years -- know what the ISNs -- the numbers -- were [Internment Serial Number]. And they kept that secret. They would classify that, even when we began to get some information. So that meant that we could never match names with numbers. It became my obsession to get those numbers, because that was the only way you could identify people reliably.

But at any rate, so that first time I took a lot of statements from the Yemenis. I was thinking of this from an American trial perspective, so I was trying to make them sound, in their affidavits, more American. So I remember this one guy -- actually, this was in Bahrain, I think -- where was this guy who I was talking to his family and the family said he was a big fan of Jean Claude Van Damme and he used to grow his hair looking like Jean Claude Van Damme. And I thought, "That's great! That makes him sound like an American as opposed to some terrorist." So I put that in the affidavit. Later, he was very annoyed at that because in Guantánamo, among his friends, to sound like an American -- because by that time the prisoners in Guantánamo had come to not really like the Americans very much. There were a lot of these sorts of tensions that would come up that I did not

anticipate. I didn't understand at all. But it was very interesting learning about them.

I went to Yemen, then I went to Bahrain. There were only six Bahrainis but I met all of their families. I met with the government. The governments were very friendly, by and large. Even in Yemen, the human rights minister was very open and friendly. Again, there was another lesson. They knew which side their bread was buttered and not just the Americans were inspiring people to hate the people in Guantánamo, but quite rapidly in the Arab world the people in Guantánamo were becoming the heroes in this very tragic sort of confrontation between the West the world of Islam.

Q: How would you then go about getting lawyers? Once you found the names of people, what was the next step?

Smith: Well, there wasn't a step at that point because what we're talking about --

Q: You just have the names?

Smith: No. We were still between the filing that we made on the nineteenth of February, 2002, and June 2004. There was nowhere to go -- right? We lost in the district court, we lost in the court of appeals. We could file on their behalf but it wasn't going to achieve anything. At that point I was acquiring this information so that when we were able to go forward with these habeas cases that then we would be able to file. Se we're hoping to win in the Supreme Court. I never believed any court could rule against us. It's outrageous.

Now, the way it began was things began together -- there were moments when we began to

get a few more allies. The first moment was June 2003 and that was when the Americans announced they were charging the first six people in military commissions. And again, this was a catastrophically stupid thing to do; the first six people included David Hicks, Moazzam Begg, and Richard [D.] Belmar. No, not Richard Belmar. Feroz Abbasi. Three of the first six were allies in this war in Afghanistan. Now, I was always trying to think what they were thinking, because this was always very interesting, trying to anticipate what on earth these lunatics in the White House thought they were up to. It has been an enduring fascination to me that it is so difficult to predict them because they do such stupid things. I would sit around saying, "Now if I was them, I would do this. Let's plan that they're going to do this." And they would never do it! I just don't know who's giving them advice up there. It made my life much easier because they would do these absurd things and it would just help out immensely.

The first was that they charged two Brits and an Australian. Now, I think they thought that they could have a show trial with someone speaking English that would be understood by America and its allies and everyone would say, "Oh, wow, these guys are great. We've got these terrible criminals." But that is not the way the world works. Even if someone is on death row who is British, even if they are guilty as sin of the most horrendous crime, the British are going to get upset about it, purely on rather fatuous, nationalistic grounds. And the same is true in Guantánamo. You knew that it was going to annoy people. And sure enough, the moment they charged these Brits -- of course, the right wing media in Britain said "Wicked, evil terrorists," but most of the people in Britain said, "Hey, wait a minute. We're on the same side. What do you mean charging our people first? I thought you were going to try to find bin Laden." That was a huge mistake and it was the first time that the media in Europe began to come around on side. They got very patronizing later about the

Americans, but up to that point, for a year and half, they had been very hostile, too.

That was the first moment. The second moment was when the Supreme Court granted cert, which was late 2003. Then suddenly, because you had Shearman & Sterling, some more people began to find this acceptable. That was when we started getting some amicus briefs and law firms wanting to do that and so forth. Our little cadre of three people added Shearman & Sterling, and in the early days added people like Eric [M.] Freedman, who was always very much on our side; we gradually began to expand quite rapidly at that point. At that point, again, I was still focused on getting clients and we were then going to match them up. I had the master list and we were going to match them up against lawyers who wanted to take on cases.

I will tell you some stories from those things. It was quite fun.

Q: Please.

Smith: It's more fun looking back on it than it was when I was there. When I went to Jordan -- I went to Jordan for two reasons. One was because I was always trying to work out ways to make other people pay for this. I had no money to do it. And so Amnesty paid for me to go to Yemen. They paid again another time. And Bahrain. When I went to Jordan I actually went paid for by a British television company because they wanted to make a documentary about Saddam Hussein. By then the Iraq War had happened and Saddam was going to face trial and I got asked to represent him, which in theory I've got no problem with. In practice, I remembered in time -- I am glad to say -- that you should not represent rich people because they will get lawyers from elsewhere.

But I went down to Jordan because it was a British television company that was funding it. It was actually Rupert Murdoch's daughter's company. That way I could do what I wanted to do for the Jordanians, and we thought the Jordanians were quite a big group, about thirty of them, because that's what the Americans were saying. The Americans wouldn't give you names but they would say "x" number from this country, "x" number from that country. So there were meant to be a big group of Yemenis, a big group of Saudis --I couldn't get into Saudi Arabia -- and then quite a big group of thirty Jordanians.

So I flew down there and I was going to meet with Saddam's daughter, which I did. A fascinating experience, actually. But then, at the same time, I held a press conference and said, "I'm here to help thirty Jordanians. If you want some help, come to this hotel." Then I started getting very hostile calls from the Jordanian secret police. At first not to me, it was to a woman who was acting as my translator, who is funded through the TV people. She got this very hostile call saying, "You are to come to the secret police headquarters right now." So she told me. I was, "Fuck off, I'm not doing --" pardon my French -- "I'm not doing that, I'm busy. I'm trying to talk to these people. Piss off, I'll talk to you later."

So then we get another call, which really was hostile, and saying all sorts of scandalous things about me. So anyhow, I thought, "All right, we'll go." So we went out and got in the taxi and said take us to the Mukhabarat Headquarters. And of course the guy pales and I'm still angry, right? I'm busy and I just don't like being interrupted. So it was only about half way there that I start thinking, "Oh, shit. I should have done something." I had not called anyone to tell them where I was going and I could have just disappeared off the map for all they knew. We got to about half a mile from the headquarters and the taxi driver wouldn't

go any further. He said, "You can walk from here." So the two of us, we walked up there. There is this enormous building -- low white building -- with sort of military people all outside. We walked up to the front gate and I had decided I was going to bluff it out. I took my British passport, because the British have always been big in Jordan. They showed us in to this long, white corridor with doors off, no one to be seen anywhere. They show us into this room and there are these two people in the room. And so I go up and say, "Hello, I'm Clive. Who are you?"

And the guy who is obviously in charge said, "We do not use names in this building."

And I said, "Well, look, I use names. Here's my passport and I want to know your name. The British government, if I am not out of here in two hours, is going to get very angry." Of course, that was a total fib because no one knew I was there.

So he wouldn't give me his name. I said, "Look, I'm going to take your description down. I will find out who you are later." It was all quite hostile. And I was just becoming --

Q: Where did you get the chutzpah to do that?

Smith: Well, I mean, I was annoyed to begin with.

Q: I would have been terrified.

Smith: Well, I began to get a bit nervous at that point. But we're a pompous, imperialistic lot, the Brits. So anyway, I was actually really worried that he was angry about the whole

thing with Saddam Hussein because I didn't want to get them in trouble. I had met with his daughter and she is a traditional woman. Very interesting. But you could get in trouble with the Jordanians if she was stirring up trouble between them and the Americans. So I was nervous about that. But actually it had nothing to do with that, I was glad to discover. He was angry that I was saying there were thirty Jordanians. He said, "There aren't thirty, there's only eight."

And I said, "Well the Americans say there are thirty."

And he says, "There aren't, there's only eight." So I said, "Who are they?"

And he says, "I'm not telling you."

And I said, "Well, you ought to. I am here to give free help to your nationals and you should damn well help me. And if you don't, I am going to go back to the British and tell them that you won't."

What sort of a threat that is I'm not sure. But anyway, in the end he said he would. And after, then we started being plied with sweet tea, and about two hours later finally got set free.

And from then on I was followed around Jordan as I was going around looking for these families. So finally this car was following. I got out of our car and I went back to him and I said, "Look, you don't have to follow us. I will tell you where we are going and you go back to that guy," who by the way, I now know who he is because I took his description. I went

back, and there was a lawyer who was helping us in Jordan called Samir Kaith [ph] and I described him -- short, red hair, balding, and whatever -- fifty years old, forty-eight years old -- to Samir and he said, "Ah, that is Colonel Ali Borjak, who is head of the secret police."

So I went back to this car and I said, "You tell Colonel Borjak that a) I know who he is, and b) He promised to help us and he damn well better do it."

They come back about an hour later and they give us a list of all the prisoners' families, and their addresses, which turned out to be accurate, actually. So it was quite helpful in the end.

But it is all funny to relate -- it was not funny at the time. It was quite intimidating. Anyway, those sorts of things happened quite often.

Q: You said you never got into Saudi Arabia. How did you find out --?

Smith: For the Saudis, the way we had to operate with the Saudis was go to Bahrain and do media there, which was beamed into Saudi Arabia, and then the Saudis crossed the border to us. There was a very, very good chap [Abdulhadi Al-khawaja] who ran the Bahrain Human Rights Centre. He and the young people in his office, we spent three days, day and night, all through the night. They were wonderful people. We got, like again, probably thirty Saudis and all the Bahrainis. And a few other people. We started making calls, then they start getting calls from Libya and all sorts of places around the world.

Q: The Human Rights Centre, is that something -- an NGO, or --

Smith: It's an NGO. Yes. And they were great. One of the things that I have liked about this is I've met a lot of the courageous NGOs. I mean, again, it's like every place. There are NGOs that are bureaucratic and don't do anything worthwhile and there are NGOs that really do the job. And we've built up a network of very good people.

Q: So the next step would have been to finally meet your clients?

Smith: Hah! No, that didn't come for a while.

Q: Yes, a long time.

Smith: Yes, yes, yes. No, look, as it got to the Supreme Court, again, the next precipitating moment --

Q: Was *Rasul* [*Rasul v. Bush*, 2004]?

Smith: No. It was Abu Ghraib.

Q: Oh, of course.

Smith: Abu Ghraib. Because, again, we were making all these allegations and still no one was really buying it. It is difficult for people to remember now, but in early 2004 when I had heard so many stories from my travels around the world of people being abused, I would be telling all these stories and no one believed. No one in the Western media bought it. And

then suddenly, just around the time of the *Rasul* argument, Abu Ghraib came out. That was a pivotal moment because I think that was the first time that anyone accepted that prisoners were being abused, and that if it was happening in Abu Ghraib it was probably happening in Guantánamo.

So that was the next moment. And then, of course, the *Rasul* decision came down in June 2004. Things moved quite quickly after that. We still had to create a mechanism for going to visit the clients. So there was a bunch of negotiation right after that.

Q: As more and more lawyers were drawn in, either on a pro bono basis or through firms, how was it coordinated?

Smith: Well, you know --

Q: Or was it?

Smith: It wasn't. Oh, I tell you now, I've missed out an important aspect. As we began building the coalition, which was getting -- by the time of *Rasul* there were a lot more people involved. Before that, actually in April 2004, we held this conference in Oxford. I had organized a couple of little meetings before that, at Columbia and then another in Washington, where we had brought people together to talk about strategy. This was all terribly novel. Joe and I talked a fair amount and we had a pretty clear view of how to do it, but we were dealing, again, with a lot of people, as you say, who had no habeas experience and certainly no death penalty experience.

One of the fascinating aspects of this is that Joe and I have always done state death penalty work, and a state trial it is very different than in a federal trial. It is a lot more fun. The feds take themselves so seriously. And I've only ever tried one federal case -- it was a nightmare. Whereas when you are in a Mississippi trial court, you can get away with anything. It was just so much more fun and they are much more political. The death penalty is all about bringing power to the powerless, it's about taking some person who is on death row, who the entire might of the government wants to kill, in a ritualistic way, and that individual is probably always indigent, probably semi-literate, totally incapable of defending themselves, and probably much hated by his own family, or not supported by his own family. So our job is to bring power to that person. Very often that means figuring out someone else to put on trial. When you are litigating race, for example, and when you are litigating whether the judge is too racist to sit on the case, it gets pretty hostile sometimes, but it's about balancing things out a bit. So suddenly the judge finds himself on trial and instead of this being a cheap, easy political fix to get some votes, it becomes a difficult, complicated, political nightmare for them. And that's really what a lot of death penalty litigation is about. It's about fairness.

Guantánamo was very much the same thing. You've got the most powerful government in the world picking on a group of people who are totally voiceless. And in fact, later you get to see the dynamics much more effectively. If you think about what contributes to a miscarriage of justice and the death penalty bill -- which I am in the middle of writing a book about, it's currently got a long way to go -- but you see a pattern of all the same things. So you see that you begin with a very emotional crime, a capital crime. Well, you look at the parallel in Guantánamo and it is the most emotional crime that has ever happened in America. Second, you have what is normally a hated subgroup, of maybe African

Americans, or whatever. Well, now we have a whole group of Muslims who have beards, and as much as white people may not understand black people in America, they have no concept about Muslims. So then the next step is that you have a bunch of police who are quintessentially ill-suited to the job at hand. People become police officers, prosecutors and judges for a reason, and the reason is that they have, normally, a very high level of faith in society and in society getting things right. They may use coercive tactics because they think the ends justify the means on this. And you can understand where they're coming from, I just don't agree with them.

Now, you compare that to what is happening in the Guantánamo context, and instead of having people who maybe in Baton Rouge, Louisiana, hit someone over the head with a telephone book, instead you've got people in Afghanistan or Pakistan holding guns on people's heads and beating the hell out of them, hanging them up in strappado position and so forth. Then you've got the maybe misunderstanding between a white cop and a black defendant in America. Well, there is certainly misunderstanding between an American soldier and an Arab-speaking prisoner. You almost invariably in a capital case have an informant, whether it be a snitch in jail who is trying to benefit himself or whatever. Well, here you had -- and this I did not realize until rather later -- this bounty process where the U.S. was offering five thousand dollars for a bounty. Five thousand dollars in Pakistan and Afghanistan is an enormous amount of money, the equivalent for us, perhaps, of a quarter of a million dollars. So you're offering these people a quarter of a million dollars to snitch on someone who they don't know and who they don't care about and who they think is a foreigner who they don't want anyhow.

And then it just goes on and on. The whole process of making mistakes -- it's not just

possible, it's inexorable. All of this was happening through the Guantánamo process.

What was my point? It was your question, a long time ago.

Q: The question was that you and Joe --

Smith: Oh, the training sessions.

Q: Right. The training sessions.

Smith: Yes, the training sessions, that's it. And so the point of all of this is, it was quite clear to people like me and Joe, because this was our lives. This is all we ever did. But I don't think it was clear to the people who are now volunteering. We were having these training programs so we could tell people and have other people tell us their views. There were some things, such as all the security stuff, I had no idea about. The idea that America was going around making all this stuff classified was absolutely ridiculous. At one of those early meetings -- the one at Columbia or the one in Washington -- someone said, and I won't say who it was, but I was saying maybe we should have some training on Islam. And he said, "What's Islam got to do with Guantánamo Bay?"

One laughs now but back then no one had met anyone and so, of course you say, "Well, actually I think pretty much everyone in Guantánamo Bay who's on that side of the fence is a Muslim." And so I thought we would have training on Islamic issues. So we were going to have it in America, obviously, but then I realized we couldn't. One of the fascinating aspects of this whole process is you don't hear from any American Muslims. You certainly didn't

back then. Deathly hush, because it was a very intimidating world. You remember the Sikhs started getting beaten up after 9/11. And that was just because --

Q: We have a very large project on 9/11, where we interviewed Afghanis and Sikhs and “strange-looking people” -- the stories are horrendous. And the round-up! There were thousands of people just rounded up.

Smith: Exactly. We couldn't bring people in to train us to America because they couldn't get visas. So in the end I said, “All right, we'll have it in London. We'll go in Oxford,” in the end. A nice guy, Don [G.] Glasscoff [Jr.], funded it. I mean, it didn't cost very much because we didn't pay anything. But we had this three-day thing in Oxford. It was fascinating. It was on Islamic culture, which is just a basic primer to tell us a bit about Islam, and all these things that people like you and me probably just would never have thought about -- about shaking hands with women and all this sort of stuff that I had no earthly idea about. And then more slightly less basic things and that. But all sorts of issues that I think back then none of us had ever thought about. Then we had some training on Islamic law -- Sharia law -- which was very useful. Fascinating stuff. I've got a bunch of Islamic law books around somewhere here.

But it was just very helpful, I thought, because when we got to litigating in Guantánamo one of the thoughts I had was that we would cite American military law because that is what they wanted us to cite. But that was pretty useless. And then there was international law but the Americans wouldn't pay any attention to that. But then I would also cite Sharia law because that had three benefits. One, it pissed them off. They hated that. The second was that it made the clients happy because for once this wasn't a purely focused on what

the American military wanted. The third was it was educational. I thought it was very helpful to learn, for example, that in Sharia law there has been a defense of diminished capacity for a thousand years.

Q: Pardon?

Smith: Diminished capacity, as in, if you're drunk, that can be a defense. If you're mentally ill but you're not insane, that's a defense. Things that are not true in America, and certainly not true under the Guantánamo laws. And that, I thought, was quite educational, to show that Sharia law -- that everyone says, "Oh, my goodness, it's all about chopping people's hands off!" -- actually has many aspects that are very enlightened, much more enlightened than the U. S. military.

We had a bit on Islamic mental health as well, because that was crucial.

Here we were thinking still of this very much as trials. Now, this was another challenge because our thinking changed. To begin with, we were all thinking about military commissions. So from June 2003, for a year, when they were talking about putting Moazzam Begg and them on trial, it was all about military commissions. I was writing a manual about how to defend the military commissions. Then in June 2004, we won *Rasul*. Suddenly the game became habeas and then much later the commissions came back into play again.

Q: But in that earlier stage was there any kind of a conflict over whether or not the clients should go through that process, or try to resist it?

Smith: Well, this was before we had met them, of course.

Q: Yes, well of course.

Smith: Gita [S.] Guiterrez was the first person to get in, in late August 2004.

Q: So you would be communicating through the families.

Smith: We couldn't even do that, because that was all censored. The only way we could have any sense of communication was through the military lawyers. And so for the six people who were charged, Joe and I were in quite close contact with the military guys. And, again, that was fascinating because this was an area where we -- Joe and I -- certainly entered that process with our prejudices fully intact. But this wasn't like working with --

Q: Oh, let's talk about that for a while, the military lawyers.

Smith: Yes, yes, yes. A good death penalty defense lawyer might have their prejudices about corporate lawyers, but when it came to military lawyers we thought, "Oh, my goodness." I remember I went to the Pentagon -- I don't know if Joe came on this. I think he might have to meet with them in the early days. And I had never been to the Pentagon before. In fact, I had some trouble getting in because -- I had an American passport by then. But even so, it wasn't easy. I know one time, years before that, I couldn't go to the CIA [Central Intelligence Agency] because I did not have an American passport.

So anyway, we went to the Pentagon, this enormous, enormous military complex that we had heard about, and met with these lawyers. To begin with, it wasn't clear. There has always been a mix in that military office between people who are doing it because they are sort of vaguely interested and instructed to do it, and people who are doing it because they are utterly offended that the U. S. is doing this. These are people who signed up to the military and swore an oath to protect the Constitution and they see the Constitution being trampled on. Some of them -- Charlie [D.] Swift, [Michael] [Michael] Dan Mori, in particular, and later, Yvonne [R.] Bradley, who was my co-counsel in Binyam [A.] Mohammed's case -- the three of them were unstoppable. Actually, there we had to pull them back sometimes.

I'll never forget when I was in court in Guantánamo -- what passes as a court in Guantánamo -- with Yvonne, representing Binyam. Yvonne was uncontrollable. She was just being incredibly rude to the colonel who was acting as the judge. And the colonel, he knew he couldn't bully me and Joe -- we were both on that case -- because we were not military lawyers and if he wants to yell at us we'll just tell him to piss off, in a polite way. But he knew that he was a senior officer to Yvonne. So he could start telling Yvonne what was what. We had raised this issue of a conflict of interest, that there was clearly a conflict in the whole Military Commissions Office because they had the commander-in-chief was George Bush, who is effectively telling Yvonne and everyone else what to do and she could get in trouble. They all had conflicts between them because they were representing co-defendants and so forth. We had taken this position because we were trying very hard to strategically maneuver our way out of the military commissions into a real court. That real court could be an Article III court, it could be -- in this case we wanted to get in front of the Bar Association, because the Bar Association controls military lawyers. If we could get the

Bar Association to tell them they were being unethical then they could get sanctioned for doing what they were doing. That took them away from just being bullied by the military hierarchy.

So that was our strategy and it worked much better than what you might imagine, because as usual, the government fought us tooth and nail, which was the silliest thing to do. The government doesn't understand that the greatest legal philosopher known to human kind is -- Who is it?

Q: [Laughs.]

Smith: What did you learn in history? Did you learn nothing? It's Br'er Rabbit. You will notice, up on my bookshelf, many Robin Hood books, and then a large selection of Br'er Rabbit books. Br'er Rabbit is the greatest philosopher known to human kind because if you say to the U. S. military, "Please don't throw us in that briar patch --"

Q: They will.

Smith: They'll throw you in every time. And anyway, so that was what was going on here.

And Yvonne -- the colonel, Colonel [Ralph H.] Kohlmann, who was the judge, finally explains to Yvonne if she does not follow a direct order, it is a criminal offense -- she goes to prison. And so he asked her, "Are you going to do as I'm ordering you to?" And Yvonne is about to mouth off and tell him to go jump a -- whatever. I took the Fifth [Amendment] for her. I said, "Colonel Bradley is not going to" -- Major Bradley at that point -- "is not going to

answer that question, Judge.” And he got very angry and told me to shut up. But at that point she took the Fifth.

Charlie Swift and Dan Mori -- I remember when Dan came to Oxford. I was trying to get him to do the press conferences. By now the British media was pretty much on our side. And we were holding a press conference about -- this was April 2004 -- about Moazzam and everyone. I was trying to get Charlie to wear his uniform, because here he is, he's a major in the Marines and I thought this would look good. So he gets forwarded not to. They say you cannot wear your uniform because you are speaking as an individual, not for the military.

So Dan does the press conferences. He was brilliant. And I didn't even put him up to this -- I wish I had. But someone in the media asked him, "Well, what do you think of this whole Guantánamo military process?"

And Dan said, "Well, I haven't been in England very long, but to me, it's a bit like telling the bowler in cricket that he can call LBW" -- leg before wicket. This may not mean much to you, as an American, but to the British it is a perfect analogy. It's like saying, "Instead of having an umpire in baseball who calls the strikes, that the pitcher can call strikes." And this was the analogy that Dan came up with. It was brilliant. It really got the imagination of the Brits. That really angered the military. So now they issued an edict saying, "You must wear your uniform because you are speaking on behalf of the American government" - - right? Nothing could be better. From now on we have Dan and Charlie and everyone wearing their uniforms as they stand up and say this is an outrageous system, an anathema to American justice. So it just went on and on like that.

And working with the military, they've tried to control the military, the powers that be have. They have tried to threaten them, they have tried to put "Yes men" in those positions. Some of the time they've succeeded, some of the time they haven't. Overall, the military lawyers have been a huge boon to us. It has been difficult with the clients sometimes, getting them to have any trust in a soldier who is sworn to fight them. But on the other hand, they have been good, really.

Q: Well, there is such a long-time enduring conflict between the Code of Military Justice as traditionally, or historically, as it evolved, and then the Bush administration -- John [C.] Yoo and people like that reinterpreting the whole thing, just destroying it.

Smith: No, they are not destroying it, they're just creating a new thing. Br'er Rabbit could not have put it better than the Bush people did. Look, from 1789 to 2010, we have had a judicial system in America where if you look at death penalty cases they have had 221 years, they still can't get it right. They get it wrong more than half the time. Somehow, the Bush administration thinks that by creating a judicial system on whatever it was -- April 30, 2003 -- that they can snap their fingers and everything is going to be fine. I mean, there was like a wet dream for people like me and Joe, that they would give us this thing. When I was writing this manual, every single thing in that new code that they created was challengeable. I mean, *everything*. It was just so much fun. If they want to go through those military commissions, they won't resolve those cases for the next twenty years because it is so badly written, which is great. Nothing could be better for us. So it was very unwise. But it's not good for society. It's a very unwise thing to do.

Q: What role did the Center play in coordinating this? Was the coordination done through the Center or did it just provide a place?

Smith: Well, that changed. That changed. In the early days I was doing the coordination but then what we decided to divide up the sort of responsibilities, that the CCR would be responsible for assigning lawyers, effectively. Joe would be responsible, mainly, for a lot of the litigation, and I would be responsible for gathering the facts and the clients. So that's how it ended up going. They did a good job. They created the web site and all the rest of it.

Q: You met with many of the families?

Smith: Yes.

Q: What was your impression of the families? Can you describe those meetings?

Smith: Oh, endlessly.

Q: Tense? Easy?

Smith: Oh, no, it was never hard.

Q: Never hard?

Smith: Because the moment you would apologize to them, everything would evaporate. Now, when I say "never hard," people were always unfailingly nice to me. They weren't

always cooperative. There was a lot of mistrust. Now it was much harder dealing with the clients, as well, in Guantánamo. Totally understandable, it is hard to say, "Hi, I am an American and I'm here to help you." We'll get to the clients in a minute. Let's talk about the families for a minute.

The most difficult thing, I suppose, was their fear of their own governments. So for example, in Jordan, the reticence people had about cooperating was all about their government and fear that this was going to anger their government and whatever. That was the tension -- the desire to want to help their loved one versus the fear that they were going to get trampled on.

There were lots of moments of great pathos. I remember in one instance in Bahrain I was in this family's house and the guy's -- the prisoner -- there was his wife, his two kids. You would always have to have sort of chaperones from the family of some sort. And I was talking to the wife and she was telling me about how her son, just before the father had gone to Pakistan, the son had got some war game, video game thing. I forget -- it is one that you and I should know but we're probably too ignorant about these things. It was like *Lethal Weapon 1* or something like that. He had always wanted *Lethal Weapon 2*, or whatever it was -- it's not *Lethal Weapon*. It's a war game that's sort of "America takes on the terrorists." And so she had saved and saved and saved, and finally scraped together the money to buy him this second video game. He was playing it and he looks up to his mummy and he says -- and his job is to mow down as many terrorists as possible -- and he looks to his mum and he says, "Mummy, why is it that to score well in this game I have to kill lots of people who look like Daddy?" I thought that was just so touching and sad.

And so there were a lot of those. There were some difficult issues because I would want to humanize people, so I always wanted photographs. Sometimes people were a bit loath to give them, sometimes they just didn't have them -- I mean, they're in Yemen. But a picture is just so important and then when you have a picture, you have got to have the right picture, because again, for the West, you cannot have a picture with a big beard and whatever because that is just going to provoke all their prejudices. But I got lots of great pictures of people looking just regular folk, which was terribly helpful to try to put out who they were.

There were some difficulties, of course. The countries -- Saudi Arabia as I mentioned, but then Syria, Libya, Tunisia, Algeria -- very hard to get to. We had our other allies. For example, Cageprisoners is an organization here in Britain that sprung up in like 2003. When Moazzam came back he joined it. Because they are Muslim and they are well trusted, they have been really helpful as allies. But, no, it's been very hard.

I think of all the prisoners over the years -- well, this is the way it worked. This is what really annoyed them. When I finally got into Guantánamo, by then I had probably got about eighty authorizations from family members, after traveling all over the place. It was really hard. So then I get to Guantánamo and we had tried to get the American military to put out a description to the prisoners saying, "You can file for habeas and you can have a lawyer and we'll do it for you for free," and this and that and the other. They wouldn't do it. Instead, they did their own, because they were trying to shut the Court up and stop the Court from ordering them to do something. So -- typically -- they put out this stupid thing, which was incomprehensible. I mean, I was talking to a friend of mine from Oxford University and he was asking me, "What does habeas corpus mean? I don't know." And I

think there are a lot of people, if you asked in America, they wouldn't know. But if you ask a Yemeni, they have no clue. So the American military put this thing about saying, "You have a right to habeas corpus," and did not explain what it was. No one understood it. But what they said in there was, "You can have any friend or family member or lawyer file on your behalf." So that was great. I got a copy of this from one of my prisoners and it says that any friend can file on your behalf. So I got the prisoners to act as next friend for their fellow prisoners. They just had to say, "We're friends with this chap."

Q: Right.

Smith: So I started getting all these next friend petitions, from Sami al-Hajj mainly. He was my favorite. Sami was an Al Jazeera journalist. Sami was brilliant. Sami gave me a list of every prisoner in Guantánamo with every ISN of every prisoner and he gave me authorizations for two hundred prisoners. This was after November 2004, and the government did not wake up to this for a bit so for a while it was easy. We got authorizations that way for 75 percent of the prisoners.

But then they finally woke up to that and started getting upset and objecting to it. But it was their fault. They had authorized that. So anyway, it was a long struggle. Even today we don't have authorizations for everybody. But we do for most.

Q: Really? Wow.

Smith: Yes. Well, there is a lot of mistrust.

Q: When you first went to Guantánamo, first of all you had to get a security clearance.

Smith: Yes. Joe and I had been trying to do that through the military process from day one. So from the moment they start charging people in June 2003, he and I both applied. And they lost it. And then they lost it again. And I got very angry about this and I started raising Cain. Finally, I remember I was at the LE conference and I got a call from General [Thomas L.] Hemingway apologizing for the fact that they had lost my thing. For us, it took fifteen months to get a security clearance.

Q: Do you think they really lost it?

Smith: They were just trying to delay things, that was it. You know.

Q: Now Gita had been among the first to go, but what did you hear from the lawyers who had gone, before you went?

Smith: Well, there were only two -- Gita and [George] Brent [Mickum, IV] were the only two who went before. And again, Joe and I went together. We sound like we're twins bound at the hip, but we did lots together. I like Joe a lot. He is a good friend.

So Gita went and she saw Feroz Abbasi. She couldn't tell you -- you could not -- the problem with this, you could talk to each other if you were in a secret facility or whatever. But there were specific rules. You had to have a security clearance. Joe and I didn't get ours until probably September -- I don't remember exactly when -- so when Gita came back she couldn't say anything. And of course, in the early days, they played all these games. So she

had not really told us anything and it was all very new. In the early days, when we went down they were delightful. They were really nice to us. And the soldiers were. They had not yet been taught to hate us, as they were subsequently taught, unfortunately.

[Break]

So, anyway, what happened? We had not talked much before we went. Joe and I flew down together in November. He was seeing David Hicks and I was seeing Moazzam and Feroz. Or was I seeing Moazzam and Richard Belmar? Yes, I think, yes.

And so we get there and it was all totally bizarre. Guantánamo is an irony-free zone. There are some things you cannot say because it angers people too much but it is really true.

When you see the "Honor Bound to Defend Freedom" nonsense up there on the signs, you just have to think of "Arbeit Mach Frei." If you say that everyone gets very mad. But it's just that. I mean, of all the mottos to have. The American military needs a decent PR machine. It really does. Anyway.

I will never forget the first time we went down. There was a lovely guy who was a colonel and as a member of the Georgia bar, I am an honorary colonel in the Georgia National Guard. That's true of all members of the bar. That means I've been a colonel since 1984, which means I am a very senior colonel, probably the most senior colonel in the American military. So I told this colonel that, and he was lieutenant colonel. He starts calling me "Sir". And I say, "No, no, no, it's only a joke." But they took it seriously for a long time. They were just very nice to begin with. Very laid back and they would let us go visit the clients, we could take whatever food and stuff we wanted. Afterwards they would let us stop off at

the computers at the library and do email and then they would leave us to watch a movie. It was the first time I had ever seen an outdoor movie, not the drive-in but the equivalent of the drive-in down there. It was all very relaxed and pleasant.

But then there were some crazy things, too. So when one day on that first trip we were going into McDonalds and the colonel is with me and some soldier salutes him and says, "Honor bound, Sir." And he salutes back and says, "To defend freedom, soldier." And I laughed, I thought it was a joke. And they were all a bit taken aback. I said, "You can't be serious that you're doing this." Anyway, there was a lot of that stuff happened. Fascinating.

Q: We collect a lot of people's reminiscences and recollections, what was first going down. And of course, in your book you talk about it at some length. But are there things you want to add to that description? Little things that happened, or just general impressions of the place?

Smith: Well, there's a lot happened after I wrote that book, which was actually in some ways more illustrative.

Q: Yes, I wanted to ask you about that.

Smith: The most dramatic, I suppose, which was just a classical illustration of how fatuous all of this was, was the case of the underpants. This was just absurd. Is it in that book?

Q: In *The Guantánamo Lawyers* they had the letter to you and your response.

Smith: Oh, they did? What happened when I got that letter, I was here. I thought it was a joke. I thought it was April Fool's Day. And so I look, and it's not, and so I'm incensed. This is serious stuff. Four or five times they had pulled one of these stunts and threatened to arrest me or whatever.

I've got to say, with the exception of that instance with the Jordanians, I have always felt far more intimidated in Guantánamo Bay than in any of these Middle Eastern countries. They tell you that you shouldn't go to Yemen because it's dangerous. I felt far more intimidated in Guantánamo . I had an agreement with Emily that when I was there, if I didn't contact her every night with a special code, which was -- I don't mind telling you now, the name of our dog in it -- that she should call Joe, who was acting as my lawyer, and get me out. That's really not a pleasant experience. It really wasn't. So this was one of a series of things. While I've made it funny, because that's the best way to deal with that sort of thing, it was also a real threat. You get forty years in prison for that stuff. And when I got it, I was absolutely furious.

So I did what Emily did, what she always does, which is unplug the Internet so I cannot send a letter I would later regret.

Q: Right.

Smith: If I had written that letter it would have taken the mickey out of them. Because the thing about my principle with them, that's always been that -- look, if you say to George Bush that you hate him, he doesn't care because you're a Commie, pinko liberal and that sort of reinforces his sense of self. But if you laugh at him, he doesn't like it at all. So it

seems to me much more effective to laugh at him. So I wrote that letter in response and sent a copy to the *New York Times* and the *Washington Post*, who published it. And that really annoyed them.

Our new chairman of the board of the charity I run here at Reprieve was going to be Anita Roddick. And just before the first board meeting, poor Anita -- does that run out after a while?

Q: No.

Smith: I was going to say, Anita died. I went to her memorial service and I told the story about the underwear. And I had had the office mock up a pair of underpants with "Fair Trial My Arse" across the back, just because I thought it was funny. And at that thing Joe [F.] Corre, who is the son of Vivian Westwood -- Joe ran Agent Provocateur. Joe got excited about this so he created a set of slinky underwear that said, "Fair Trial My Arse," in orange. Then after that, Lush Cosmetics came out with a whole set and they came out also with these bath ballistics which you put in your bath and they're orange and they fizzed and out would pop Binyan Mohammed or Sami al-Hajj. Emily came up with a great advertising slogan that was "Buy one, set one free".

So we did a whole thing with this "Fair Trial My Arse" stuff, which was just to ridicule the whole notion. First, let's pretend for a minute that I had smuggled underwear into him. Which I didn't, but let's pretend I did. So what? Who cares? What can that possibly be a threat to national security about? And then it was obvious who did it, it was obvious it came from some nice military person.

Q: That's what struck me that if they did have the underwear, one of the soldiers must have given it to him.

Smith: Of course they did. Of course they did.

Q: And as a gesture of --

Smith: Decency.

Q: Yes.

Smith: And if a soldier did that, the soldier should be commended. It was a nice thing to do. I found out when I next went down there, I went to the NEXMART because I had never heard of Under Armor underpants and I didn't know what they were. So I just wanted to see whether they were sold at the NEX, the Navy exchange. And sure enough they were -- they were really expensive. They're like thirty dollars or something. Maybe a bit less. But I thought, "Wow, whoever the soldier was that gave it to him was really quite generous." It must have been they're good at not rubbing off the inner thighs or whatever. So I don't know.

That was an example and there were many, many examples like that of the fact that it is a goldfish bowl down there and the people in Guantánamo had no perspective on the real world. There was a mix, of course, and as I write about, there were some very decent soldiers who were very nice to me, and tried to be nice to the prisoners. But they were

counterbalanced by a lot of soldiers who had been very much indoctrinated into the idea first, that the prisoners were evil terrorists of the worst sort, and second, that we, the lawyers, were the enemy. That is actually a very worrying concept, that the powers that be are saying that lawyers are the enemy. That is really bad. I understand that they believe it, but that is a dangerous belief.

Q: But some of the prisoners were still being beaten.

Smith: Oh, yes. One of the most sickening things, which I did write about, is the hunger strikes and the fact that they used to put the tube up. I remember I was there one day and I went to see Shaker [Abdur Raheem] Aamer. And he had the tube up his nose. He pulled it out to show it to me. It was really painful pulling it out and blood all over. It was horrible. And I tried to take it out with me. I told the soldiers I was doing it. I wasn't going to pretend or do it secretly. They wouldn't let me have it. Because I wanted to show the world what was going on there. The idea that they began to pull it out after every feeding to "make it more inconvenient". They were just doing that to make it torturous. It was just terrible.

Do you mind if we take a quick break, actually?

Q: No, not at all.

[Interruption]

Smith: Where were we?

Q: Well, off tape, for a moment, we were talking about, where you point out in the book, that the things that you were restricted from talking about. You mentioned British libel laws as a kind of barrier to what you want to say. Do you have any idea of what you would have said differently if you hadn't worried about the libel laws?

Smith: Well, actually, the British libel laws are insane. I mean, there is an intriguing aspect, I think, to Europe. The European national sport is not football or soccer, it's bashing America. And, I mean, it is a game that all Europeans play, they think it's a lot of fun. When George Bush was in power it was a lot easier for everyone to do it. And yet, what they do is they criticize America for a number of things, much of which criticism is totally valid. And then they only copy the bad things. They don't copy the good things. I had to give a talk one time -- I'm sure there's a copy of it lying around here somewhere -- of what we should copy in Europe from America that would be good to take. First and foremost, of course, is the First Amendment. British people think they have free speech. They don't. I was very encouraged to read in yesterday's paper that the Senate is looking to pass a law protecting Americans against the British libel laws, because the British libel laws are scandalous.

When I was writing that book, the British lawyers parsed through it for anything I said that might be taken the wrong way and result in a law suit. They were afraid, for example, that if I said that a particular doctor in Guantánamo Bay, if I called him Dr. Mengele or whatever, just something that would spring to mind and strike me as being entirely suitable, that we would end up getting sued. As far as I'm concerned, bring it on. I mean, I'm judgment proof so I don't care. I think that nothing would give me more pleasure than to be sued by someone so I could force them to expose the truth. But British publishers are

just intensely paranoid about those things. I don't recall at this point what it was they made me take out of the book, but there were a bunch of things that I had to rephrase to avoid their paranoia about being sued. It never happened.

I am engaged in a capital case right now, for example, where I have constantly been saying that the trial lawyer for Linda [A.] Carty in Texas is the worst capital defense lawyer in America, by far. And I'm happy to name him, if I can remember his name. His name is -- what is his name? Jerry Guerinot. And he is the worst capital lawyer in my opinion, by far. He has had more prisoners on death row than twenty-six states. The idea that anyone might sue me for saying that is ridiculous. I mean, he's welcome to if he wants to, but the truth is a defense.

And so that was one aspect. The much more insidious thing, though -- I think the libel laws are terrible but they are only one facet of covering up the truth. I've learned so much over the last few years. When the history books are written, or as the history books are being written by you, if this is indeed considered history, it's not torture that's going to be considered the worst aspect or worst legacy of the last ten years. We will win the battle on torture. In fact, we have always won it on abuse. It's sort of like executing people in the dark. People are ashamed of what they did. We know it, and they're running away from it. What they are not ashamed of, though, is the secrecy, and there is a large swathe of people out there who really believe in the secrecy business. And to me, that is a far more insidious, more dangerous legacy of the last ten years and we see this across the board. I wrote a little bit about it in the book, to the extent one could. I did write a few things in the book, in a desperate effort to get censored, because I submitted the whole book for a review to the military censors because I wanted them to censor parts of it.

Q: Aha.

Smith: So the first bit, where I write about flying to Guantánamo and how outlandishly bad their security is, I hoped they would censor that because I thought it would be great to have a bit of a book on the evils of censorship blacked out. But they didn't. They didn't fall for that particular Br'er Rabbit trick, I'm afraid. I was very disappointed.

But, there are far worse aspects. And so for example, every person I would go see in Guantánamo, whatever they said to me is classified until they say otherwise. I got in even worse trouble than the whole business with the underpants last year because I wanted to illustrate how wrong this was. The way I went about it -- and what I can tell you, there are some things I can't tell you, still -- but what I can tell you is this.

Q: So anybody who really listens to this or reads this should know that there are some things that you still cannot tell me.

Smith: Yes. No, there is an enormous amount I still can't and it is frustrating because I can say this about everything I've seen over the last seven or eight years -- well, since 2004 actually, so six years. There is not one shred of material I have seen that should really be classified, with perhaps the only exception being the names of U. S. secret agents. I'll give them that their names should be kept secret. I've got no interest in making them public anyhow. But all the other stuff that is classified is all the material that is embarrassing. It's the conflation of national security with political embarrassment. That is the legacy of the last ten years, and you see it all around you.

Let me give you a public example of it, which you will be familiar with, which is -- you won't be as familiar as we are here in Britain, but the British political expenses scandal, a huge scandal in this country where British politicians were spending public money on ridiculous things like duck ponds and cleaning out the moat of their castle and that sort of thing.

Under the Freedom of Information Act we were trying to get people who were trying to get access to those records. They were going to release a redacted version of those records that protected the "privacy" of the politicians. When that redacted version came to light you would not have known anything about the criminal offenses committed by British politicians. The only reason we know about those things is because someone leaked the original copy to the *Daily Telegraph* and it was all published. And so they used the privacy laws to cover up their own embarrassing mistakes.

That is one example of something that's happened throughout the Guantánamo process, which is they've used the national security laws to cover up embarrassing things. For example, with the case of Binyam Mohammed what I can tell you is this, because we got a lot of the unclassified information through Britain. We had got a good judge in Binyam's case in America and that judge, Judge [Emmett G.] Sullivan, had ordered that all exculpatory material should be revealed to us, the defense, in the habeas case. We had received virtually nothing from the government, nothing of any relevance. So we, as one does as a strategic general in the "war on terror", we opened up a second front here in Britain where we sued the British government for being complicit in Binyam's abuse because they had been. Binyam had told us about how, when he was being interrogated while he was being tortured in Morocco, he had been questioned on questions that were obviously supplied by the British. There were photographs that were obviously coming from

the British because they showed British scenes and so forth. And that he had been interrogated by a British agent in Pakistan and so forth.

So we sued the British government, saying that, "You are complicit in what happened to Binyam, so you have a legal and moral obligation to assist us in helping get him a fair trial and proving that he is not guilty of what they are alleging." We won, in the British courts, and the British judges were very forthright about it and said this was outrageous and ordered that forty-two documents be revealed to me in America -- classified. The forty-two documents that I got to see in America are classified. I read them and whatever but I can't talk about them. But some of that material was declassified here in Britain and there was a huge argument over seven paragraphs of that opinion where the government, the British government, tried to keep that covered up and the Americans worked through the British to keep that covered up on the theory that it belonged to the Americans and it was outrageous that this should be revealed. Those seven paragraphs detailed some, and only a very small amount, of the abuse that Binyam had undergone in American custody and made it clear that the Americans had written reports that reflected that they were torturing Binyam. They had admitted it in reports. I mean, this is astounding that anyone could be that stupid. So anyway, that came out in Britain.

Well, the issue in all this conflagration was whether people should have the right to know. So while the argument was going on I wrote a letter, in America, to President [Barack H.] Obama saying, "Why are you trying to prevent the world from knowing this material? I know what it is. I've seen it and here it is. This is inside detail of the abuse of Binyam, that was then classified," and saying, "I would like you to reconsider this and instruct your people that you're not going to cover up a crime." This is a criminal offense, to cover up

evidence of torture. The convention against torture says, "No, you cannot cover it up, you've got to have a thorough investigation."

So I wrote this letter to Obama and then I had one of my colleagues submit it to the censors in Washington. I knew what they were going to do. They always do this. They censored it. So then we redacted a bunch of stuff out and submitted it again. They censored it again. We carried on this process until finally we had a version that they agreed could be sent to Obama. This was a version that was all censored and so it basically said, "Dear President Obama: In re: torture of Binyam Mohammed." And then, "All censored." And "Yours sincerely, Clive."

And so then we released that to the media. That was the plan all along, to show that this was the only information they were willing to let out. I sent a copy of that to Obama saying, "This is all you're allowed to see, apparently." And what happened was that the Obama administration was embarrassed. It was published in a bunch of papers. And they got very angry with the people in Washington, saying, "What's going on here?" And as a result, the people in Washington got very angry with me. They brought contempt proceedings against me and one of my colleagues, in court, in Washington, for violating the amended protective order. Nowhere in there did they say what we violated because we clearly didn't. They alleged that we had somehow revealed classified evidence. The whole point of this letter was not to reveal classified evidence but to reveal the fact that they were covering up evidence of torture. And this went on and on and on. I didn't care too much about it because I have been through this a lot of times but the young guy who was working in our office, his first experience of the judicial system is being prosecuted by these people and it was very intimidating and it was just so very wrong. But it illustrated, again, the intimidation

tactics.

As you see all the cases I've dealt with, 95 percent of the material that is most embarrassing to the U. S. is still covered up, it's still classified and it will continue to be. There is a particular example that I can tell you about in general terms but I can't tell you who it is or where they meant to go, because of these other fatuous rules. For example, if one of our clients is cleared for release, we are not allowed to say that. So we can't, if I'm representing a person who doesn't want to go back to his home country -- let's say it's Syria, for want of anything else. It's not but let's say it is -- and I want to go to a European country and say, "I represent this Syrian guy, he's innocent. We want asylum for him and he's been cleared." I can't do that because the fact that he's cleared is classified.

Now, what's the possible justification for that? Because it makes it impossible for us to represent him because we can't tell the Europeans he's been cleared. We go to the Europeans and say, "This Syrian guy, we would like a home for him."

They say, "Well, according to the records he looks like a wicked guy."

And we say, "No, he's not really."

And they, "Well, the Americans say he is." We can't tell them, "No they don't! They say he's innocent. They say he's cleared." Or whatever.

There is a particular case right now which just incenses me, where one of the people I represent is meant to be returned to the country whence he came. Now, he hadn't lived

there for thirty years or so. He had gone to Pakistan because he was being persecuted in that country and he was living perfectly quietly and happily in Pakistan. And then he ends up getting caught up in all of this stuff and ends up at Guantánamo Bay. He doesn't want to go back to his original country. The Americans have published all this information saying he's a wicked, evil terrorist. I had a prosecutor, in his case, a Department of Justice lawyer, who was a decent guy. He was a real lawyer. He was a real prosecutor, he wasn't one of these sort of functionaries for the government. We agreed on a system that he could give us exculpatory evidence that minimized the inconvenience on him but maximized the honesty with which the government would respond. And he gave me an enormous quantity of stuff, which was great. It was like Christmas for me. I spent days going through it and it proved, without any doubt, that the guy I am representing is innocent of all of this rubbish that's been alleged against him. It's all classified -- every single word of it is classified. So now they want to send him back to the country that he originally came from, with a public package saying that he's a terrorist and he's wicked and he's evil. And we can't defend him with the information that proves he's innocent because all of that is classified. I filed something in court saying, "You've got to declassify this material before you can send him back."

Q: Yes, I was going to ask what your next step is.

Smith: Yes, but I bet we don't win that. The government opposes it.

One of the frustrating things about the government opposing it is, they opposed it a couple of weeks back, but I don't know what they said, because to read what they said I've got to go to Washington to read it, because it's all classified and I have to go to the little secret place

to read it. So until I can travel across the Atlantic, which is not going to be for a few more weeks now, I can't even read what they said. This whole system is pointless because what they are saying should be classified has nothing to do with national security. It's not "how to build a nuclear bomb" or what our secret plans are for invading Iran. It's just embarrassing stuff about how we abused prisoners.

Q: You mentioned Judge Sullivan, but in your book, at the time it was written, you have something in there that not one person was freed as a result of a judicial decision.

Smith: True.

Q: What are lawyers good for? That just kind of jumped out at me.

Smith: Right.

Q: That's not true anymore.

Smith: It's not true anymore, but it was true. I remember a habeas case years ago on an issue where it said, "Statistics don't tell the whole truth, but there is nothing as emphatic as zero." And that was true. As of probably June 2008 there had been over five hundred prisoners released, and zero released through a court order. That illustrated something that I think I, and certainly Joe, had always been saying, which is the court of public opinion is vastly more significant than the court of law. The problem with our litigation, to the extent that it has been a problem, has been that lawyers take themselves too seriously and they think that the courts are where it all happens. And the courts are important because

without the courts we couldn't have seen the prisoners. But on the other hand, they're of only parallel significance to what really gets people out of there.

Q: Two things involved in that. But at that moment in time were you depressed about that?

Smith: No. No, no.

Q: No.

Smith: Good Lord, no. You look at death penalty cases. Over my career we have won 98 percent of cases.

Q: You're quoted some place as saying, "If you are properly prepared you will always win a death penalty case."

Smith: True. I mean, if you start at the beginning. If you start when the person is already sentenced to death, it's a lot harder. But no, one of the things I was so grateful for was I left America with no one on death row. Oh, thank goodness. Because it's one thing to lose -- I've lost six cases of people who are on death row. You always have the psychological defense that someone else put him there. But if you were the one who tried that case and you got it wrong, then you have no defense. So I'm very grateful for that. But that's not any act of genius on my part. It's just that it is actually not that hard if you do the job right. It's quite hard to get twelve people to want to kill someone.

Q: I gather there was some bit of tension about those lawyers who felt that if you stick to

the Court and not make a broad public appeal.

Smith: Well, there is some disagreement over that. There are some legitimate disagreements and there are just misguided disagreements.

Q: The idea that it might harm the case in court?

Smith: Well, I think I could say this without any doubt. The only mistakes that we have made of any consequence in the defense of prisoners in Guantánamo have been acts of omission. There have been people who have been afraid to act and that has caused problems for the cases. People have done some weird things, don't get me wrong. I mean, they've done some -- like when David [H.] Remes dropped his underwear in Yemen -- that was a weird thing to do.

Q: Pardon?

Smith: David. David was a lawyer with Covington & Burling and he is very committed and I like David a lot and he's given up his job at Covington to do this work full time, which is a tremendous commitment. Perhaps didn't show the greatest judgment when, in order to illustrate the humiliation that was inflicted on prisoners in Guantánamo, he dropped his trousers in Yemen. And that was captured on camera, as it would be, and unfortunately --

Q: Oh, I don't know the story.

Smith: Yes. Yes. Well, I think that did not endear him to his partners at Covington. But

anyway, so one or two things like that, which were not terribly wise, but it didn't do any harm in the great scheme of things whereas people not acting has done far more harm. When people have been afraid that what they do might hurt the case, then that's what's caused problems. I think that's the biggest issue. And I understand why. With Tom Wilner, he got in trouble over that business of the interview.

Q: Right.

Smith: And, yes. But what he did was not illegitimate. It was nothing wrong with it. The reason that people got upset with him was it was embarrassing. And it was embarrassing in a way that was just -- they said was a violation of the protective order. A classic example of conflating national security with political embarrassment again. And it was very sad that the Kuwaitis basically said they had to quit. Or fired them or whatever it was. I don't even know.

Q: Right. His client's reaction was more damaging than the government charge.

Smith: Yes. Exactly. And in fact what he did was legitimate and made the point and I think it was quite justified. Some people would say that was a mistake. I wouldn't. I would say it was a case where he got mistreated by the people who should have treated him better.

There have been examples of people who have been afraid and who have just said, "We'll go to court." Well, going to court will achieve some things but it won't achieve other things. Now, look, some of them are true. If you're representing certain people -- I mean some of my clients -- it doesn't help to go to the media because there is nothing to be said. That's true of

every case, whether it's capital case or Guantánamo. But take Mohammed al-Gurani, the kid who we represented, or better yet, you take Sami al-Hajj. Sami's case was fascinating and I don't know whether I mentioned it in the book. It wasn't easy to get Al Jazeera on the side.

Q: No, you didn't mention it.

Smith: Oh, I didn't? Well, I don't hold this against them but it's a good example of the intimidation factor. When I first went down to Qatar -- Sami was such a great client to have. He is such a nice guy and he so got it, because he's a journalist. He so got the idea that to defend him the best thing we could do was go in the media. So I went down to Qatar to meet with Al Jazeera because they had done nothing for him. And when I got there I -- they wouldn't meet me. And I was getting very annoyed. So I called over and I said, "Look, I want a meeting in the next hour or I'm going to go to your competitors and tell them that you guys are being spineless."

So then they did and actually the guy, Whadah Khanfar, who's head of Al Jazeera, was wonderful. He worked with the BBC [British Broadcasting Corporation] before. He totally got it, and he was incredibly supportive and good. But I think up until that point they had been a bit afraid that a) Sami might be guilty, and b) they were going to annoy the Americans. I was giving a talk at Al Jazeera and I started it off by saying, "Look, of the forty or fifty people in the room, two of you are working with the Americans. We know that. We know you are working with the CIA [Central Intelligence Agency] and you are going to go report to them afterwards. Now --" and they all start looking at each other. And I said, "Now, as far as I'm concerned, that's good, because I'm spending my whole life trying to get

those people to listen. And this is the message I want you to take back to them. That if you let go of Sami al-Hajj tomorrow, fine. Everything will be fine. If you don't, we're going to screw with you for the next ten years. So my advice is, let him go tomorrow. He is the one person that you should let go immediately in Guantánamo because he is my most helpful client."

Whether the message ever got back, it certainly freaked them out and they thought there were stooges in -- anyway.

Q: Just from looking at things, it strikes me that the court of opinion in Britain was easier than in the United States.

Smith: Much. Much. For two reasons.

Q: Is that because you were British, or --?

Smith: No. I mean, the first reason is that -- again it goes back to the fact that the European national sport is bashing America. It is an enduring irony to me that the British never got how evil Belmarsh was, which was the British equivalent to Guantánamo. I honestly, honestly can't see the difference. And then I think what the British did in Belmarsh was equally horrendous, in many respects, to what the Americans did in Guantánamo . Perhaps we didn't beat the prisoners up in Belmarsh in the same way but it was still utterly reprehensible. In a way it's more stupid because what the British did was they banged up a dozen people in Belmarsh, and by doing that they angered the entire Muslim population. With twelve people you could have just followed them or bugged them

or whatever. What we did for such a small thing was we annoyed everyone. Whereas Guantánamo, at least there were seven hundred and sixty people. At least it wasn't people who could have just been watched. So in a way, Belmarsh was sillier than Guantánamo even if it wasn't quite as reprehensible. But the British, because they were being hypocritical, were willing to look at Guantánamo and get very angry. So it's quite easy to stir up support for the people we were representing.

But the other side of it is this, that the American media was incredibly intimidated over Guantánamo. The classic example was the case where -- was it *Newsweek* or *Time*? I think it was *Newsweek* -- who reported about the Koran being flushed down the toilet. And the Bush administration just laid into them and effectively forced them to retract it. What no one seemed to notice was three weeks later it came out that what they said was true. The American media has been incredibly intimidated and my experiences dealing with them have been very frustrating because for the most part, with one or two very limited exceptions, for the most part, if the Pentagon says something they just publish it. If we say something that our clients report, they insist on having three different forms of corroboration.

One thing that is sort of sad but true is if Binyam Mohammed says that, "I was tortured at the behest and by the Americans," and if George Bush says we don't torture people and never have and never will, then you and I know who was telling the truth. Binyam was telling the truth. We also know that in the world at large, 90 percent of people will believe Binyam over George Bush, which is tragic. So the fact that the American press will believe, or purport to believe, the Pentagon over the prisoners, all the time, is terrible and it is terribly wrong. They really did a disservice to America by being so reticent about publishing

that material because I think they perpetuated the problems for a long, long time.

Q: But you're also able to mobilize some Parliamentary support here.

Smith: Right. It was easy.

Q: And very difficult to raise any kind of Congressional support in the United States.

Smith: No, not really. Actually, I testified in Congress a couple of times on it and there were some people who were quite supportive, they just didn't do much. And then I was trying to get --

Q: Congressman [William D.] Delahunt?

Smith: No. Yes, Delahunt was great.

Q: Yes.

Smith: I don't know how much they feel they can do, but I met with his staffers a few times, and I would tell them the things they should subpoena or request. I would draft letters for them. I just thought we would get the job done. It was hard to do that. But of all the people, Delahunt was the best.

But here it was easy. I mean everyone is on our side here, except for Tony Blair.

Q: Was it easier with [James Gordon] Brown than Blair? There seemed to be a change. It seemed to be a little bit better, easier?

Smith: No, in many ways. And again, this was interesting because with the litigation, for example, over Binyam Mohammed and over all these other -- the British complicity. My sense became that because I was based here in London -- the first reason I was focusing on getting the clients and so forth was because I was better placed to do that. But then it has become clear to me that the way we are going to penetrate this implacable wall of silence is by running around the back. I used to tell my clients two things, in Guantánamo. It was very funny to hear them come back to me.

One, was I would tell the story of Br'er Rabbit and the little rabbit and the tar baby, and getting thrown into the briar patch. I just cannot image what the CIA people thought when they heard all these prisoners talking about the little rabbit, because all of the prisoners would talk about the little rabbit. And they must have thought this was a devious, deep, secret thing, whereas, no, it wasn't.

But the other thing I would always tell my clients is the "Charge of the Light Brigade," a very, very unwise strategic move by the British, which was to get on their horses and ride straight towards the guns. I mean, what happens is you get shot. Whereas, if instead, you ride around the back you are much more likely to get what you want. And so certainly my strategy has been to come around the back and sue in Europe where the judges are itching -
- rightly or wrongly and perhaps on some level with a certain degree of hypocrisy but on some level totally right -- they're itching to slap down what has been done.

We have sued them on a whole series of British complicity cases, and other European cases. So you have Binyam Mohammed, you've got Shaker Aamer where the British were clearly complicit, you've got the Iraq renditions case where the British captured two people in Iraq and rendered them with the Americans to Bagram. And you've got Diego Garcia where prisoners were flown through Diego Garcia, and prisoners were probably held in Diego Garcia. Then you've got some European cases where the HVDs -- the high value detainees -- were held in Poland, Lithuania, Romania. Where again, we can bring cases against those countries for complicity, which we will win. That will result in orders against those countries to assist us in representing those people, and because it is illegal under European law to send people to America to face the death penalty without getting assurances that it won't be applied, it will create a big political problem for the Europeans and the Americans. This is a very effective way of penetrating the process and there was a time -- and I don't think this is true anymore -- but there was a time when I think it was clearly true that we had won more cases about Guantánamo in Europe than we had won in America.

Q: Yes.

Smith: And that was a very helpful principle. Now we are doing it in Pakistan. We are suing in Pakistan this week for the same thing. Because you can't lose. Because the thing there is we are representing people who are basically heroes to the local populace. The judges are politically motivated to slap down the government in Pakistan. So we're going to win -- there's no two ways about it. And what that is going to do is just put a lot of pressure on the Pakistani, American, and British triangular relationship to do the right thing. This has happened here as well. What you always have to remember in this stuff is that you don't get into litigation just for fun. We're not doing this just to get in the newspapers.

We're doing it because the clients need the help.

So I sat down with the legal advisor to the Foreign Secretary. I met the Foreign Secretary here, David [W.] Miliband, before all of this happened. I told him what we were going to do to him. And I said, "Look, this is what we're going to do to you in Binyam Mohammed's case and I think we will win legally, but even if we don't win legally we are going to win in the court of public opinion. You cannot win this battle. So my advice to you is that you should just give us what I'm asking you for. And that will fine and then I'll get on and help get Binyam out of there." And they wouldn't do it. On one level, of course, I'm very happy because that case has caused more trouble than any other. And it's because of what I refer to as the Richard Nixon syndrome, which is, when are these people going to learn that the cover-up is far more embarrassing than the initial offense? The cover-up of the Binyam Mohammed case has caused them immense trouble and it's not over yet. And it is going to get worse before it gets better. So you know, whatever.

Q: I read that section of the book about the case and then last night I watched television about the ideology of the special relationship.

Smith: Oh, yes.

Q: And that's not going to die. That special relationship will not --

Smith: Well, they like to think it, don't they? But it could be special. It could be special and about human rights rather than being special and about how do we cover each other up for criminal offenses.

Q: I wonder if we can talk about the prisoners now. There have been a number of memoirs turned out and a number of re-interviews done with prisoners, etc. And one of the things that struck me was, first of all, that they were able to communicate with one another, despite the horrendous conditions. They seemed in communication and told everybody about everything else. Everything they wanted to know.

Smith: Totally. I mean, look --

Q: The system was not total.

Smith: No, the system was not total because it was wrong. Sami used to refer to the "fifth column." What he meant by the fifth column were the nice guards who told him everything. Sami knew more about what was going on in world affairs than I did. I was too busy half the time and he would fill me in on what was happening and whatever.

And so this sort of Bush telegraph in the prison was huge. One of the reasons was there was nothing else to do. They couldn't get information. They were desperate for information. They would spread it around. If they got a little grain of fact, that would go around the whole prison like a wild fire. And that inevitably happened. And the guards, the guards -- they were maybe, I don't know, 80 percent indoctrinated to follow the rules and 20 percent just thought the whole thing was horrendous. I would talk to those guards and they were nice. I wasn't doing it to undermine the mission. I was doing it because there was nothing else to do. And the guards, I'm sure, were doing it for the same reason. But then, I would publish a bunch of it because it was so outrageous and that's when -- I wasn't the only one,

of course. Lots of people were. That's when the rules got even harsher. Because they realized that the truth was embarrassing. It wasn't because they realized that we were making up lies -- we were just telling the truth.

Q: There is also a number of instances of rebellion, where they threw their feces at General [Geoffrey D.] Miller or whatever his name was. And all the way through hunger strikes.

Smith: Right.

Q: So there were moments of resistance.

Smith: Well, you've got five or seven hundred prisoners and you've got people who responded very differently. There were some who were trying to be compliant and nice, and you've got some people -- I remember the chairman of the board at the charity that I worked with in Atlanta, the Southern Center for Human Rights, was Rubin "Hurricane" Carter. I don't know if you've read the book or seen the film about him. When he was in prison for a murder he didn't commit --

Q: Oh, yes. One of my questions --

Smith: Yes, you remember. I mean, prison is designed to take away your ego. And the way it does it is it takes away every purported decision you have to make, even down to when you go to the toilet. And so by doing that you just become an automaton. What Rubin Carter would do would be he would violate every rule so he would stay up all night and sleep all day and wouldn't go out in the yard and whatever. That was his way of trying to

preserve his sense of autonomy.

What I found with prisoners on death row who would drop their appeals was it was almost invariably because they had no choice left in their life except whether to live or die. And so they would choose to die because that was their choice and that gave them a sense that they were doing something. The moment they did that everyone showed them attention. Suddenly they realized that wasn't their only choice, so they would pick their appeals up again. What was the enduring irony of Guantánamo is that the process that is used to indoctrinate prisoners is the same process that is used to indoctrinate soldiers. And so actually these two -- and it's sort of like taking a Marxian approach to the process. Actually, the soldiers and the prisoners are very much in the same boat. And I would have these conversations, point it out. I don't think I won anyone over on that particular debate, but I tried to do it with the prisoners, too, because I didn't want them hating the guards any more than I wanted the guards hating the prisoners. I wanted the prisoners to see that the guards actually were in the same boat as they were, living the same miserable life, in the same God-forsaken place. The way the guards were treated was horrible. They were stuck there for six months on end. If they wanted to leave the island they had to pay for it themselves normally. They sometimes weren't allowed to leave the island. And the sort of desperation with which the guards would drink, and whatever, was just very sad to see. I tried to get my clients to see it that way so that they could see some sense of human -- of commonality.

Q: But some of the things -- the prisoners had had serious consequences. They would be beaten and the guards would storm into the cell and just beat them.

Smith: Right. Omar Deghayes, who was one of the people I represented, was beaten very badly -- blinded in his eye and so forth.

Q: Yes, that's right.

Smith: But Omar, that was what reaffirmed his sense of self, was that they beat him, so that showed -- "I'm beaten, therefore I am."

Q: The other thing that is kind of clearer though is the religious commitment.

Smith: Yes. Well again, I mean, whether one views that as the opiate of the masses or whatever, it is definitely effective. And the same is true on death row. I would find that. I remember with Larry [Grant] Lonchar on death row, Larry came within forty minutes of execution four times, I think. Once he came within fifty-eight seconds. He was terrified, and then he got very religious. He got very Christian. When they finally killed him, he was totally calm and he sat in the electric chair and his last words were, "Lord, forgive them for they know not what they do." What everyone believes about that, it was very effective for Larry. And what everyone believes about Islam -- and some positive things. My clients would constantly try to convert me.

Q: Oh, really?

Smith: Oh, yes.

Q: How did that work?

Smith: Shaker, for example, wouldn't meet with me unless we dedicated thirty minutes at the end of each session for him to be able to teach me about Islam. And fine, I've got -- I think that's rather sweet. Some people, some of our lawyers, resent that sort of thing because most of the lawyers are die-hard atheists and ACLU anti-religious types. But I think it's rather nice that people do that.

There is a lesson I learned in capital trials, which in my first capital trial I did what English public-schoolboys do, I quoted Shakespeare. "The quality of mercy is not strained. It droppeth as the gentle rain from heaven upon the place beneath" and so forth. It is a very powerful piece, as you know, from *The Merchant of Venice*. I get to the end of it and the end of the argument -- and I was very young, this was my first trial. I was less than a year out of law school. It was shocking that I was doing a capital trial, incidentally. But this old lawyer in the back of the courtroom, Bobby Lee Kirk, came up to me and he said, "Clive, you can't quote Shakespeare to a jury around here. I've used the same quote but when I used it I said, 'I think it was in the Book of Job I read.'"

Now, I don't know if she would approve of fibbing to jurors but what that taught me was if you're talking to a very Christian jury you've got to talk the Bible, you can't talk Shakespeare. And the same is true with prisoners in Guantánamo. You can't go in there and say, "Hell no, I'm not going to sit and listen to you talk about Islam for thirty minutes." It was quite enlightening. It was interesting. So, you know, whatever. But I think the religious thing, whatever one makes of it, was a very important, empowering factor for the prisoners.

Q: Were there problems with women lawyers, Jewish lawyers?

Smith: Look, fewer than you might think. I mean, that was one of the things that we thought, "Oh, my goodness," when we had the conference here in Oxford, the idea that we were going to have a lot of trouble with women lawyers getting in and so forth. A lot of the lawyers are Jewish. And my dad was Jewish. I didn't know that until I was thirty-seven and it's one of those things that illustrates the British anti-Semitism, quite frankly. But I think I wrote in the book about that. Tom Wilner will have told you that the interrogators would say to his clients that he was Jewish, in an effort to try to drive a wedge. I remember that happened with me and Shaker. Shaker said I was Jewish. We had a long conversation about it and we finally agreed that you need to trust the Jewish lawyers because the Semites need to stick together.

And then they told one of my clients -- this was a nice chap from Jordan, Usama Abu Kabir. They told him I was gay and I liked -- the precise quote was, "Clive likes to have sex with men." And he wouldn't tell me that. This was right after the thing about me being Jewish. And the next visit, I think -- Usama is just a nice, conservative, quiet guy -- And he says, "They're saying something about you."

And I said, "What is it? What is it?"

I'm all excited because I'm going to publish this and I'm going to make people look bad and show them what's going on. And so I just want to know. And he won't tell me, won't tell me, won't tell me. And I said, "Please, Usama, just tell me what it is."

And he finally says -- he gets bright red in the face -- and he says, "They're saying that you like to have sex with men." I just laughed and laughed. But the thing about that is you couldn't sit there and have a conversation saying, "Who cares?" because the interrogators had chosen that as one of the really deep Islamic beliefs. You might call it belief, you might call it prejudice. I don't have time in Guantánamo; in a visit, to persuade people that this is just wrong. I just have to show him my wedding ring and say this was ridiculous.

But there was a very dark side to that, which was the interrogators trying constantly to convince the prisoners that the lawyers were wicked.

Q: Were there any kind of particular responses to your being British, or having a British accent at least?

Smith: It was a huge advantage, actually.

Q: Was it an advantage?

Smith: Yes. A huge advantage. It is actually surprisingly in capital cases, too, for different reasons. In capital cases it was because there would be an objection to Yankees coming down and telling people in the South what to do. But with me, there wasn't. People were so nice to me and they would say -- I remember at the end of one trial this woman came up to me and she said, "I love your accent. I didn't understand a word you said from beginning to end but I just could listen to you talk all day." But in Guantánamo it was just much easier because regardless of the fact that in my opinion the British were as mixed up in this in many ways as the Americans, the prisoners didn't see it that way. They saw the British as

much more honest, which whether that is true or not, it inured to my benefit.

Q: You mentioned at one point something about talking cricket.

Smith: Yes. Well, we had talked about cricket. Certainly, how can anyone have a sensible -- well the great thing about that was, of course, in Guantánamo there's a bunch of Jamaicans and people. I would practice my cricket there because that would be there for cricket season. I would have to practice. So I would be out on the tennis court practicing my bowling and everyone laughing at me.

Q: The interrogator -- that raises an interesting question about the kind of middle-level bureaucrats who run the place. The doctors, the counselors -- if they had counselors -- the interrogators, the educators, supposedly, kind of middle strata and their particular allegiance to the system.

Smith: As a generalization -- and this is a generalization that's not always true -- as a generalization, the more senior the person you dealt with, the more unreasonable they were. And the people who were our -- what do you call it? The chaperones, effectively, the junior people who drove us around, were just unerringly pleasant and polite. Sometimes the lawyers were a pain in the neck. I would be critical of the lawyers sometimes because they were piddling around, wanting to go and have coffee and go and do this, and imposing all sorts of things on the escorts that were utterly unnecessary. It irritated me because I wanted to spend the time with the clients. They were rude to the escorts and it wasn't the escorts' -- they were just doing their job. I would always write letters of recommendation at the end of my visit there for each of them because they were great. Once or twice that's not

true. But overall it was true.

As you worked up the chain, generally, you got to more unreasonable people. And that was for two reasons. One is that the only people who survived down there in the position of authority were the ones who believed in it. You will know, for example, that the chap who is the first senior officer -- his name was Commander [Matthew M. Diaz] -- what is his name? I forget his name. He was a Navy guy.

Q: Baumgartner?

Smith: No, no. This was the guy who was the head of the SJAs [Staff Judge Advocate], who was prosecuted for supposedly sending Gita Guiterrez a list of the prisoners. Now, I don't know the truth of that. I made every effort to make sure I never learned the truth of it. But he was a very nice guy. If what they alleged against him is true, it was because he thought that what was going on there was just wrong and that the idea of them not giving us a list of prisoners was ridiculous. How could that be a threat to anyone's national security? Now, that was a very sad case, one way or the other. But he was a very rare exception and, I think, probably taught them a lesson in the higher echelons that they needed to have true believers.

One thing that I remember talking to Colonel Sharon [A. Shaffer] -- her last name, it won't come to me -- in the Office of Military Defense. She told me that she wanted to be a judge and she had to apply and she had to go through a whole interview process and was deemed to be too liberal, so they made her a defense lawyer. They had this vetting process for all these folk. I'm sure they had the same vetting process for people running the facility. You

wouldn't last there if you had your eyes open and said, "This is wrong." You would either leave or you would get told to leave. Or you would get prosecuted if your name was Chaplain [James J.] Yee.

Q: Right.

Smith: So gradually they would become more unreasonable and more blinkered. And I would, look -- I remember the time that hunger strikes were on for the first time and Shaker and I were talking about it and we wanted to meet with the authorities and tell them how to sort it out. It wasn't a big deal. We could have sorted it out for them. I tried to meet with Colonel [Michael L.] Baumgartner and with whoever the general was at the time. They just wouldn't do it. They were stupid. We could have saved them a lot of trouble. But they would not communicate with you at all.

Q: One of the problems with all the secrecy, of course, is we'll never know the names of these people. The doctors who were down there.

Smith: Well, we do know the names of a lot of them and as a matter of fact, we are suing a bunch of them right now.

Q: Oh, really? Good.

Smith: The thing about that is you can only get so much secrecy, and they come home and they talk. Daryl Matthews was one of the first psychiatrists down there. He came back and he was outraged. He has been an expert for us lots of times. I don't quite know how he gets

away with it because I would have thought that they must have made him sign something, but no one goes after him so it's fine.

Q: We've been here -- what?

Smith: Well, I don't know when you -- I tell you ideally, if it works for you, let's go until you've had enough, at say two, if you can hang on without lunch until then.

Q: Well we can go until two. I'm getting to the point where I'm going to have to review what's been said today and notes.

Smith: Fine. We can stop any time you like. I've got lots to do today, so.

Q: Well, a final question for today.

Smith: Okay.

Q: When Obama was elected your first reaction seemed to be somewhat optimistic. How would you assess that at this point?

Smith: Well, I was optimistic, because -- look, clearly this was hugely better than what went before. But I did say right at the very beginning this is not going to be easy for him to solve. It could have been. I remember I wrote something about how to do it, right that week, because I was sure he was going to get some bad advice from the military. It's just hard to get -- it's not like I think Obama reads articles I write in the paper, but whatever. But I

never thought it would be as difficult as it's been. And I think he has made some serious strategic blunders in terms of how he has dealt with it. It's too bad. And some of the things he's done have, quite frankly, been as bad as Bush. I mean Bagram is worse than Guantánamo.

If you're up for a break, that's fine by me. I've got a lot of stuff sitting here.

[END OF SESSION]

MJD

Session Two

Interviewee: Clive Stafford Smith

Location: Symondsburry, Dorset, England

Interviewer: Ronald J. Grele

Date: June 29, 2010

Smith: You're setting a subject for conversation. What would you like me to discuss?

Q: Actually what I want to do, is first ask you if last night you thought about anything that you should have said or wanted to say.

Smith: Oh, no, I didn't. I'm afraid I was -- there is so much about it. It's been life for the last seven or eight years. But, no, I was immediately taken off onto conference calls about the death penalty.

Q: Then, a couple of things we didn't talk about yesterday that struck me. We didn't talk about funding. A couple of times you mentioned the differences between yourself and Tom Wilner in terms of the funding, etc., but where did your funding come from?

Smith: Well, I had very, very limited funding. To begin with, I got a grant -- I can't remember the sequence. I got a Soros Fellowship to do this, which would have been in 2004, I should think.

Q: Now, did you apply for that --

Smith: Yes, yes.

Q: -- or did they approach you?

Smith: No. No, I applied for it because I wanted independent funding so, as I say, that there was no question that I was being funded through office funds at the LCAC [Louisiana Crisis Assistance Center]. That was really it. That, and I had an Echoing Green Fellowship.

When I came back to the UK in 2004, 2005, I got this fantastic grant, which was a Joseph Rowntree Charitable Trust [JRCT] thing. They are Quakers up in York. They have funded me for the last five years. They don't pay enormous amounts of money, which is fine. I don't want it. But that's all I need.

Q: Now does that come to you directly or through Reprieve?

Smith: No, just directly. I'm not technically hired by anybody. No, it's a wonderful set up. It's way better than retirement, even. You just get to do what you want.

Q: No restrictions, no --

Smith: No, no. I'm not required to --

Q: No reports, no nothing?

Smith: No reports, no nothing. Absolutely wonderful. So, that has been very nice. It's the same as death penalty work. You don't do capital defense to get capital investment, but it's all I needed. And then Reprieve. After I returned to the UK in 2004, Reprieve then was only two people. We have gradually raised charitable funding only and now there are twenty

people there, so that's good.

Q: I do want to ask you about Reprieve, about organizing Reprieve -- when you got the idea, or why; what it was set up to do.

Smith: Well, that was actually 1999 when I started Reprieve, but back then it was really about the death penalty because what we used to have at the LCAC in New Orleans was a lot of volunteers coming from Britain and Australia, primarily. They would come for three months, sometimes six months, sometimes longer, and they would come and work for nothing, which was great. We were terribly underfunded there. That was an office of, at one point, twenty-three people, and our funding was fairly limited. We had just dozens of death penalty cases. I think at one point we had like forty. So we were very dependent on volunteers and we used to get these volunteers coming rather inchoately from Britain. So I set up Reprieve in 1999 in large part to coordinate that, to get people volunteering from Britain to come through that. And then with a longer term, even then I think Em and I expected we would probably come back at some point to Britain. So it was an entirely selfish way of setting something up that I could work with later on. I wanted to have something to do when I got back here that was focused on the death penalty. And then after I got involved in the Guantánamo stuff, Reprieve did too. We came back and there were only two people but since then now there are over twenty. I think there are twenty-four full-time staff and I am glad to say I'm not. I'm director but that is only because I was required to be. I don't want to be. So we hired Clare Algar, who is wonderful, to do the direction and I just do what I want to do, which is the case work.

Q: When you set it up did you have a model?

Smith: Well, I had set up the LCAC, and in fact, we had a -- I don't know if you remember that ridiculous American film with Kevin Costner about baseball?

Q: Oh, yes.

Smith: You know, build the --

Q: *Bull Durham*?

Smith: Yes, *Bull Durham*. Right. "Build a field and they will come." Do you remember that?

Q: Oh, no, the other one. Yes.

Smith: The other one. Which is that? Which one was that? [*Field of Dreams*]

Q: Oh, about the farm in Iowa. Right?

Smith: Yes, yes, yes.

Q: The Kevin Costner one about Bull Durham was a wonderful -- wonderful.

Smith: Well, I never --

Q: But the other one is a silly thing.

Smith: I enjoyed both of them. They're both silly.

Q: Yes.

Smith: But on the other hand, I've always borne that in mind. The office we have in New Orleans, we bought this building, which I grandiosely call the Justice Center. We bought it for nothing -- \$150,000 for this enormous building in the middle of New Orleans. That all came about because the place we had rented wouldn't let my dog in. I was so annoyed. He was a black Labrador and I thought they were being racist about my black dog. We bought this building. It was huge, it was like fifteen thousand square feet, and so we had space for all sorts of NGOs. We ended up having four or five in that. Actually, come to think of it, I think it was five thousand square feet. But it was very big. Over three floors.

We had the LCAC, which was my office, which was basically a capital trial office. There was the Capital Appellate office, there was the Innocence Project of New Orleans, there were a number of different ones at different times. There was an Investigative Capital office. All of that was in that building. The idea was just to have a place where people could incubate, basically. Little NGOs that were doing non-profit work with very little money because when you start up an NGO it's quite hard to do. I think the figures are that 80 percent of charities fail in the first five years. So the idea was just to have a place that people could start their NGOs and have some sort of semi-sound financial footing. And I'm glad to say it's still going. We bought that place in 1995, I should think -- 1996 -- and it is going strong. So that's good. Reprieve was really just linked to that. I've set up NGOs left, right, and center. What the hell? Why not? I never understand why people have for-profit

organizations. I don't see the point of a for-profit one. Because what do you want to do? You just want to get paid a salary and get on with the work.

Q: Well, some of them make money.

Smith: Yes, but the idea that you get -- certainly in the line of work we do, we shouldn't be making a profit. That's absurd.

My mother-in-law coined the phrase that we hold the money in trust for the prisoners we represent, and that's true.

Q: In terms of funding, do you think the differences in funding between the lawyers, some coming from pro bono firms where they were really making money, others volunteering, did that play itself out in any way? A different attention? It's a difference.

Smith: It is certainly a difference and I think there were several differences. There were the NGO types -- very few of us. There was basically -- my end, there was CCR, and really that was it for NGOs. Then there were the big firms, who were the majority of them. Then there were the people like Joe Margulies, who were either small firms or academics or, in Joe's case, both. Later there were the federal public defenders. And all of them played a different role. I suppose there were also later the small-firm NACDL [National Association of Criminal Defense Lawyers] types and they played a different role. And I think they were all useful.

My view of these things is that there is always this pressure among lawyers to say that

there is only one way to do something. I have very strong views about the best way to do things and they're fairly radical, I imagine, comparatively. But on the other hand, I think it is always useful that people are doing things different ways because we are up against the government and if you're doing it all the same way, you are very predictable and you make their life easy. Whereas if you have people who are doing it very different ways, it is unpredictable and it makes the government's life more difficult. So I'm all in favor of that. Now, I don't agree necessarily with strategic decisions people make but I would be hard pressed to come up with any examples of any decisions, really, that hurt the overall process, with the exception of the decisions to do nothing. That was always the worst decision. And there was some of that. I mean, there was fear among people, that, "Oh, my goodness, if I do that it might rebound in so many different ways." But so what? In a way, the whole Guantánamo process was chaos and chaos is very often our best friend because if you follow a regime from A to B, A to B tends to be from where you are to another prison. That's not in our clients' interest.

Q: When you say that you had a firm view of how to do things, generally what is your view of how to do things?

Smith: Well, I think clearly with the Guantánamo process it wasn't to see how the process could work, it was to make sure that we effectively eliminated the process. The process was an anathema to American society and the American judicial system. You remember that lovely quote from -- oh, I'm going to forget which justice it was just before he retired [Harry A. Blackmun], where he said, "I will no longer tinker with the machinery of death." That is a very fine phrase and it is the way I feel about Guantánamo. We're not here to tinker, to try to make the process marginally less unfair. The process is rotten to the core and our job

is to illustrate that. Our job is basically to tear the process down because in place of that you have a very legitimate legal system. You either have the Article III Courts or you have courts-martial. If you look at the Geneva Conventions, the Geneva Conventions say you have to apply the same legal system to POWs as you apply to American servicemen. The courts-martial is perfectly adequate, as far as I am concerned, for any cases that are really military, and the vast majority that are actually just criminal should just be dealt with in the criminal court.

The argument to the contrary is fatuous. We had a process -- before all the high-value guys showed up on September 6, 2006, in Guantánamo Bay -- at Reprieve we had a process where we were trying to track them down, because we wanted to know where these guys had gone. The Bush administration had boasted that we had found Khalid Sheikh Mohammed or Ramzi Binalshibh or whomever and we were trying to work out where they had hidden them, because one of the projects we had was just tracking secret prisons and trying to open them up. I have a very long memo on each of those people, with all the publicly known information about them and the idea -- and this was before they were tortured and everything else -- and the idea that you couldn't put those guys through a regular criminal trial was silly. We had masses of evidence. Khalid Sheikh Mohammed went on television --

Q: Right.

Smith: -- and boasted that he was behind 9/11. So all you have to do is play the video tape. It's pretty simple. And so the argument that we need a new system is simply an argument that we need to cover up the sins that we've committed. It is all about trying to hide the fact

that we have tortured people.

Q: As I listen to you talk, it occurs to me that that is the answer to the question you posed. There are no judges and no prisoners have been released as a result of a judge releasing them, what are lawyers good for or what a lawyer should do? It starts with that's the answer, to expose the system, to undermine, to keep --

Smith: Well, undermining the system sounds somehow nefarious. But it's not that -- it is about bringing power to the powerless. What you've got to do, you can either be a player in a rotten system or you can play the system to get your client to where your client needs to get to. There was a big argument in the early days. The ABA [American Bar Association] took the position that lawyers should not take part in the military commissions because in their view it was unethical and by being involved you were somehow putting an imprimatur approval on the process.

I understand that position. On one level I respect it. I think they are taking a principle position. I think they are unbelievably wrong, because you would have the same thing in every case. You would go to Mississippi and you would say, "Wow, this death penalty process is outrageous." Or Texas "It's terrible. So we shouldn't play a role in it, it's so outrageous. We just can't take part." You can't do that. You have to get involved and you have to make sure it works for the people who are on the receiving end. I think that was a big mistake in the early days of the ABA, and other groups, too. Certainly I would disagree with that. But on the other hand, the purpose of having a lawyer is not simply to walk into court and get shot at by the overwhelming power of the opposition. The purpose of having a lawyer is to get you justice and justice is achieved in many different ways. By and large, in

Guantánamo it is achieved through the court of public opinion, not the court of law.

Q: Did your clients want their day in court?

Smith: I had many, many clients and they had very different, diverse views on it. I remember with Binyam Mohammed, when we were dealing with the military commissions, they were a farce. They were a total farce.

Q: I've read that.

Smith: The military commissions. Oh, it was tremendous fun but it had nothing to do with the judicial system. But we were very sad when they were stopped because -- the phrase -- I think it was me that said this but I always attribute it to Binyam because I would rather give him credit for it because I'm rather pleased with it and I don't want to sound smug or whatever. But our mantra was, "Better a kangaroo court than no court at all." And that was true. The kangaroo court actually gave us a tremendous opportunity to illustrate the absurdity of the process. So even though the consequences and result of that court would have been meaningless and would have been totally contrary to American judicial processes, nonetheless, having a process was better than having no process at all. This was true for the guys in Guantánamo from February 2002 to mid-2004, when lawyers got in there. Who knew what was going on in there? Nobody. They had no voice, they had nowhere to go. So anything was better than that. But that didn't mean that you should say, "Okay, well a kangaroo court is better than no court at all, therefore we'll accept a kangaroo court." No, no, no. That's not true at all.

Some of the prisoners wanted nothing to do with that process. Because, again, they thought their involvement lent the imprimatur to it. I think that was their mistake, too. I constantly argued with the clients I had in Guantánamo who wanted to play no part in it, because they were basically surrendering. Because again, if a tree falls in the wood, who knows that it falls if you're not there to see it? And as I constantly told the clients, we've got to do something or nobody knows what's going on in here. Sami Al Hajj was one of the people who really got that. But a lot of them don't. There were all sorts of people that had great conspiracy theories, some of which I think were undoubtedly true. Shaker Aamer told me that I was an unwitting tool of the interrogators because I would come in and talk to him and they would listen to our conversation. Anyone who thought they weren't listening to our conversation was naïve, in my opinion. Of course they were listening to it. Now, that was wrong, but I didn't really care. I wasn't saying anything illegal.

Q: But your clients would have known that so they would have been careful with you. For the most part.

Smith: Well, they would have been, but I never made the big mistake that some lawyers made when they went to Guantánamo, walking in there as if it were some regular case and their first question was, "Well, did you do it?"

Q: Right.

Smith: And I mean, I would never, ever do that in a regular case because you've got to have a trust with your clients. And if you walk in and say, "Did you do it?" the natural human instinct is say no, whether you did or not. The last thing you want to tell your new-found

friend, the lawyer, is, "Oh, I did these wicked things." So you're going to say no whether you did them or not. But then later, when you've built the relationship of trust with them, you're not going to want to admit you lied. So it's a terribly bad idea to walk into a client, anywhere, and say, "Did you do it?"

I would tell the clients this. I would say, "Look, I'm not in the least interested in what they say you did. Let's talk about what they did to you, as opposed to what they say you did." I thought that was the best way to get people to begin to open up. But even that was a mistake sometimes because -- and again, I think it may have been Shaker who said to me, "Look, this is just a scam. You ask me what I most hated about my torture and then they just come in and do it to me again. So they're listening to find out what I most disliked so that they can do it to me more."

There are so many things like that you just don't think about and you don't anticipate. And there was no way to win. I mean, one way or the other I was going to make mistakes. That's just all there is to it.

Q: We talked yesterday about getting the lawyers to think around issues like Islam, training them culturally. Did you also just train them in terms of the law, what to expect when they get in? Not to ask those kinds of questions, not to proceed as they usually would?

Smith: Well, when you say "train" that makes it sound like any of us really knew what we were doing. This was all totally novel. I think it was much closer to a state court death penalty case than anything else, but even so, this was totally novel to us as well. So I think it was more a sharing of experiences than us --

Q: So it wouldn't be meeting in one room but rather individual kind of --

Smith: No, no. We had these meetings where those of us who had done a lot of it would share what we felt we had learned from it. As with everything, I think we all learn from each other's experiences. There are some things about the firms that they are so much better equipped to do than we are. In our little NGO we were representing fifty people and the only reason we were doing that was because we couldn't find other people to do it. You couldn't do that effectively. We had way more clients than any other organization or firm and way less resources. It was certainly not ideal. I think some of the firms brought to this the ability to pour resources into research on this. And there's not just legal research, but factual research. So, for example, if you were dealing with an issue about the bounties, they could figure out where in Pakistan or Afghanistan you could get this stuff from. And they had just vastly more resources. We, for example, focused almost exclusively on people who spoke English, or French, or Italian. My Italian is horrendous but you know, simply so we could talk to them without translators, because a translator would cost a thousand dollars a day. We didn't have that sort of money. And that was very, very difficult. Later when we had to do some cases of people who needed translators, it was impossible.

Q: Sabin [Willett] told me about the problems with finding Uighur translators.

Smith: Oh, gosh, yes. And it's not just Uighur translators -- I didn't know there was a language called Uighur. But you've got to find a Uighur translator who has got a security clearance. Very often the only one you could find was one who had been used by the government. How did that look? You're coming here saying, "I'm an independent person"

and the prisoner says, "Yes, but that person was a translator for the interrogators last week." There were so many reasons why they had a rational basis to mistrust us. It was very hard.

Q: I have forgotten which lawyer, but in the book *Guantánamo Lawyers* one of them talked about working with Afghanis who were surprised that they had lawyers, because only the rich Saudis had lawyers. And so it's a way in which the finances plays itself out in the other end.

Smith: Right, right.

Q: Where the prisoners know who has access to money and who doesn't.

Smith: Oh, totally, yes. It was quite hard for people to believe that we were doing this for good motives. Part of the problem was, you had at one point five hundred lawyers involved in this. And they had such different perspectives. I think I found it quite easy because I would go in there and I would begin by apologizing for George Bush and apologizing for Tony Blair and generally bad-mouthing Bush. Of course, I would do it with the greatest of glee because I think the guy caused more trouble than any other person, [Osama] bin Laden included. That's quite something. But on the other hand, some of the other lawyers approached it in a very staid way and it was quite hard for them to establish trust, I think.

Q: But if you were dealing with people who spoke English, French, or Italian, so that you were dealing with people who are more or less literate or open to the world.

Smith: Not necessarily because you --

Q: Rather than a Pashto speaker who had never been out of the village.

Smith: Well, that's true. But on the other hand you are dealing with Moroccans, Algerians, Tunisians, some of whom had traveled. I think probably at least half of the people I represented had traveled significantly. So yes, I suppose in that sense they were more exposed to the West. I mean, and if you dealt with the Yemenis -- I had some Yemeni clients and they were very nice but less attuned to Western things.

I hate having to use translators. We have a couple of lovely people who did it but it is just so hard to have a conversation with a translator.

Q: We talked about the prisoners yesterday. One of the things we didn't talk about was the suicides.

Smith: Yes, right.

Q: The effect both on the prisoners and on your work.

Smith: Well, you say suicides. You couldn't say that to the clients because they didn't believe there were suicides. And a surprising number of the lawyers don't believe it either. Personally, I find it --

Q: The lawyers didn't --?

Smith: No. I mean, a significant number of the lawyers thought that they were murdered as opposed to suicide.

Q: Oh.

Smith: And there are still people who do. My own view, I find it very hard to believe that the Americans were going to torture people. I still find it hard to believe that they were that stupid. And I find it hard to believe that they would murder three people simultaneously. Now, the case for the prosecution there is that these guys all suffered similar injuries to Shaker, and they were all being abused in the same way. So it was clear that they were being abused by the U. S. Whether that was the abuse that caused their death or whether it was the abuse that caused them to commit suicide is a different question. Either way, though, of course the U. S. is ultimately responsible for it. But that was a very ugly part of it. There were two sides to it. Number one, you won't convince any prisoner in Guantánamo that those three people weren't murdered. You don't want to say that because you would lose a lot of credibility. But second, there were a lot of repercussions.

I'll give you one example. One was that Sami al-Hajj, who was normally a very rational, calm, sensible guy, became obsessed with the fact that his number, 345 -- that was his ISN, was 345 -- and there was a fourth person who died -- right? So there were three people who died, a fourth person who died, and he thought he was going to be the fifth person because it was 3, 4, 5. And there was just nothing I could do to convince him that that was absurd. I'm glad to say it turned out not to be the case. But on the other hand, there was an awful lot of dreams and paranoia like that, that were utterly irrational and totally unpredictable.

And totally understandable, though, that people would suffer that way.

Q: I was able to find out some figures that, to date, thirty-five people have been released as a result of a judge's decision.

Smith: Of course now. Yes. Thirty-five out of forty-four, I think.

Q: Yes, fourteen were denied.

Smith: Fourteen, okay.

Q: Fourteen were denied.

Smith: I looked at the figures just yesterday, actually.

Q: Yes, since it was in the *Herald Tribune*.

Smith: I'm not sure that our figures agree with that. But even so, that comes to 69.4 percent. Yes. I mean, it's amazing isn't it? This is what really tells you -- I find this hard to believe, even now. You remember when Donald Rumsfeld said these were the worst of the worst of the worst?

Q: Yes.

Smith: Now, there have been 779, give or take, people in Guantánamo. Five hundred plus

were released before we ever got to court. And those five hundred, you assume -- if it's a rational system -- were the ones that they thought were the least consequential people. So that leaves about two hundred and fifty, two hundred and seventy people in there who they've distilled over the course of five, six years to be not just the worst of the worst, but the worst of the worst of the worst. And these are the ones who we finally got to court.

Of the ones that they've distilled into being the worst people, we've acquitted 70 percent of them. And this is acquittal not in a beyond-a-reasonable-doubt standard where the government has a very heavy burden of proof, but where they only have to show it by preponderance of the evidence. They don't have to show they committed a crime, they just have to show that they think they're bad dudes associated with bad stuff. They can use secret evidence, they can use hearsay evidence. The clients don't know what the secret evidence is. And they still lose.

I mean, it is a stunning, stunning indictment of the whole process that they've been losing at that rate. It's astounding. I would never have guessed that. I mean, can you imagine being in a context of criminal procedures in New York, say, and someone comes to you and says, "Well, 70 percent of the people that they've arrested are innocent." I mean, can you imagine that? That would be horrifying. And yet that's basically what the statistics suggest in Guantánamo.

Q: When were the first -- were the Algerians the judges released?

Smith: The first ones were the Uighurs.

Q: Oh. The Uighurs.

Smith: Yes. Sabin brought the first one.

Q: Ah, yes, the first ones. There's still one Uighur left on there.

Smith: There's more than one. I've got three Uighur clients still down there.

Q: Still three? I thought that they had gone to Palau.

Smith: No. They wouldn't go. I tried to get them to go.

Q: Oh. Right. The ones that won't go.

Smith: I would love to go to Palau. I told them I would come and visit them there.

Q: Were you at all involved in finding places for people to go afterwards?

Smith: Yes, we've got an organization within our office called LAG, which is Life After Guantánamo.

Q: Yes, I know that the Center -- you have a kind of an outreach program trying to --

Smith: Yes, well, we've got two people working out of our office full time on that. They've been traipsing all around the world, mainly around Europe, trying to talk people into it. I've

done a bunch of that myself and it's just very frustrating. It is very hard to persuade the Europeans that they should take people when the U. S. won't.

And the problem is -- I gave you the example of one of our clients whom I can't name, but who they want to send back to his home country with a package saying he's guilty, whereas we know he's innocent. But all the innocence evidence is classified. So the U. S. -- Bush goes around for years and years saying these guys are the most dangerous terrorists in the world, and then he suddenly turns around and says, "Oh, by the way, will you take some of them?" Of course, they're never going to admit they made a mistake. They've only apologized to one person in Guantánamo and that was Sheik [Abdul Salam] Zaeef. I think they apologized to him and he was the former ambassador to Pakistan of the Taliban. But I may be even wrong about that, but I think they did.

But, they never say to the other guys, "Look, we're terribly sorry. We made a mistake." And they won't say to the European governments, "Actually, we made a terrible mistake. We shouldn't have arrested these guys in the first place." It is very hard for European governments to say, "We'll take these people as refugees." But we've been trying very hard to persuade them to, on the principle, actually, that if you want to make your country safer from extremism, you don't bang people up in Belmarsh, you treat them fairly.

And as I've said to various European politicians, if you take prisoners from Guantánamo you're going to make your life safer. Clearly. Now, convincing them of that is difficult, but it's the truth.

Q: So you've had negotiations with European politicians?

Smith: Oh, yes. Yes. With a lot of them. I mean, I've been to Brussels with the European Parliament and I have had endless meetings with the British. It is difficult because the State Department is so cagey. They were good for a little while, you know, they were quite open in discussing things with us, but ultimately their political goals differed from the goals we had for our clients. Now when we try to get a country to take one of our prisoners, we get undermined by the State Department because they want that country to take someone else. That's really unfortunate. It's very unwise. We should be on the same side on this.

Q: Right. Why are they working against you?

Smith: Well, because they've got -- let's say there are fifty people who we need to resettle. We think we need to resettle. And the government thinks they haven't got the political will to resettle more than twenty of them. They're going to try and force the other thirty to go back to countries where we think they will be persecuted and they're going to focus all their energies on resettling the twenty. That's why we got into this contratong [ph], whereas -- and I have sympathy with them, that they've inherited a nightmare situation from the Bush administration. But on the other hand, it is the U. S. government's problem, it's not our problem, and they should realistically put a lot more energy into it. But it is just not high up on their political agenda, is it? Particularly not now, I think. Now, they face a lot of problems closing Guantánamo because they've let that slip through their hands.

Q: There was an article in yesterday's *International Herald* about --

Smith: Here we are in England and you have to --

Q: -- critiquing the --

Smith: -- keep reading the *International Herald Tribune*. You can't read a good paper like *The Guardian*?

Q: Well, I don't know if *The Guardian* carried the story.

Smith: No, what was it?

Q: About Senator [Carl M.] Levin predicting that they're not going to be able to close Guantánamo in Obama's first term.

Smith: I think that may be right. I think it's right because he's missed the opportunities -- I mean, if when he came in he had made his announcement and just done it -- but instead of that he waffled around. You were seeing the difference between lawyers and academics. I don't know that lawyers are all that decisive, but if it had been me I would have just done it and taken the consequences. I think the consequences would have been far less if he had just shown the courage of his convictions. I think his M.O. is to try to build consensus. But how can you build consensus with people who are absolutely focused, like Sarah Palin, on doing you in? You can't do it.

Q: Could we talk for a little while about the book?

Smith: Yes.

Q: What was the impetus for writing it? And how did you go about it and --

Smith: Well, I think many lawyers are repressed authors. Have you written books?

Q: Yes.

Smith: Yes. Well, I like that stuff. I love writing. It's a hobby for me. These authors who agonize over their books -- come on, this is fun. I wrote that book in three months, which probably reads that way. But the main theoretical reason for it was based, again, on the court of public opinion. It's one thing to get all this information and to have a story in a paper somewhere or whatever, but I wanted to put out there the other side. I would get increasingly annoyed by the things that the Pentagon would do.

For example, when they would release the British clients back to Britain, Britain was doing them a favor by taking these people -- right? But the Pentagon would always send these guys back to Britain and then leak something to the media saying they were evil, wicked terrorists. And they would even do it anonymously so they wouldn't even say Moazzam Begg is such-and-such, Richard Belmar is such-and-such, they would just have Prisoner A, B, C, and D. So that the end of speculation in the media about who was the baddest dude was all based on this nonsense, as those of us involved know, and it made the life of the British government much harder in doing the right thing. The Pentagon was constantly doing this and they were constantly releasing what I think was just false information as part of their PR campaign. So I think the onus is on us to refute that. I thought it was important to write something that was about what Guantánamo was really like, from our

perspective. I'm not saying I have a monopoly on the truth, but everything in that book, as far as I know, is true. And it's certainly not the way that the Pentagon would have put it. I thought that was important. Now, look, how many people read a book? Plus I enjoyed doing it anyhow. We'll see.

My poor wife, Emily. When you're writing a book the worst thing is the clunkiness of prose. So we sat in Turin when we went to visit her parents and read it out loud in a coffee shop. The entire book. Emily deserves a medal for that.

Q: Did you have to vet it?

Smith: Well, I sent it all to the U. S. Military censors, in the hope that they would censor some of it. But they didn't, actually.

Q: They didn't?

Smith: But I wanted -- yes, you have got to be careful in this stuff. I think of all the people in Guantánamo, I have obeyed the rules more carefully than anyone else I know, simply because I think I do things in a slightly more -- what's the right word? A slightly different way than others. I don't want to give anyone the excuse to come after me.

Q: How do you see those differences?

Smith: Well, it is just that it is a PR campaign more than a legal campaign. And that doesn't go down well with the government, who would rather that this was all cautiously

played out under their rules and court. Their rules and court make it all secret, no one is allowed in to hear it, the judge might decide that they got the wrong person, but actually the judge can't say in his opinion why because it's all secret. That way, the most outrageous mistakes the government makes remain under wraps. And if you only play the game that way, for the first three years, four years, nothing comes out because the courts aren't doing anything. That is certainly not the way I think it should be done. And I think I was not the most popular person in Guantánamo, among the hierarchy of the authorities, because it was clearly my goal to get as much information legitimately out of Guantánamo as possible. I always followed their rules very carefully because I didn't want to get in trouble but I was focused on getting information out of Guantánamo rather than simply filing some bit of paper in court.

Q: Well, the book, by itself, would make you much more of a public persona than the other lawyers.

Smith: Well, I don't know about that. How many people read a book?

Q: But how many of the other lawyers have written a book? Or how many of the other lawyers have written so many articles about the experience?

Smith: Well, it's not about the experience, it's about the cases.

Q: The cases, okay.

Smith: If you are trying to get the British government to do the right thing by a prisoner,

you've got to put pressure on them. And the way you do that is through the media, by and large. And that is a constant -- it's just you're representing someone.

I view the world as a series of juries. You might have the jury in a court or you might view the judge as the decision maker. But there are many other decision makers, and those include the governments of the different foreign countries and so on and so forth. Those are actually much easier juries to persuade than the ones in the U. S. In the UK it was quite easy to maneuver the British government into helping us because it was much easier to get the British press on our side and therefore the British people, than it would be the American people. The same is true to the nth degree in the Middle East. In Yemen, 99 percent of the Yemeni population is automatically on our side. You're playing to a much more friendly audience there and that is a much more effective way to achieve the goals for your clients.

There are some people who think, "Well, that's not the lawyer's job." Well, it is the lawyer's job. Certainly that's the way I feel.

Q: Considering the world that way, you are able to change your narrative for the different juries?

Smith: Well, it's not a matter of changing the narrative. You always have the same narrative -- you are changing your language. So, for example, if you were talking to a jury in the Deep South about the death penalty, it is Matthew chapter 5 verse 7, "Blessed are the merciful for they shall obtain mercy." If you are making the same pitch to a jury in Pakistan you're not going to quote the Bible -- it's going to be the Koran, I suppose. Simply

a different language, but it's the same discussion. I heartily disapprove of different stories for different people. It's just the way those stories are told.

Now, there are some surprising things. The clients always wanted us to make the big deal to be, for example, the fact that the guards touched the Koran. Well, in the West, who cares? That is such an uninteresting story to Western journalists that it is pointless telling it. Now, you tell that story to the journalists in Yemen, they get outraged. It is different parts of the same story play very differently in different audiences. But it's all the same story.

I think telling lies is a terribly, terribly bad idea. As Winston Churchill said, "If you tell the truth the first time you don't have to remember what you said."

Q: We always do this, us historians, but I was really interested in the commentary of Alistair Palmer of the *Sunday Telegram*.

Smith: What did he do? What did he say?

Q: Oh, he panned the book terribly.

Smith: Oh, I'm sure he did. I don't read that stuff.

Q: Oh, yes?

Smith: What did he say?

Q: Well, he said you had accepted as true everything the prisoners said and as a lie everything the Americans said.

Smith: See, that is not true. That's not true. I think the converse is true, that the media accepted as true everything that the Pentagon said and as false everything the clients said. I've got to say --and I've said this before, but if you put George Bush's credibility up against Binyam Mohammed's credibility, sad to say, George Bush is almost invariably the one who is wrong. I'm not sure he's lying. I think he may believe the sort of drivel that he said. But he's wrong, nonetheless. And when he says, "We do not torture," you've got to be kidding me. Overall, I have found the prisoners vastly more credible than the authorities. But on the other hand, that doesn't mean they are always telling the truth.

Q: Well, most of the reviews were favorable.

Smith: Oh, really? Well, I'm glad to hear that.

Q: You don't read your reviews?

Smith: I don't read that stuff.

Q: What was the reception of the book, from your point of view?

Smith: Well, there is a difference. In England, overall, it was very positively received but that is because I have a certain image, I suppose, and it is vastly inflated. What I love about

the English and books is you write a book and that makes you suddenly somehow an academical intellect sort of thing, which is a wonderful falsehood. So it was fine. But you look at the reality -- I think ten thousand people bought that book, which is not too bad for a book, but compared to a newspaper article where two hundred thousand people will read it on a day, or if it's in the *Daily Mail*, six million will read it.

Q: You might have given us a best seller.

Smith: No, well maybe. But I think books are overrated in their impact, quite frankly, unless it happens to be *Harry Potter*. I think it was as much because I wanted to do it as anything. I don't think it had an enormous impact.

Q: Why the change in title?

Smith: Oh, that was a terrible mistake. I argued with them and argued with them and argued with them. *Bad Men* was a great title. I think Emily came up with it, I don't think I can claim it. She certainly did the cover, which I love the cover.

Q: That is ambiguous.

Smith: That's the point. If you read *Trollop*, there is no one in *Trollop* who is uniformly good or uniformly bad. The idea came from George Bush saying, "All I know about those people is they're bad people." They didn't say "bad men" actually, but "bad men" sounds so much better than "bad people". And yet, you would talk to the clients and they would say, "That Bush, he's a bad man." And then you talk to the guards and they would say, "We've been

told the lawyers are the enemy. They're the bad men." The pictures on the front were, obviously, bin Laden and Khalid Sheikh Mohammed and some of the prisoners I was representing. But then also George Bush, Tony Blair and all that lot. And then some of us. My picture is on there, Joe Margulies is on there, Michael Ratner is on there, Sabin is, Tom Wilner is on there. All the dubious characters that you've dealt with are on the front cover.

Anyway, but it should be ambiguous because everyone --

Q: Well, why did they want the different title?

Smith: They wanted it to be like that book about Savannah. *Midnight in the Garden of Evil?*

Q: -- in the *Garden of Evil*. Yes, good and evil.

Smith: Which is a wonderful book but it's not a book I wrote. They wanted to call it all these different sort of absurdly pompous titles. And I just didn't. I finally got tired of it and told them to do what they want. And I think it was a big mistake.

Q: Was that *The Nation*?

Smith: Nation Books, yes. Too bad. Whatever. I think at some point they stoned in America. I don't think many people --

Q: Yes, I wonder who down there is involved in that?

Smith: Well, they were very nice people.

Q: Victor couldn't be.

Smith: Sorry?

Q: Victor couldn't be.

Smith: No. I mean they were lovely people. Don't get me wrong, they are very nice. I just think that was a mistake. Whatever. It's not the end of the world.

Q: But some of the prisoners were bad men. When they went back they did become open spokesmen for --

Smith: Well, look, those are some of the most contentious statistics out there. Some of the --

Q: Those are the Dane and a few Saudis and --

Smith: But the Dane -- didn't he just end up stealing from a post office or something?

Q: Yes.

Smith: But whatever. From my perspective it is astounding that everybody didn't become the enemy. And indeed, certainly there are people who did bad things -- of course there are.

I think the quintessential issue that we should focus on is -- with 9/11, for example, it's a crime. It is not an act of war. If you had listed the entirety of Al-Qaeda, if any such group ever existed, if you had listed their entire membership on September 12, 2001, it would have been on one sheet of paper. Whereas today, if you had to list the people who want to do America ill, it would cover reams of paper. Now why is that?

It's obvious why it is. It's that the strategies we have had to deal with extremism have actually provoked it. There is a difference between justifying it and explaining it. I'm not saying that anything that George Bush did justifies killing innocent people. Nothing justifies killing innocent people. But in terms of explaining it, there was a CIA agent -- who I think I quoted in the book -- who said in 2004 that he thought for every prisoner we held in Guantánamo Bay, we had provoked ten people into wanting to do us harm. Well, of course, if you had to answer that question today in 2010 it would be for every prisoner we have held in Guantánamo there are a hundred, or however many people, who want to do us harm.

The real issue to me is this -- what is a politician's job? Is a politician's job to anticipate a hypothetical, future act of violence, or is a politician's job to make your country safer overall? Well, it clearly is to make your country safer overall. But when they do what they do, which is legislate by anecdote and they think, "Oh, well, we had 7/7 [July 7, 2005 bombings in London] so we've got to make sure we don't have another 7/7." In order to prevent that future hypothetical act, they create laws that offend everybody and piss off the whole world and create more enemies and make us into hypocrites. What they actually do is they make the world less safe, not more safe. That's been the running theme of the Bush administration, of the Blair administration and, and to a lesser extent, both Obama and

what we're dealing with now in Britain. It's just because they take the wrong line. And I think one of the themes I was trying to write about, which I still bang on about at every possible opportunity, is that really, if you want to talk about the anti-terrorism weapons in your arsenal, human rights are number one. Because if you behave well, more people respect you, fewer people want to do you harm, and more people want to help you out. Whereas if you behave as a total hypocrite, as Bush did, then everyone hates you because hypocrisy is the yeast that ferments hatred.

So anyway, that's the lesson I wish we would learn from Guantánamo. I'm not sure we have learned it.

Q: When Obama came in, did you have any contact with Greg [B.] Craig?

Smith: Greg?

Q: Craig. Who was handling these things [inaudible] --?

Smith: The counsel. I didn't personally but we had a lot of people on the team who did. Yes. We had some very good contacts in the White House to begin with, and indeed, they helped us out on some of the Bagram problems. It's just been very sad to see Obama replicate Guantánamo and Bagram in a way that's equally foolish.

Q: How do you see that?

Smith: Well, Bagram is Guantánamo's evil twin, isn't it?

Q: Right.

Smith: In Bagram, the rules are worse than Guantánamo, the secrecy is worse than Guantánamo.

Q: And Obama expanded it.

Smith: And he expanded it. It's horrific. And it's so pointless because -- I had a really interesting conversation with a guy called Kirk Black, who is a U. S. soldier. Now, I met him in Guantánamo when he was doing security detail on Binyam Mohammed's case. Kirk is a S.W.A.T team officer with the Baltimore Police Department. He's thoroughly right-wing. And I'm sure we didn't see eye-to-eye in Guantánamo. But one thing, actually -- one of the few things I will claim that the book did achieve was Kirk read it -- he told me when he left Guantánamo -- and he said that he felt it was all accurate, I can't believe that I got everything right, but I was very flattered by that. He said that it made him think twice about what was going on.

He then got posted to Afghanistan and he saw the same thing happening there. And his job there was to liaise with the local authorities. The Afghans. Go to the Sharia councils and listen to their complaints and try to resolve them. So he did that and one of several cases he came across was this guy, Gul Kahn, who everybody swore up and down was just a sheep herder who had been mistaken for a guy called Qari Idris, who was a big-time Taliban guy. And everybody said, "No, the Americans just made a mistake." So Kirk tried to straighten it out. He went to his higher-ups and told them and said, "Let this guy go. Give him a break."

They wouldn't do it. So in the end he emailed me. He tracked down my email and sent me an email saying, "Would I help?" I naturally assumed this was a sting operation from the CIA because I had a number of those things by that point. But then I thought about it, and look, if someone is reaching out to do the right thing, you simply can't mistrust them. You've got to accept them at face value. Now, it doesn't mean you're stupid. I was very careful to follow the rules very, very particularly. But on the other hand, I wasn't going to kick sand in his face when he was trying to do the right thing. He went out and got all the information about Gul Kahn. He got statements from the family members and sent them to me. And I told him, "Look, the way we'll get him out is we'll get an article in the *New York Times* about you doing the right thing. That will get Gul Kahn out quicker than anything. But I've got to warn you, Kirk, that this going to get you in trouble because no good deed goes unpunished." And he said he didn't care and that he just wanted to do the right thing. I said, "Kirk, you will never be -- you're Captain Kirk now, but you'll never be Major Kirk."

Anyway, so he did the right thing and we contacted the White House and told them, "Look, we're going to really make you look bad unless you do the right thing. But we're giving you the opportunity to get this right." And I proposed to them that they turn what he was doing into a pilot project to do justice. We would do it all for free. Kirk would do it. It would make them look good. Kirk said it would make him safer. He went through his chain of command and his superiors agreed with him. They were all in favor of doing it. We couldn't get a positive response out of the White House, even though we had good contacts in there. So in the end we had the *New York Times* do an article, and then sued them. And my colleagues in America who were doing it with us were driving to the courthouse to file the papers when the White House called back and said they will take care of this by Friday, so we didn't end up actually filing the law suit. But that's how you get things done. The fact of the law suit,

that didn't achieve anything. It was the *New York Times* article and the fact that we were going to make them look bad.

But unfortunately, what I wanted to do was make them look good -- get them to do the right thing. And help them do -- and do it for nothing, and we would do all the work. But they wouldn't do that. And as a consequence, here we are now, a year and a half later and things are no better in Bagram. We are about to do them again on that stuff. We've now got six prisoners in Bagram, two of whom are juveniles. One was fourteen years old when they seized him.

Q: God.

Smith: He was never in Afghanistan until they took him there. Again, it is as hard today to get media interested in Bagram as it was in 2003 to get them interested in Guantánamo. But this is still going on. And it's not just Bagram. There are a bunch of other places.

Q: Well, Obama was supposed to have eased off on the tough interrogations and the torture. Is that true for Bagram as well?

Smith: Well, I mean it depends --

Q: Or is it still going on there?

Smith: It depends what you mean. I have not been in Bagram. I am dependent on what people tell me about their experiences. But again, just as they told us about Guantánamo,

the stories are so consistent I have little trouble believing them. The real issue -- I don't even care if they give up slapping people about, which I don't think they have. I think there still is physical violence going on. I don't think they're doing to prisoners in Bagram today what they did to Khalid Sheikh Mohammed. They're not water-boarding them. But on the other hand, if I take you at age fourteen in 2006 and I bang you up in a secret prison where you have no legal rights of any consequence, where you can't see a lawyer, where you're just held in a cell twenty-four hours a day, or you're allowed out for one hour a day. You're not allowed any education, you're not allowed anything meaningful -- then, is that abusive or not? Yes, of course it's abusive. And if we do it without any charges, without any trial, we are no better than the worst things we've said about the Soviets.

There are two words in this debate that are very unhelpful and they both begin with "t". One is "torture" and one is "terrorism". And the moment you start talking about torture, you presuppose that everything else is okay. Well, there is a reason why the torture convention says "torture or cruel, degrading, and inhumane treatment." There's not just torture. Just to say, "We're not torturing people," does not mean that holding someone without trial for five years when they're a juvenile is somehow okay. So "torture" is a very unhelpful term because it tends to imply that anything else is okay. "Terrorism" is a very unhelpful term because it makes everyone think, "Oh, he's a terrorist," and somehow the rules of the world dissolve.

Q: In May of this year Congressman [Jeff B.] Miller from Florida put an amendment into the defense appropriation to curb the lawyers. It failed. But there are still attempts in Congress to limit --

Smith: You don't have to go to Congress. Last week the U. S. Supreme Court held that providing assistance to terrorist groups, even if it's legal assistance, is a criminal offense. I mean, in theory, I think what that says is that those of us who represent people who the U.S. government says are members of terrorists groups, are potentially legally exposed.

Q: Right.

Smith: That's been a source of a lot of heartache amongst some of the lawyers. Some of the firm lawyers are really worried about that. Personally, I don't care. I mean, if they say that providing legal services to someone who's being held without trial is a criminal offense, then bring it on. You can put me on trial if you like, but I am so certain that justice is on my side. I'm not going to bother getting afraid about that. But on the other hand, it's intimidating. I mean, they could do it. I find that horrific. That U. S. Supreme Court decision is absolutely un-American. Anyway, the only response to it is to challenge it.

Q: How many clients do you have today, down there?

Smith: Right now in Guantánamo there are about thirty people we are helping.

Q: About thirty people.

Smith: Yes. Yes, more or less.

Q: How would they break down?

Smith: Well, there are three Uighurs; there's a significant number of people who need resettlement who we are trying to find resettlement for. There is still one British guy, Shaker Aamer. And then I'm trying to help on the cases of three, at least, of the HVDs [High Value Detainees]. I don't have a top-security clearance so I can't go see those guys. But, again, these are people who have been held in Europe. I think we can bring litigation here on their behalf in order to try to expose what happened there, one, purely because it think it's important to do, but two, because the Europeans are trying to cover up their involvement in this. And that's wrong. If they made a mistake, they can apologize. I don't want to prosecute them. I don't care about that. I just want them to admit what they did so we can set in place rules to make sure this doesn't happen again. But getting them to admit they made a mistake is quite a battle.

Q: Do you think they're fearful of reparations?

Smith: Oh, yes. I know they do. Of course they do. But look, there is an inquiry that the British will at some point hold into all of this. Everyone is paranoid about being prosecuted and this, that, and the other. Personally, I'm against them being. I don't want them prosecuted because when you start prosecuting people, people start asserting their right to remain silent and you don't get the facts. I don't for one second think that Tony Blair is going to be put on trial in The Hague. I think that the people who try to make that happen are actually causing more harm than good, in the sense that I want the truth out. I would like Tony Blair to appear in front of a commission, I want him to have no excuse not to answer all the questions, and I want him to have to say why he did what he did. And then let history be the judge. But on the other hand, it is going to be a big battle to get that. There are a lot of the people on the left in England who want these people prosecuted. I

disagree with them, but whatever.

Q: I've kind of reached the end of my questions about Guantánamo.

Smith: Very good. Okay.

Q: I was wondering if we could talk about you as a death penalty lawyer.

Smith: Sure, if you would like to.

Q: But would you like to take a little break?

Smith: No, no, no. It's fine. I've got to meet someone at twelve thirty so we've got a couple of hours.

Q: Oh, okay.

Smith: An hour and three quarters. Unless you would like another cup of coffee.

Q: This one I haven't even touched yet.

Where I go back is to the University of North Carolina [UNC] at Chapel Hill.

Smith: Oh, really? My goodness.

Q: Is that a fair kind of beginning for you?

Smith: Well, it began a bit before --

Q: With the Morehead Fellowship.

Smith: Yes, it began a bit before that, but that's fine. Yes.

Q: Okay. Let's begin at your point.

Smith: I don't want to bore you with stories you don't want to hear.

Q: No, no. You don't bore me. Don't ever look at it that way.

Smith: I don't know, talking about myself may be my favorite subject but it is a slightly vain one. But anyway, we all have our obsessions and the death penalty has been mine. It goes back to when I was very young. I remember when I was probably ten, in a history class -- you will be very glad to hear it was a history class -- and we were studying the Hundred Years War. I'm in a middle of a book about it now, actually. I'm actually on the chapter about [Domrémy-] la-Pucelle and Joan of Arc. And I remember seeing a picture -- back then when you were learning about the English fighting the French you assumed that it is all good stuff. Doing in the French people at Agincourt was a good thing, heroic English people. But then I came across a picture of us burning Joan at the stake and she looked just like my sister, Mary. And I remember this very vividly, the picture in the book, and I thought, "My goodness, what are we doing this to her for?" It made me really think that this was

clearly a wrong thing. It was evil for the English to do that to the poor girl. So that was when I started sort of having a thing about the death penalty.

Later, when I was at Radley College -- it was an English school, public school, which means it's private, naturally -- I was writing a paper, which I thought was a history paper, about the death penalty, and it came as a huge surprise to me that the Americans still used the death penalty. It was one of those things. You know how in our solipsistic world history begins with us? I was born in 1959, which is about when the death penalty went out, so the death penalty hadn't existed for me. When I found the Americans still did it, I thought, "Oh, bizarre." So I decided when my mother was working at Kings College, Cambridge, and my brother went to Cambridge, and I was going to Cambridge to study natural sciences, and I didn't want to. So this opportunity came to go to America and I thought, "I'll tell you what. I shall go and straighten out the U. S. and stop the death penalty. I shall write the seminal book on the subject, which will convince people of the error of their ways."

Q: Oh, really?

Smith: Yes. So I went there when I was eighteen. I wanted to be a journalist and write all this stuff. And there was a wonderful program, the Morehead Foundation, they paid you to go --

Q: You had a scholarship to UNC Chapel Hill?

Smith: Yes. There were four English people who used to go there each year on the Morehead Scholarship and it was fantastically generous. They paid for everything and they

paid for you to do stuff in the summers. And so the first summer I did what they told me to do, which was go work with the police in Los Angeles. And I worked with the Los Angeles Sheriff's Department [LASD]. It was a fascinating --

Q: I was living there at that time.

Smith: Were you really?

Q: Yes.

Smith: I was in the People's Republic of Santa Monica.

Q: Oh.

Smith: This would have been what? 1979. Or something like that. Yes.

Q: Did you know any of those folks?

Smith: No, of course not. But I --

Q: Tom [E.] Hayden and Jane Fonda and all.

Smith: No, no. No. I mean, look, I was a kid. I didn't really know which country I was in. I was doing this internship with the LASD and it was fascinating. They were so corrupt. And there are some nice guys, though. I got into an argument one night with this Scottish police

officer. He was Scots-heritage police officer, banging on about how we should execute people. And I was banging on about how we shouldn't. And he said, "I know the person you should go work for. There's this left-wing person called Millard Farmer in Atlanta." So I said, "Well, I will then." So next year, instead of doing the program they wanted me to do, I got them to pay for me to go work with Millard in Atlanta on death penalty stuff. That changes everything because instead of having a theoretical opinion about the death penalty, you suddenly get to see the real world and meet -- I was useless to them. I was twenty and knew nothing about anything. But I just spent the summer visiting prisoners on death row. Absolutely fascinating.

Q: When you say get to know the world, the world of the American South.

Smith: Yes.

Q: Had you ever --? Well of course, you had been to school there.

Smith: Well, I don't think -- UNC is not really --

Q: Yes, no.

Smith: The day I arrived in Atlanta we got in a car and drove to Mississippi because Millard and the others wanted to take part in a demonstration in favor of some strikers at this chicken plantation. The guy who ran the plantation called it a chicken plant, but he called it a plantation because he was just that way inclined. And it was just incredible stuff. For someone brought up in Britain where unions had enormous power and the Labour

Party was basically run by the unions, the yellow dog contract, the right to work stuff in America was shocking. I remember, we had a rental car and we went to this place, which was near Meridian, Mississippi, and there were all these Klansmen doing a counter-demonstration in their horrendous hoods and stuff. I knew nothing of all of this. Someone put a bullet through the radiator of the car. And I remember, we were walking along as part of this demonstration and there was this little white picket fence -- this is sort of the stereotype little Southern town -- and there was a little old lady who looked like my grandmother in the garden. It was a sunny day, and suddenly this little old white woman in her garden starts venting incredible racist spleen at us: "Nigger-lover this, nigger-lover that." And I was just -- I mean, what a culture shock. Or lack of culture-shock, or whatever you call it. It was just absolutely fascinating. For me, coming from a very privileged English background, it was something I had just never encountered as intriguing. It only got more extreme after that.

Q: What was he like then?

Smith: Sorry?

Q: What was he like then, at that time?

Smith: Who? Millard?

Q: Yes.

Smith: Oh, I love Millard dearly. He was always a lunatic. He was, if you know Millard's

history, he was very privileged himself, from Newnan, Georgia. He was clearly the black sheep of his family and had spent anything he had ever had on this. There was the whole of Team Defense, who was then Millard, Kimellen Tunkle, Joe [M.] Nursey, and slightly later there was Andrea Young, Andrew Young's daughter. And that was it. It was a very small place just down off Peachtree Street in Georgia. It was total chaos. I remember, like, Joe and his girlfriend, we would go to the cinema to watch a movie for fifty cents, out on a little five points, and they would sneak in their own popcorn. It was just an incredible shoe-string operation. I got there, I had no skills. And so they just --

Q: What did you do?

Smith: So I went to Reidsville. Reidsville, Georgia, where death row was then. I rented a little apartment for next to nothing. I just had a mattress on the floor and so forth. I rented it from Wensley Hobby, who was a lawyer in Reidsville and he was another very strange person. I remember going into this office and he had a clockwork mouse that he wanted to show me. And then one day -- he didn't know what to make of me being in Reidsville -- and one day I heard a noise outside the window of the apartment and I look out there and there is Wensley crouching under the window. But anyway, it was very odd. And there was nothing, of course, to do. As you go down -- I love that -- as you go down to that part of Georgia you come to Claxton, home of the fruitcake, Vidalia, home of the spring onion, and then Reidsville, home of the Georgia state prison. And I just spent every morning and every afternoon visiting the prisoners on death row. One in particular, Jack [H.] Potts, was constantly dropping his appeals. It was astounding to me to learn that these guys in the richest country in the world had no right to a lawyer. That there were all these people on death row, including Johnny Mack Westbrook, who was illiterate and was meant to

represent himself. And so they were dependent on Millard. My job really was just to talk to them, keep them happy, and then report back to the office if there were some disaster about to happen, as frequently happened. Because Jack Potts kept dropping his appeals.

In the end, what I decided to do, I would come out of the Reidsville prison and frantically go to a call box and call Millard and say, "Jack's dropped his appeals again." And then there would be this frantic effort to try to stop him getting executed. I decided I was going to write a book about Jack. I was only at UNC for two and a half years, really, and the last six months I got them to fund me to do an independent study to go down and write this book. By which time they had moved death row from Reidsville to the euphemistically named Georgia Diagnostic and Rehabilitation Center up at Jackson. So I spent six months living there and writing a book about Jack, which is called *Life on Death Row*, which will never see the light of day. It was my juvenilia. But it was actually fascinating to do. I talked to Jack about his life story and then I'd go talk to the other --

Q: A very convoluted life.

Smith: Oh, well, but actually fascinating. He was someone who was very intelligent but had chosen the wrong parents. As a consequence, he would have been a doctor if he had chosen the right parents, but instead he didn't, so at the age of ten he was being heartily abused and doing drugs and so forth. He was always trying to dress his life up with some romantic fantasy that it wasn't. So he would tell you his version of the story and then I would go and check it out with the person who he said knew most about it and write their version of the story, which was always very, very different. And for me, it was fascinating. I mean, I have never tried to publish it but it was a very interesting experience. I met all these people on

death row and I thought to myself, "It's pointless just coming here to visit them. I should get a law degree and help them." So that's why I went to law school.

Q: Why Columbia?

Smith: I wanted to go to New York, frankly. And I made the mistake of not going to NYU [New York University], which was in a much more fun part of New York, if I had only known.

Q: You were editor of the student newspaper there.

Smith: Oh, God, what you know. Yes, it was tremendous fun, the law school years. I enjoyed that immensely. No, it was very interesting, law school in America. People take themselves very seriously there. I wasn't really used to that. I loved doing the law school news. The law school paid for me to have an organ that I could use to propagate my propaganda. It was a lot of fun. I remember doing the April Fool's version of it where I went down to St. John the Divine, which still has only one of the towers. Went outside and took a slightly out-of-focus picture of the model inside of what's it's meant to look like, and then published it as "Miracle on 113th Street. St. John the Divine finished overnight." All these people came up to me that morning and said, "I went down there -- it's not." I don't think April Fool's Day has quite the same resonance in New York as it does in England.

Q: The one I liked was the Americans at the rugby match.

Smith: Oh, yes?

Q: Yes. Funny.

Smith: What was that?

Q: You wrote a --

Smith: Oh, did I? When? God, I don't remember this.

Q: You took a couple of American friends to a rugby match over here.

Smith: Oh, yes.

Q: And then you have a conversation between the Americans and a rugby fan in which they totally can't comprehend each other.

Smith: Well, we went to the wrong game, by mistake, too. We were driving up to Edinburgh. Actually, the way it came about is a ridiculous story, but I was asking them various totally pointless trivia, "So which are the two cities in England --" you know a city has to have a cathedral -- right? -- and there are only two cities that have a city charter in England that don't have a cathedral. One is Cambridge, which doesn't, and the other is Hull. So we were driving past Hull and I was giving them lots of hints, like "They have a rugby team called the Kingston Rovers [KR]." Well, that didn't help them. They had no idea what that was. So finally we come to Hull and I say, "Well, why don't we stop off and watch the Hull KR."

"Yes, yes, let's do that."

And it was a fun thing, so we all went to the game and we had taken some American football chants and changed the words so we could cheer for the Hull KR. So we're singing these songs and the guy taps me on the shoulder and he says, "Hey, lad, this isn't the Hull Kingston Rovers, this is the Early Birds." So we had to change the words quickly. They were very sweet. And they invited us into the changing rooms later so we could meet the teams and we were the American supporters club for the Hull Early Birds. So anyway, that was that.

Q: When you were at Columbia, did you have contact with Jack [M.] Greenberg at that point?

Smith: Yes, Jack was then at the LDF [National Association for the Advancement of Colored People Legal Defense Fund] but he taught a class as a sort of adjunct professor.

Q: Right. You took his class and were on that?

Smith: Yes.

Q: You knew then that you were going to be working --

Smith: Oh, I only went there to get a law degree, to go back down South. Yes, that was the only reason.

Q: Was he at all helpful?

Smith: Well, I mean, Jack was lovely and he was totally --

Q: I mean, I should make this natural connection but I don't know --

Smith: Well, I think he was far too busy, really, for some little peasant like me. But he was a great inspiration. Jack was, Steve [F.] Ellman, there were a number of people there who -- but overall, actually, there weren't enough. I mean, Columbia was intensely corporate-oriented. That was one reason I wish I had gone to NYU. Now, I think Columbia has got vastly better. But back then there just weren't many courses you could take. So I ended up doing a lot of independent projects. I did one with Jack, just about the death penalty. And so forth, just because I just was not interested in all that other stuff.

Q: Did you run across Tony [G.] Amsterdam?

Smith: Not in person. No, I don't think so.

Q: While he was there?

Smith: No. No, I met him a lot later. But --

Q: You were also involved in the Lawyers' Committee for International Rights?

Smith: I spent a summer with them, yes.

Q: Who was --?

Smith: Then it was Arthur [C.] Helton and Mike [H.] Posner were running it. Mike is now working for the government, isn't he?

Q: Right.

Smith: And Arthur, poor fellow, got killed in -- yes-- but I did a summer with them. Yes, because it was quite hard. I did a summer with the ACLU. It was hard to get from Columbia, to get work doing death penalty work down South, which was what I wanted to do.

Q: Why was that? No interest?

Smith: It's one of those things I think we owe to young people -- that young people don't get taught very much about how to create the job that they really want to do. I was terribly lucky to muddle my way through because I never really thought about these things very well. But back then there was no organized set up. A place like Team Defense didn't have the resources to come up to New York and recruit people. So it was purely up to you. Team Defense, I didn't really want to go back there then because I wanted to meet other people in the field. I did want to go back to Team Defense eventually because they were so great.

But anyway, I just muddled along. And then as it became clear that the end of law school

was in sight, you've got to figure out how to get a job and all the job orientation at Columbia was about going to big law firms. They would give you horribly bad advice, as it turned out, that the way to get a job in public interest is go to a firm and get experience. That's the worst way to get a job in public interest. I was lucky that -- there are two things. One is I didn't want to have to pay my student loans, so I spent time setting up a student loan forgiveness program. The other was I wanted someone else to pay me because I knew I couldn't get Team Defense or someone to pay me. So I worked out a way through the Public Interest Law Foundation to get them to give me a grant of, like, \$3,500 for the first year, which was my salary. But that way I could go --

Q: Did you go back to Team Defense or to the --

Smith: No, I went to what was then called the Southern Prisoners Defense Committee. And Steve [B] Bright, to his enormous credit, was always really good about taking young people who wanted to do the job, basically on spec. He let me come work there without us every meeting. He just announced that he would like me to go to Louisiana and get the Louisiana bar, because he had plans to do that. And then I didn't meet him until I went to Louisiana. It was really, really impressive that he would do that.

Q: What was the relationship between the Prisoners Defense Committee and Farmer? Were they competing organizations?

Smith: Well, they were different organizations. I mean, I don't think ever they were competing. They didn't. Steve and Millard didn't always see eye-to-eye but everyone was in the same boat. I mean, there is a problem in the whole death penalty world of -- you know

Monty Python's *Life of Brian*, right?

Q: Yes.

Smith: You know what that film is about, really -- it's about death penalty NGOs. They have that bit where all the different Jewish organizations are under the Romans and there's the Jewish Liberation Front and the People's Liberation Front of Judea, the Palestine whatever. And they're all fighting each other while the Romans are marching above them. And there is a terrible tendency in the left of America, and elsewhere, for people to just cannibalize each other. Steve and Millard didn't really have that problem but there is an awful lot of that in the different organizations. Even though we're all on the same side, it is actually quite hard to get people to row in the same direction.

Q: Yes. I asked the question because the work would have been different, or the work atmosphere would have been different.

Smith: Very different. I mean, it was still an incredibly shoe-string operation. The first year I worked at SCH [Southern Center for Human Rights] -- or well, now. It was the SPDC then. It's now the Southern Center for Human Rights. That first year my salary was \$3,500 and then after that I did a lot of the fundraising, actually. But we were constantly without funds. So, our salary was \$10,000 or something. But you could cut -- we wouldn't get paid every other month and that was just the way the world worked. It was very hard to raise funds.

Q: And they sent you to Louisiana, right?

Smith: No, no. Ultimately I took the bar, but we didn't end up opening an office in Louisiana then.

Q: You had to take the Georgia bar?

Smith: I took Georgia, I took Mississippi.

Q: No problem?

Smith: Well, I mean, a total waste of time but I took them. I ended up doing mostly Mississippi work, really.

Q: What was your first case down there?

Smith: Well, the first case -- I remember all of these things, actually, because they were all catastrophic. One of the earliest cases I was involved in was [James] David Raulerson in Florida. Steve was doing the case and Robert McGlasson and I were left in Atlanta. Steve was down doing the real job when poor old David had an execution date in Florida. I remember that because Steve had us writing parts of the brief for filing in Eleventh Circuit or wherever. And neither of us had the slightest -- I had no idea what the Equal Protection Clause was. Columbia prepared you for nothing in terms of real work. When they say you don't know the way to the courthouse door, I certainly didn't know the way to the courthouse door.

Q: Oh, well that's why I asked this question about Jack Greenberg. I would assume the Legal Defense Fund would have kind have given you some kind of preparation.

Smith: No, not at all. I mean, that's all very intellectual stuff compared to the real world of down there. What you were dealing with in the early -- 1984 we're talking about -- the main focus of the SPDC [SCH] was post-conviction. Habeas, effectively. And that was good back then because up until 1984 you won a lot of those cases. 1984, you will recall, was when *Strickland v. Washington* was decided where suddenly the barriers to winning an effective assistance to counsel were hugely raised. Up until then the focus had been on doing habeas, because you had terribly limited resources, you had to decide where to commit them, and you would commit them to the people who were closest to execution, where you had a very real chance of winning. Because you wouldn't win in state court but you could win in federal court. However, starting around 1984, starting a bit before that in some cases, but rapidly accelerating, the federal court started closing the doors with all these procedural rules, which made it difficult to win. So we started working backwards. Very soon after that I started doing state court appeals. I started doing in 1984, which was really good to do. I remember the Georgia Supreme Court had its motto --

[Interruption]

Q: The Georgia Supreme Court has --

Smith: Yes, the George Supreme Court had its motto above it and it said *fiat Justitia ruat caelum* [Let justice be done though the heavens fall], and when I was talking to the clerk, one of the young clerks for one of the justices and he was saying, "Do you know what that

means?"

And I said, "What do you think it means?"

And he said it means "we affirm".

And I said, "No, it doesn't. It means, "Do justice even if the heavens fall." And of course, at the time it did mean "we affirm." They affirmed 95 percent of cases back then. But actually, as the federal courts became less amenable to us, less friendly, the state courts became more open. I think in part, up to that point, psychologically, the state courts had always thought, "Why do we need to do anything? We'll just let the feds do it." But gradually they began to take their role much more seriously. We began to win cases in the Georgia Supreme Court. I did a number of Georgia Supreme Court appeals, which were a very good way to begin to do death penalty work because you learn the law by writing the appeals. When you argue a case in front of the Supreme Court of Georgia, it's not that big a deal. I mean, you do something stupid -- and I did plenty of stupid things -- they are willing to forgive you, whereas if you are in front of a jury it's a very different world.

But as that was going on, even in 1984, 1985, I thought, looking at it, that we had to work earlier and earlier in the process. It became clear that once you were on death row it was going to get much harder to get you off. So I got involved in my first capital trial in late-1984 or early-1985. I was just out of law school. I knew nothing about this. But I went with Julie [L.] Edelson out to Haralson County, west of Atlanta. And we go to see these two lawyers who are representing John [David] Pope [*Pope v. The State of Georgia*, Supreme Court of Georgia, 1986]. And we walk in and I say, "Hi, I'm Clive."

And the lawyer turns to Julie and says, "Oh, and what do you do? Carry his briefcase?" Just offensively chauvinist. We had this conversation where it became clear that these lawyers had no idea what the law was. It was for me -- it was such an eye-opener.

Q: These were the defense lawyers?

Smith: These were the defense lawyers. They thought that John could get the death penalty for armed robbery, which had been declared unconstitutional seven years before, and so forth. So, in the end, for better or for worse, we decided we were going to get another lawyer for John because John was a roly-poly, old armed robber. That was what he did for a living. And he was, in a way, one of the old school. He was always terribly polite, and whatever. But this one had gone horribly wrong. The victim of the robbery had gone after him with a broomstick and whacked him over the head. And John insisted he remembered nothing after that and had acted automatically, whatever he did, but he had shot somebody. And it was therefore a robbery/murder. We got this guy, Jerry Word, to agree to do it with me and Julie. And Jerry honestly barely knew anything more than we did. Jerry had never tried a capital case.

Q: He was local?

Smith: He was the local lawyer. He was meant to be the lead lawyer because he had at least tried some criminal cases. How Steve ever allowed me to do this, I have no idea. But we ended up actually trying the case. A total nightmare. I had no idea what I was doing. I remember, in the closing argument -- this was when I was quoting Shakespeare -- I did the

penalty phase closing argument in 1985 in a capital case when I was a year out of law school, which was insane. And John was sentenced to death, as one might expect. Now, we got it reversed on eight different grounds. That was the thing. It was very interesting as a sort of academic, at the time. I knew nothing about the real world but I had at least spent three years studying capital law. It was actually very easy to get people reversed because all you had to do was raise issues. The judge was a guy called Judge Arthur [W.] Fudger. I kept accusing him of fudging on issues, which he didn't take very well.

Q: Oh, he was F-U-D-G-E?

Smith: Yes. And at any rate, he could never get anything right. So it was easy to get him reversed. But on the other hand, the whole process was crazy -- the idea that some student like me, some recently-graduated student, would be doing capital trial? But I did that one and we got it reversed later, thankfully. Willie Gamble [Jr.] -- I remember we tried Willie starting April 16, 1986. The reason I remember that is because it was immediately after *Batson v. Kentucky* [1986] was decided. And this was down in southeast Georgia and I was no less ignorant than I had been the year before. And picking the jury, the prosecutor used all ten of its strikes against all ten black people and later admitted, over a drink at a party after the trial, that he had done it to test the constitutionality of *Batson*. They're crazy -- *Batson* was decided by the Supreme Court. But anyway, we had this fantastic record because you were then allowed to ask him what his reasons were for these obviously racist challenges. So the first one, I remember, he had stuck this one woman because her husband was a mason and during *voir dire* we had been asking questions about Masonic lodge affiliation because the two victims in the case were Masonic affiliates. So that we pointed out to the judge that, yes, her husband was a mason, he was a brick mason, not a Mason-

Mason. But that was good enough for government work.

And then the next person who came up was a guy called Isaiah Mason and the prosecutor said "Well, there's something about his name I just don't like." It was ludicrous. And I remember, he was sentenced to death, too, because none of us knew what we were doing. I did the appeal and it was actually a really interesting experience because we had this fantastic record about the racism. And the Georgia Supreme Court had never encountered anything like it before. I had to spend a lot of time writing a brief because I couldn't figure out how to do it properly. I was doing the oral argument -- and I can still remember. It is so embarrassing to remember this. One of the justices said, "Well, it seems clear that you should win the case but it's difficult how to write the opinion." What do you say to that?

And I said, "Well, you could just copy my brief." Such an incredibly arrogant thing to say. But he just laughed at me. I did apologize. I thought it was a ridiculous thing to say. But, anyway, they ruled in our favor. And fortunately on retrial, Steve did it. I helped him and then Willie finally had a competent defense and so we avoided the death penalty on his retrial. As well as John Pope's.

So those were the early days in Georgia. It was a very strange world. It was crazy that we should be allowed to do those sorts of cases but there was no one else, so that was what it was. I started doing Mississippi cases after that. People thought I was some sort of wizened, old expert at the law. I was still twenty-six. Anyway.

Q: You obviously talk about the experience in two different ways. When you are talking about working on appeals you are much less engaged in the conversation, compared to

when you're talking about trial.

Smith: Well, trial is what it's all about, right? I love doing trials.

Q: That's right. Yes.

Smith: The intellectual issues on appeal are quite interesting but I would slash my wrists if I had to do that for the rest of my life. Whereas -- and I've said often, and I mean this -- I would much rather represent a guilty person than an innocent person because whether someone did it or not, it's a debate of fact and whatever. But why we do things, why people do horrendous things, is just the human condition, isn't it? Murder is something that everybody could do. And why it ends up happening is just intriguing. Obviously tragic. Don't get me wrong. Being against the death penalty doesn't mean you're in favor of victims suffering, but on the other hand, there's just trying to understand these tragedies. And so they're fascinating. And you learn so much. I love juries. Particularly, I guess I have a bit of a stereotype about what I would refer to as the ACLU-type lawyer. I've got nothing against ACLU but its people who are vehemently opposed to religion and think that -- there is a tendency up North to sneer at the Southerners. Whereas my view on it gradually developed.

[Interruption]

Q: We were talking about the differences between working on appeals and working in the courts, on the original cases.

Smith: Well, that's something I really want to write about at some point because I started off knowing absolutely nothing about trials and everything I learned was by making the mistakes, I think.

Q: Like what mistakes?

Smith: I mentioned the story about quoting *The Merchant of Venice*?

Q: Yes. And the Book of Job.

Smith: The Book of Job. Yes. That is a serious lesson, was that you've got to speak the language that people hear as opposed to the language that you speak.

I remember Millard Farmer would tell the story about a dog. It was Millard's story about how a single juror should hold out. And he told this long story about, "My dog, Blue." And it was all about how Blue had been on a hunting thing and had cornered the fox or whatever they were chasing -- it wouldn't have been a fox in the Deep South -- and refused to give up on it, while everyone else gave up and went home. And there's this long, long, typical Millard story and the moral of the story was that one juror should hold out if they thought it was the right thing to do. And actually, it was a great story for a Southern juror, if told by Millard Farmer.

I remember during an appeal out of Mississippi with this lawyer from just south of Jackson, and I was reading the transcript and he said, "I was recently at a seminar with a man called Millard Farmer. And he told me a story about his dog called Blue." And then the guy

launches into Millard's story. I didn't have to read the next thirty pages of transcript because I knew what was in it. But this was a lawyer who was trying his best, but was just trying to do Millard. When I started off I -- Millard was my idol for how you do trial work in the Deep South. But of course, I can't be Millard Farmer any more than he would want to be me. And so you gradually learn that you have to be yourself and you have to be totally honest with people about that. I think that so many lawyers put on all this rubbish, whereas if you're sincere -- and I was very glad one time to have a juror afterwards say that he may not agree with me on everything but he knew I really believed what I was saying. And that's, I think, incredibly important. But also, speaking the language of the jurors and then recognizing the good in jurors. I think so many people go into those situations knowing who they are and knowing what their prejudices are against other people. But they lose sight of what the good things are.

The best example of that would be, for example, [Allison Scott] Scotty Thibodeaux's case, where Scotty, clearly if you look at the facts, it's very hard to escape the fact that he had killed two women in a really horrible way. And there has to be something wrong psychologically with him, but the experts all said there was nothing wrong with him. I thought that just meant they didn't know what they were talking about. We had none of what you would classically think of as a mitigation case of explaining why something happened. But what we did have was Scotty was intensely religious and that was the whole focus of his life. He was Pentecostal and he was totally sincere. And he would try to climb the mountain and then the devil would grab his ankle. The devil, alcohol, would drag him back down again. And the people who really cared for Scotty were all members of his Pentecostal church so even though we didn't have people saying, "This is why he committed a murder," we had people saying, "This is the good that there is in Scotty." And I learned

that sympathy is not a very powerful tool. Empathy is what gets jurors to do the right thing. Sympathy implies pity and you look down on people. Empathy implies that you see the humanity in them.

And with Scotty we picked twelve Pentecostal jurors, effectively. They were people who the average defense lawyer would shy away from. In a normal case you would say, "My goodness, these people believe in the automatic penalty," and so on and so forth. If you can figure out what their language is and how to get to the goodness in them, they're fantastic. Because they are people who truly believe in redemption. Some people think they do, but Pentecostals really do. And so I would ask them on *voir dire* -- I love *voir dire*. You get to ask people what you want. It's such a wonderful experience, and I just love talking to all these people and asking them all these things and learning about them. And so I would ask the jurors, "What's the worst crime that a human being can commit?" What would your answer be?

Q: Probably murder.

Smith: Yes. See, that's not their answer. Their answer is failing to accept Jesus Christ as your Lord and Savior. Now, you think about that. Scotty has accepted Jesus Christ. The prosecutor over here, Patty Minaldi, clearly hasn't. Or certainly didn't seem like she had. So you're starting the trial with Scotty guilty, perhaps, of a less great crime than the prosecutor. And so I spent the whole trial talking about religion, which is very important. The language that the jurors care about is religion. I don't care what the ACLU thinks, that's what they care about. Patty Minaldi was incensed that I would talk about religion.

Q: That's the prosecutor?

Smith: She kept banging on about how, "I object, Your Honor. You can't talk about religion."

I would say, "Judge, what is she talking about? You're saying I can't talk about religion in the courtroom? Is she a member of the ACLU or something?"

The jurors couldn't understand her, because she was a very good lawyer but she just didn't get that the language they heard was what mattered, not what she thought. And so those jurors saw the goodness in Scotty and they came back against the death penalty in the shortest time I had ever had. They were just incensed at Patty's efforts to inflame them. Which was very interesting. It taught me a huge lesson.

I just love that whole jury selection process in America because you get to talk to people and find the most important things to them. The questions people ask when you go into a *voir dire*, they ask such stupid stuff. They bang on about, "Will you accept the law this? Will you accept that?" Whereas if you ask them open-ended questions that really expose their true beliefs -- like, "What is your favorite Bible verse?"

If I asked you that what would you say?

Q: My favorite?

Smith: You have to answer -- you're under oath.

Q: Yes. I would probably answer one of the Psalms or something or other.

Smith: You've got to come up with a -- which one?

Q: "Yea, though I walk through the valley of death --"

Smith: There you go. That's good. "I shall fear no evil." I would probably pick you on the jury. If you have people say something about Genesis, they're gone. You have people talk about Timothy 2, whatever, it's all this business about work making, they're gone as well. But then you have people who really care about that, certain issues that involve compassion. And they're great. It is that language which taps into them, that you quote back to them in closing argument and it is very effective. It's very powerful because it's what they really believe.

I love that stuff. It's fascinating.

Q: For some reason I would think it's just the other way around, the Pentecostals would be much more Old Testament and judgment rather than New Testament and redemption.

Smith: No, they are. But on the other hand they recognize that no matter what you do, you can seek redemption. So I think you would have a very hard time with them with a client who was totally non-Christian and whatever. But when they saw Scotty and they heard his story they could empathize because the way Scotty spoke was the way they spoke. They could see him. It wasn't like they were forgiving him for murder. They convicted him of

capital murder, but they weren't going to sentence him to death because --

Q: Now, was it a white jury and a black --

Smith: No, they were white and white.

Q: White and white?

Smith: But even so, it's true that women and black people would, as a vast generalization, understand issues more than white men, but again, those generalizations would turn out to be false. I'll never forget the very first trial I did. And there was this guy, Alswar [ph] Dearing, and he was obviously a right-wing lunatic. He had a crew cut, he worked for the Boy Scouts, and he was just quintessentially someone you thought would fry you as soon as look at you. And the judge got to the question, "Could you impose the death penalty?" He was emphatic he couldn't. The whole thing about jury selection is so silly, of course, because during jury selection I'm trying to get the juror to say he will impose the death penalty. And the prosecutor is trying to get him to say they won't impose the death penalty. And it's just a crazy world. But there was nothing I could do to get him to even consider the death penalty. He was not having any of it. And it was very interesting and you get to ask him why. Ultimately there is nothing you can do about it and I'm just interested in why. I don't remember what he said but it is just fascinating to listen to people talk and learn about them. I always like them.

The favorite trial, I think, of all I ever had, was Charlie Rodriguez, because Charlie was just your average Joe and he had killed his wife and he had killed his wife's paramour, who

happened to be the nephew of Congressman [Robert L., Jr.] Livingston from Louisiana. Had a lot of power lined up against us. And Charlie was just simple, simple, simple. I was trying to work out how to present him to the jury. So I spent hours and hours with him. And I had asked Charlie, I said, "Charlie, what's your dream in life?" And Charlie said, "Well, my dream is to have a wife, to have a family, to have health insurance, to have a house, and have a good job."

I said, "No, no, Charlie. Charlie, what's your dream in life? I'm not asking you what your minimum standard of living is. What is your dream?"

And he would say, "My dream is to have a wife, have a family, have health insurance, have a job, and have a -- " you know, whatever. And I thought, "Christ." You know. And this was from my immensely privileged, ridiculous background. But then you start questioning the jurors about that and I would ask all the jurors that. 75 percent of them would say, "My dream in life is have a wife, have a family, have health insurance, have a job, and have -- " whatever.

The thing about Charlie was that he had lost it all. He had had a nervous breakdown. His wife said she was going to leave him, she was going to take the kids, she wanted the house. He had a nervous breakdown and his health insurance didn't pay for it all so he didn't get proper treatment. So he lost his job. So he lost everything. And that was his story. No, he clearly killed them both. There was an incredibly human story behind it. We picked a jury, and I was a bit nervous about this jury. It was eleven white and one black, eleven male and one female, but these were all people who had said that they had the same dream as Charlie. And so I was doing the closing arguments and these guys were just giving me the

dirtiest looks. And I was thinking, "I am not getting through to these people. I thought these were people who would really empathize with Charlie." And I was just so nervous.

And so the jury went out and they came back in eight minutes, in favor of Charlie. And I got a message from the bailiff they wanted to talk to me. So I went back into the jury room. There was this one juror who had been giving me really dirty looks. And I went over and I said, "Look, I'm really grateful you did this. But I've got to tell you, you had me incredibly nervous. I thought you were going to execute me as well as Charlie."

And I said, "Why were you giving me that look?"

And he said, "What you were saying was so much about my life that I was about to cry and I wasn't going to allow that to happen. So I had to put on a stern face." And it was fascinating because that was Charlie. Charlie was that person. And that juror was Charlie. And he just saw that, but for the grace God go I. And that's, to me -- that was not a big case. It wasn't one of the great celebrated cases. But it was the most human case I ever had. Had ever tried. And it was fascinating.

Q: Do you know Scharlette Holdman?

Smith: God, yes. Scharlette is the only woman --

Q: Have you worked with her?

Smith: She is the only woman ever to propose to me.

Q: Oh, really?

Smith: Scharlette proposed to me when I was in immigration trouble. She offered marriage to get around it. I didn't accept.

Q: But you weren't married at the time?

Smith: No, I wasn't married. But I'm very grateful to her for the thought, even though I don't think that was perhaps the way to solve my problems. But she's wonderful, yes. In fact, she came to Pakistan. We're doing a bunch of death cases out there now, and she came out there on a conference that we put together just in February.

Q: I met her through my son, John.

Smith: All right. Yes. Well, she's quite -- she is Scharlette. There is no other --

Q: Have you worked with her on --

Smith: Oh, yes. Yes. It's a small world.

Q: Drawing up the life histories --

Smith: Not so much that actually. I worked with Scharlette, not on a lot of cases, but I did for the first time ever, way back in 1986, 1987, on the case of an aboriginal guy who was on

death row in Florida when Scharlette was in Florida and I was in Georgia. And I did his appeal. His name was Russell Moore.

Look, the thing about death penalty --

Q: That's the one where the jury let him off and the judge imposed --

Smith: Well, they voted for life and the judge overrode it. Yes. And then we did the appeal. It's just fascinating to learn.

One of the things about death cases -- I have a theory called the Zero Theory, which I love to give talks to lawyers and I say, "Now, who's heard of the Zero Theory?" And these are lawyers, they can't say they don't know, so there's always some people who throw their hands up. And I say, "What is the Zero Theory?" And they start muttering. And I say, "Oh, come on, I made it up."

But the Zero Theory says this and it really sums up an aspect. I made it up, so it's not real. But if the probability of something happening is one in a million, then everyone assumes it's zero, that it's not going to happen. For example, let's say that a child is standing on a chair, three feet above the floor, and falls off and hits her head on the floor, what's the chances of her dying? They're very, very small. Let's say it's one in a million. So if I say that's what happened at trial and the prosecutor says, "Well, the odds of that happening are one in a million." Then the jurors say "Well, that's ridiculous, that didn't happen. Beyond a reasonable doubt, we're sure that didn't happen." And so therefore, they convict you.

Now, the problem with this is that if you've got three hundred million Americans and the probability of something happening is one in a million, then it's going to happen all the time. But when it happens, no one is going to believe it. The great thing about death penalty cases is they are the distillation of the bizarre. Because if you really are guilty, then there is a strong chance you are going to plead guilty and you won't go to trial. If you are really innocent, but you're innocent in the context of a bizarre happenstance, then the chances are you will go to trial but the jury inevitably won't believe you. And you'll get convicted. And then because you arrogantly said that you were innocent, denying what is the obvious truth to them, they will sentence you to death for being arrogant. This has happened to certainly a few of my clients. And it's why so many innocent people get sentenced to death.

But it also why it's so fascinating. The case I'm writing a book about right now, Krishna Maharaj, if you wrote it as a novel, people would just think you had done too much cocaine and you're just out of your mind, it was ridiculous. Because it's just too bizarre to be true. But it is true. There is no alternative hypothesis. Chris is as innocent as the day is long but he is seventy-one years old and he's on death row -- I mean, he's not on death row now. We got him off death row but he is serving life, and he is not eligible until he's a hundred and one and he's going to die in prison. We've lost all his appeals because the courts are so cynical that they won't accept the plausibility of the implausible. They won't accept that when all other explanations fail, the bizarre has to be the answer. And that happens in capital cases all the time. I will never cease to be amazed. I'm fascinated by my work, because it's always like that. It just carries on.

Q: What kind of juries can't you win over?

Smith: Oh, you can win over any jury.

Q: Really?

Smith: If you pick them. Now, if they give you a jury of twelve lunatics who, where you don't know them -- even people with extreme views you can win over, if you know them. And that's why *voir dire* is so important, because you've got to know what makes them tick. There is goodness in everybody and you've just got to work out how to get to it.

Now, when I say, in a blasé way, you can win over anyone, you can't do it by just snapping [snaps fingers] your fingers. It is an enormous amount of work. I was always the beneficiary of young people who did enormous amounts of investigation. So we had the facts. The most difficult cases would become actually the easiest because the more bizarre the facts the more patent the explanation ultimately.

Q: I saw you quoted someplace saying that, "If you do your work properly you can win every death penalty case."

Smith: Yes, except --

Q: I don't know if you said it that blankly.

Smith: Well, something like that. I think that is generally true, at trial. It's not true on appeal because you are dealing with all this legal rubbish. But at trial it's true, with the

exception of the fact that the ultimate lesson is that the bizarre is always going to happen. You're going to lose the most obviously winnable case because something crazy is going to happen. To say that you would win every case is horribly arrogant. Obviously you wouldn't ultimately.

I was terribly grateful to leave the U. S. without any of my trial clients on death row because that's really hurt Millard. Millard represented Henry Willis [III] back in the early 1970s. Henry was a black guy accused of killing a white police officer. A very difficult case. And Millard lost it. He lost it in an era when it was a very unsophisticated, if you will, way of trying capital cases. And he did the appeals for the next twenty years, and did them at the highest level that one did them, according to the era. But capital cases got so much more complex as the world went on. I ended up doing Henry's successor petition, at Millard's request. There were some things in there that were obvious, to us now -- whatever it was, the late-1990s -- that Millard had not done in 1976. And poor Millard felt so bad about it. Look, if it had been me, I wouldn't have found my way to the courtroom. It had a devastating impact on him, that someone who he had tried the case, ended up getting executed. Because, again, psychologically you have no one to blame but yourself at that point. I think it was very hard on him. On a purely psychological level, I'm so grateful that I have avoided that particular self-flagellation, or whatever one would call it.

Q: What about Southern prosecutors?

Smith: Look, I'm very fond -- I mean, I think they're crazy, right? I think anyone who tries to take someone else out and kill them is psychologically, seriously imbalanced. But that's just in my little world. Mental health is defined by the society you're in, I suppose.

I was in Pakistan recently and we were helping to represent a British guy who is accused of blasphemy. He had said a few things about the Prophet Mohammed. They want to kill him. We could get him off quite easily, because what we have to do is just put on the insanity defense and say only a crazy person would say things like this. And the local people will say, "Wow, that's true. If he said that, he's got to be crazy. All right, we'll let him off." And so they will acquit him in the end.

But the bottom-line is I think they're crazy. I think the guy we represent may be the only person who is sane in the whole community. But of course, in the community that he was in, he's the crazy one.

I feel a bit the same way about prosecutors who seek the death penalty. I mean, they think I'm nutzo -- right? But I think they're crazy. And when the history books are written I suspect they will be on my side. In that sense I don't think they're wicked. They're working within the system that they were brought up to work in and if they had been brought up in a different system, they wouldn't be doing that. I was very sorry about some of the very effective lawyers who were on the other side. Like John Sinquefield, for example, who I think, John, if he had been brought up in a gentle, little society like this one --

Q: Which case was this?

Smith: No, John's in Baton Rouge. John is the guy who offered to buy me a one-way ticket to leave town. He prosecuted me for contempt one time, which was very ugly. It was very unpleasant. But you know.

Q: Oh, tell that story.

Smith: Oh. It was when I was trying Charlie Rodriguez's case, right? Which is just along the road, just along I-10, or I-12, or whatever it was there. I was trying Charlie's case. I get to the Friday of the trial, and I think we won the case on the Friday. And in the meantime, while I was in that trial, John Sinuefield had charged me with contempt in Baton Rouge, just fifty miles along the road. I was to be put on trial on Monday. I had no chance to prepare anything. And the charge of contempt was ridiculous. There was a guy called Marcell O'Conner and I had gotten involved in his case because he was represented very ineffectually. And so I jumped into his case. The prosecution wanted him shrunk, wanted him to see a psychiatrist. Well, I wasn't going to let their expert see our client before we had had our own evaluation. I told Marcell that he had every right to take the Fifth and refuse to talk to the guy. Which he did -- that's in the Constitution. So I told him that.

Well, Sinuefield said that by advising my client not to talk to the state's expert, after the court had appointed and ordered the state expert to do an evaluation, I was guilty of contempt. Ridiculous. But on the other hand, in Louisiana a prosecutor can up and charge you with contempt and you have to go to trial. There is no choice about it. And it's a judge trial and my goodness, I had to show up in court that Monday and go through a trial. If I had more time to think about it could have been fun. We came up with some ideas. Tom [L.] Lorenzi represented me, with Walt [M.] Sanchez. They did a good job with a very difficult client. There's nothing worse than representing a lawyer. But even so, we could have had more fun if we had more time to prepare. It was very unpleasant, because there's old John Sinuefield up there arguing that I am the cause of the American demise and the entire

republic might collapse if I'm not banged up in prison immediately. It was -- in retrospect, of course -- it was very interesting to hear, with your own ears, a prosecutor talking about you the way that they normally talk about the client.

One of the mistakes I've made over the years is not really appreciating the impact of that on the prisoner. In Ricky [J.] Langley's case, for example, Rick Bryant, who is a prosecutor I have no respect for, was just being really ugly about Ricky and saying he should die this and die that, and we should kill him and whatever. And Ricky lost it, and lost control and stormed out of the courtroom. Well, why shouldn't he? That's a perfectly reasonable thing to do and it's stunning that more people don't do that. And it's a tribute to the sort of imposing power of the judicial process that more people don't do that. Ricky was seriously mentally ill. Fascinating, fascinating case and great story. Which Hollywood is making the movie on now. But it was the kiss of death for him in that trial to have the jurors see him out of control.

Anyway, I've got acquitted of my contempt.

Q: Pardon?

Smith: I was acquitted of contempt. But it was a close-run thing, I'll tell you.

Q: Why the move to Louisiana?

Smith: Well, I moved there in 1993 because I had spent nine years with the SPDC and I wanted to set up an office myself. I have a huge respect for Steve, I think he's a wonderful

lawyer, really good person. Steve did things in the office in ways slightly different than the way I would want to do them. And I just thought I would go and make my own mistakes.

And also, I had always wanted to go to Louisiana. Tom Lorenzi, who is an old friend of mine, had been trying to get me to go down there. And they had come up with this contract that I could do four capital cases for Lake Charles for \$100,000. I thought, "Wow, that's an enormous amount." I've never heard of so much money. And so I thought this is the moment to set up an office because they give us \$100,000, that would keep us afloat for a year or so or more. And I would go to Louisiana, where my friend David [J.] Motter was, we would set it up together. I love Louisiana. One thing that some of our capital colleagues do too much of is the sack cloth and ashes business. You've got to have --

Q: Pardon?

Smith: Sack cloth and ashes. They take life too seriously. If you're going to survive in this business, you've got to not weep every day. You see things which would make you cry but on the other hand I have little time, really -- I have sympathy, but little time with the notion that we should view it all as an assault on our own egos. Because the victims in these cases are the victims of murder and the victims of execution, not us.

So at any rate, I thought this was a great chance to set up the office. It was a disastrously bad financial move because the guys I was meant to represent, I was still representing ten years later. And, these were capital cases that dragged on and on. One is still going on. I tried the case twice and my office --

Q: Who is that?

Smith: Ricky Langley.

Q: That's right.

Smith: Yes. It was the worst financial deal I ever made. But it at least it allowed us to set up the office in New Orleans. And New Orleans is a wonderful city. It's just great. And if you have to be living in the Deep South doing this stuff, it's the place to be.

Q: You had to take the Louisiana bar?

Smith: No, I had already done that.

Q: You had already done that. You already told me.

Smith: That was another reason. At least I could do it without taking a bar again.

Q: What are the particularities of Louisiana law? It's so much different --

Smith: All about such a myth. It's a total myth.

Q: Is it?

Smith: Yes. I like to do cases in different states because the law is different in each state.

And one thing I would do in the early days is I read every case from every state. Every capital case. Because the way you won cases was to import the ideas from other states into your state. If you raised a hundred different novel issues, the judge only had to get one wrong and you would get him reversed. And normally they would get dozens of them wrong. One thing I love to do is go from state to state and import their different ideas into the different places. Louisiana's law is really not that different. It's no more different from other states are from each other. But there are lots of good things. One of the great things in Louisiana was you had an automatic right to an interlocutory appeal, pretrial. So you could take any issue up on pretrial, which was great because you could get a lot of things reversed before they messed up the trial. Louisiana I'm very fond of.

Q: This is after *Dead Man Walking*?

Smith: Yes. Well, that was there, yes.

Q: Did you meet Sister --

Smith: Oh, I know Sister Helen [Prejean] very well. She lived there for a long time. No, she was very good.

Q: Then there was a network of people that you could move into, in Louisiana?

Smith: There were some. It was all post-conviction and I was interested in trial work. When I moved there it was very badly funded. Back then it was still a thousand dollars for a capital case. If you were appointed to a case you would get paid a thousand dollars at the

end of it. And that was for the lawyers, the investigators, everything. And you know. I remember when we had that in Mississippi, too, and Steve and Palmer did Marion [Albert] Pruett's case. We ended up suing them for the thousand dollar cap. One of the claims that we had was that it violated the federal minimum wage, because it did. It was way less than that. I think they were being paid about \$1.98 an hour.

Q: By that time you were married?

Smith: I was married twice. Well, I was married first in 1980 -- I was married on Valentine's Day in 1986. That didn't last too well and then we got divorced in 1990. And then I met Em in 1996.

Q: What are the effects on your personal life, not making any money?

Smith: Oh, I don't care about the money. That's nothing. One thing Christiana, my first wife -- she was Italian and she was not into the world of the death penalty, she was an artistic sort of designer person. And it was hard for her because it was sort of like being in a bigamist marriage. It's not what people make out. Even though it's very stressful stuff and when you're in trial, you're there twenty-four hours a day, but otherwise I would work from nine to six, not more than that, and I would take weekends off mostly. So I don't know that that's really a catastrophic thing. But I got much worse later. But then Em, of course, we worked in the same office. That was the perfect scenario. And in fact, at one point in our office in New Orleans, when we had about twenty-three people there, I think sixteen were in relationships, either with other people in the office or with one of our associate's offices. That was the only way to have a relationship was to go to work with the person that you

were in a relationship with. I will say that it was the hardest thing about my job as the director, was reconciling all these relationships. Give me a capital trial any day. But trying to reconcile these people was a nightmare.

Q: You brought over a number of Brits?

Smith: Some. Yes. We had in the office three or four Brits, a couple of Australians.

Q: I read in a newspaper for somebody who went in there and said the accents are all British accents and in the middle of Louisiana.

Smith: Yes, yes. Well, there was a lot of that. It was a big advantage. I remember when the study came out in Georgia that said that the average Georgian thought someone with a British accent was twice as smart as them. That's the way the British feel, of course. It was very helpful.

Q: The documentary, *Seven Days in May*--

Smith: Fourteen. You saw the short version obviously.

Q: Pardon?

Smith: You must have seen the short version.

Q: Yes. How did that come about?

Smith: Well, that was 1987. That was very early days. I didn't know Paul Hamann at the time. Paul was the BBC guy making it. He had gotten in touch with me just because I was British and in Georgia. I had advised him to go to Mississippi because that was a place he might get into. It was pure coincidence that the case that he ended up being allowed to do was one where I was representing the guy. I was doing the successive petition. Ken [J.] Rose had done the work up until then and Ken had asked me if I would come and help do a successor, just to have a new look at the case.

I will say, up until then it had been relatively easy to stop execution dates. I didn't think for a minute that it was going to get to an execution. And I told Paul that. I said, "Look, you might get an interesting insight into the American process but he's not going to get killed." Up until then we had stopped most of the cases. It had been relatively easy. And this was just another example of those lightning bolts. I only represented Edward [Earl Johnson] for three weeks, but even so, in those three weeks we had masses of stuff. And indeed, one of the issues that we ended up losing on in Edward's case later, James Stringer won in the U. S. Supreme Court. When confronted with the fact that the Fifth Circuit had rejected that same issue in Edward Johnson's case, the Supreme Court said, in their opinion, "All we can say is that the circuit was wrong." And that's just so sad that it came after Edward was dead and buried, of course.

But I thought we were going to win all the way through. The people who came to bat for him were fantastic. The Pope [John Paul II] intervened. I thought we would get the Pope involved because the governor was Catholic and it would apply pressure on him to do the right thing. It was easy. I called the Papal Legate up in Washington, and I get a call back. I

talked to his secretary. He called me back in about an hour and said he would get right on to the Pope. The Pope called the priest for the governor within twenty-four hours, and had a message to the governor saying don't kill him, which was astounding. And there is so much about that.

Poor old Edward. He was eighteen, very, very strong case of innocence. But back then, it was really just me and Rob [B.] McDuff doing it, with Ken helping, and we didn't investigate nearly enough. It wasn't until after they killed him that I found a woman who said that she had been with him at the time of the crime.

Many years later, when we sued the State of Mississippi over the use of the gas chamber -- or was it over counsel? I forget which of the law suits we brought against them. The Governor's name was Allain -- Bill [A.] Allain. Bill Allain was no longer Governor and he was a lawyer representing the Supreme Court. So I went to talk to him about the case to see what we could negotiate. And I thought, "Well, if it comes up I will talk to him about Edward's case," because I wanted to. I thought he had obviously done the wrong thing. I hadn't got in his door before he starts talking to me about it. We spent the entire time discussing Edward's case and he says he wants to go on camera.

As we sit here today, there is a woman who I am working with who is in Mississippi today, hopefully this week doing an interview with Bill Allain where he wants to go on camera to say a) he thinks Edward was innocent, b) a white woman came to him and said he was innocent and told him who did the crime, and c) that he thinks that having politicians involved in the decision of life and death on clemency should be eliminated forthwith because the only reason he did the wrong thing was because he was worried about his

election. And I think if he does that, I hope he does, then that will be incredibly powerful. It's one thing I've always wanted to do for Edward, is make sure his death is not totally in vain. *Fourteen Days in May* did that. I mean it had a big impact, I'm glad to say. But it's horrible.

Q: You watched a couple of your clients --

Smith: Six.

Q: -- be executed. You've gone to each one of the executions?

Smith: Yes. I think you have to. They certainly need someone there who is on their side. Like with Larry [Grant] Lonchar, he came within one minute of his execution date before we got it stayed. So you need to be around.

Q: Tough thing to do?

Smith: Well, it's horrible. Of course, not the worst thing. The worst thing is to listen to a juror come back and vote for the death penalty because those are people who have the choice to do the right thing. When you are at an execution, the majority of people don't want to do it. The guards don't want to do it.

I remember when they were killing Nicky [L.] Ingram and I wasn't able to be with him anymore, I was just on the phone with him from the holding cell, before they took me around to the execution chamber. And this guard was coming towards me and he looked

like some crew-cut, right-wing guard who was going to be all gung-ho for the death penalty. As he came by he stopped and said quietly how sorry he was that it was all happening and he knew Nicky and he was really sorry it had to happen. That's the general attitude, to be honest, among guards. Because they know these guys and they don't want to do it, but they don't have a choice. The people who actually are involved in the execution are a bit different because they are volunteers. But most of them don't want to be involved. Honestly the worst people are the media because they are voyeurs. They are there just to get a story.

But overall, it's a horrible, horrible thing but it's most horrible, of course, for the guy who is being killed. I think it's always important to maintain that perspective.

Q: And along the way you've gotten to know the families?

Smith: Yes. Particularly with some. With Nicky, I represented him for twelve years. I knew him very well. He was a friend. I had gone through divorce with Nicky and he was a sort of person I would talk to about it. We were very close. Nicky, I wouldn't say he was a saint. He wasn't. But having him shaven and electrocuted, just disgusting.

Q: When did you begin to feel that you needed to change? A change?

Smith: Oh, I never felt that.

Q: Well, to come back to England.

Smith: Oh, that was something totally different.

Q: Oh, it wasn't just burnout?

Smith: No. No, no. I don't believe in burnout.

Q: No burnout?

Smith: No. God, no. I would burn out --

Q: Well, let's get that on the record because it seems --

Smith: No. Gosh, no. If I had to work in a corporate law firm doing pointless things about money, I would burn out in seconds. But if I'm allowed to do what I love to do for people who need it, no, there's no burnout. I love this stuff. We moved back to England simply because Em's parents and my parents were getting very old. Well, my parents are older than Em's dad, who I just see working out in the garden. He's seventy-two but he wouldn't like to be considered too old. My parents were in their eighties and so we moved back here because of that mainly. And indeed, my father died a couple of years ago so we moved back to be here when that sort of thing happened. That's the reason we came back here.

Q: So your wife is a lawyer, too?

Smith: Yes. She worked with us, went to law school in America, and then set up the Innocence Project, representing lifers effectively. I'm obnoxiously proud of my wife, Emily. And the first thirteen cases, she proved twelve of them innocent and got them out, which I

think is tremendous. By the time we left, that was her record, which I think is pretty damn good.

Q: Do you still have death penalty clients?

Smith: Dozens of them, yes.

Q: None at all?

Smith: No, we've got dozens of them. We've got probably thirty. They're all over the world now. What I find interesting now is we've got twelve in Pakistan. I was helping represent Akmal Shaikh, the British guy who was killed in China just over Christmas. There are various ones that make the American media.

Q: He was strange, yes.

Smith: Oh, he was bipolar. He was just like my dad. The fact that they wouldn't take into account his mental illness was disgusting.

But then, we represented Samantha Orobator, who was the British woman in Laos who was pregnant on death row. And that was fun because that was just doing it the same way we would do it in America and the Lao government had no idea what hit them. We really embarrassed them. It was great. They let her go and she's free now. She's home, free, in England with her little child.

We've got people we represent. Still a lot in America. Actually now a project in America I'm very excited about, which is that we're surveying the entirety of death row -- all 3,260-odd -- to try to determine how many are foreign nationals because if you have foreign nationality, it immediately brings more power to bear on your behalf. We've got five people working full-time funded by the Council of Europe to do that and it's very exciting. It's just started and all sorts of good things happening on that.

Q: I have a list of cases but I don't know if it would be worth going through them.

Smith: Well, we might want to put that off until tomorrow because I think it's getting to that point where someone's --

Q: Why don't we do that.

Smith: My visitor is going to come in twenty minutes.

[END OF SESSION]

MJD

Session Three

Interviewee: Clive Stafford Smith

Location: Symondsburry, Dorset, England

Interviewer: Ronald J. Grele

Date: June 30, 2010

Q: This is the third session of the interview with Clive Stafford Smith for the Columbia University Oral History Research Office. Today's date is June 30, 2010. The interview is being conducted in Dorset, in England. The interviewer is Ronald J. Grele. This is an interview for the Columbia University Oral History Research Office.

Terrific.

Smith: Terrific. Very good.

Q: Yes. Yesterday we talked about talking about some of your cases. And I also have a few notes for filling in.

Smith: Sure.

Q: Different things, some small, some large. But we'll start with the larger issues.

We talked about prosecutors yesterday and we talked about juries. We didn't talk about judges. How do you form relationships with judges, what has been your experience with judges? I know at one time I read something that said it's necessary to request the removal of the judges very often.

Smith: It is unfortunately true in the U. S. that the majority of judges become judges from a prosecutorial background, and the elected nature of state court judges is truly horrific. The idea that you should run for election based on what you're going to do? I remember, there was an election in Louisiana for the Supreme Court of Louisiana where the two prospective justices were vying over who was going to be harshest on the death penalty. That's absurd, the idea that you're going to prejudge cases in the election campaign and promise to execute more people. What is perhaps even more bizarre is Florida, where some of the defense lawyers are elected. Can you imagine? What are you going to run on? What platform is a defense lawyer meant to run on?

This whole electoral thing is, I think, an anathema to justice. There's a consequence very often. The state court judges in capital cases are utterly biased, in favor of the prosecution. It's not always true. I've dealt with one or two very good judges, but I think they've been the exception rather than the rule. And there's a consequence. It is a matter of power. I remember with the case of Walter [C.] McMillan, who was the judge in both in Willie Gamble's case in Georgia and also in George [E.] Dungee's case, I think. He came from a very racist background and he was thoroughly biased and he was proud of the fact that he had sentenced a lot of people to death. He was never going to be fair. He wasn't fair in any respect. We did move to disqualify him on the basis that he was racist. And there was a hearing and Steve Bright did most of the hearing on just how racist he was. The evidence reflected that the only black people in the courthouse were the janitors and that the only other black people who Judge McMillan would basically deal with very much were serving him at the country club.

That hearing included Judge McMillan testifying. And he testified, as I recall, that he

called black people niggers. Wouldn't answer whether he called Willie Gamble or George Dungee a nigger. Of course, you don't win a lot of those. You don't ever win those hearings, really, because how often is it going to be that a brother judge is going to say, "Oh, yes, Judge McMillan is too much of a bigot." But actually the headline in the paper after that hearing was, "Judge McMillan found to be not too racist to sit on the case." And the question on appeal then became, well just how racist do you have to be?

We got rid of Judge McMillan in the end but on different grounds. It's always the same way. It's like Al Capone. He didn't go down for shooting people, he went down for tax evasion. The same is true in these situations. They're not going to say the judge is too racist. But Judge McMillan filed his own briefs on appeal, defending him, saying that he shouldn't be recused. And that's sufficient evidence of bias right there. What's a judge doing filing his own pleadings? So we got rid of him eventually.

But these sorts of things used to happen all the time. I probably filed a motion to recuse a judge in more cases than I didn't, in terms of state pro-capital trials. That was because the judges were biased. Now, they didn't like it. They didn't necessarily like me a whole lot. But that wasn't the point -- the point was how you level the playing field. Yes.

Q: I was going to ask, what are the repercussions if you lose that?

Smith: Oh, I don't care. The judge is not going to be my best friend anyhow. I learned a principle on the very first case I ever did, where we were sitting around in the judge's chambers talking about when to set the trial, and the judge was asking when everyone's holidays were -- vacations. We went around the room and everyone said when they were

going on vacation. I said when I was going on vacation. And so he then immediately set the trial for the time I was going on vacation. Now that sort of thing used to happen all the time. I was trying a case in Baton Rouge, Louisiana, when I had to be hospitalized for something. They wouldn't stop the trial. Even in a federal case, they thought I had cancer and so I had to have a biopsy operation. They didn't stop the trial for that, either. There's a very different rule applied towards defense lawyers than prosecutors. In some cases. If you're not playing their game. But that's fine. I think that when people behave badly it's almost invariably because they're insecure. So it used to give me a sense of satisfaction when the judge would try to mistreat me, personally. Because as long as he was focused on mistreating me he was less focused on mistreating my client.

Q: How do you make the decision to challenge them openly in court? Do you ever challenge them openly in court?

Smith: Always. Always.

Q: Always?

Smith: Oh, yes.

Q: When do you make that decision to do that?

Smith: Well, it's all about power. The most shocking power of all is the power that the government wants to exercise to kill your client. I remember, it was -- this happened many times -- but I remember holding a hearing in Sam [Bice] Johnson's case in Mississippi,

where we were alleging that the whole prosecution of Sam was racist. And I think it was. Sam is black, the victim was a white police officer, and there were all sorts of things that were going on. The sheriff, the guy who was in charge of the investigation, was Lloyd "Goon" Jones. And Goon Jones was notable for having ordered the police, the highway patrol, to open fire on Jackson State students back in the civil rights era. There were other things. So we put on all this evidence about how Goon Jones had taken this one civil rights worker, had dry-shaved his head, poured moonshine on his head, and stuck a fork up his nose. And he was testifying and I had obviously done a lot of research on him and he used to call black people niggers. I asked him if he still did that.

And he said, "No, I don't."

I said, "Well, why don't you?"

And he said, "Well, someone said that was rude."

So I said, "What do you call black people today?"

And he said, "I call them colored boys."

And I said, "Well, when are you going to stop doing that?"

And he said, "When someone tells me it's impolite."

I said, "I'll tell you what, I'm going to share with you right now, that's not polite."

And he looks at me and he says, "Boy, I don't appreciate your opinions."

The whole thing in that courtroom, it was so obviously racist. Years ago I represented Warren McClesky on his successive petition and the idea that you have to prove that the judicial system is racist, you might as well prove that the sun rises each morning.

Q: Right.

Smith: But I think it's very important to do that. I used to divide motions up into three types of motions. There were the "duck motions," which you just worked them and you filed a bit of paper and quack, and a total waste of time. Then there were what I referred to as the "Sinéad O'Connor motions," because she did the song, *The Emperor Wears No Clothes*, which in litigation is where you are pointing at stark realities about the judicial system but no one is ever going to admit it. And one of those is invariably racism. It's permeated with racism, the judicial system. But no one is willing to admit it because when you do admit it, it de-legitimizes the process. Then the third group of motions were what I called the "George Bush motions" because that was all about "kicking the ass" of the prosecution. Because when George Bush Senior was asked about going to war over in Iraq, he said, "We're going to go over there and kick a little ass," which is just a stunningly inappropriate thing for a president to say about a war where people are going to get killed. But those were motions where you really expected to get something done.

But the "emperor wears no clothes" issues are very important, because the moment you start accepting the unacceptable realities of the system, then you might as well just give up.

With judges, even though a lot of them are biased and even though you knew they were going to get very hostile when you accused them of being biased, I would always do it -- almost always do it -- for the simple fact they needed to hear it. I think it intimidated them much more than they can intimidate me. There is a great advantage to not caring what they think and not caring what they do, insofar as there is nothing they can do to me. I don't care if they try and lock me up. That's fine. As long as they're trying to prosecute me they're not prosecuting my client. I really don't care about that stuff. Whereas they do care. I think that's important.

Q: In talking this way, you mentioned a number of your cases. I think that's a nice way to go, to frame an issue and then have you illustrate it by the cases. Several cases you dealt with, obviously, are most of them black?

Smith: Probably about fifty-fifty. Disproportionately black, but not most of them.

Q: Not mostly. A number of them involved are people of very low IQ.

Smith: Yes.

Q: Are they more prone to be prosecuted and convicted than people who --

Smith: Oh, most definitely. People who have low IQ, mentally ill, they're just easy targets. That's why they disproportionately end up on death row. It's not because mentally disabled people commit more crimes, it's because they're just easy.

I guess the best illustration of that would be a guy called Jerome Holloway, who I represented in Georgia [*Holloway v. State*, Supreme Court of Georgia, 1987]. Jerome's IQ was forty-nine, and you get forty-five points for just taking the test. That means that the chair you're sitting on has an IQ of forty-five, whereas Jerome was four points above that. The lawyer who represented him at trial, first off, just didn't understand it. He thought fifty is half of hundred, a hundred is an average IQ, so he's just half as smart as the rest of us. Mentally disabled people, of course, are very, very good at covering up their inabilities, so the only evidence against Jerome was a confession and I needed to prove that he would confess to anything.

One of the tragedies of mentally disabled people is to get the message across to judges and prosecutors who are not terribly well-educated in these things themselves. Unfortunately, you have to humiliate them. With Jerome Holloway, I asked him, I said, "Jerome, did you assassinate President Lincoln?" And he had no idea what the word "assassinate" meant, because it was a big long word. But he and I had established a relationship. He trusted me and he said always what he thought I wanted to hear. So if I asked it in a particular way he would say yes. So he said, "Yes. "

So I said, "Did you assassinate President Kennedy?" And he said yes. Start a whole new theory about the Kennedy assassination. And then this was when Reagan was President and it was when you could make jokes about him because it was before the poor guy got Alzheimer's. So I said, "Did you assassinate President Reagan?" And he said yes. And I said, "No, Jerome, President Reagan is not actually dead, he's just brain dead." Which, anyway, some people thought was funny at the time.

The only thing that Jerome understood in court, when we were going through this whole process, was the people were laughing at him. That was terrible for him but it was the only way to get across to people how terribly dysfunctional he was and how he would confess to anything and to convince them that actually this confession was not worth the paper it was written on.

And there was just an extraordinary -- people talk about coincidence. I don't really believe in coincidence for every time it happens, a particular thing, it doesn't happen a million times. So, what's the big deal? But there were some extraordinary issues there and one was that at the same time as I represented [Shelton] Jerome Holloway in Georgia -- and we did get him out from under the death penalty, I'm glad to say -- there was another guy I was representing whose name was Jerome Holloway who was in Alabama, who had an IQ of forty-nine. He had been through a much more sophisticated education -- special education -- process, and was therefore much better at covering up his inabilities. But it was just amazing to find all these people called Jerome who had such low IQs on death row. There was Jerome Bowden as well, of course, and he was executed. Jerome Bowden was given a test and told, "If you fail this test you live, if you pass the test you die." And he tried. Is there anything more illustrative of his intellectual limitations than the fact that he tried? And when he "passed the test" he was happy. And when they gave him his last meal he saved his dessert and he said, "I'll have that later." This was the illustration of how out of touch with the world poor old Jerome Bowden was.

But I had a lot of clients. We did a study in Mississippi. I sometimes have harsh words to say about the U. S. Supreme Court. I think they have no concept about the real world down in capital trials in the Deep South. One of the ways I like to illustrate it is through the

three silliest Supreme Court decisions of the 1980's and 1990's. And they go in this order.

The first is *Giarratano v. Murray* [*Murray v. Giarratano*, 1989]. The idea that the Supreme Court could say that someone who is on death row has no right to counsel and should therefore represent himself is absurd. I mean, this is the most complicated legal process in the world and you've got all these mentally disabled people who are meant to represent themselves is just stupid. Again, I think it's very important to ridicule that sort of decision. In Mississippi we did a study of everyone on death row. We IQ tested them. 32 percent came out as mentally retarded --within the range of mental retardation, at least. We gave them the LSATs because I thought it would be fun to just see if they could get into law school, because if they couldn't get into law school how could you expect them to represent themselves? No one passed. Not one of the people on death row passed. More than a third of the people on death row scored less than zero. I didn't think you could. And I thought of IQ testing the attorney general who was arguing these guys shouldn't have lawyers. I thought maybe he would come out mentally disabled, too. But then, just to illustrate the absurdity of this, we asked that the people on death row be allowed weekend furloughs to go investigate their case, go talk to the jurors, see what happened in the case. Of course it was ridiculous but I think you have to do things like that to show how absurd the notion is that these people are meant to represent themselves.

So *Giarratano v. Murray* is the third silliest that we've had. The second, of course, is *Herrera v. Collins* [1993] where the Supreme Court effectively said that there is no U. S. constitutional bar to executing innocent people. If you translate that into English what it really means is that whether you did it or not is not constitutionally relevant to whether you should die for it. Now, that's just too absurd for debate. And then of course, the third

was *Bowers v. Hardwick* [1986] which said that you could legitimately criminalize consensual oral sex. I had a little side line in oral sex cases, which I think were very important. They were fun, apart from anything else. But it was very important because what you have to remember is the same judicial system that comes up with ludicrous rules like that is the one that is judging people's life and death.

And I guess the best illustration of that was a case I had the late-1980s, one summer, where this guy called me up and his name was Jim -- what was Jim's last name? At any rate, Jim -- I forget his last name [James D. Moseley]. But he was, he said, serving five years for consensual oral sex with his wife. And I said, "Come one, pull the other one." But I went down to see him in a maximum security prison in Georgia. And he was classified the same as a rapist. When I went in to see Jim, he told me he never told anyone down there that he was in there for oral sex because they would laugh at him. He would go out in the yard and Jim would say, "I'm in here for murder. What are you here for?" And he would say, "I'm in here for having sex with my wife?" and they laughed at him. So he started saying he was a murderer because it was just easier.

But it was one of those things that you just couldn't have a conversation about without making awful puns. Towards the end of our conversation I said, "Jim, we'll get you off within a week. Don't worry about it." And I called up Michael [J.] Bowers, the attorney general of Georgia. And I said this is ridiculous, this guy, the way he had got there was his wife was apparently cheating on him with a lawyer and wanted to get custody of the kids. Her lawyer friend said, "Well, have him arrested for something because then you will automatically get custody." She alleged he had raped her. Her sister talked to her, and you know, rubbish, so her sister went to the police and said, "No, this is ridiculous. She's just

making it up." They went ahead and prosecuted him. In the meantime he had confessed that he had had oral sex with her. The judge instructed the jury that that was a criminal offense. So the jury -- and we talked to all the jurors -- and they convicted him of this offense that I hope they were indulging in on a regular basis.

Anyway, it was actually great fun. There were two ways of approaching that. One is to take seriously what is ludicrous, and I think that is very dangerous. It's like arguing about torture. Do you argue that torture is legitimate, or illegitimate, or do you just take the mickey out of them and make everyone laugh at them? I certainly prefer the latter. And so in that case we sat around writing a brief. We called it *tunnilingus prohibitem* and people thought that was a real Latin phrase. We accused them of "cunning linguistics" in the brief. There was a section under the First Amendment where we said this is a protected form of oral expression. I had a section under the Eighth Amendment saying, "This is disproportionate because if you take bestiality, necrophilia, and public indecency, and run them all consecutive, you get more time in prison in Georgia for having this heinous act with your spouse in the privacy of your bedroom than you do if you do it with a dead horse out in the middle of the courthouse square." Indeed, a little bit of free advice for people who are going to Georgia, if you wait until your spouse dies, it's only necrophilia. You get half as much time in the prison as while he or she is still alive. It was just absurd. And yet the State of Georgia fought to maintain its right to do this. We moved to disqualify in that case all the attorneys general unless they would swear in public they had never done it themselves. Because how could they possibly prosecute this guy for something that they were probably routinely practicing?

That was an illustration of the judicial process at its very worst. But unfortunately, it's an

illustrator of the judicial process that we dealt with everyday. We did get Jim out of prison, but he ended up in a mental hospital because he had been a military Naval person, he believed in America, justice and everything. To experience what he experienced just crushed him.

Q: It does raise an issue about what is defined as a crime.

Smith: Of course. If I were to ask you, and I'll advise you as your lawyer not to answer this question, what's the thing you've done in life that you are most ashamed of, I would -- and the same thing with me -- I would hazard a guess that the honest truth to that is it is something you did to someone you love, close to you, that really hurt them, that's isn't a crime. It's just some nasty, selfish thing that we're all ashamed of. Now, the question is, why isn't it a crime? What you did to the person you love was far more damaging to them, far more hurtful to them, than perhaps being the victim of a burglary or being a victim of a theft, or whatever. The question is why is what you and I do that's so nasty not a crime. I think there's an obvious answer to that.

Q: A lot has been written on the attempts to change the law in terms of death for rape and other crimes than murder. And they've been fairly successful in some of those efforts.

Smith: Some. Not really. They did it in Louisiana and they sentenced one of our clients to death and we got it reversed in the Supreme Court. It's a very emotive issue, that. But on the other hand the idea that you have the death penalty for it is even sillier than murder.

Q: My impression was that the courts are becoming more and more restrictive about the

crimes for which one can issue the death penalty.

Smith: Well, they did -- they are. And they have. And I think we're winning that battle, gradually. But that's small solace for the three thousand people on death row at the moment. When they die it's not going to do them much good to tell them that one day we'll win the battle.

Q: A number of the cases that you have are very young people.

Smith: Yes. Well, fortunately, that is now history. But it wasn't for a long time. I had a lot of kids -- they call them juveniles, and that's another aspect of this. It's dangerous using those anodyne words because they are designed to make people not unto humans. Who calls their own child a juvenile? Nobody. But on the other hand, if you call them kids, they are kids.

I remember going up to see Shareef Cousin, for example, who was sixteen years old, sentenced to death in New Orleans for a crime we later exonerated him for. He clearly didn't do it. But when I went to see him at Angola, on death row -- yes, he wanted to be the tough, young kid, but just a few minutes into our conversation, he burst out crying. And he just couldn't understand what he was doing up there. We did get him out eventually but it had traumatized him and wrecked his life.

Q: And the case of Troy Dugar?

Smith: Troy Dugar. Oh, that goes back a long way. There are many cases I look back on and

I think I let people down, and Troy is one of them. Troy was fifteen and he was on death row, out of Lake Charles, Louisiana. His case was ridiculous.

When I first went to see Troy it was obvious he was absolutely insane. He was schizophrenic and he was picking at imaginary spiders on his skin and hearing voices and all the rest of it. And that had been happening in trial. I mean, the judge in his case was this old judge in Lake Charles who I had crossed swords with a few times. He was an idiot, the judge. It was not his fault, but he was an idiot. He had sentenced Troy to death and it amused me to talk to Troy about his experience of the trial because poor Troy was so crazy that he described watching drool running down the judge's lips and watching the judge float off the bench up to the ceiling. All of these things that illustrated very powerfully how crazy Troy was. But at the same time it gave me a slight chuckle to put them all into the evidence, because it didn't describe the judge in very flattering terms.

But we raised the issue of whether he could proceed on his appeal when he was clearly incompetent. And it was a new issue and something the Louisiana Supreme Court hadn't dealt with. They didn't do anything for a long time and I got the hint that they might do the right thing and send it back for a retrial if we filed a particular motion. And I did, against my better judgment. I didn't want to do it because I thought the pressure was squarely on them and we should just leave it there. What they did was they reversed the death sentence and just sent him back with a life sentence. That was a tragedy and I feel guilty not to have done more later on Troy's case because he clearly did the act that he was charged with, but he was also clearly insane and he should have ended up in a mental hospital, not in prison. I think the poor kid was just tortured in prison. I think he would have been tortured in a mental hospital, too, but it's just wrong to treat him that way.

Q: You mentioned Lake Charles a couple of times. Are there certain kinds of areas, regions, states, communities, from which most of these cases come and others where they didn't come from? For the same crimes?

Smith: There are, definitely. There were certainly hot beds where the death penalty happened. Then there was all this to do with the prosecutors, so what we would do would be to focus on those areas. But then they would shift. You might potty train -- for want of a better word -- one DA not to behave so badly, then someone else would start misbehaving. It was all like putting your fingers in a dike and there would be leaks that would spring everywhere.

What was extraordinary about Lake Charles was they did have Rick Bryant, who was a particularly blood-thirsty DA. I had a lot of cases in Lake Charles. Actually, I really enjoyed it. The bailiffs in Lake Charles were incredibly nice and friendly. They were always on our side. The lot of the people there were just very friendly. And there were two or three of the judges who came around. One, Al Gray, in particular -- who sadly is now dead -- was an African American judge who was just a delight to work with because I think he was basically fair. The prosecutors thought he was hugely biased in favor of us, but that's only because he wasn't biased in front of them. I don't think Al Gray was biased in our favor, I think he basically held the balance pretty even. But he was a good guy and he didn't take himself too seriously.

I had a lot of cases there. What was extraordinary was I was doing a capital case, Chris Guillory's, which was a particularly ugly one -- three people got killed and the victims were

very hostile. I would always try to talk to the victims because just because you're against the death penalty doesn't mean you want them to suffer. I would always try to be nice to the victims. It was hard. They were getting a bit better and we were having conversations. And then their son got charged with the death penalty. And it was actually very nice that they asked me to represent their son at that point. And it was a very different experience for them from being the victim's family, where the DAs were all nice and saying, "We're here to make this guy die," to suddenly it's their son, where the DAs want to kill their son.

Then after that happened, next up, one of the DA's sons got charged with the death penalty. I represented him. This Assistant DA, who had been part of the whole process of death, suddenly finds himself with the shoe on the other foot and he was outraged at the way his son was being treated. I was telling him, "Look, this is the way you people do it all the time." We worked out something for him, too. Then next, one of the judge's sons got charged with the death penalty, implicated along with the sheriff's son. It was just remarkable that in this small community, suddenly the shoe was so firmly on the other foot. I think it made people see the world rather differently than they had to that point.

That was the place that some of the most significant, from my experience, cases came from. Ricky Langley was out of Lake Charles. And Ricky's case I learnt more from than any other.

Q: What was that case?

Smith: They're making a movie about his thing now. It's because Ricky Langley was a pedophile and he was accused of killing a little kid, six-year-old Jeremy Guillory. There's no

doubt he did it, the question is whether he was insane. And Ricky is the most insane person I've ever represented. And he knows it. The great challenge there is, how do you explain to a rational jury what's happening in an utterly irrational mind? It's an incredibly difficult thing to do. I really confronted that in Ricky's case. The other aspect of his thing, Ricky I tried first time around, his case. It was a disaster and he was sentenced to death. He was sentenced to death on my birthday, as a matter of fact. I really failed him, I think, because we hadn't had time to prepare and it was just -- we put on an insanity defense. The jurors later told us they were totally convinced by it -- they were convinced he was crazy. But they thought they had better sentence him to death because he was crazy, because he clearly was uncontrollable and therefore he was going to be dangerous. And that was quite an eye-opener.

Fortunately, we got his case reversed and got a second chance at it. And coming around the second time -- the first time I had only had brief conversations with Lorilei Guillory, the mother of the victim. Even then I had the sense she didn't really want the death penalty. We had a conversation just before the penalty phase where she basically said that. We wanted her to come in and say it in court and the DAs basically kidnapped her and kept her in the place she was staying in, at the motel. So she couldn't come in. In the intervening years we had reached out to Lorilei, and she had a terribly difficult time. Poor woman -- her six-year-old child had been strangled. She suffered from alcoholism and she had a very difficult life. But she didn't want the death penalty. And she wanted desperately to understand why Ricky had done this. In the end I met with her and said, "Well, why don't you sit down with Ricky and talk to him and he will tell you? Now, it's very hard because he's so crazy, but he would love to do two things. One is apologize for doing it, and second try to help you understand why it happened."

So she did sit down with him. Ricky explained the whole thing, which I had told her already, which was that before Ricky was born his mom, Bessie [E. Langley], had been in the car with Alcide [J. Langley] his father, and their children. They were driving along, and whether Alcide was drunk or whether he went to sleep or whatever, they drove off the road and ran into a bridge. And had a terrible accident where two of the children were killed instantly. One was decapitated, Oscar Lee, who was then six years old, blond-haired little boy, and another was killed instantly. Now, Bessie was thrown through the wind screen and was terribly, badly injured and she ended up spending the next of years in hospital, for the most part, and she was in a full-length body cast from her neck to her ankles. While she was in this body cast, with hundreds of broken bones, she got pregnant, which was a tribute to Alcide's insensitivity, perhaps. But anyway, no one believed she was pregnant so they carried on bombarding her with x-rays and giving her all these drugs. The fetus was Ricky. When the doctors worked out she was pregnant -- five months pregnant -- they cut open her body cast and there was a big whoosh and her belly expanded. The doctor said, "You've got to abort this child," because his private Hiroshima of x-rays is going to have done something terrible. Interestingly, we learned later, one of the drugs that Ricky had been exposed to, as a fetus, had been linked with pedophilia. If you're exposed as a fetus to this drug it raises the probability of pedophilia.

Now, I didn't --

Q: Really?

Smith: Yes. I found that terribly hard to believe and I didn't present it to the jury because I

didn't think anyone would believe it. But it's true. It's just one those facts that's just too bizarre to be accepted.

But anyway, the doctor said to have an abortion, she wanted an abortion, her husband, Alcide, who is Catholic, refused, so they didn't. So Ricky was born. By age ten he was posting notices on his school notice board saying, "I'm not Ricky Langley, I'm Oscar Lee," as in his dead brother, sleeping on gravestones, and exhibiting everything you would expect. The prosecution had this bizarre notion that somehow he was preparing, at age ten, for insanity defense later in life. He told his whole story, and he had always said to me that he had these conversations with his dead brother. I would ask him, when I really established trust with him I asked him, if I could meet Oscar Lee and he said "Yes, if Oscar Lee wants to meet you, you'll meet him." But he knew -- Ricky knows -- that we think he's crazy. But it's his world and it's the world he lives in and it really is just so difficult for us to comprehend. But it's utterly the truth for him.

Anyway, what happened --?

Q: He met with Lorilei.

Smith: Then he met with Lorilei and explained that Oscar Lee would be the one who would tell him to offend, to be a pedophile, and he hated that. No one in the world hated Ricky Langley more than Ricky. And he hated Oscar Lee for doing this. So when he saw Jeremy he thought it was Oscar Lee. And fascinatingly enough, actually a picture of Jeremy we had, and a picture of Oscar Lee we had, were identical. But even so, that's not rationally what was going on. Ricky was insane. That was just a sort of momentary insight into his

mind. He strangled Jeremy thinking he was killing Oscar Lee, is his way of putting it. Now, that's far too simplistic, really. But any rate, he explained everything and he apologized and whatever. And Lorilei, who had always called him Langley, came out of there and said, as she left him she said, "Ricky, I'm going to fight for you."

And she went -- she was amazing -- she went to the DA's office, she said, "I don't want this death penalty stuff."

And Rick Brown, the DA, said, "Mrs. Guillory, you're a very strange defendant. Oh, I mean victim."

Then the government started mistreating her horribly and started trying to take away her second child, saying she was an unfit mother. And poor Lorilei went through a nightmare of it. But we got to the trial, we picked this jury. It was a great jury, twelve really good people all of whom had very close ties to someone who was seriously mentally ill. So they understood. How the government let me pick twelve people like that, I have no idea. But they laughed at all my jokes and I knew that they were never going to convict Ricky of capital murder. So I told Lorilei. She had wanted to testify that she didn't want the death penalty. The government had fought tooth and nail to stop her from being allowed to say that. They want people to be able to get up there as victims and say how awful it is and how the guy should die. But the moment you have a victim who doesn't want that, they don't want to hear. I told Lorelei that she wasn't going to have a chance to do it because we weren't going to get to a penalty phase, in my opinion. I thought we were going to avoid capital murder. They might convict him of something else but they wouldn't do him for capital murder. She went away and she prayed overnight and she came back the next

morning and she said the logic of her position was that if Ricky was really insane he shouldn't go to prison. And so she wanted to testify that he shouldn't go to prison.

Incredible, for a victim. So I asked her, "I'll just ask you whatever questions you want me to ask."

And so she said, "Just ask me one question."

So she comes in to testify the next day, to the horror of the prosecutors, who tried to stop it but couldn't. And I asked her one question, which was, "Mrs. Guillory, do you have an opinion as to whether that man over there, who killed your son, was mentally ill at the time he did it?"

And she replied -- she said, "Yes, as a matter of fact I do. I think that Ricky Langley has been crying out for help since the day he was born and for whatever reason, his family, society, the legal system, has never listened to him. As I sit in this witness chair today, I can hear the death cries of my son, Jeremy Guillory. But at the same time, I can hear that man crying out for help and I think he was mentally ill at the time that he killed Jeremy."

That was unbelievable. Sometimes when you go doing closing arguments in a capital case it's very hard. I would stay up late in the night trying to work out what to say. Here it was easy. I said, "Listen to what she said." She is a remarkable person. And they're doing a movie, which I think should be mainly about her. They keep trying to include the lawyer and all that rubbish. But it's about Lorilei because of what she did. She is so obviously what the lesson of the case is, if you will. Should we encourage victims to be vengeful, or to be compassionate? I mean, it's obvious. Your mother told you when you were a little boy the

answer to that. All of our mothers tell us the answer to that. And yet the government tries to teach us the wrong thing. Lorilei, on the other hand, did the right thing. Now it's not easy. It's not easy for victims to do that but it's obviously the right thing to do. Anyway, that was Ricky.

Q: A couple of times you've mentioned that you've talked to the jury. Is that something that you would ordinarily do?

Smith: Always, yes. Afterwards. I would always talk to the jurors.

Q: For what purpose?

Smith: Well, for several purposes. I do it in every case. First --

[Interruption]

Smith: I would do it for several reasons. First, it's the only way to learn what mistakes you make. And boy, do you learn things.

I remember in [Clarence] Smitty's case we had put on a great case. We had destroyed the government's case and it was clear Smitty was innocent. And the jurors were out for three hours. I couldn't think what they were talking about, for goodness sake. I talked later to the foreperson of the jury, who's name I can't remember now. I should. She was very nice and she told me that what had happened was this one guy on the jury who had, throughout the trial, come to this theory that whenever I stood on the sides of my feet I was not telling the

truth. And so he then correlated this. Apparently every time I said that Smitty was innocent, I stood on the sides of my feet, according to this guy. He spent the whole time in the jury room arguing that Smitty was guilty because of the way I stood on the sides of my feet.

You find things like that all the time from jurors. Crazy, crazy stuff. It makes you very, very self-aware. I have never stood on the sides of my feet since that day. You learn things, more substantive things about yourself. You learn a lot of things about how jurors think. Sometimes pretty wacky. But then also, you learn about misconduct and so forth. There's a number of cases where they've allowed books into the jury room, where the bailiff has said something they shouldn't have said, or the judges -- whatever. Those are very important. So we always talk to the jury. Apart from anything else, it's fascinating. I love talking to jurors. I would love to be a juror. It's something that will never happen, I dare say. Have you ever been one?

Q: Yes.

Smith: How was it?

Q: People take it very seriously.

Smith: I hope so.

Q: I was really quite struck by the other people, how serious people take that obligation.

Smith: Well, I'm glad to hear it. It's not always true.

Q: No, three times.

Smith: Really? Gosh.

Q: All civil cases.

Smith: Civil cases. All right. I was going to ask you --

Q: People have been very serious about it.

A couple of times you've had almost last-minute reprieves, or sometimes last-minute denials. What is the condition for that, do you think?

Smith: Well, one of them, Larry Lonchar, who I've written a book about, actually -- I haven't tried to publish it because I want to do it separately because Larry was bipolar. My father was bipolar and I want to write a book about their parallel lives. Because my dad lived in a gentle society and while a lot of people thought he was a fraudster, he clearly wasn't. He believed everything he did -- he was just mentally ill. But he never ended up being prosecuted or going to prison or anything. Larry, on the other hand, lived in a very harsh world in Georgia and he ended up on death row and dying. I represented him for eight or nine years. Larry, when he would get depressed, would drop his appeals. In all their enlightenment, the Georgia prison would refuse to give him medication because they were happy that he was trying to drop his appeals and get himself executed. We got into a

lot of litigation over that. He dropped his appeals four or five times. I think five times. And each time it got a little more difficult to stop it. I remember having a conversation with someone, who will remain nameless, about this, who said, "Why are you wasting your time?" There are so many prisoners out there who want to be represented, and here was I at loggerheads with Larry to try and stop him from dying, when he said he wanted to die.

To me it was a bit like you run across someone who is trying to commit suicide. You have a moral obligation to try and stop it, which carries a lot of other moral obligations with it, if you do stop it. With Larry it was really difficult because he was an agonized spirit, and also consciously, or subconsciously, I suspect he knew how to press my buttons because he was just like my dad. He knew how to get me going. We came within forty minutes of his execution, I think four times, totally. One time we even came within fifty-eight seconds of the time he was set to die. That was when we got the Supreme Court to grant his stay. And we won in the Supreme Court later.

Q: The U. S Supreme Court?

Smith: U. S. Supreme Court, yes. I was on the phone with the clerk at Court and we had like two minutes before seven o'clock. And I said, "What's the decision?"

He said, "Can you give us a couple of minutes?" I said no, we don't have a couple of minutes. And so finally he came back and said, "Stay granted, cert granted." Which was fantastic. But that was with seconds to go.

With Larry, the first four times that he came very close to execution, he was a gibbering

wreck. He was terrified. It was electrocution. It was a horrible, horrible thing to go through and the whole rigmarole of having your hair shaved and all that. It was very difficult to deal with that because one way you could get him to agree to pick up his appeals was just talk to him about what they were going to do to him. But that was pretty tortuous. We were litigating, for example, that they shouldn't electrocute him because he didn't want to be electrocuted. And so we were litigating the issue of how horrible electrocution was. But you have the question, "Do you show these pleadings to him?" because he's the one who is going to have to go through it. He wanted to see that stuff, so I did. That just terrified him some more.

Then there was another time, Larry had a really decent core and he hadn't done what the government said he did, but he had lived a pretty rough life. He very much regretted what had happened. What he wanted to do was make up for it. He came up with this idea of donating his organs. Well, I got on the phone with Jack Kevorkian and Jack Kevorkian agreed to come down and harvest his organs. Old Jack was a pretty odd duck. But all of this I was doing to try to persuade Larry to let me litigate the issue of whether he could donate his organs, which then would give us an excuse to stop his execution. Well, the great thing about Jack is he may go around ushering people across the River Styx, but he's afraid of flying. He wouldn't take an airplane. He would only come by train. He was coming from, like, Chicago, so it was going to take two days. Larry agreed to let me try and get a stay. It was one thing for him asking for it, then we had to get the judge to order it, and that was where it got hairy. But Larry agreed that time because we couldn't get Jack Kevorkian down in time.

And it was always like that. Bizarre stuff.

Q: And Kevorkian did come?

Smith: Kevorkian ended up actually not coming, I think, because it had been stayed. He helped us because we were trying to litigate the fact that you can't electrocute him because that's going to destroy all these organs. We want to just sedate him and harvest his organs. It was all pretty sick stuff really, but it was just the sort of bizarre things we would get into.

The Supreme Court stayed it a penultimate time. Then the last time, Larry had got religion and he had become very Christian. No matter what one thinks about that, one way or the other, it was really good for Larry. He had decided he had just had enough of all of this. So he dropped his appeals again. There was a certain inevitability about it at this point. But then I remember, I was actually with Emily and we were driving down, because I was going to have to witness his execution and he still wasn't picking up his appeals. We stopped about halfway down and I got him on the phone. He said he had decided to let me pick his appeals up again. This was now with three hours to go before the execution.

I ran off to another telephone and called the judge. Larry was talking to Em and Larry said to Em, "How did Clive look when I said that?" and she said, "Oh, he was really happy." He can go off and tilt the windmills again. And Larry said, "Oh, well that's good because I did it for him. Because I knew he would want to. And I know he can't stop it at this point but it's," -- he went on to say this -- I get very emotional thinking about it -- he said, "He's the only person who's ever been my friend and stuck with me so I wanted to give him one last chance."

He was very incredibly nice. I was talking to him when I got down to the prison and he was totally calm, and he was incredibly kind to me about having stuck with him. I was always very conflicted over it because I felt I was torturing him on one level, but on the other hand it was really wonderful to have him say this at the end because he had been very glad that I had stopped him from getting himself killed these other times. Now he was very religious. Now he was still getting electrocuted, he just didn't care. When they strapped him in the electric chair he was calm as calm could be. They asked him what his final words were and he said, "Lord forgive them for they know not what they do." Which really pissed off the Georgians. And that was it.

It's one of those bizarre things where actually the positive aspects of them killing Larry way outweighed the negative, in some very strange way, in the sense that he was the only person ever who I felt just really wanted it. He was so miserable in life and so afflicted with his mental illness that he was happier to die. He did it in a way that, I think he just didn't care about the pain they put him through because he suffered so much greater pain on a daily basis. It's sort of weird to say that you go to an execution and it's a positive thing. And I dare say there's an awful lot of right-wing lunatics who say that, but they're wrong. But in this particular instance it was a really human experience.

Q: In the case of Nicky Ingram, you tried to get British support for a stay.

Smith: I did get a huge amount of British support. But just not from the right people -- not from the government. That was very different role because, again, they electrocuted Nicky and that was very different. Nicky was terrified of it. They put him through a horribly torturous thing.

We got a lot a lot of British support. It was one of those utterly arbitrary things as to whether it's a slow news week in the rest of the world. And it was. There was nothing else going on in Britain so the British media was obsessed with Nicky's case. There were British journalists all over Georgia. And as luck would have it again, John Major, the British Prime Minister, was on a visit to Washington at the time of the execution. Nicky's mom, who is British from -- Nicky and I were born in the same hospital, Addenbrooke's in Cambridge. And he and I had become very close over the twelve years.

John Major just wouldn't intervene. I had talked to the lawyer for the Georgia Board of Pardons and Paroles and he had told me that if the British asked for clemency they would get it because it wasn't that huge a deal for the Georgians and they were willing to do that as a favor to the Brits. So we dogged Major around Washington, just trying to get him to do the simple act of writing a letter to the board asking for clemency. He wouldn't do it.

We got the case stayed anyhow. I forget what the basis was. On the night before -- he was set to die at seven o'clock on -- on Thursday night, and I was in court. We got a stay from the judge at ten past six or something. I had to run back to the office to get Nicky on the phone to tell him. As I pick up the phone, now it's like six forty. I say, "Nicky, how are you doing?"

And he says, "Well, I don't know. You tell me." They hadn't told him.

And indeed, the woman -- and I'm struggling not to use an epithet here -- who was the PR woman for the prison -- had come out to the British assembled media and said, "The federal

judge has stayed the case. What do you say we don't tell him?" And they didn't tell him. And they went ahead and shaved him anyhow, even though there was a stay of execution in place. I went to see Nicky the next morning, very early. It was this horrible slap in the face when you go there and see him and he's totally shaved bald. I knew his mom was going to come in just after I visited him so I was begging the people at the prison to get him a cap or something to cover up his head. Which, ultimately, they did. But that was just so disgusting. Then the Eleventh Circuit lifted the stay that afternoon and they went through the whole rigmarole again. They killed him that evening on Friday. Nicky was very nice to me, again. But it was horrible what they put him through.

Q: Somewhere along the line the chairman of the appeals board visited him?

Smith: Well, he did, actually. That was one of the factors. One of the things one always does, of course, is figure out who the people are who are making these decisions. The chairman of the board, who was quite an Anglophile, came over here all the time. I had always taken the position with clemencies that they should come and see the guy. You can't validate or invalidate someone's execution without talking to him. I forget his name, but he went down to see Nicky. And I thought, wow, this is great, because Nicky was a nice chap, and once you met with him it was going to be incredibly hard not to go ahead and grant him clemency, I thought. So it really got my hopes up.

Can you imagine? Nicky, I talked to him about it, about what that situation is like where some guy comes in who has the power of life and death over you, what you're meant to say. It didn't do any good.

Q: We have an interview with an Italian journalist who was the last person to see [Bartolomeo] Vanzetti before he was executed. And the same thing happened. Judge [Webster] Thayer came to see him and his hopes were raised. The journalist talks about poor Vanzetti, his hopes raised so high. [Ferdinando Nicola] Sacco would have nothing to do with it, wouldn't meet with him at all. When I read that I said, "God, that's happened before."

Smith: Well, that's like when you beat a dog, isn't it? It's so much better to beat a dog every day than to treat him kindly every other day. The inconsistency of hope is the cruelest thing. That's what happens with all of these capital cases.

For example, when you win in the federal district court and you get the death penalty reversed or a new trial or whatever, and then the government appeals and it's taken away from you in the court of appeals, it would have been so much kinder never to have it because that roller coaster of despair is terrible.

Q: When you were doing primarily appeals, you dealt with a lot of defense lawyers, local defense lawyers. And what kind of defense do poor, black people in the South get?

Smith: Well, the sad truth is you get what you pay for. There are some people who tried very hard and meant very well. When I first did a case I had no earthly idea what I was doing. In fact, I think a lot of people today don't have much of an idea what they're doing because they take the law too seriously and they don't take seriously enough who the jurors are. So when I say that the standard of defense for people in capital cases is abysmal, I don't mean in many cases to be personally critical of the people doing it. But my goodness,

it's hopeless.

Part of the problem is that it's always been so badly paid that the people who end up doing it very often end up doing it because the judges have sort of coerced them into doing it.

Their whole lifestyle is based on basically being the bottom feeders in the courthouse who are picking up whatever case comes along. When the judge says, "I want to appoint you to this capital case," it's quite hard for them to say no because if they make enemies with the judge, then they can't live there anymore. Or they can't make a living. Very often you would get these people doing it who were being paid a pittance and doing an awful job, but what do you expect? They did an awful job in every case and it wasn't because they intentionally did an awful job, it was just because they were hopeless. But then there were others. You take Jerry Guerinot, with Linda Carty. I mean, this is someone who has financed quite a good lifestyle. He apparently makes more than a hundred thousand a year off court appointments, and does that by taking just far too many cases and doing them all horribly. There comes a point when you just have to say those people have got to take some degree of responsibility for what they're doing.

I'm trying to think of all the other cases. I lost patience with that very quickly, with the abysmal quality of defense. That was why I figured I had better go do it myself. No, not that I wouldn't make a lot of the same mistakes, which I did, but -- I don't like sitting around criticizing other people for doing so badly when you should just go do it yourself.

Q: You mentioned a couple of times the case, Krishna Maharaj, which is still kind of ongoing.

Smith: Good Lord it is, yes. Seventeen years of my life later and twenty-four years of his. What do you want to know? I'm writing a book about that.

Q: Oh, really?

Smith: Yes. Well, it's about the death penalty really, but it's about Krishna because --

Q: Well, some of the press called him the "billionaire murderer."

Smith: Oh, rubbish. Krishna was very rich at one point. By the time I got to meet him he had no money left. Indeed, his poor wife, Marita, who has stuck by him for twenty-four years, is in total penury. It was only a very generous, anonymous donor, just a week before last, who agreed to pay her rent for the next year, who saved her from being evicted and having to come back to Europe and leave her husband behind.

But Kris, look. The reason I want to write a book is it takes a book. It's so complicated I don't want to bore you to death with it.

Q: Right.

Smith: But his case illustrates my Zero Theory. Did I explain my Zero Theory?

Q: Yes.

Smith: Yes. Well, his case is just so bizarre that no one would believe it. But it's the bizarre

explanation that is true. And in his case, the bizarre is that the victims were almost certainly assassinated by some Libyan cartel hit men. And Krishna was framed on it all. It's an extraordinary, extraordinary case. I won't bore you with the details.

Q: Well, the interesting part was the judge was convicted for bribery?

Smith: Oh, one of the things. The series of judges Kris had -- the first judge was a guy called Judge [Howard] Gross, right? Aptly named, who, according to Krishna, long before the trial sent a bag lady, who was a lawyer, to come and tell Krishna that if he paid a fifty thousand dollar bribe he could fix the case. Kris angrily spurned it, probably very unwisely. It would have been the best fifty thousand he ever spent. But he reported it to his lawyer, who brought it up with the prosecutors and so thankfully it is documented that prior to trial Krishna raised this. No one took him seriously. On day three of the trial Judge Gross is arrested, taken away in handcuffs from the courtroom. That's because he had been recorded the night before negotiating a bribe in another case, on tape, in which he mentions Kris' case.

So Judge Gross is arrested and taken away. Now what is the first thing that should happen? Obviously they have a mistrial because the judge in Florida was the one who sentenced you to death. No, the defense lawyer waived a mistrial, and you can only believe that that was because he was privately retained and was going to lose money if he didn't. So he waives the mistrial.

They bring another judge in. The second judge is a judge called Judge [Harold] Solomon, who is not quite so aptly named. Judge Solomon gets together with the prosecutors and I

found this -- it was like Christmas going through the prosecution file later when I was doing the appeal because in the prosecution file there were a series of orders sentencing Kris to death that had obviously been edited and at the bottom had the dates on them. The dates of these orders sentencing Kris to death was before the judicial sentencing hearing. It turns out that the judge and the DAs got together, *ex parte*, and the judge had asked the DAs to write up an order sentencing Kris to death before the judicial sentencing hearing. Talk about bias.

So that was what we got the death sentence reversed on in the end. But it didn't stop there. The next judge, whose name I am going to forget, did the same thing. The next judge was an assistant DA previously, became a judge, who asked the prosecution, *ex parte*, to write up an order denying Kris' post-conviction challenge. That's how we got another hearing on that. So it just went on and on. But we got his death sentence reversed but we never did get his case reversed because they said that the lawyer waived for Kris the right to challenge the fact that the judge was soliciting bribes. Why on earth they wouldn't give us a hearing on that is beyond me.

I got to do his re-sentencing trial, which was a good illustration of *Herrera v. Collins*. Under Florida law, whether you're innocent or not is not admissible at the penalty phase of a capital trial. And the judge told me that if I said the word "innocent" at any point during the resentencing trial he would hold me in contempt. And so I was meant to represent Kris, on trial for his life, where he was insistent he was innocent, and he wasn't allowed to say it. That's Alice in Wonderland, isn't it?

We won anyhow but we won only to beat the death penalty because that was the only issue

at stake. But Kris still faced three life sentences and whatever, and he's not eligible for parole until he's 101. And he is patently, patently innocent. We've been through every court. I've represented him seventeen years and we have lost in every court and the courts are so cynical, they just won't believe what the evidence patently shows. That's why I want to write a book about him because really his only chance now is the court of public opinion and try to get --

Q: Seventeen years represents a certain kind of doggedness.

Smith: Well, it's a responsibility. You can't abandon people.

Q: And you represented Clarence Smith from the Outlaw --

Smith: Smitty, I love Smitty. I must go see Smitty. Smitty was the head of the Outlaw Motorcycle Club in Tampa, Florida. And you have to call it a club. If you call it a gang he gets very upset. Smitty was charged, he was put on death row in Louisiana and he was put there by two snitches, John Hall and Carl Holly. And at any rate, the prosecution had covered up just an enormous amount of evidence showing these two snitches were lying. In fact, they were the ones who did the murder. In Louisiana -- that was the case where the juror said I was standing on the sides of my shoes -- we got him acquitted at his retrial in Louisiana. That was quite easy.

I told Smitty, "You just lay low. I don't want to hear from you again. I want you to keep quiet, go and live your life." Smitty would have none of that because his Outlaw motorcycle brothers were being persecuted by the feds, he thought he would go and support them. I

said to Smitty, "You carry on doing that, they're going to come after you." And sure enough they did. They charged him with six homicides, five of which he had been previously acquitted of, and the sixth of which they had never charged him with. And they appointed a DUI lawyer in Florida to represent him who had never done any sort of case like that. I went over to represent him. It was ridiculous. They paid us thirty-five hundred dollars, I think, for the entire investigation of the case.

I kept tabs during the trial of how much they had paid their witnesses. They had paid their witnesses over a half a million dollars in cash, they had forgiven them seven death sentences, twelve life sentences, and two hundred and twenty thousand years in prison. There were fifteen witnesses against Smitty, every single one was a snitch. And every single one had testified as a result of all of these favors. Now, with the one murder that he had never been tried for before, the feds were so naïve. They would believe whatever the snitches told them. This one snitch, Carl Holly, said that Smitty had committed this murder with an outlaw called Junk Yard. Well, Junk Yard was the Outlaw's dog. So I went and took a picture. Poor Junk Yard was dead but he had a little tombstone at the Outlaw clubhouse. So I had a picture of his tombstone. I also took a picture of my dog, Mel, with his paw on the steering wheel, and I asked the government witness whether I should keep closer tabs on my dog because he might be out there as a hit man at any moment. So he was acquitted of that murder.

But the five murders that he had been previously acquitted of, we weren't allowed to tell the jury that he had been acquitted of them. Indeed, the government was allowed to tell the jury that he had been in prison for twelve years, which he had, in New Orleans -- well, he was on death row for something that we later acquitted him on. But we weren't allowed to

say that, "Yes, he was in prison for twelve years but he was acquitted of that charge." And indeed they are charging him again. It was just the most unfair, dispiriting trial. It went on for three months. That was when I got diagnosed with potential cancer and had to have an operation in the middle of it. Nothing slowed that railroad train down. It was just very dispiriting. The jury was out for like seven days, but in the end they came back and convicted him of some stuff. It only took convicting him of one and he would get life. So Smitty got life.

I don't think he regrets being loyal to his friends, but I think it's very sad they did that.

Q: You've never taken a case in Texas?

Smith: Oh, yes. I've had a few Texas cases.

Q: Oh, really?

Smith: Yes. I've never tried a case in Texas. But, like, Jackie [John] Elliot was a British guy in Texas.

Q: Okay.

Smith: I've been involved in a number of Texas cases. It's a place one should do more, but I'm quite glad I don't have to.

Q: The hardest place?

Smith: Hardest place, Alabama. Alabama is the hardest place.

Q: Really?

Smith: Because it was judge sentencing. I remember, like, Shep Wilson [Jr.], we got Shep a new trial. Or rather my friend, Ruth, did. Ruth bullied me into doing his retrial. This is a retrial in front of Jerry [L.] Fielding, the judge, who has already sentenced him to death once, who tells me he is going to do it again. So what's the point?

The bizarre thing about that is at the penalty phase, if the jury votes for life at the penalty phase and the judge overrides it and votes for death, then everything that you do at the penalty phase, harmless error. Because it doesn't matter what you did, the jury voted for life anyhow. If the jury votes for death and the judge goes along with that, then you can get the penalty phase reversed. So you actually want a death sentence. When you know the judge is going to sentence him to death, you are better off asking the jury to impose a death sentence than you are trying to get them to sentence to life. It's ridiculous.

The whole process -- the capacity for racism in Alabama is infinitely greater than other states because of the way they pick a jury. When I was representing Otis Grimsley [unclear] -- I loved doing cases in Alabama because they were so bizarre and I had a lot of fun on them. But on the other hand, it was still a ridiculous process. With Otis we had a hundred jurors, roughly, and then you strike them down to twelve. Meaning that each side gets forty-four strike, right? Which gives you the ability, if you're the prosecutor, to eliminate all the black people much easier. Because instead of other states where you might have twelve

strikes each, it's actually quite hard for them to get rid of every black person. If you've got forty-four strikes, even though I've got forty-four, too, I can't get rid of all the whites even if I wanted to. But they can get rid of all the blacks easily.

And I remember doing Otis's case, I would always use Sir Ronald Fisher's hypergeometric distribution, a statistical test to say the probability of racism effectively in the strike pattern. And when the prosecutor got to seventeen black people he had struck in a row I said to the judge, "Look, the probability that Don Velasco would do that without being a racist is one in ten to the power of thirty-five, according to the hypergeometric distribution."

The judge told me later, he said, "You're wrong about that. Because I know the probability that Don Velasco would strike seventeen black people in a row is not one in ten to the power of thirty-five, it's one in one. He always does it."

I said, "Judge, I think you're missing my point."

You have this process that is so incredibly unfair. Shep's case was in Talladega County and we did studies of that to show both the racism and the jury selection and to show how many hours or minutes or seconds the defense lawyers spent with their clients prior to trial. They had to file bills where they itemized all the time on the case so you could see. I forget the exact number, but the average time the defense lawyer spent with their client before a capital trial was like an hour and a half. Instead of what I would normally average, which would be like a month and a half. So it was just dramatically bad.

And with Shep -- everyone finally realized, because we had beat up on them very badly for a

long time and they finally got sick and tired of it. And they didn't really want to kill Shep. But they couldn't figure out what to do with it, so they just left him on death row. And his case was reversed in 1989 and he died in 2008, where nineteen years had gone by without his case being retried. That's got to be the longest delay of any case in history. But anyway, old Shep was quite happy just sitting on death row, really.

Q: Were you in on the Kenny [T.] Richey case in Ohio?

Smith: Yes. I did Kenny's cert in Supreme Court.

Q: You work up North?

Smith: Well, not very much. I went up to Ohio. It was only because he was British. And I went. I remember when I first went to see Kenny. There was a nice guy who ran the prison up there. I was going in to see Kenny and I stopped in to see the warden. He was a decent chap. And they searched me on the way in and they took my wallet. And at that stage -- this was many, many years ago -- I had a condom in my wallet because my dad had told me to. And so they took it from me.

I was just flabbergasted by that. So I went back to see the warden afterwards and I said, "Look, what is this? What do you think is going on in there? I'm not taking condoms in for any nefarious reason."

And he said, "No, no, no. What they do is they don't like defense lawyers so they take it and they poke pin pricks through so it doesn't work."

I said, "You're crazy. That just means there are more defense lawyers out there. You don't want that!"

But anyway, that was Kenny. It took years and years and years. I got a law firm involved after I did his cert petition and -- God, how many years was it? It must have been fifteen years later, he was finally effectively exonerated. He actually had to plead guilty to some lesser offense and walk free with time served. And as one might say, bizarrely, in the first trial where he said he's innocent, they gave him death. Whereas the second trial where he said he's guilty, they set him free, which is perhaps an illustration of the absurdity of the process.

Q: Any major difference between North and South?

Smith: Well, there is. I think some of the generalizations might be over-general, but when you look at the -- the South is just exponentially worse in many ways. I remember when I was in Louisiana when O. J. Simpson's case was going on in California. We worked out that the entire budget for this one parish where we had eight pending capital cases -- the entire defense budget for the whole parish was sixteen thousand dollars, which included eight capital cases and goodness knows how many non-capital cases. And that was the same amount that one expert was getting paid for one day in O. J. Simpson's case. It sort of set it in perspective. Now I guess it's not exactly the same. I know some parts of Ohio and some parts of Pennsylvania that are as racist and backwards as some of the parts of the Deep South. But overall I would find that I was an irritating dinner guest to anyone in the North or anyone in Britain who wanted to tell their favorite story -- their favorite anecdote --

about the worst case in their jurisdiction because they would tell their story and I always had ten that were far worse from Mississippi or Louisiana. I don't think they could really compete.

Q: The other day you mentioned pro bono, the positives and the negatives of pro bono. But we never really got it, though. You just tossed it off. I was wondering, were you able to mobilize pro bono often?

Smith: Yes. First one should say that pro bono means "for the good" so it's obviously better than pro malo, which is what the alternative might be.

Q: Right. But it's often taken to mean "for free".

Smith: Yes. It basically is for free for those big firms. The big firms were hugely important for the post-conviction cases because we had no -- I think I can say with all honesty that of all the post-conviction cases I've ever done in my entire life, I've never been paid a penny for them. I think that's true. I can't think of any case where I've been paid anything.

In a trial at least sometimes the state would pay. Not very much but at least they had to pay because you had a right to counsel. But again, due to the absurdities of *Murray v. Giarratano*, you had no right to paid counsel in post-conviction. We were desperately short of resources for a long, long time. It wasn't until 1996 that you began to get some of the resource center stuff. Or perhaps a bit earlier than that. Yes, it was earlier. I'm sorry, it was in the early 1990s and then 1996 was when they started dismantling them.

We would do a bunch of post-conviction work, in Louisiana, for example. We would get paid for the trial stuff, we would raise a few funds elsewhere, and then we would have to do all the post-conviction for free. So having big firms was important. We needed the resources and the help. There was a division between big firms who took it very seriously and did a really good job and big firms who were utterly worthless, who I think had been coerced into it by some judge and didn't really want to do it and so the senior partner made some other person do it who didn't want to do it, and it was just painful. It would have been far better not to have them at all.

The whole notion of pro bono is odd. If you think about it, if you imagine going to a car salesman and saying, "Hey, I would like you to give me every tenth car free." Or you go to the pub and say, "This is my tenth beer. I want it free, pro bono, please." There's a level of a sort of patronizing attitude that somehow this is a legal system. I think while volunteerism and charity is good, I'm not convinced of the notion that there should be pro bono as a substitute for the government doing what the government should do anyhow. I don't think that's good. The government should pay. If they want to kill some guy they should pay for a proper defense. But that said, we deal with the real world as opposed to the world that perhaps would be better. And in that sense it could be very positive. I worked with some firms that were great.

You think about Sam Johnson's case in the Supreme Court. I had a series of cases in the Supreme Court and the issue always was who should do the argument. I never really wanted to because, a) it took too much time, but b) like with Sam's case we had -- oh, what's his name? The famous First Amendment lawyer -- Floyd Abrams -- did the argument. Floyd knew all those people. I heard later that Floyd went to a cocktail party and saw Justice

Sandra Day O'Connor and she asked how Sam was doing. Well, someone like me is not going to get that sort of access and the benefit, I think, for Sam to have some incredibly high-powered person in that position is obvious. So that can be very positive.

In the Guantánamo cases, for example, you see some of those folk, like Sabin and Tom and all of them, have been great.

Q: Well, sometimes younger people in the firms --

Smith: Well, that's a generalization. The younger people in the firms very often actually -- I'm not talking in this instance about people you know -- but in many instances the younger people are far better. They know far more. But one of the structural problems with law firms is because they are so hierarchal, their senior partners make the call on things and they're just often wrong. The younger people know much more about the case and they're very smart and so forth. And that was one of the frustrations I found just dealing with firms.

Q: My son tells me some of the problems with the younger people is that they come up with these bizarre defenses that will never work out in the actual trial.

Smith: Well, that's true. But on the other hand, they also come up with bizarre things that do work. And when we would do brainstormings on cases, the rule I had was that everything goes unless three people hysterically laugh at it when you say it. But even so, I've won cases on the most bizarre things.

For reasons. For example, with Adam Pinkton's case, we got his death penalty reversed.

Q: Who was Adam --?

Smith: He was a guy on death row in Mississippi, years and years ago. This was like 1986. He had pled guilty and he was sentenced to death with five aggravating circumstances, each of which were “he intentionally killed so-and-so in the course of a robbery” or whatever. And the issue that we won on was that they didn't make a quote "end them finding", which was simply whether he killed, intended to kill, or contemplated the use of lethal force. Well, it was ridiculous. They had made five “end them” findings basically and he had pled guilty. But the reason the court did that was they recognized it was just an ineffective, rubbish case and the kid should never have got sentenced to death. They granted relief on a frivolous issue because it was the right thing to do.

I think one has to be careful about disparaging these silly ideas of young people because sometimes they work.

Q: Tell me about the Merrilyn Thomas book [*Life on Death Row: Remarkable Story of Clive Stafford Smith*].

Smith: Oh, God, I don't know. I've never read it. I wouldn't know.

Q: You never read it?

Smith: No.

Q: You come off pretty good in it.

Smith: Is that right? Well, good, I'm very glad to hear it. I think my mother has read it.

Q: Did you cooperate with her?

Smith: Yes, but it was meant to be, originally, about Edward Johnson.

Q: Right.

Smith: This was a long time ago. This was 1987 I think. But she was from Cambridge and got inspired by -- there were a group of people who -- it was a very positive consequence of the tragedy of Edward's execution, was that it was all witnessed on television and so all these British people set up a group called Life Lines, writing letters to prisoners. That was based in Cambridge because Jan Arriens, who was the founder, he lived there. Merrilyn got connected with that with Ian and was going to do a book about Edward, I think, and somehow it morphed into -- I really have never read it, so I'm not sure what's in it. The only thing I do know is in it is something that really annoyed my father because she quoted me as saying something that is true, but I should never have said, about how my father -- when his mental illness struck. I was brought up on a stud farm in New Market -- a horse farm. It went bankrupt because my dad was mentally ill and did all sorts of crazy things. I made some comment on that just by way of explanation. I did tell her not to print it. But she did. So my dad was furious at me. And rightly so. I understand.

Q: A few just minor things here and there.

In 1997 there were inquiries about you running for Parliament.

Smith: Yes. I did have that ambition once, standing for Parliament. We do things much more --

Q: Oh, standing.

Smith: -- sedately in England than running. No, I did. I thought I should be in the Labour -- I've always been a Labour Party person. I thought it would be fun to be an MP. But then, Emily was always opposed to it. She said that power corrupts. Actually you have much more influence outside than inside sometimes. But still, it would be fun. If someone appointed me Prime Minister tomorrow I would do it. It would be a lot of fun. I would screw up the entire country but I would have a lot of fun doing it.

Q: Now that was New Labour with Tony Blair?

Smith: Yes. Yes, before we discovered how bad Tony really was.

Q: And you've received a number of awards and actually talked to the Queen.

Smith: Yes. Wow.

Q: Tell the story.

Smith: Well, that was just the absurdity of the Order of the British Empire. Let's face it, the British Empire is Gibraltar and the Falkland Islands. I approve of those gongs in the sense that they recognize people without giving them money or anything. I think it's very good to recognize what people do as long as it doesn't cost anything. One of the problems is when you only recognize people through financial reward. I think that's a shame. They called me up and asked if I would accept. And I was very conflicted because I think they're pretty silly. But I thought about it and I thought, a) it's actually good as long as they don't pay you anything, and b) it would make my mother very happy, and c) it would be churlish to refuse. Let's face it -- they're being nice, so why be unpleasant?

So I did and we went to Buckingham Palace. And I feel slightly ashamed of the fact --

Q: When you say we, you and Emily?

Smith: My mother and my father and my half-sister. You all had to get dressed up and go there. And you know, all of that is silly -- right?

I feel slightly churlish that a friend of mine at *The Guardian* put me up to asking the Queen whether she was aware of the fact that she signs the execution warrants for everyone in the Caribbean, which we need to stop because they're all part of the Privy Council that still goes through the Queen, apparently. I don't think that was necessarily the kindest thing to ask her when she was just being nice and doing some boring duty that she has to do. But the whole royalty thing is pretty silly, isn't it? There was a chart in *The Guardian* two days ago of species in England that are becoming extinct and someone wrote

in asking why they didn't have a picture of the royal family. I'm afraid they're not extinct yet -- not that I want them to die; I just don't think they should be a royal family. It's rather silly.

Q: And you received something called the Robert Burns Award?

Smith: Oh, look, there have been lots of those things. That was just a very nice thing up in Scotland. I think I have one of his books in the other room. Robert Burns' poetry, which we English don't really quite understand.

Q: I didn't make the connection between Robert Burns and an award for your work.

Smith: No, well they just have this sort of Rob Burns' peace award or something it's called - I forget. It's just up in Scotland at this lovely castle where Robert Burns apparently did his poetry. I don't know where it comes from but they gave it to me one year. It was just a nice excuse to go to Scotland.

Q: And Katrina destroyed your offices in Louisiana?

Smith: Well, it didn't destroy them in the end. It wasn't too bad, actually. We were very lucky. The great thing about where the office was, it was in some of the older part of New Orleans which wasn't flooded quite as badly as some of it. The bottom floor where we had a bunch of records was rather damaged. But overall it came through not too badly.

Q: And now you're doing more international work. You mentioned Pakistan and the

Caribbean.

Smith: Yes.

Q: That's through Reprieve?

Smith: Basically, Reprieve, what we had done is taken on the cases of British nationals. The reason we do that is not because British people have more human rights than others, but there are so many people on death row around the world you've got to have some defining factor and it allows us to draw in the power of the British government to help these prisoners facing the death penalty. That's the focus I've had for the last little while. In America, and Pakistan is a big place. Then they're all over. In China, we've got someone in Thailand right now. There is a trial set to start the day after tomorrow of a British guy in Thailand. And Laos and Vietnam and all over the place. I don't actually do anything in the Caribbean because there's other people who do that. That's very interesting but we're about to expand that out in two ways. One is in Pakistan where we have a couple of young women who are doing Pakistani death penalty cases.

Q: They're Pakistani?

Smith: Yes. Yes. And so we fund them and it's great. One of them was trained by Scharlette Holdman for two years. So it's a small world, but an effective one. And then the other thing we're doing is --

Q: They must be very brave.

Smith: Oh, they're great. One of them got arrested recently, going to help one of the British people in Kashmir. She was arrested going to see him, so they are courageous.

We've also got this project in America where we're studying all the foreign nationals on death row in America. The principle being one of just bringing power to them -- that bringing the governments who are concerned with them in to intervene can be very helpful. With any luck it will lead ultimately to a more international approach and ultimately to the abolition of all of this nonsense.

Q: On the first day you mentioned a couple of cases in which the death penalty work and Guantánamo kind of overlapped. Do you see that overlap? How would you explain it?

Smith: Well, it's exactly -- no, it's all the same. One thing that people didn't really seem to latch onto in the early days was that everybody in Guantánamo faced the death penalty. In the military commissions it didn't matter what you were charged with, whether it was slaughtering three thousand people in 9/11 or whether it was sort of aiding the enemy. All of those were capital offenses. So, in one level it is all the same thing.

In another level, though, it's all the same thing because when you think about why we focus our hatred on the small group of people in America, whether they be, basically disproportionately African American folk on death row, it is because we want someone to hate. And we want -- instead of dealing with very complicated issues in our society -- why do we have such a high crime problem, why do we have drug problems, so forth. We could deal with that in a complicated way by having a welfare state, by having a health service,

by banning guns, by legalizing drugs, or whatever. A whole series of complicated and difficult steps. Instead of that we can just lie to people and say we'll execute a few folk and that will make the difference and we'll conjure up this hatred for the people on death row and pretend that they are somehow the fulcrum around which all of these terrible things happen.

Well, when you look at Guantánamo, it's the same process, but exponentially multiplied. So instead of hating a minority in America, we now hate Muslims around the world. Instead of blaming them for the crime in America, we blame the Muslims around the world for everything bad about the world. And instead of banging them up in Angola or Parchman, some prison way off away from anywhere, we put them in Guantánamo. Instead of saying that you don't have a right to paid counsel -- but you can have pro bono counsel -- we say in Guantánamo you don't have a right to a lawyer at all. And so on and so forth. It's all the same game but multiplied in a dangerous way.

So that was why I got interested in that.

Q: Okay. Can you think of anything else you would want to say?

Smith: No. We would be here for months if you asked that question.

Q: Well, you will receive a transcript. I have come to the end of any questions I might have. You will receive a transcript and you can then edit it. You can add things to it if you want.

Smith: I'm not going to edit it. I'm sure I just trust you. I don't want to read it.

Q: Oh, you have to.

Smith: Oh, I do?

Q: Yes. You will be asked to sign a release, etc. governing usage of it. I do have to warn you that these days, after the Homeland Security Act, we're not able to really defend against government subpoenas anymore. At one time we were. Or Columbia would have but they won't anymore. But you will receive a transcript and you can edit it and you can put in restrictions to use, etc. And they will contact you about it.

Thank you very much.

Smith: Oh, my pleasure. Thank you.

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