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Death Sentence Commuted In Va. Case

Prosecutor Action Is Issue, Not Mental Status of Defendant

By Donna St. George
Washington Post Staff Writer
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YORKTOWN, Va., Jan. 17 -- More than five years after his case made legal history with a [U.S. Supreme Court](#) ban on executions of the mentally retarded, Daryl Atkins was spared his own long-held place on [Virginia's](#) death row when a judge commuted his sentence to life in prison Thursday.

The reprieve came for reasons that few would have guessed during the ever twisting, nearly 12-year course of the case, which had focused largely on Atkins's mental limitations. Instead, it came because of a [Hampton](#) lawyer's allegation of evidence suppression by prosecutors as they prepared for Atkins's murder trial in 1998.

"The court finds that had he [Atkins's attorney] been given the evidence, the outcome might have been different," Judge Prentis Smiley Jr. of York County-Poquoson Circuit Court said after ruling that prosecutors had committed a violation by not fully disclosing the evidence.

The turn of events came in Southeastern Virginia, where Atkins, 30, faced charges in the slaying of Eric Nesbitt, 21, an Air Force mechanic who was shot in York County in August 1996 after being carjacked and robbed.

Atkins and his codefendant, William Jones, ultimately admitted to taking part in the crime, but each man claimed the other did the shooting. In Virginia, only the person who pulls the trigger is eligible for the death penalty.

Jones's testimony against Atkins was a central part of the case against him, and it was Jones's first and only interview with prosecutors and police that came under question in Thursday's proceedings. At that two-hour interview in 1997, Atkins's lawyers alleged, prosecutors coaxed and coached Jones when his statement was not in line with forensic evidence in the case.

The interview was tape recorded, and an expert in audio analysis testified that 16 minutes could not be accounted for.

"We're relieved," said Joseph Migliozi, Atkins's lead attorney and capital defender for the Southeastern



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District of Virginia. "We believe the judge took this very seriously, and we feel that he arrived at the fair and appropriate decision."

Atkins, who often stares blankly during court hearings, raised a fist in momentary celebration as he was ushered out of the courtroom.

The decision was made by the same judge who handled Atkins's case when it first came to trial, in the same community, with some of the same lawyers on hand. It was a defeat for Commonwealth's Attorney Eileen M. Addison, who had vigorously denied the contentions of Atkins's legal team.

Addison and former prosecutor Cathy Krinick left the courthouse quietly, declining to comment.

The Atkins case had been taken up by the U.S. Supreme Court in 2002, when it issued a landmark ruling that prohibited the death penalty for mentally retarded inmates.

For Atkins himself, however, the high court decision was not enough. The Supreme Court left unsettled the question of whether Atkins was mentally retarded.

Since then, Virginia has tried to determine what the standard for mental retardation is, and whether Atkins meets it.

In 2005, York County became one of the first jurisdictions to hold an extended trial on the question of whether a death-row prisoner met the test for mental retardation, which in Virginia includes both a low IQ score and "significant limitations in adaptive behavior" before age 18.

In that trial, a jury decided that Atkins did not qualify as mentally retarded under legal criteria -- and thus faced execution again.

But in 2006, the case was overturned again, when the [Virginia Supreme Court](#) ruled that the jurors deciding the mental retardation issue should not have been told that another jury had put Atkins on death row.

As Atkins's attorneys were preparing for another hearing on the question of mental retardation, they were told, by a lawyer for Atkins's codefendant, that he had been bothered for years by prosecutors' interview of his client.

Lawyer Leslie P. Smith testified that the tape recorder was turned off at a point during the interview when Jones's statements were inconsistent with forensic evidence.

Prosecutors let Smith know of the inconsistency and said it was a problem, he testified.

In announcing his decision, Smiley said he would not consider ordering a new trial, which he said would be "a waste of everybody's time" because innocence was not an issue. But he said he felt the reduction of punishment was necessary.

"The court finds there was favorable, potential impeachable evidence possessed by the commonwealth," he said.

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Attorney Struggled Over Case For Years

By Donna St. George
Washington Post Staff Writer
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YORKTOWN, Va. -- Lawyer Leslie P. Smith brooded over what he knew for a decade: information that might spare the life of an inmate on [Virginia's](#) death row. He had thought about disclosing it long ago. But back in 1998, he had been told not to jeopardize the interests of his own client.

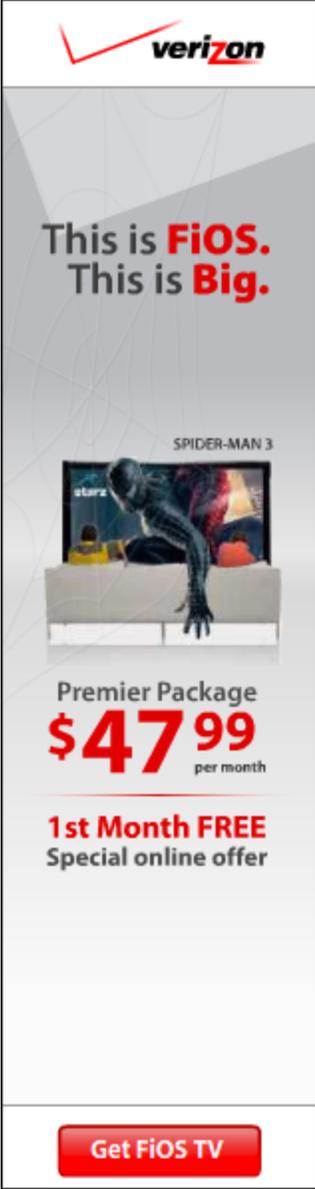
The case he could not forget was that of Daryl Atkins, who was convicted in a carjacking murder in York County, Va., and whose appeals spurred the [U.S. Supreme Court](#) to a landmark ruling that banned executions of mentally retarded inmates. Ironically, Atkins remained on death row in spite of the historic decision, his own mental limitations still under debate.

All the while, there was Smith, a solo practitioner in [Hampton](#), sometimes pondering his vow of silence. He had been the attorney for Atkins's co-defendant. And what he felt he knew was this: His own client had been coached in his testimony to help ensure that Atkins got the death penalty.

Last spring, Smith, 64, unexpectedly decided to raise the issue again, writing a letter to the Virginia Bar. This time, he was urged to tell what he knew, he testified in court. And the outcome of that revelation came Thursday evening: Atkins's sentence was commuted to life in prison, bringing apparent finality to a case that has bounced from court to court for a decade.

In the end, it seemed one man's disclosure had changed everything. Many lauded Smith for coming forward, although others asked why he waited so long.

"The court finds that Leslie Smith's evidence was indeed credible," Circuit Court Judge Prentis Smiley Jr. said Thursday as the low-key Hampton lawyer watched quietly in the courtroom. The judge noted that Smith had "absolutely nothing to gain."



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Atkins's own counsel told the court, "He comes forward at great personal cost to himself."

To some, Smith might seem an unlikely man for the spotlight.

After the ruling was handed down, he left the courthouse without comment. A day later, he was working in his office in Hampton, even though it was a state holiday. Not a showman, not a tough talker, Smith has practiced law 37 years -- half real estate, half criminal work. Other lawyers describe him as honest, forthright.

"He's just a pleasant, down-to-earth, plain-spoken kind of guy," said Ron Smith, a Hampton lawyer who has known him 20 years. "What he did was extraordinary, and he wrestled with it a long time."

"Somebody's sitting on death row, and you know there's evidence . . . they don't know about," said Ron Smith, who is no relation to Leslie Smith. "That's an awful situation for a lawyer to be in."

Over his long career, Leslie Smith has handled five or six capital cases, including the one involving Atkins's co-defendant.

Atkins and William A. Jones were charged with killing Airman 1st Class Eric Nesbitt, a 21-year-old Air Force mechanic. Their photos were taken by a surveillance camera as they forced Nesbitt to withdraw cash from a bank machine. They both ultimately admitted their roles, but each said the other did the shooting. In Virginia, only the triggerman can be given the death penalty.

The episode that Leslie Smith found so troubling -- and kept a secret -- goes back to the first interview prosecutors had with his client, Jones, on Aug. 6, 1997. Prosecutors wanted to use Jones's statement to convict Atkins and ask for a death sentence. They offered to drop several charges against Jones if he proved to be a credible witness.

But, according to court testimony, the interview went awry. Jones's statements about what happened were at odds with the forensic evidence in the case. At one point in the interview, someone turned the tape recorder off, Leslie Smith testified in December.

"Les, do you see we've got a problem here?" he recalled a prosecutor asking him. "This isn't going to do us any good."

Smith told the prosecutor his client sometimes confused his right with his left. The group created a mock crime scene so Jones could show prosecutors what happened. Smith testified that law enforcement officials then coaxed his client to give answers that would fit the facts.

The tape recorder was turned back on. An audio expert testified that about 16 minutes of tape could not be accounted for.

Smith said he called Timothy Clancy, the lead attorney in the Jones case, soon after the interview to discuss how to proceed. He wrote a memo about the events. Clancy then asked a local judge for advice and ultimately called the Virginia Bar.

The bar's advice, he testified, was that an attorney's first obligation was to his client -- and he might harm Jones's interests by giving Atkins' attorneys exculpatory evidence.

Nearly 10 years later, Smith told the court that he believed the ethical problem was not what had happened but that it had not been divulged to the other side and could not be used at trial.

"I felt that the law is kind of like professional golf," he testified. "You have to trust everybody else to follow the rules, and you have to be willing to call penalties on yourself because we have to trust one another."

Smith -- a grandfather of five who grew up in the District but made his living in this waterfront city off Interstate 64 -- did not expound on all of this at his office last week. But in the courtroom, he testified that it always bothered him.

Asked what he did about his concerns, he said: "For nine, 10 years, nothing. I mean, Clancy and I, when we were alone together, would reminisce about this and more or less renew our vow of silence, that we felt there was nothing that could be done.

"Earlier this year, I wanted to get an answer for myself if we rephrased the question, because I wasn't 100 percent sure that the right question got presented to the bar. But I think the answer was correct in '97, '98. . . . The circumstances have changed."

Several lawyers were impressed that Smith came forward. "I think there's a great deal of respect and admiration for him," said [David Lee](#) of [Williamsburg](#). "He could have kept his mouth shut. He didn't have to put himself on the stand to be cross-examined."

The victim's family, however, expressed disappointment that Atkins would be spared a death sentence. "We want to see him executed," Dan Sloan, Nesbitt's stepfather, said. "Be nice to see a little justice."

Others were troubled that Atkins has spent a decade on death row and wondered why Smith had not stepped up after Jones's sentence was made final back in 1998.

Carmen Taylor, president of the Hampton branch of the [NAACP](#), said: "How can you sleep at night for 10 years? It takes 10 years for your conscience to kick in?"

She added: "This is just one case. How many other cases are like this?"

These kinds of issues are not uncommon during the deal-making process with prosecutors, said Corinne Magee, a former prosecutor who is now a board member of the Virginia Association of Criminal Defense Lawyers and traveled several hours to watch the proceeding. "Absolutely, it goes on a lot -- trying to make sure the testimony of the witness is going to jibe with the other evidence in your case," she said.

In Virginia, state law adds to the problem, Magee said. "We have such limited discovery in Virginia as defense counsel that these kinds of issues are continuously emerging," she said. Her group, she said, has pushed to make Virginia's laws more consistent with the laws in other states.

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