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### Celebrating Great Lawyering (reviewing Welsh S. White, Litigating in the Shadow of Death: Defense Attorneys in Capital Cases, by Welsh S. White (2006))

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# Celebrating Great Lawyering

Albert W. Alschuler\*

WELSH S. WHITE, *LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES* (University of Michigan Press 2006).

Welsh White was addicted to scholarship, and his last book, *Litigating in the Shadow of Death*, was published five days after he died. White held an advance copy a few days before his death, admired the dust jacket,<sup>1</sup> and heard his wife Linda and a friend read a portion of the text.<sup>2</sup>

*Litigating in the Shadow of Death* examines the work of defense attorneys in capital cases. Like much of White's earlier scholarship, it goes beyond reported cases, academic writings, and other library materials to present material from trial transcripts and White's interviews with practitioners. Among the thirty-seven defense attorneys and mitigation specialists White interviewed for this book were many of the most respected capital defenders in America. The book effectively encapsulates their wisdom.

White did not write this book to be a practice manual, but a practitioner who sought down-to-earth guidance on how to litigate a capital case could not find a better place to start. He did not write this book to be a best seller, but its compelling narratives of cases, ethical dilemmas, and strategic choices are often difficult to put down. He did not write this book as a treatise on the law, but it includes a careful description and analysis of relevant Supreme Court decisions. He did not write this book as a brief against the death penalty, but the book reveals how variations in the quality of counsel produce gross inequalities in who lives and who dies.

*Litigating in the Shadow of Death* has eight chapters. This review offers a synopsis of each, along with brief comments on most chapters and longer

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<sup>1</sup> The jacket is by Phoebe Gloeckner, a noted comic book artist.

<sup>2</sup> White died of lung cancer at the age of sixty-five on the last day of 2005. A tribute to Welsh White is published in this issue of the *Ohio State Journal of Criminal Law* at pp. 1–25.

Although *Litigating in the Shadow of Death* was White's last book, it was not his final publication. Following his diagnosis, White completed an article titled *Deflecting a Suspect from Requesting an Attorney*, and this article will appear in the Fall 2006 issue of the *University of Pittsburgh Law Review*, an issue dedicated to his memory. White's article considers the common police stratagem of indicating to a suspect under interrogation that it would be unwise for him to exercise his right to counsel. It reviews the tangled cases on this subject and, as White's articles always did, proposes a moderate, insightful, and sensible solution.

comments on the chapters concerning the effective assistance of counsel and plea bargaining in capital cases.

## I. INTRODUCTION

Chapter 1, “The Role of Defense Lawyers in Capital Cases,” provides an overview of the book. It also tells a familiar horror story, the story of defense representation in Texas capital cases. In Texas, judges have treated court-paid capital appointments as a form of political patronage. They repeatedly have appointed incompetent lawyers like Joe Cannon, who was notorious for dozing off in some capital trials and for doing next to nothing in any of them. White explains how “the Texas criminal justice system, including the highest Texas court to review criminal cases, created a climate under which inadequate representation of capital defendants seemed to be tolerated, if not encouraged.” (White, at 7.)

## II. EFFECTIVE ASSISTANCE

Chapter 2, “Effective Assistance of Counsel,” describes how the Supreme Court has restricted the right to the effective assistance of counsel and how the Court’s narrow construction of this right may be changing. The Court’s 1984 decision in *Strickland v. Washington*<sup>3</sup> tilted the scales heavily against claims of ineffective assistance, and in the 1980s and 1990s, the Court rejected every claim of constitutionally ineffective counsel it heard. (White, at 19.) Although some lower courts in these decades made “a serious effort to monitor capital defense attorneys’ representation at capital trials,” in “the Fourth, Fifth, and Eleventh Circuits, federal courts rarely granted relief.” (White, at 17–18.) Moreover, “with some variations, the state courts within these jurisdictions followed the pattern set by the federal courts.” (White, at 18.) The courts most reluctant to grant relief heard cases from the states in which death sentences were most frequent.

In 2000, however, and again in 2003, the Supreme Court set aside death sentences because defendants had been denied the effective assistance of counsel at the penalty phases of their trials.<sup>4</sup> White wrote that these rulings had “the potential for strengthening *Strickland*.” (White, at 14.) After his book had gone to press, moreover, a third Supreme Court decision setting aside a death sentence confirmed the potential and even converted some potential energy into kinetic.<sup>5</sup>

The Supreme Court’s shift, not in its stated legal standard, but in its implicit standard for judging claims of ineffective assistance was attributable in large part to movement over time by Justice Sandra Day O’Connor. Justice O’Connor was

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<sup>3</sup> 466 U.S. 668 (1984).

<sup>4</sup> *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003).

<sup>5</sup> *Rompilla v. Beard*, 545 U.S. 374 (2005).

in the majority of an often sharply divided Court both when it denied relief in ineffective assistance cases and when, in the current decade, it afforded relief.

Justice O'Connor wrote the opinion in *Strickland*, which, among other things, declared that American Bar Association (ABA) standards for defense counsel as binding "would interfere with the constitutionally protected independence of counsel."<sup>6</sup> In 2003, however, Justice O'Connor wrote the majority opinion in *Wiggins v. Smith*,<sup>7</sup> which relied heavily on an ABA standard.<sup>8</sup>

*Strickland* treated a failure to investigate mitigating evidence as a reasonable strategic decision, and two later Supreme Court decisions reached similar conclusions.<sup>9</sup> Justice O'Connor's opinion in *Wiggins*, however, treated a failure to seek mitigating evidence as unreasonable because it "ma[de] a fully informed decision with respect to sentencing strategy impossible."<sup>10</sup> In *Williams v. Taylor*,<sup>11</sup> the Court, with Justice O'Connor's concurrence, held a failure to seek mitigating evidence prejudicial despite the existence of powerful aggravating evidence.

Most significantly, after *Litigating in the Shadow of Death* had gone to press, Justice O'Connor joined a five-to-four majority in *Rompilla v. Beard*.<sup>12</sup> In *Rompilla*, as in most ineffective assistance cases that reach the Supreme Court, the standard of review was "double deference" or "deference squared." Under *Strickland*, "[j]udicial scrutiny of counsel's performance must be highly deferential,"<sup>13</sup> and the federal habeas corpus statute allows a federal court to grant relief from a state-imposed death sentence only when the state court's application of clearly established federal law was "objectively unreasonable" and not merely "incorrect or erroneous."<sup>14</sup> In other words, state courts must defer to counsel's performance, and even when they defer too much, federal courts must defer to them. The Court nevertheless found ineffective assistance in *Rompilla* because two lawyers had inadequately investigated the mitigating circumstances of a capital case. Although these lawyers had interviewed their client and five members of his family and had obtained the opinions of three mental health experts, they had not done enough.

Astonished capital defenders in the South report that application of the standard of diligence implicit in *Rompilla* would assure their victory in nearly every case in which they allege ineffective assistance of counsel. Application of this standard might come close to abolishing the death penalty in many states.

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<sup>6</sup> 466 U.S. at 689.

<sup>7</sup> 539 U.S. 510 (2003).

<sup>8</sup> *Id.* at 524.

<sup>9</sup> *Burger v. Kemp*, 483 U.S. 776 (1987); *Darden v. Wainwright*, 477 U.S. 168 (1986).

<sup>10</sup> 539 U.S. at 527.

<sup>11</sup> 529 U.S. 362 (2000).

<sup>12</sup> 545 U.S. 374 (2005).

<sup>13</sup> 466 U.S. at 689.

<sup>14</sup> 539 U.S. at 520–21 (interpreting 28 U.S.C. § 2254).

*Rompilla* clearly should be understood, not simply as a “death is different” decision, but as a “death is VERY different” decision.

Justice O’Connor’s political and jurisprudential inclinations were typically conservative, but she exhibited a willingness to moderate her views in the light of new experience. A notable example came in *Planned Parenthood v. Casey*,<sup>15</sup> in which she voted to reaffirm *Roe v. Wade*<sup>16</sup> largely because this decision had induced widespread reliance. Another significant illustration came in *Grutter v. Bollinger*,<sup>17</sup> in which her opinion rescued affirmative action from the banishment that earlier decisions had seemed to portend. In *Grutter*, Justice O’Connor was influenced by the success and widespread approval of affirmative action in business, the military, and the academy.<sup>18</sup>

Justice O’Connor’s recent sensitivity to the need for the effective assistance of counsel in capital cases may have stemmed from a recognition of how frequently and how egregiously this right had been denied—and of how its denial had placed dozens of innocent people on death row. Justice O’Connor followed the news, and she was the only member of her Court to have held elective office. More than many of her colleagues, she had her ear to the ground.

Although Justice O’Connor rarely supplied a decisive vote in *favor* of the claims of criminal defendants, she did in recent ineffective assistance cases. Capital defenders report, however, that the message of these cases has not reached the Fourth, Fifth, and Eleventh Circuits. Additional rulings like *Wiggins* and *Rompilla* may be necessary to convince these courts that capital defendants truly have a right to capable lawyers, and with Justice O’Connor’s departure from the Supreme Court we are less likely to get them.

### III. EXONERATING THE INNOCENT

Chapter 3, “Defending Capital Defendants Who Are Innocent,” begins by examining the disputed question of how many death row inmates have been exonerated. White considers, for example, whether an acquittal after a retrial reliably indicates innocence.

Most of this chapter consists of detailed descriptions of the performance of counsel in three cases in which people who were later shown to be innocent were sentenced to death—those of Earl Washington, Jr., Anthony Porter, and Ernest Willis. In each case, bad lawyering contributed to a wrongful conviction and death sentence, and heroic lawyering contributed to the defendant’s exoneration.

White describes how the police obtained a patently false confession from a retarded and suggestible Earl Washington, how prosecutors parlayed this

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<sup>15</sup> 505 U.S. 833 (1992).

<sup>16</sup> 410 U.S. 113 (1973).

<sup>17</sup> 539 U.S. 306 (2003).

<sup>18</sup> *See id.* at 330–31.

confession into a conviction and death sentence without much challenge from defense counsel, and how several state and federal courts turned a blind eye to the seemingly manifest injustice. Washington ultimately was pardoned on grounds of innocence because a fellow inmate brought his case to the attention of a New York law firm and because the members of this firm worked around the clock to obtain a stay. The lawyers succeeded in securing this stay nine days before Washington's scheduled execution. Thereafter, a volunteer Virginia lawyer, Bob Hall, discovered an exculpatory laboratory report that trial counsel had overlooked or misunderstood. The evidence that Hall uncovered persuaded an interim Virginia Attorney General, Steven D. Rosenthal, to order new DNA testing. The results of this testing persuaded a Virginia governor, Douglas Wilder, to commute Washington's death sentence on the harsh condition that he abandon his appeal. Later DNA testing convinced another Virginia governor, James Gilmore, to issue a full pardon.

In Porter's case, a defense attorney who had clashed bitterly with a judge in earlier cases and who had even called this judge a racist elected to hold capital sentencing proceedings before this judge. The lawyer's fees had not been paid, and he concluded that a bench trial would be quicker and less work than a jury trial. Porter later came within fifty hours of execution. At that point, a volunteer lawyer obtained a stay, not because Porter was innocent or because his lawyer had been ineffective, but because Porter appeared so severely retarded that he could not be executed. Shortly thereafter, the members of a college journalism class secured a confession from the person who had committed the murder of which Porter had been convicted.

In Willis's case, volunteer lawyers at two New York firms devoted thirteen years and three to five million dollars in legal time to post-conviction representation. When they finally obtained habeas corpus relief, a conscientious prosecutor declined to retry the defendant because "he simply did not do the crime." (White, at 65.)

The exoneration of Washington, Porter, and Willis did not demonstrate that the legal system corrects its own errors. In these cases, as in nearly all other cases of death row exoneration, only the heroic intervention of people other than criminal court regulars produced the truth. White appropriately describes the exoneration of these three defendants as "extraordinarily adventitious." (White, at 65.)

#### IV. PENALTY TRIAL STRATEGY

Chapter 4, "Defending Capital Defendants Who Have Strong Claims of Innocence," addresses some strategic issues that arise in the penalty phase of capital trials. White encourages lawyers not to shy away from double-edged mitigating evidence that reveals the defendant's propensity for violence while at the same time revealing the adverse circumstances that gave rise to this propensity.

He suggests that it may be appropriate to use new counsel at the penalty phase to emphasize that, although the defense accepts the jury's verdict, the jury's task at this phase is to "look at who the defendant is." (White, at 82.)

White focuses particularly on whether and how to argue "residual doubt" to a sentencing jury. When a jury has just convicted a defendant, suggesting that there remains a doubt of his guilt may appear insulting and disrespectful. One circumstance counsel should consider in deciding whether to make a residual doubt argument is the length of the jury's deliberations. In some cases, counsel may appropriately argue to the jury, as Stephen Bright once did:

[Y]ou spent a day agonizing over that [issue] and I'm sure discussing it back and forth and you came to the decision you came to. But I'd suggest to you . . . that part of that struggle is a reason for voting for a life sentence in this case, the fact that it was a close question, a difficult question . . . . (White, at 86.)

If the credibility of a prosecution witness was seriously challenged, counsel may invite the jury to consider the possibility that this witness may recant his testimony. "[I]f Paul was still doing his life sentence in prison and Mr. Hogg happened to [admit that he lied], something can be done about it; but if he's executed, it can't." (White, at 88, quoting attorney David Bruck.) In this chapter, one sees White's sound strategic judgment as well as his focus on the art of litigation, a focus that sadly has become rare in the legal academy.

#### V. PERSUADING JURIES TO SAVE A LIFE

Much of Chapter 5, "Defending a Capital Defendant in an Aggravated Case," consists of detailed descriptions of how outstanding lawyers convinced juries to spare the lives of three defendants who had committed especially stomach-turning killings. One of these defendants was Lee Malvo, the seventeen-year-old sniper who, with his older confederate John Muhammad, killed ten people and wounded three in the Washington, D.C. area in 2002. Attorney General John Ashcroft facilitated Malvo's trial in Virginia rather than another state to maximize the likelihood of his execution, and his case was assigned to a prosecutor who previously had obtained seven death sentences. Malvo, described as "the most terrifying serial killer in U.S. history," had made a detailed confession that appeared "boastful," admitted a financial motive for his crimes, and said, "I intended to kill them all." (White, at 109–10.)

At the guilt phase of Malvo's trial, counsel offered a defense of insanity with little hope of success. Their primary purpose in presenting this defense was "to front-load the mitigating evidence." (White, at 111.)

While growing up in Jamaica, Lee Malvo almost never saw his father. He attended ten schools and had many caretakers. His brutal mother repeatedly left

him with these caretakers while she lived elsewhere. She authorized the caretakers, in the words of a Jamaican folk expression, to “punish this child but spare the eye.” (White, at 112.) This expression meant that the caretakers could discipline Malvo severely but not kill or blind him.

When Malvo was fifteen years old, his mother took him to Antigua and left him alone for three months in a shack without electricity or running water. While living in this shack, Malvo met John Muhammad, who befriended him, invited him to live with Muhammad in Antigua, and ultimately brought him to the United States. The defense offered evidence that Muhammad was the father figure Malvo long had sought and that Muhammad brainwashed Malvo.

In his closing argument, the prosecutor declared that if there “was ever going to be a case for [the death penalty], this was it.” (White, at 118.) Malvo’s counsel, Craig Cooley, however, told the jurors that they were the last in a long line of Malvo’s caretakers:

[A]s Una James did with all of the caretakers that she gave this child to, I leave you with a phrase. It’s a phrase that both invites you to mete punishment out but also to temper it, to draw the line short of the ultimate penalty, and I leave you with this phrase. Punish this child, save the eye. (White, at 120.)

Although most observers speculated that the defense would achieve an outcome no more favorable than a hung jury, the jury returned a unanimous verdict in favor of a life sentence.

A noteworthy aspect of the other two cases White describes was counsel’s jury selection strategy. Although Michael Burt and Robert Berman were William White’s defense counsel, they sounded like prosecutors as they emphasized the aggravating circumstances of the defendant’s crime during their *voir dire* examination of prospective jurors. “And then he injected the victim with rat poison,” Burt said. “And then he sodomized him.” (White, at 122.) Counsel asked the prospective jurors whether these circumstances would cause them to vote for the death penalty automatically or whether they would consider mitigating evidence as well. The trial judge dismissed for cause the prospective jurors who said that they would not consider a life sentence.

The legal merits of counsel’s challenge seem to me dubious. Recognizing that no evidence concerning, say, Osama bin Laden’s troubled childhood would alter a juror’s opinion of the punishment bin Laden deserves need not call the juror’s objectivity into question.<sup>19</sup> Nevertheless, California precedent supported

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<sup>19</sup> If counsel for the defense may secure the dismissal of every prospective juror who would not consider a life sentence in an extremely aggravated case, may a prosecutor secure the dismissal of every juror who would not consider a death sentence in a case with overwhelming mitigating circumstances—perhaps one in which the defendant is accused of the consensual mercy killing of a long-suffering family member?

counsel's challenges,<sup>20</sup> and I imagine that judges in other states would allow similar challenges.

White suggests that the case of Martin Gonzales illustrates the virtues of the "Wymore method" of selecting jurors in capital cases. David Wymore, the Chief Public Defender of Colorado, devised a system for ranking prospective jurors' attitudes toward the death penalty. In selecting a jury, the most effective strategy may be to consider each prospective juror's "Wymore ranking" with little or no attention to other possible predictors of his or her decision.

Although White was far from the first scholar to note the frequency with which sleeping and otherwise incompetent lawyers have brought death sentences to their clients, *Litigating in the Shadow of Death* is the first work to show in detail how exceptional lawyers work their magic and save even the worst of the worst from execution. White criticizes the many decisions treating the failure of defense attorneys adequately to investigate mitigating circumstances as non-prejudicial because reviewing courts themselves considered the aggravating evidence overwhelming. As White notes, "[E]ven in the most aggravated capital cases, introducing mitigating evidence at the penalty trial can dissuade the jury from imposing the death sentence." (White, at 201.)

## VI. PLEA BARGAINING

Chapter 6, "Plea Bargaining in Capital Cases," could have been subtitled "Frankenstein Meets the Werewolf." It describes the intersection of two dreadful monsters of American criminal justice, the practice of capital punishment and the practice of plea bargaining.

White, Stephen Schulhofer, and I once applied for a federal grant to determine how many of the inmates on death row were there only because they had declined bargains that could have saved their lives. We applied during the Reagan years and did not get the grant. Today the number remains unknown.

White, however, asked experienced capital defenders to make their best estimates. Millard Farmer declared that "75 percent of the defendants who have been executed since 1976 could have avoided the death sentence by accepting a plea offer." (White, at 145.) Stephen Bright and Michael Burt maintained that half of the defendants executed in America "at some point had an opportunity to enter a guilty plea that would have eliminated the possibility of a death sentence." (White, at 146.)

America thus executes people, not simply for the crime of committing an aggravated murder, but for the crime of standing trial. In many cases and probably most, standing trial is as much a necessary condition of execution as committing a capital offense. The United States kills people for being too optimistic about their prospects of acquittal and for exercising their constitutional rights.

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<sup>20</sup> See *People v. Cash*, 50 P.3d 332, 340 (Cal. 2002).

Plea bargaining gives the lie to the most common rationale for the death penalty—that some crimes are so horrible that they simply require it. Proponents of this penalty insist that no lesser punishment can adequately express the community's condemnation. The actions of American prosecutors, however, speak louder than their words, and these actions convey a different message: A lesser punishment can adequately express the community's condemnation if the accused agrees to ease the prosecutors' financial burdens by pleading guilty. For defendants who agree to save the costs of a trial, lesser punishments are just fine. These defendants' horrendous crimes turn out not to demand death after all. In the immortal words spoken by Gilda Radner on Saturday Night Live, "*Never mind.*"

Plea bargaining cheapens the death penalty. It changes what the death penalty is about. Plea bargaining also exposes efforts to promote the even-handed administration of the capital penalty as empty and cosmetic. In one of his earlier books, White wrote about the mass murderer Ted Bundy and about Sandra Lockett, the defendant in a prominent Supreme Court case.<sup>21</sup> Bundy, one of the worst of the worst, was executed only because he turned down a deal.<sup>22</sup> Lockett, far from the worst of the worst, had been minimally involved in a robbery that ended in an unanticipated killing by a co-felon. She was sentenced to death because she had a possible defense and turned down offers that could have saved her life. Lockett's co-felon, the killer without a defense, pleaded guilty in exchange for a life term.<sup>23</sup>

When Berkeley law professor Malcolm M. Feeley visited death row in Tennessee, he noticed an inmate in kitchen whites delivering meals to the death row inmates. It took a moment before Feeley realized that the inmate was James Earl Ray.<sup>24</sup> Ray, the probable assassin of Martin Luther King, Jr.,<sup>25</sup> had entered a plea agreement. He was therefore on one side of the bars while less iniquitous killers awaited execution on the other.<sup>26</sup>

In America's bizarre system of criminal justice, a serial killer may reduce the likelihood of his execution by committing additional murders. The more unexplained disappearances a killer can solve, the greater his bargaining power. In 2003, the very worst of the worst, Gary Leon Ridgway, the Green River Killer, escaped execution through a plea agreement that required him to assist in locating

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<sup>21</sup> See *Lockett v. Ohio*, 438 U.S. 586 (1978).

<sup>22</sup> WELSH S. WHITE, *THE DEATH PENALTY IN THE NINETIES* 57–60 (2000).

<sup>23</sup> *Id.* at 60–62.

<sup>24</sup> By keeping Ray physically separated from both the general prison population and death row inmates, his work assignment protected him from a privately administered death penalty. It also kept Ray, an earlier escapee, in a secure place away from the perimeter of the prison.

<sup>25</sup> In 1997, with the approval of Dr. King's widow and his other children, Dexter King shook Ray's hand and expressed his belief in Ray's innocence. Because there is no reason to credit confessions induced by the threat of death, plea bargaining in capital cases settles the question of an accused killer's guilt in a way that should not satisfy anyone.

<sup>26</sup> See e-mail from Malcolm Feeley to Albert Alschuler (Mar. 28, 2006) (on file with author).

the remains of his victims. Ridgway, the most prolific serial killer in American history, pleaded guilty to forty-eight charges of aggravated first degree murder. King County Prosecuting Attorney Norm Maleng then congratulated himself: "This agreement was the avenue to the truth. And in the end, the search for the truth is still why we have a criminal justice system."<sup>27</sup>

It may take a great trial lawyer to save an exceptionally brutal killer from a death sentence by arguing to a jury, but almost any lawyer can save a brutal killer by bargaining. White notes that Philadelphia District Attorney Lynne Abraham has been called the "deadliest D.A." because she seeks the death penalty in nearly every case in which the defendant is eligible for it. In even the most egregious cases, however, Abraham's office foregoes the death penalty when capital defendants agree to plead guilty. (White, at 147-48.)

One imagines that District Attorney Abraham is a well-meaning public servant. Like others socialized to treat plea bargaining as routine, she may be oblivious to the fact that her methods are the equivalent of Torquemada's. Abraham may not fully realize the ugly purpose for which she really uses the death penalty. What is familiar tends to become what is right.

When Hannah Arendt spoke of the banality of evil, she referred to the Holocaust and to a greater evil than that of the American criminal justice system.<sup>28</sup> Arendt's phrase may come to mind, however, as one hears bargaining lawyers discuss whether to take or to spare a life. The answer often turns on whether obtaining a death sentence seems worth a week or two of trial.

As White emphasizes, the key to successful bargaining may lie in threatening to increase the financial expenses of the other side. The defense attorney's goal is often to persuade the prosecutor that a trial will "cost the county more than it can afford." (White, at 148, quoting Michael Charlton.)

White describes how Edward Staffman saved the life of Sampson Armstrong by bargaining with five county commissioners. Staffman first secured the court's permission to retain six expert witnesses. Then he met with each of the county commissioners individually and observed that compensation for the defense experts would exceed \$100,000 if the case went to trial. Staffman suggested that this expenditure "would not be a good use of resources." (White, at 150.) The commissioners were persuaded, and they in turn convinced the prosecutor to make a deal. Staffman's proposal included a face-saver for the officials: Some of the money saved by avoiding trial could "be used to provide a suitable memorial for the victims." (White, at 150.)

Michael Burt saved the life of Mendes Brown by alleging that for thirty-six years "no Chinese-Americans, Filipino-Americans, or Hispanic-Americans had served as foreperson of a San Francisco indictment grand jury." (White, at 151.)

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<sup>27</sup> See Wikipedia entry on Gary Ridgway, at [http://en.wikipedia.org/wiki/Gary\\_Ridgway](http://en.wikipedia.org/wiki/Gary_Ridgway) (last visited Mar. 23, 2006).

<sup>28</sup> See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1964).

In a criminal justice system that is alternately miserly and profligate, this allegation generated three years of costly pretrial litigation. Eventually the victim's son, "[i]n the interest of obtaining closure, . . . withdrew his opposition to a negotiated resolution that would allow the defendant to avoid the death penalty." The prosecutor then made a deal. (White, at 150–51.)

As the *Brown* case illustrates and as White emphasizes, many prosecutors have delegated *de facto* control of the state's most awesome penalty to private parties, the victims' families. The attitudes of these families range from adamant opposition to the death penalty to insistence that death is the only appropriate punishment and prosecutors should not bargain about it. As White observes, "[T]he prosecutor's deference to the family members' wishes enhances the death penalty's arbitrary application." (White, at 169.)

Capable defense attorneys now find it advantageous to bargain with family members as well as prosecutors. They may promise to conceal embarrassing information (for example, that the victim was a prostitute), to disclose information that the prosecutor has not revealed to the families, to make no statements to the press, to ensure that the defendant will not seek to profit from his crime by writing or granting interviews, and to arrange a meeting between the defendant and the family members at which the defendant will explain his crime and express his remorse. (White, at 153–55.)

Defense attorneys approach their clients' families too, for "[t]he participation of a defendant's family members or loved ones will often be critical" in persuading the defendant to plead guilty. (White, at 159.) As White reveals, a defense attorney's most challenging bargaining sessions are often those he conducts with his client. Many defendants, uncertain that life without parole is worth living, seem more willing to risk their own deaths than their lawyers can stomach. Attorneys sometimes go to extraordinary lengths to persuade clients to accept what the lawyers, at least, regard as life-saving deals. White describes a three-hour meeting between Pierre Rausini, a capital defendant, and Scharlette Holderman, a mitigation specialist:

[Holderman] talked about her experiences in "attending Florida executions." Among other things, she talked about the anguish suffered by Ted Bundy's mother when she witnessed Bundy's execution. Bundy's mother not only had to witness her son's execution but was taunted and harassed by death penalty supporters. . . . After hearing what she said, Rausini said, "I'll think about it." Later, he accepted the prosecutor's offer. (White, at 162–63.)

The practice of plea bargaining often transforms defense counsel from courtroom champions into the point men and women of a coercive system. The principal function of these attorneys is to explain to their clients just how the legal system's armaments work and to force clients to recognize the coercive power of

the alternatives they face. Plea bargaining demeans the role of counsel as it trivializes the purposes of the death penalty.

## VII. POST-CONVICTION PROCEEDINGS

Chapter 7, "Seeking Postconviction Relief in Capital Cases," describes how the Supreme Court established barriers to federal habeas corpus relief in the 1970s and 1980s and how Congress added to these barriers in the 1990s. The chapter then describes a number of cases that illustrate both the appalling and the admirable work of post-conviction counsel.

On the appalling side is the case of Richard Zeitvogel, a prison inmate who became a confidential informant and provided information implicating Gary Dew in the burglary of a prison chapel. Dew's lawyer, public defender Julian Ossman, showed copies of Zeitvogel's confidential statement to Dew. Dew, nicknamed "Crazy," was enraged and threatened to kill Zeitvogel in the presence of several witnesses. Dew then arranged to be transferred to Zeitvogel's cell. The two inmates fought, and at 4:30 p.m. on the day Dew arrived, Zeitvogel informed a guard that he had killed Dew in self-defense.

Zeitvogel's counsel at his trial for murder was Julian Ossman, the lawyer who had revealed his client's confidential statement to the lawyer's now deceased former client and thereby provoked the deceased client's murderous rage. Ossman called none of the witnesses Zeitvogel had requested. Although he presented evidence that Dew had threatened Zeitvogel, he offered no evidence that Zeitvogel's confidential report had prompted Dew's threat. He also failed to impeach the prison authorities who testified that they did not know of any desire on Dew's part to murder Zeitvogel. Ossman could have shown that these officials were aware of Zeitvogel's incrimination of Dew. When Zeitvogel was convicted, Ossman presented no mitigating evidence at his penalty trial. A jury sentenced Zeitvogel to death.

The Missouri Supreme Court affirmed Zeitvogel's conviction and death sentence, and a public defender then filed a state post-conviction petition. This defender asserted Ossman's ineffectiveness but only because the trial lawyer had failed to call additional witnesses. He did not mention Ossman's flagrant conflict of interest or his failure to present the evidence that Zeitvogel's confidential statement had enraged Dew. The Missouri courts denied Zeitvogel's post-conviction petition.

Another lawyer then sought federal habeas corpus relief, but the earlier lawyer's failure to present the crucial allegations in the state post-conviction proceeding proved fatal.<sup>29</sup> A Supreme Court decision precludes a federal court from considering new allegations unless a defendant can establish "cause" for his failure to present these allegations to the state court,<sup>30</sup> and the Supreme Court has

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<sup>29</sup> Yes, literally.

<sup>30</sup> See *Wainwright v. Sykes*, 433 U.S. 72 (1977).

held that the ineffectiveness of post-conviction counsel can never establish cause.<sup>31</sup> The Court recognizes an exception to the cause requirement when a defendant can establish “actual innocence,”<sup>32</sup> but Zeitvogel’s habeas counsel failed to allege his actual innocence. A second habeas corpus petition corrected this defect, but it was too late.<sup>33</sup> Zeitvogel was executed in 1996.

On the admirable side was counsel’s performance in the case of Darryl Atkins, a case in which the Supreme Court overruled a thirteen year-old precedent and held that the Cruel and Unusual Punishment Clause precludes execution of the retarded.<sup>34</sup> White shows how thoughtful and energetic lawyers laid the groundwork for this ruling by emphasizing, among other things, a retarded defendant’s inability to make meaningful contributions to his defense.

### VIII. CONCLUSION

White’s Chapter 8, “Concluding Observations,” reiterates “that the post-*Furman* reforms designed to reduce the death penalty’s arbitrary application have not been and probably will not be effective.” (White, at 197.) The American criminal justice system makes a defendant’s punishment (that is, in capital cases, his life and death) dependent on the quality of his counsel—more dependent than it is in any other criminal justice system in the world. Our legal system, however, does little to ensure that defendants have the assistance of able lawyers.

White observes that dedicated defense attorneys have done a great deal in recent decades to alter the public’s perceptions of capital punishment. The last sentence of his last book offers a moderately hopeful glance into the future:

In the long run, . . . just as a defense attorney’s compelling narrative of injustice can produce a favorable result for a particular capital defendant, defense attorneys’ compelling narratives of the series of injustices perpetrated by the modern system of capital punishment may lead to a continuing decline in the use of the death penalty, and eventually to its outright abolition. (White, at 208.)

White planned to write another book on capital punishment during his sabbatical in the 2006–07 academic year, but it is difficult to imagine what book he had left to write. Just as White’s scholarship had explored virtually every aspect of

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<sup>31</sup> See *Coleman v. Thompson*, 501 U.S. 722 (1991).

<sup>32</sup> See *Murray v. Carrier*, 477 U.S. 478, 480 (1986).

<sup>33</sup> The Eighth Circuit held not only that the allegations of the second habeas corpus petition were too late but also that Zeitvogel had not made a sufficient showing of innocence. Forensic evidence indicated that he strangled Dew from behind, and he did not immediately report the killing. See *Zeitvogel v. Bowersox*, 103 F.3d 54, 55–56 (8th Cir. 1996).

<sup>34</sup> *Atkins v. Virginia*, 536 U.S. 304 (2002) (overruling *Penry v. Lynaugh*, 492 U.S. 302 (1989)).

the law of police interrogation,<sup>35</sup> his work had, as best I can tell, examined in depth and detail every aspect of America's system of capital punishment. White had discussed false confessions in capital cases, the quality of counsel, client interviewing, factual investigation, plea bargaining, jury selection, the issues posed by defendants who tell their lawyers not to oppose death sentences, the persistence of racial discrimination, the role of victims' families, the role of psychologists and mitigation specialists, jury instructions, penalty trial procedures, closing arguments, appeals, habeas corpus, and the rulings of the Supreme Court. Welsh White made extraordinary contributions to our knowledge and understanding of American criminal justice. *Litigating in the Shadow of Death* was the capstone of his remarkable career and dedicated life.

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<sup>35</sup> See, e.g., WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* (2001).