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CAPITAL DEFENSE LAWYERS: THE GOOD, THE BAD, AND THE UGLY

Sean D. O'Brien*

LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES. By *Welsh S. White*. Ann Arbor: University of Michigan Press. 2006. Pp. 219. Cloth, \$60; paper, \$21.95.

INTRODUCTION

Professor Welsh S. White's¹ book *Litigating in the Shadow of Death: Defense Attorneys in Capital Cases* collects the compelling stories of "a new band of dedicated lawyers" that has "vigorously represented capital defendants, seeking to prevent their executions" (p.3). Sadly, Professor White passed away on New Year's Eve, 2005, days before the release of his final work. To the well-deserved accolades of Professor White that were recently published in the *Ohio State Journal of Criminal Law*,² I can only add a poignant comment in a student blog that captures his excellence as a scholar and educator: "I wanted to spend more time being taught by him."³

Another colleague stated, "He believed very strongly that the way [in] which the death penalty is carried out in the United States is unfair and inhumane and violates the Constitution. He stood up for what he believed and was very influential in doing that."⁴ Professor White's book is a wonderful parting gift from a scholar and humanitarian. The book advances his cause by exposing the Achilles Heel of capital punishment: the Court's unwillingness to guarantee adequate legal representation to every person accused of a capital crime. It may be his most influential publication on the death penalty.

The book explores the work of defense attorneys, both good and bad, on behalf of prisoners in capital cases. Professor White interviewed over thirty lawyers "identified as among the most skilled capital defense attorneys in

* Visiting Professor, University of Missouri, Kansas City School of Law, and a capital defense attorney. Two of Mr. O'Brien's cases are discussed in chapter seven of Professor White's book.

1. Late Professor of Law, University of Pittsburgh School of Law.

2. See Andrew E. Taslitz, *A Grateful Student's Farewell to Welsh White*, 4 OHIO ST. J. CRIM. L. 5 (2006); John T. Parry, *Tribute: Remembering Welsh White*, 4 OHIO ST. J. CRIM. L. 11 (2006); James Tomkovicz, *Welsh White: A Farewell to a Generous Spirit*, 4 OHIO ST. J. CRIM. L. 19 (2006); John Burkoff, *Remembering Welsh White*, 4 OHIO ST. J. CRIM. L. 15 (2006).

3. Posting of Russell Lucas to Attorney/Wastrel, <http://www.attorney-wastrel.blogspot.com/2006/01/professor-welsh-white.html> (Jan. 2, 2006, 23:11 EST) (last visited July 10, 2006).

4. Leigh Remizowski, *Remembering prof. Welsh White*, PITT NEWS, Jan. 20, 2006, <http://www.pittnews.com/news/2006/01/20/> (follow "Remembering prof. Welsh White" hyperlink) (quoting University of Pittsburgh Law Professor John Burkoff).

the country” (p. 10). He also examined records in capital cases, “including cases in which attorneys superbly represented capital defendants and others in which their representation was problematic for some reason” (p. 11). By presenting his findings, Professor White establishes that the current system of providing representation to people accused of capital crimes contributes significantly to the arbitrariness of the death penalty. As the recent verdict in the trial of Zacarias Moussaoui amply demonstrates, a defendant fortunate enough to be appointed a dedicated capital defense attorney can avoid the death penalty even in the most aggravated case.⁵ On the other hand, a defendant represented by less conscientious or less experienced counsel runs a substantial risk of being executed, even if he is innocent.⁶ Professor White’s book illustrates the role that each type of lawyer plays in the current system of capital punishment.

The best way to appreciate the significance of Professor White’s book is to begin with portions of his final paragraph: “Following the example of Anthony Amsterdam in the pre-*Furman* era, defense attorneys have transformed our understanding of the modern system of capital punishment, identifying fundamental problems with the way it operates” (p. 208). Executions will most likely continue at a rate of over fifty per year, yet Professor White believes that:

[J]ust 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.” (p. 208)

Most readers who undertake the journey described in Professor White’s book will find themselves in agreement with him.

This review focuses on White’s discussion of capital defense attorneys and the current judicial and ABA standards that govern them. Part I discusses the *Strickland* standard for deciding claims of ineffective assistance of counsel and how it has failed to ensure that capital defendants receive competent representation. Part II discusses Professor White’s exploration of the differences between dedicated capital defense lawyers and less experienced or less committed lawyers and their approaches to innocence claims, aggravated cases, plea bargaining, and appeals. Professor White contends that if courts were to more rigorously apply some of their ineffective assistance precedents—particularly those about investigating mitigating factors—we would see fewer individuals sentenced to death. While I agree with Professor White’s conclusion, I believe we are missing an important part of the story. Professor White correctly concludes that exhaustive investigation marks the difference between effective capital defense attorneys and

5. See Neil A. Lewis, *Moussaoui Given Life Term By Jury Over Link to 9/11*, N.Y. TIMES, May 4, 2006, at A1.

6. See, e.g., Stephen B. Bright, Essay, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994).

other defense lawyers, but he provides few details about the investigative process behind the successful defenses discussed in his book. It would have been helpful to hear how the dedicated lawyers portrayed in his book obtained the time and resources needed to assemble a competent defense team and thoroughly investigate the client's life history.

I. THE STRICKLAND STANDARD'S WEAK PROTECTION

Professor White suggests that "one approach to upgrading the quality of lawyers' representations in capital cases would be to rigorously enforce the constitutional guarantee to effective assistance in all criminal cases, or at least in all capital cases" (p. 13). Unfortunately, the standard adopted by the Supreme Court in *Strickland v. Washington*⁷ "gave capital defendants relatively weak protection against ineffective representation" (p. 13). Under *Strickland*, a capital prisoner must show not only that counsel's performance "fell below an objective standard of reasonableness,"⁸ but also that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."⁹ In *Strickland* and in subsequent cases, the Court indicated "that it might be difficult for a capital defendant to establish that his lawyer's deficient performance resulted in prejudice" (p. 16).

An overview of capital representation in America makes it clear that *Strickland* does not adequately safeguard these defendants. Professor White notes, "As the pace of executions increased, it became increasingly clear that defense attorneys' representation of capital defendants was sometimes shockingly inadequate" (p. 3). A 1990 study by the American Bar Association uncovered widespread problems with legal services for capital defendants.¹⁰ Professor White substantiates these condemnations with specific examples of glaring incompetence, or worse, on the part of attorneys purporting to represent capitally charged defendants.

One attorney, for example, was out of the courthouse parking his car while the key prosecution witness was testifying. Another attorney, in front of the jury, referred to his client as a 'nigger'. . . Yet another attorney stipulated all of the elements of first degree murder plus two aggravating circumstances.¹¹

The system of capital defense in America has operated in a constant state of crisis since the resumption of capital litigation in the wake of *Gregg v. Georgia*.¹² Professor White observes, "The states with the most executions

7. 466 U.S. 668 (1984).

8. *Id.* at 688.

9. *Id.* at 694.

10. P. 3 (quoting Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases* 1990 ABA CRIM. JUST. SEC. 55) [hereinafter ABA Task Force].

11. P. 3 (quoting ABA Task Force, *supra* note 10, at 54).

12. 428 U.S. 153 (1976).

have done the least to ensure that capital defendants are provided with effective representation at trial” (p. 4). Texas is a prime example; the hallmarks of its indigent defense system are “inadequate structure for appointing attorneys for indigent capital defendants and inadequate pay for the attorneys who are appointed” (pp. 4–5). Texas does not have a monopoly on incompetent capital defense; Professor White gives stark examples of inept representation in Illinois, Pennsylvania, Georgia, Alabama, Mississippi, Louisiana, Missouri, and even California (pp. 5–10). In state after state, he found examples of neglectful lawyers who were frequently appointed by the court, perhaps because they would do little to obstruct a death verdict.¹³

Professor White explains that a significant obstacle to any solution is the apparent indifference of public officials to the quality of defense in capital cases. A reporter who watched defense attorney Joe Cannon sleep through Carl Johnson’s capital trial asked a Texas judge why the trial was allowed to continue. The judge replied, “‘The Constitution doesn’t say the lawyer has to be awake.’”¹⁴ In 2001, six judges of the Fifth Circuit Court of Appeals agreed with him. The Court *en banc* barely mustered enough votes to grant habeas corpus relief to Calvin Burdine, a Texas death row inmate defended by Cannon, who “‘repeatedly dozed and/or actually slept during substantial portions of [Burdine’s] capital murder trial’”¹⁵ Professor White provides other examples of capital defendants who were executed, even though objective observers would agree that they were inadequately defended at trial (p. 17). From these instances it is clear that *Strickland* has not adequately protected defendants on death row.

Professor White’s concern that *Strickland* offers insufficient protection against inadequate defense is grounded in research uncovering many cases in which lawyers failed to search for mitigating evidence, often making weak claims of “trial strategy,” but where courts nevertheless relied on *Strickland* to affirm capital convictions and sentences (p. 18–19). Although Professor James Liebman’s research demonstrates that many death row inmates have obtained relief under *Strickland*,¹⁶ “lower courts in jurisdictions with the most executions were least likely to grant relief” (p. 17). Such relief is almost unheard of in Virginia and Texas (p. 18), although no one would argue that those states provide the best defense lawyers.

Professor White suggests the fault lies in the *Strickland* standard itself, which “did not have enough teeth to ensure that it would provide consistent

13. For instance, the California courts frequently appointed Ron Slick to defend indigents because, unlike most other lawyers, he would not ask for a continuance to prepare for trial. P. 8.

14. P. 6, n.36 (quoting Rick Casey, *Lawyer Sleeps? Court: So what?*, SAN ANTONIO EXPRESS NEWS, March 10, 2000, at 3A). In spite of his lawyer’s drowsiness, Johnson was executed on September 19, 1995.

15. *Burdine v. Johnson*, 262 F.3d 336, 340 (5th Cir. 2001) (*en banc*) (citing *Ex Parte Burdine*, 901 S.W.2d 456 (Tex. Crim. App. 1995)). In two dissenting opinions, six judges urged denial of habeas relief under *Strickland*.

16. See JAMES S. LIEBMAN, JEFFREY FAGAN & VALERIE WEST, A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES AND WHAT CAN BE DONE ABOUT IT 11 (2002), available at <http://www2.law.columbia.edu/brokensystem2/report.pdf>.

protection to capital defendants or any incentive to states to impose stricter standards for attorneys representing capital defendants” (p. 19). Further, Professor White observes, “the Court’s test [is] . . . too malleable to provide adequate safeguards against unreliable results in capital cases” (p. 19). Professor White’s criticism of *Strickland* focuses on the heavy deference to the “strategic” decisions of trial counsel, and on the subjective determination of whether the prisoner has met his burden of showing that his trial lawyer’s deficient performance affected the outcome of the case (pp. 17–19).

Professor White’s criticism of *Strickland* is certainly valid. However, the “competent performance” aspect of *Strickland* has also contributed to unfair treatment of capital prisoners and warrants substantial discussion. Unfortunately, standards which impose specific duties on the part of capital defense attorneys raise the issue of funding and resources, which have long been the proverbial “elephant in the room” in discussions of capital defense standards. For example, in *Parkus v. Bowersox*,¹⁷ trial counsel knew his client had been institutionalized for most of his youth, but went to the wrong institution looking for records. When counsel was told there were no records on his client, lack of time and resources forced him to trial without the benefit of a complete investigation. Consequently, the jury was led to believe Parkus was institutionalized for repeated acts of delinquency, when in reality he was hospitalized for mental retardation, childhood schizophrenia, and to protect him from his caretaker, who was a sadistic pedophile. Even though the Court of Appeals had earlier ruled that such evidence may have affected the outcome of Parkus’s trial,¹⁸ relief was denied under *Strickland* because counsel performed reasonably given his limited time and resources. The Supreme Court in *Rompilla v. Beard*¹⁹ avoided the issue of adequate funding in its opinion granting relief under *Strickland*, even though the lower court, in an opinion written by then-Circuit Judge Samuel Alito, had denied relief because the investigation had gone “far enough to leave counsel with reason for thinking further efforts would not be a wise use of the limited resources they had.”²⁰ I would like to have heard Professor White’s thoughts about the proposition that a capital defense lawyer’s obligation of competent performance is decreased in states that chronically under-fund indigent defense.

In spite of the discouraging state of capital representation in America, Professor White’s innate optimism illuminates a hopeful future. While courts and political institutions have been indifferent to the obligation to provide competent capital defense, “[o]ver the past fifteen years, the ABA has made a concerted effort to improve the quality of representation afforded capital defendants” (p. 3), primarily through the promulgation of detailed performance guidelines for attorneys representing capital defendants. Where the ABA has led, the Supreme Court may follow. Professor

17. 157 F.3d 1136 (8th Cir. 1998).

18. *Parkus v. Delo*, 33 F.3d 933 (8th Cir. 1994).

19. 545 U.S. 374 (2005).

20. 545 U.S. at 379.

White sees hope in two recent decisions: *Wiggins v. Smith*²¹ and *Williams v. Taylor*.²² This review will discuss those cases and what the effective assistance of counsel means generally in Part II.

II. EXHAUSTIVE INVESTIGATION: AN INDISPENSABLE ELEMENT OF EFFECTIVE REPRESENTATION

While Professor White's analysis of the *Strickland* standard is insightful, his compelling narrative of trial and postconviction cases handled by dedicated capital defense lawyers has the potential to be even more influential. He sees a wide performance gap between experienced criminal defense attorneys and experienced *capital* defense attorneys, who have a superior understanding of the decision-making tendencies of capital juries and the importance of exhaustive investigation. He shows numerous examples of dedicated lawyers avoiding their client's execution through diligent investigation, teamwork, and thoughtful planning. This investigation and planning is truly what separates the effective lawyers from the ineffective.

Section A discusses Professor White's illustration of innocent persons sentenced to death row after trial counsel failed to conduct the exhaustive investigation necessary to defend a death penalty case. Section B details how these investigations can make a difference in even the most aggravated of cases, and the lengths to which dedicated attorneys will go to complete a full investigation. Section C considers plea bargaining as a way that experienced capital defenders prevent their clients from facing the death penalty in the first instance. Finally, Section D describes experienced capital appellate lawyers and the formidable procedural obstacles facing capital prisoners in postconviction proceedings.

A. Innocence on Death Row

Professor White devotes much of his book to the issue of innocence, pointing out many ways in which factors unique to death penalty cases undermine the reliability of death judgments. The prospect that an innocent person could be (or has been) executed in the United States has been prominent in the death penalty debate, particularly in light of the number of people released from prison after new evidence established successful claims of actual innocence.²³ Professor White provides specific references to

21. 539 U.S. 510 (2003).

22. 529 U.S. 362 (2000).

23. Pp. 37–41 (discussing 119 cases of death row inmates released based upon evidence of innocence). Since the publication of Professor White's book, that list has grown to 123 with the release of Derrick Jamison, Harold Wilson, and John Ballard. Ernest Willis, discussed at 55–63, is listed as exonerated number 120. See Death Penalty Information Center, Innocence: List of Those Freed from Death Row, <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110> (last visited July 12, 2006).

the positions of both sides of the debate,²⁴ pointing out that while there may be some guilty persons among those released from death row, “there is also substantial reason to believe that other death row defendants who have not been exonerated are in fact *not* guilty of the capital offenses for which they were convicted” (p. 41). To illustrate his point, Professor White provides detailed accounts of the wrongful conviction and exoneration of Earl Washington, Jr.,²⁵ Anthony Porter,²⁶ Earnest Willis,²⁷ and Joseph Amrine.²⁸ Each of these men spent over seventeen years on death row before proof of their innocence set them free. These stories call to mind Bryan Stevenson’s comment after winning the freedom of his innocent client, former Alabama death row inmate Walter MacMillian: “It was too easy for the state to convict someone for that crime and then have him sentenced to death. And it was too hard in light of the evidence of his innocence to show this court that he should never have been here in the first place.”²⁹

24. The detailed footnotes in Professor White’s book are characteristic of his work, as remembered by his colleague, Pitt Law Professor Ronald Brand:

Just two days before White’s death, Brand remembers visiting him. Though he was bed-ridden and uncomfortable, he was elated by the fact that he had a copy of his new book. White asked Brand to read it to him. After beginning, he warned that he wouldn’t take the time to read the footnotes, but White insisted. This need for specificity was inherent in White.

“You see, when he did anything, he did it completely and he did it in detail,” Brand said. “His footnotes were both important and human. And in anything he did, he wanted to understand it completely.”

Remizowski, *supra* note 4.

25. Pp. 42–49. Virginia Governor James Gilmore granted Washington a full pardon on October 2, 2000. P. 49.

26. Pp. 50–55. Porter’s exoneration was an important factor in Governor George Ryan’s historic decision in January, 2000, to suspend executions in Illinois. “‘How do you prevent another Anthony Porter . . .?’ he asked. ‘Today I cannot answer that question.’” P. 55.

27. Pp. 55–50. The district attorney who portrayed Willis as “a cold blooded monster, devoid of empathy or feelings of any kind,” p. 57, eventually dismissed all charges against Willis, explaining, “[h]e simply did not do the crime. . . . I’m sorry this man was on death row for so long and there were so many lost years,” p. 65.

28. Pp. 189–93. Amrine’s case is particularly disturbing. In seeking to carry out Amrine’s execution in spite of the new evidence of his innocence, the Missouri Attorney General argued before the Missouri Supreme Court that the execution of an innocent person is not a manifest injustice:

JUDGE STITH: Are you suggesting if we don’t find there’s a constitutional violation and if even we find that Mr. Amrine is actually innocent, he should be executed? . . . I’m asking is that what you are arguing for the State?

ATTORNEY GENERAL: That’s correct, Your Honor.

P. 192 (quoting Audio Recording: Missouri Oral Arguments on Archive, *State ex rel. Amrine v. Luebbers*, 102 S.W.3d 541 (Mo. Feb. 4, 2003) (No. SC 84656), at <http://www.missourinet.com/gestalt/go.cfm?objectId=03A1CA5A-94A2-4ADD-866448549D08DD74%category=6%5EMissouri%20Supreme%20Court%20Argument>. Professor White points out that although the attorney general’s argument “seems absurd and illogical, contrary authority is scant.” P. 194.

29. *Man freed after spending six years on Alabama’s death row*, DALLAS MORNING NEWS, Mar. 3, 1993, at 6A.

1. *The Investigations*

Reflecting on these cases, Professor White observes that “the circumstances that led to the defendant’s exoneration were extraordinarily adventitious” (p. 65). Earl Washington came within three weeks of execution before a New York law firm, at the behest of former death row inmate Joe Giarratano, took up his cause (pp. 47, 65). The investigation that freed Anthony Porter occurred only because journalism students happened to take an interest in the case (pp. 53–55). In Willis’s arson-murder case, “the catalyst that precipitated the massive investigation that resulted in Willis’s exoneration” was the fortuitous “confession” by inmate David Long that, in retrospect, “was very likely false” (pp. 65–66). The investigation prompted by Long’s confession turned up physical evidence that convinced even the prosecuting attorney that the fire “probably wasn’t caused by arson at all . . . most likely [it] was caused by an electrical problem—a broken ceiling fan or a faulty outlet.”³⁰

These cases provide an informative backdrop for Professor White’s discussion of the sources of error in capital cases, including false confessions (pp. 66–67), mistaken forensic testimony (pp. 66–68), mistaken identification (p. 68), and a dynamic called “‘the prosecution complex’—where overzealous police or prosecutors prematurely become convinced they have the right suspect and become narrowly focused on strengthening the case against that suspect” (p. 68). Professor White quotes a chilling statement attributed to a Texas prosecutor that “any prosecutor can convict a guilty man. It takes a great prosecutor to convict an innocent man.”³¹ Such attitudes lend credence to Professor White’s conclusion that “the execution of an innocent defendant has probably already occurred and, in any event, is inevitable.”³² This most certainly illustrates that “there are fundamental problems with our system of capital punishment” (p. 203).

Professor White notes that the defense attorneys in the Washington, Porter, and Willis trials appeared to have good reputations. These lawyers “do not fit within the category of capital defense attorneys characterized by the

30. P. 65 (quoting Scott Gold & Liane Hart, *The Nation: Inmate Freed After 17 Years; Prosecutors Once Called Him a ‘Satanic Demon’; but Fatal Fire Probably Wasn’t Even Arson*, L.A. TIMES, Oct. 7, 2004, at A14).

31. P. 71 (quoting WELSH S. WHITE, *THE DEATH PENALTY IN THE ‘90’S* 42 (1991)).

32. P. 203. Since Professor White’s book went to print, in at least four cases, posthumous investigations strongly suggest that innocent persons were executed, including two in which the prosecution has reopened the investigation of the original homicide. Larry Griffin was executed in Missouri on June 21, 1995. Terry Ganey, *Case Is Reopened 10 Years after Man Was Executed*, ST. LOUIS POST-DISPATCH, July 12, 2005, at A1. Ruben Cantu was executed in Texas in 1993. Lise Olsen, *The Cantu Case: Death And Doubt: Did Texas Execute an Innocent Man?*, HOUSTON CHRON., Nov. 21, 2005, at A1, available at <http://www.chron.com/disp/story.mpl/metropolitan/3472872.html> (Last visited July 13, 2006). Carlos de Luna was executed in Texas in 1989. See Maurice Possley & Steven Mills, “*I Didn’t Do It, But I Know Who Did*”: *New Evidence Suggests a 1989 Execution in Texas Was a Case of Mistaken Identity*, CHI. TRIB., June 25, 2006, at 20 available at <http://www.chicagotribune.com/news/specials/chi-tx-1-story,0.4563517.htmlstory> (last visited July 13, 2006). Cameron Willingham was executed in Texas in 2004. Howard Witt, *Texas Urged to Probe Claims of Wrongful Executions*, CHI. TRIB., July 7, 2006, at 6.

ABA as ‘abysmal’ or ‘deplorable’” (p. 71). Nevertheless, the defenses in those cases produced death sentences against innocent clients (pp. 71–73). Lawyers without capital defense training and experience simply fail to appreciate the many ways in which death cases are different, and thus fail to adopt investigative, preparation, and trial methods that account for those differences.³³ Because there are many aspects of the current system of capital punishment that are stacked against capital defendants, the defense lawyer is the only person standing between innocent clients and the executioner.

2. No Strategy About It: Investigating Mitigating Evidence

Experienced capital defense attorneys understand that one of the ironies of death penalty litigation is that defendants who claim innocence are at a greater risk of being sentenced to death than a defendant whose guilt is obvious.³⁴ Capital defendants claiming innocence often discourage their lawyers from investigating sentencing issues, believing that it will diminish their chances of being acquitted; meanwhile, attorneys without capital experience often misjudge the likelihood of success and acquiesce to the client’s wishes.³⁵ “Paradoxically, a capital defendant’s strong claim of innocence thus sometimes creates a trap for unwary defense counsel that, if not avoided, will increase the likelihood of the defendant’s execution.”³⁶ Indeed, Professor White’s research revealed that experienced capital defense attorneys approach this difficult situation very differently than other criminal defense lawyers.

Inexperienced capital lawyers, even those with substantial criminal defense experience, will often “talk themselves into thinking they don’t have to worry about the penalty phase because they have a great shot of winning the case.”³⁷ Such lawyers will often “place undue emphasis on securing a favorable verdict at the defendant’s guilt trial, thereby jeopardizing his chances at the penalty trial” (p. 101). Inexperienced attorneys typically will

33. Some of those differences are discussed in Section II.A.2.

34. See Steven P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538 (1998) (acceptance of responsibility and remorse are highly mitigating); Scott E. Sundby, *The Jury and Absolution: Trial Tactics, Remorse and the Death Penalty*, 83 CORNELL L. REV. 1557 (1998) (denial defense more than twice as likely to result in death sentence, compared to admission of responsibility cases).

35. A claim of innocence can be a source of distrust between a capital defendant and his lawyer; the client may feel that “[i]f you are preparing for the penalty trial, that means you don’t believe I am innocent. If you don’t trust me when I tell you I’m innocent, I don’t trust you to represent me when my life is at stake.” P. 78 (quoting an e-mail from Michael Millman to White).

36. P. 101. Professor White found another “perverse effect” of the death penalty related to innocence: a defendant who is truly innocent “will be more likely to reject any government offers to plea bargain.” P. 169. However, experience shows that “just because the defendant is innocent of the capital crime does not mean the jury will acquit him.” P. 169 (citing discussion at 37–42). Therefore, “[c]apital defendants who are guilty are . . . more likely to avoid the death sentence through a plea bargain; on the other hand, those who are innocent are more likely to be subjected to the vagaries—and potential mistakes—of a trial by jury.” P. 169.

37. P. 78 (quoting White’s telephone interview with Michael Burt, Federal Death Penalty Resource Counselor).

“grossly underestimate the difficulty in convincing a death-qualified jury that there is a reasonable doubt as to the defendant’s guilt,” failing to appreciate that “death-qualified juries . . . are thus much more likely than other juries to credit the prosecution’s evidence and less likely to acquit the defendant or find him guilty of a lesser [i.e. non-capital] offense.”³⁸ Further, persisting in claiming innocence in the face of a guilty verdict is likely to be “counterproductive” because the jury may interpret such arguments as “the defendant’s failure to accept responsibility for his actions [as] a consideration that argues in favor of imposing the death penalty” (p. 101). Therefore, “even able and experienced criminal defense attorneys who lack experience in capital cases may fail to prepare for the penalty trial because they are confident that there will be a favorable outcome at the guilt trial” (pp. 78–79).

Specialists in capital litigation “unequivocally reject this approach. Because they are aware that even defendants with very strong claims of innocence may be convicted of the capital offense, these attorneys insist that a lawyer representing a capital defendant should always prepare for the penalty trial.”³⁹ Experienced capital attorneys are also more acutely aware that the penalty phase becomes a more difficult undertaking when a defendant is convicted of a capital crime in spite of his claim of innocence. Death-qualified jurors may feel that an argument “that there is still a lingering doubt as to guilt is disrespectful to the jury in the sense that it challenges the legitimacy of their recently returned verdict” (p. 82). Such jurors are also “significantly less likely than the normal population to perceive a lingering doubt, or any kind of doubt, as to a criminal defendant’s guilt. In addition, members of any jury may believe that, once the jury had returned a guilty verdict, that verdict resolves *all* possible doubts against the defendant” (pp. 81–82). An argument that the jury’s verdict was mistaken could be interpreted by the jury as disrespectful to its verdict, or worse, as lack of remorse on the part of the defendant (p. 101). It is extremely risky, therefore, to argue in the penalty phase that the jury’s guilt-phase verdict could be wrong.⁴⁰

The type of mitigating evidence that might be persuasive to a juror who has rejected an innocence claim presents yet another dilemma. The most frequent type of evidence presented in a capital sentencing trial relates to

38. P. 78. A death-qualified jury is one selected by eliminating people whose views on the death penalty substantially impair their willingness to impose it. Although the Supreme Court has upheld the constitutionality of the procedure, the underlying research demonstrating the biasing effect of death qualification is persuasive. See Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985), *rev’d sub nom.* Lockhart v. McCree, 476 U.S. 162 (1986).

39. P. 79. See ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 10.10.1 (Rev. 2003) [hereinafter ABA GUIDELINES] (“As the investigations mandated by Guideline 10.7 produce information, trial counsel should formulate a defense theory. Counsel should seek a theory that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies.”).

40. In spite of this caveat, Professor White provides several examples of arguments by experienced capital attorneys, including David Bruck, Steven Bright, and Michael Burt, who skillfully and successfully presented lingering doubts of their client’s guilt as a persuasive reason to spare his life. Pp. 85–100. Any attorney confronted with this difficult dilemma would find inspiration on those pages.

“the defendant’s troubled childhood and impaired mental health” (p. 83). If such evidence can be interpreted as an explanation for violent behavior on the defendant’s part, “the jury may feel that the defense attorney should have presented this evidence at the guilt stage rather than asserting a claim of innocence without providing the jury information that would have helped the jury assess that claim” (p. 83). Therefore, if the defendant has presented a strong claim of innocence at the guilt stage, experienced capital defense attorneys “will be less likely to introduce mitigating evidence designed to explain why the defendant committed the crime [because] it may lead the jury to view the defense as disingenuous” (p. 83).

Experienced capital defense attorneys will base strategic decisions on a thorough investigation of the defendant’s life history. In some cases, the defense may present “‘good guy’ evidence, such as the defendant’s good character, good employment record,” or other testimony indicating that the defendant is not aggressive and need not be executed to protect society (p. 83). Indeed, some attorneys reported that jurors in the penalty phase asked if they could change their guilty verdict after hearing “good guy” mitigating evidence (p. 84).

In many cases in which the defendant has maintained his innocence during the guilt trial, “good guy” mitigating evidence may be lacking, or intermingled with evidence of behavior attributable to severe mental impairments or “‘a profoundly troubled childhood in which the defendant was subjected to horrendous abuse and profound neglect’” (p. 84). Attorneys without substantial capital experience may reject such “double-edged” evidence because while it may cause them to empathize with the defendant, it may also eliminate any lingering doubts about his guilt, making jurors more concerned “that sparing his life will enhance the danger to society, a consideration that empirical data indicates will weigh heavily in the penalty jury’s decision” (p. 84).

In spite of this dilemma, “experienced capital defense attorneys invariably conclude that mitigating evidence must be presented, even if there is some chance that the jury may view it as double-edged.”⁴¹ Steve Bright, one of the most experienced capital trial lawyers in the country, states that counsel must “always present mitigating evidence that will explain the defendant’s background and history to the jury, thereby enabling the jury to gain an understanding of the defendant as a person” (p. 85).

The disparity between how an experienced capital defender will prepare to argue innocence and how a typical defender will prepare demonstrates that substantial reforms are necessary to prevent the execution of more innocent defendants. There are signs, however, that the Court is becoming less tolerant of lawyers who rely on clients’ claims of innocence to justify the failure to investigate penalty issues. In *Wiggins v. Smith*,⁴² the Court found

41. P. 85. See also *Williams v. Taylor*, 529 U.S. 362, 396 (2000) (finding that the double-edged nature of mitigation evidence did not justify trial counsel’s failure to investigate and present mitigation).

42. 539 U.S. 510 (2003).

trial counsel ineffective for failing to investigate mitigating evidence, rejecting trial attorneys' attempt to rationalize their failure to investigate mitigation because they believed Wiggins was innocent. The Court had previously rejected this "strategy" as an excuse for trial counsels' failure to investigate.⁴³

Professor White hopes that *Wiggins v. Smith* will "dramatically expand a capital defendant's attorney's obligation to investigate mitigating evidence in preparing for the penalty trial" (p. 19). The Court specifically observed that "[t]he ABA Guidelines provide that investigations into mitigating evidence 'should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor.'"⁴⁴

Professor White believes the Court should go even further and recognize that "[t]he practices of skilled capital defense attorneys indicate that these attorneys will rarely, if ever, decide to curtail investigation for mitigating evidence for any reason" (p. 200). Even when mitigating evidence includes facts that show the defendant may have violent tendencies, skilled defense attorneys nevertheless present such evidence "in order to provide the jury with a fuller understanding of the defendant's personal history and the forces that have shaped his conduct" (p. 200). Based on his study of skilled capital defense attorneys, Professor White concludes that "[c]ourts should interpret *Wiggins* to mean that, in the absence of very unusual circumstances, a capital defendant's attorney needs to conduct a full investigation for mitigating evidence in order to make a fully informed decision as to the strategy to be adopted at the penalty trial" (p. 200). Potentially innocent defendants are just as deserving of a vigorous sentencing-phase defense as those who are clearly guilty. Indeed, given the ever-increasing restrictions on capital appeals, an effective penalty phase defense may be necessary to the defendant's ability to prove his innocence at some future proceeding.

B. *Litigating Aggravated Cases*

Professor White provides examples of experienced capital defense lawyers avoiding the death penalty in three highly aggravated cases: John Lee Malvo, accused of nine Washington, D.C., area sniper homicides in October 2002; William White, an ex-convict charged in California with two homicides that involved torture and sexual assault; and Martin Gonzales, a defendant with a previous murder conviction accused of beating three women to death in Texas. His narrative provides more support for his assertion that *Wiggins v. Smith*⁴⁵ should be more rigorously enforced. Professor White purposely chose these cases because each involved the type of murder about which prosecutors commonly say, "'If this isn't a death penalty case,

43. *Williams*, 529 U.S. at 395.

44. 539 U.S. at 524 (quoting ABA GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES 11.4.1(C) (1989)).

45. 539 U.S. 510 (2003).

we might as well repeal the death penalty statute'” (p. 105). Yet in each case, defense attorneys diligently investigated the case and developed a case-specific “theme for life that was strong enough to convince the jury that, despite the aggravated nature of the case, the death penalty should not be imposed” (p. 109).

Professor White uses these cases to make his point that a diligent defense can avoid the death penalty even in exceptionally aggravated cases. The reader will be most familiar with the “Beltway Sniper” case, in which John Lee Malvo was charged in the series of shootings that killed nine people and wounded three in Maryland, the District of Columbia, and Virginia in October 2002. Malvo, the alleged triggerman, was accused of conspiring with John Allen Muhammad, his forty-one-year-old mentor (p. 110). Attorney General John Ashcroft decided that Malvo should be tried in Virginia because the laws of that state were the most conducive to obtaining and carrying out a sentence of death.⁴⁶ In spite of Malvo’s youth, the death penalty seemed almost inevitable given the number of victims and Malvo’s confession in which he “claim[ed] to be the trigger man in each of the Washington area’s 13 sniper shootings . . . , saying ‘I intended to kill them all.’”⁴⁷

Professor White details how Malvo’s attorneys, Craig Cooley and Michael Arif, convinced the jury to spare Malvo from execution by developing a powerful theme for life through the testimony of more than sixty witnesses. The defense presented evidence of Malvo’s impoverished childhood in Jamaica, where his mother, Una James, “‘beat him regularly with her hands and with sticks and belts,’” and abandoned him for months at time.⁴⁸ Malvo’s teachers and caretakers used a Jamaican folk expression to describe James’s approach to child rearing: “‘Punish this child, save the eye’” (p. 112). In other words, beat the child severely, but stop short of crippling or killing him. Caretakers described Malvo “as a gentle, vulnerable youth who was desperate for a father or for a parent of any kind” (p. 113). Muhammad provided that father figure for him just as Malvo was left alone in Antigua for three months “with virtually nothing. ‘He was living in a shack that had no electricity and no running water.’”⁴⁹ Muhammad’s twenty-one-year-old son, Lindbergh Williams, described his father as manipulative and skillful at exploiting weakness, (p. 113) and told the jury, “If my mother had not been a strong woman, if my mother had not fought for me, then it would have been me rather than Lee Malvo in that car with John Muhammad in October of 2002.”⁵⁰

46. Malvo was only seventeen years of age, making him ineligible for the death penalty under Maryland and federal law. 18 U.S.C. § 3591 (2000); MD. CODE ANN., CRIM. LAW, § 2-202 (West 2002). The District of Columbia has no death penalty.

47. P. 110 (quoting S.A. Miller, *Malvo: “I intended to kill them all”*; *Prosecutors play sniper tape*, WASH. TIMES, Nov. 19, 2003, at A1).

48. P. 112 (citing Tom Jackman, *Malvo Said Confession to Police Was a Lie, Psychologist Tells Court*, WASH. POST, Dec. 9, 2003, at A1).

49. P. 113 (quoting a phone interview with Craig Cooley (Feb. 2, 2004)).

50. P. 113 (quoting Cooley interview, *supra* note 49).

Although the jury convicted Malvo of capital murder, they spared his life after hearing penalty phase testimony, which “emphasized Malvo’s positive characteristics, including his intelligence and gentleness, as well as his need for a father figure and his susceptibility to indoctrination” (p. 117). Defense counsel concluded his plea for Malvo’s life by telling the jury that “they were ‘in a very real sense’ becoming ‘the last of the very long line of care takers.’”⁵¹ Cooley then returned to his original theme: “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 . . . Punish this child, save the eye” (p. 120). Notwithstanding Malvo’s terrible crime, the jury returned with a unanimous vote for life.

Professor White’s retelling of the Malvo defense demonstrates his point that a defense conducted in compliance with the ABA Guidelines can produce a life sentence even in highly aggravated cases. To further illustrate his point, Professor White provides narratives of two additional highly aggravated death penalty cases involving defendants not as youthful as Malvo. Michael Burt and Robert Berman’s successful defense of William White, who was charged with two homicides involving torture and sexual deviance, is another example of a painstaking investigation resulting in a persuasive case for mercy. The defense themes focused on White’s tragic childhood of abuse and neglect, followed by his successful adaptation to prison, where he was a “‘calming influence’ on other prisoners,” and had even saved a guard from being stabbed (p. 127). In spite of White’s terrible crimes, Burt and Berman convinced a jury that “his life was worth saving” (p. 129).

Professor White draws several conclusions from these cases. A competent capital defense attorney, working with a mitigation specialist, will conduct “a full investigation that will allow the defense team to identify possible mitigating factors,” (p. 105) and develop a case-specific “theme for life” that tells a “coherent story” which explains the defendant’s “life to a jury the way one would relate facts to a neighbor or friend” (p. 106). Capital defense attorneys, wherever possible, rely on lay witnesses and documentary and demonstrative evidence, in addition to expert witnesses who can demonstrate for the jury in a persuasive way the defendant’s mental impairments, disorders, or limitations, or who may demonstrate the defendant’s capacity for “rehabilitation or ability to lead a productive life in prison.”⁵² Experienced capital defense attorneys will “seek to articulate and to offer evidence in support of the defense’s theme for life as early and as often as possible” during the trial (p. 107).

51. P. 120 (quoting fax from Craig Cooley to author, Defense Counsel’s Closing Argument during Penalty Phase of Malvo Trial 2 (Feb. 10, 1994)).

52. P. 106 (citing S. CTR. FOR HUMAN RIGHTS, CASE EXAMPLE: PRESENTING A THEME THROUGHOUT THE CASE 6–7). For example, in Malvo’s case, in addition to lay witnesses, the defense called psychologist Dewey Cornell, who testified that Muhammad had brainwashed Malvo to participate in his sniper plan, and Neil Boothby, “a recipient of the humanitarian award from the Red Cross for his work with child soldiers from third world countries.” P. 115. Boothby “explained how adults train children to be soldiers and why children are especially susceptible to this kind of training.” P. 115, n.42. It is clear, however, that the anecdotal material provided by lay witnesses formed the core of the defense theme for life.

The defense lawyers' in-court strategy, however, is not the entire story. One limitation of Professor White's book is his tendency to focus on the courtroom execution of the defense trial strategy, without a detailed discussion of the investigation that preceded the trial. The reader must infer from the description of each case the thousands of hours of investigation that enabled the defense to develop a compelling theme for life. The reader would benefit from hearing about the Malvo defense team's travels to Jamaica and the Pacific Northwest to trace their client's life history, find Malvo's teachers and caretakers, and bring them to Virginia. It would also be interesting to hear how the defense team selected the experts who helped explain the effectiveness of Muhammad's conditioning of Malvo, and how the defense attorneys were able to obtain such resources in a state known for its failure to adequately fund capital defense. Equally enlightening would be a description of the defense team's investigation into William White's life history, and how they approached interviews with White's sister, who agreed to testify to the horrible abuse to which she and her brother were subjected.⁵³

In glossing over the pretrial preparation part of these stories, Professor White misses perhaps the most important difference between capital defense lawyers and less dedicated or experienced defense attorneys: the capital defense bar will always reach out for help and advice from multiple sources, just as Malvo's lawyers did with the Red Cross volunteer, to unearth sources of human compassion in their cases. Of course, that level of detail would undoubtedly add hundreds of pages to this short and very readable work. Nevertheless, it would be helpful to emphasize that successful capital defense attorneys work with co-counsel, mitigation specialists, investigators, and experts in advance of trial, and to describe in more detail the successful investigation that uncovered the compelling mitigating evidence and themes that prompted death-qualified juries to reject the death penalty for defendants found guilty of aggravated murders.

Professor White's accounts of cases in which diligent lawyers persuaded jurors to spare the life of defendants found guilty of exceptionally violent homicides vindicates the Court's analysis in *Williams v. Taylor*.⁵⁴ Professor White suggests that *Williams* "could alter the way in which courts apply *Strickland's* prejudice prong in capital cases" (p. 9). *Williams*, though providing few guidelines for lower courts attempting to apply *Strickland*, nevertheless makes it clear that a condemned prisoner can prove that he was prejudiced by his lawyer's poor performance even in cases in which "the government establishes significant aggravating circumstances" (p. 34). Professor White's discussion of the Malvo and *Williams* cases demonstrates that the defense counsel's performance, not the government's case in

53. Professor White gives a brief synopsis of her testimony:

William had three sisters. His father would hang all four children from the rafters, beat them with a belt, and then pour salt in their wounds to increase their pain. In addition, William had to watch his father rape and abuse his three sisters . . . [A]pparently for no other reason than that he knew William loved his pet, Mr. White had [William's] dog put to death. P. 124.

54. *Williams v. Taylor*, 529 U.S. 362 (2000).

aggravation, is the appropriate focus of an ineffective assistance of counsel inquiry. Professor White also sees hope in *Wiggins v. Smith* that the Court will enforce counsel's obligation to conduct reasonable investigations and scrutinize claims of "strategy" that are not based on thorough investigations.

By providing details about the investigation overseen by the experienced death penalty defense attorneys in the Malvo and Williams cases, Professor White could have shown how teamwork is a core component of a competent capital defense, and that mitigation specialists are an indispensable part of that team.⁵⁵ The Court's more recent decision in *Rompilla v. Beard*⁵⁶ is a good illustration of this point. Rompilla was defended by two court-appointed lawyers who consulted three mental health experts and interviewed five members of Rompilla's immediate family. Nevertheless, they were able to produce little mitigating evidence for the jury. Rompilla himself was not interested in assisting with a mitigation defense, and his family apparently led counsel to believe that there was nothing significant about his childhood. Postconviction counsel subsequently reviewed the files of Rompilla's prior conviction, which the prosecution used in aggravation of punishment, and discovered evidence which led to substantial, compelling mitigation. Rompilla's parents were "severe alcoholics who drank constantly," and his father beat him "with his hands, fists, leather straps, belts and sticks."⁵⁷ Rompilla and his brother were caged "in a small wire mesh dog pen that was filthy and excrement filled."⁵⁸ Postconviction counsel also found documentary evidence from Rompilla's childhood establishing that he had mental retardation, probably connected with fetal alcohol syndrome caused by his mother's drinking during pregnancy. The Court granted relief under the *Strickland* standard because reasonably competent trial counsel would have reviewed the file of Rompilla's prior conviction and discovered a mental evaluation that referred to some of these mitigating facts.⁵⁹

The deprived and terror-filled childhoods described in the cases of Rompilla, Taylor, Wiggins, Malvo, and Williams are not unusual in individuals who experience violent outbursts that produce capital crimes. Yet experienced capital defense attorneys understand that there are many obstacles that make it difficult for clients and their families to disclose such facts. Abuse, neglect, and mental illness are often associated with events or conditions considered humiliating or shameful, and thus become closely guarded family secrets. More often than not, defense lawyers come from a different cultural background than the client and his family, making trust and com-

55. Guideline 4.1 provides that "[t]he defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 5.1, an investigator, and a mitigation specialist." ABA GUIDELINES, *supra* note 39, at 28. Further, the defense team must include "at least one member qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments." *Id.*

56. 545 U.S. 374 (2005).

57. *Id.* at 391-92.

58. *Id.* at 392.

59. *Id.* at 393.

munication even more difficult. As amply demonstrated by *Rompilla*, investigation limited to trial counsel interviewing family members and calling in mental health experts for generic consultations will not uncover the facts most pertinent to the jury's life-or-death decision. It would have been enlightening for Professor White to expand his discussion of these cases to include the substantial contributions of non-lawyer members of the successful defense teams.

C. Plea Bargaining: Taking Death Off the Table

Because the best capital trial lawyers are adept at avoiding the death penalty through negotiation, Professor White devotes an entire chapter to plea-bargaining (chapter six). Experienced capital defense attorneys "have long understood that aggressively seeking negotiated resolutions in capital cases is a vital aspect of effective representation" (p. 145). Millard Farmer, a Georgia capital defense attorney, "estimates that 75 percent of the defendants who have been executed since 1976 could have avoided the death sentence by accepting a plea offer" (p. 145). Other experienced attorneys estimate that over half of the defendants who have been executed had an opportunity to enter a guilty plea to a sentence other than death (p. 146). Skilled capital defense attorneys will therefore pursue negotiated settlements that avoid the death penalty.

Professor White discusses cases in which skilled attorneys found alternatives to execution that served the interests of the state and even the victim's survivors. These cases illustrate that experienced capital attorneys do not passively await plea offers from the prosecution and present them indifferently to the client; they diligently and creatively pursue negotiated settlements.

While plea bargaining is "an important weapon that may be used to save clients' lives," Professor White also finds it "exacerbates a well-documented weakness of the death penalty: its arbitrary application" (p. 168). Factors which had nothing to do with the magnitude of the defendant's crime, "such as the time and place where the crime was committed, the victim's characteristics, [and] the effectiveness of the defendant's lawyer," have a significant effect on the likelihood that the defendant will receive a death sentence (p. 168; footnote omitted).

Plea-bargaining contributes to the arbitrary imposition of the death penalty by allowing the guilty to escape death but exposing the innocent to the risks of trial by jury.⁶⁰ While prosecutors may support the death penalty because of the significant advantage it gives the government in plea negotiations, there are documented instances in which innocent persons have pled guilty to avoid the death penalty. In Missouri, for example, Johnny Lee Wilson's attorneys convinced him to plead guilty to a murder he

60. P. 169. See *supra* Section II.A.1 (discussing the risks of arguing innocence to a death-qualified jury).

did not commit in order to avoid the death penalty.⁶¹ Lloyd Schlup, after a court found that he was probably innocent of the murder for which he was sentenced to death,⁶² pled guilty to a reduced charge rather than risk returning to death row.⁶³ I sat with Schlup in the death watch cell in Potosi Correctional Center when he came within a few hours of execution, and the terror of that experience was the pivotal factor in his decision to accept a plea offer that would make him immediately eligible for parole. It was as if the prosecution were allowed to negotiate a settlement while holding a gun to Schlup's head.

D. Postconviction Litigation

Finally, Professor White examines representation of death row inmates in postconviction proceedings seeking to set aside a capital conviction or sentence. He begins his discussion with Professor Liebman's exhaustive survey of post-*Furman* capital sentences which revealed that courts have set aside sixty-eight percent of the death sentences imposed between 1976 and 1995.⁶⁴ Regardless of the historically high rate of success, obstacles confronted by lawyers and their clients in these cases are formidable. In 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), which limited the power of federal courts to review state-imposed convictions and sentences (pp. 173–80). Since then, the rate at which capital prisoners are being denied habeas corpus relief on procedural grounds has steadily increased.⁶⁵ Even before AEDPA, however, "The Rehnquist Court established significant barriers to obtaining federal habeas relief in the 1970s and 1980s" (p. 177).

One of the significant barriers that capital prisoners face in postconviction proceedings is that the indigent defense system in capital postconviction cases is even more strained than at the trial level. Most capital jurisdictions depend upon inexperienced lawyers with meager resources, and in 1995 Congress terminated funding for Capital Punishment Resource Centers which trained and assisted those lawyers (pp. 175–76). The Supreme Court's decision in *Coleman v. Thompson*,⁶⁶ which deprives prisoners of any remedy if their court-appointed postconviction counsel commits malpractice, exacerbates the harmful effect of bad lawyering in postconviction

61. Terry Ganey, *Pardoned Man Wants to "Pick Up My Life"*, ST. LOUIS POST-DISPATCH, Sept. 30, 1995, at 1A.

62. *Schlup v. Delo*, 912 F. Supp. 448, 450–51 (E.D. Mo. 1995).

63. See Death Penalty Information Center, *Released From Death Row, Probable or Possible Innocence* <http://www.deathpenaltyinfo.org/article.php?scid=6&did=111#Released> (last visited July 29, 2006).

64. P. 173 (citing LIEBMAN ET AL., *supra* note 16, at 11).

65. John H. Blume, *AEDPA: The "Hype" and the "Bite"*, 91 CORNELL L. REV. 259, 288–97 (2006).

66. 501 U.S. 722 (1991). See also *Murray v. Giarratano*, 429 U.S. 1 (1989) (holding that there is no constitutional right to counsel in post-conviction proceedings).

proceedings.⁶⁷ Therefore, a postconviction lawyer can erect procedural barriers to federal habeas corpus review even in compelling cases of constitutional violation.⁶⁸

Professor White's discussion of Ricky Zeitvogel provides a stark example of the impact of *Coleman v. Thompson* and *Murray v. Giarratano*. Zeitvogel, a prisoner in the Missouri State Penitentiary, was convicted of capital murder and sentenced to death in the death of fellow inmate Gary "Crazy" Dew. Missouri Public Defender Julian Ossman, another attorney known for his inept defense in capital cases, defended Zeitvogel.⁶⁹ Ossman did not tell the jury that Zeitvogel had been a confidential informant in a pending prosecution of Dew for attempted murder, even though Ossman knew this, as he had defended Dew on that charge, and had given Dew a copy of Zeitvogel's statement (p. 186). Although this information was very probative of Zeitvogel's claim of self defense, *Coleman v. Thompson* caused his claim to be procedurally barred because his postconviction counsel never pursued the evidence, in spite of Zeitvogel's repeated requests. Thus, Zeitvogel was executed because his postconviction lawyer's inept performance white-washed the disloyalty and incompetence of his trial attorney.

Defenders of the current system of capital appeals often claim that it offers capital prisoners one fair bite at the apple. Professor White points out the fallacy of that assumption after *Coleman v. Thompson*: "If a capital defendant has a knowledgeable state postconviction attorney who will fully investigate and accurately allege his constitutional claims, the defendant will get two bites at the apple; his postconviction claims will be considered by both the state and federal courts" (p. 194). On the other hand, if the state postconviction attorney does not adequately preserve his claims, "he is likely to get no bites at all; as Zeitvogel's case demonstrates, even if he has good constitutional claims, they will probably not be considered by either the state or federal courts" (p. 194). A capital prisoner gets two bites at the apple or no bites; nobody gets just one.

This dynamic explains why Professor Liebman found regional patterns of relatively poor success of capital prisoners in federal habeas proceedings: the most active death rows are in states with historically poor records of providing competent counsel to capital defendants.⁷⁰ By providing equally poor representation in postconviction proceedings, those states disable

67. In *Coleman*, court-appointed postconviction counsel filed a notice of appeal from an order denying postconviction relief one day late, resulting in the dismissal of Roger Coleman's appeal on procedural grounds.

68. For a compelling argument that *Coleman* was wrongly decided and should be overruled, see Eric M. Freedman, *Giarratano Is a Scarecrow: The Right to Counsel in State Capital Postconviction Proceedings*, 91 CORNELL L. REV. 1079 (2006).

69. Two of Ossman's other clients, Joe Amrine and Eric Clemmons, were convicted and sentenced to death in spite of innocence. P. 189; *Amrine v. Roper*, 102 S.W.3d 541 (Mo. 2003) (en banc); *Clemmons v. Delo*, 124 F.3d 944 (8th Cir. 1997). In two other cases, Ossman was found ineffective, but those judgments were vacated on procedural grounds and Ossman's clients were executed. *Nave v. Delo*, 62 F.3d 1024 (8th Cir. 1995); *Bolder v. Armontrout*, 921 F.2d 1359 (8th Cir. 1990).

70. LIEBMAN ET AL., *supra* note 16, at 413-15.

federal courts from exercising habeas corpus jurisdiction over the constitutional claims of capital prisoners. Three years prior to *Coleman*, an ad hoc committee appointed by Chief Justice William Rehnquist studied the system of habeas corpus review of capital cases and reported that the primary cause of unfairness and delay was the prisoners' lack of access to qualified legal representation.⁷¹ The Court in *Coleman* missed an opportunity to correct the situation; it could have held that prisoners who were the victims of legal malpractice in state postconviction proceedings could nevertheless have their cases fully heard in federal habeas corpus proceedings. Such a holding would have given states the incentive to adequately fund indigent defense systems, but their failure to do so would not prevent capital prisoners from having the constitutionality of their convictions and sentences decided in federal courts.

CONCLUSION

In addition to reducing executions through competent representation, Professor White sees the work of dedicated capital defense lawyers as eroding support for the death penalty by making us all aware of three significant problems: “[f]irst, too many defendants are sentenced to death; [s]econd, too many capital defendants are not afforded adequate representation by their defense attorneys; [t]hird, at least in some cases, death sentences are imposed on defendants whose diminished moral culpability does not justify this punishment” (p. 203).

Professor White's telling of the gripping stories of capital defense lawyers and their clients reflects his well-known passion for human rights. More importantly, his book highlights some needed reforms in the field of capital litigation. The *Strickland* standard clearly needs to be strengthened to assure that capital defendants are represented by defense teams who thoroughly investigate their cases. Doctrinally, *Taylor*, *Wiggins*, and *Rompilla* are steps in the right direction, as is their recognition of the ABA Guidelines as appropriate professional norms governing the performance of capital defense counsel. However, as long as the *Coleman* doctrine rewards states that under-fund indigent defense, there is no realistic possibility that the death penalty can be reliably and fairly administered. I agree with Professor White that abolition is the best solution.

71. Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Report on Habeas Corpus in Capital Cases*, 45 CRIM. L. REP. 3239 (1989).