Review Section

Book Reviews

Litigating in the Shadow of Death: Defense Attorneys in Capital Cases, by Welsh S. White. Ann Arbor: The University of Michigan Press, 2006. 219 pp.

reviewed by Charles Anthony Smith

In *Litigating in the Shadow of Death: Defense Attorneys in Capital Cases*, Welsh White considers the effect of both skilled and unskilled lawyers on the development of the application of the death penalty since *Strickland v. White*, 466 U.S. 668 (1984). White's recent passing means this is his final contribution to a literature that, in many ways, he defined. This is an analytical exclamation point to a powerful body of work. White begins with a comprehensive consideration of *Strickland* and its progeny. *Strickland* set forth the foundation for assessing whether a capital defendant's legal representation at trial was constitutionally ineffective. In both *Williams v. Taylor*, 529 U.S. 362 (2000), and *Wiggins v. Smith*, 539 U.S. 519 (2003), the Court reversed death sentences based on ineffective counsel during the penalty phase. In *Wiggins*, the issue was whether the decision to cease the search for mitigating evidence before the penalty phase was a constitutionally defective approach by the defense counsel. *Williams* considered the prejudicial effect of a failure to introduce mitigating evidence during the penalty phase. White presents the cases through a careful retelling of critical facts and insightful legal analysis. Perhaps the greatest contribution of this early portion of the manuscript is White's insightful consideration of this jurisprudence and its implications for the ongoing development of the law. The analysis is equally compelling for practitioners who may be crafting trial strategy and for academics considering the ebb and flow of legal development.

Next, in chapter 3, White considers a series of cases where a previously convicted death-row inmate was subsequently exonerated. He weaves together the narratives of the cases to demonstrate ultimately the importance of a competent defense. Specifically, the fate of the defendant seems to rest as much on the competency of the lawyer as on the alignment of facts and evidence. White also draws important conclusions for future defense counsel from these efforts to exonerate. Specifically, this chapter acts as an insightful road map for searching out categories of exculpatory evidence. Chapter 4 enters the difficult legal terrain of mounting a proper defense when the defendant has some credible claim to innocence. As White points out, this is an especially sensitive legal problem when the defendant is convicted and the attorney must present mitigating evidence during the penalty phase. At this stage, a defendant may object to any presentation of evidence by counsel that does not simply support the claim of innocence. Still, after conviction for a capital offense, the penalty phase pres-

ents the best opportunity to avoid a death sentence. Again, White takes the reader through a series of briefly described cases. Each example includes important questions from counsel that demonstrate the strategies at play. This chapter forcefully makes two points. Experienced attorneys are better at making the difficult strategic choices when faced with a convicted client who, nonetheless, has a credible claim of innocence. Second, broadly inclusive approaches to the introduction of mitigating evidence—even "double-edged" mitigating evidence—are more likely to be successful.

In chapter 5, White engages the uncomfortable situation of a defendant convicted of an aggravated case. An aggravated case is simply one with some particularly heinous dimension. The aggravating factors could be tied to, among other things, the status of the victim or the number of victims, the senselessness of the crime, or the exceptional violence or cruelty of the acts. White provides a road map for responding effectively to the prosecutorial argument "if not the death penalty for this heinous act, then when?" White demonstrates that the construction of a compelling argument for life over death is tied to the competence and experience of the lawyer. He points out that the foundation for this sort of argument can be first set forth during voir dire. The life story of the defendant should humanize and provide a multidimensional picture so that the jury has reason to look beyond the atrocity of the act. This strategy can lead the jury to see the defendant as more than just a heinous criminal. As in the other chapters of the book, the argument is set forth through a persuasive set of case studies complemented by interviews with the counsel from those cases.

Chapter 6 considers the role of experience in effective plea bargaining. White points out that as many as half of all defendants who have been executed may have had an opportunity to plea out before sentencing. This startling revelation illuminates the critical opportunity a plea bargain may represent. It also underscores the disparate justice visited upon those with or without experienced representation. This chapter also engages the difficulty of client mistrust when defense counsel suggests a guilty plea. As with every other dimension of the death penalty, competent and experienced lawyers are more capable of overcoming this mistrust and obtaining a plea over a death sentence. The vignettes in this chapter demonstrate, among other points, that a defendant may not agree to plea simply because the attorney believes a life sentence is the best possible outcome. This nuanced dimension of death penalty litigation—the role of experience in building a trustful relationship with the client—is understudied but critical. This chapter alone would make a substantial contribution to the literature.

Chapter 7 is a comprehensive examination of post-conviction relief. Like the earlier chapters, the analytical focus here is on strategy illuminated by case studies. As with the earlier chapters, the case studies are enhanced dramatically by interviews with the lawyers involved in those cases. This is perhaps the most comprehensive chapter in the volume. This chapter should be required reading for any appellate- or criminal-law class. The factual explication provides terrific insight into successful

appellate strategy and again demonstrates the critical importance of good judgment and experience in the development of that strategy.

The final chapter not only recaps the book in a concise and clear way, but also draws important conclusions about the death penalty since *Strickland*. White concludes with the observation that "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 its outright abolition" (p. 208). Books such as this one will serve the same purpose. I would be remiss if I did not take a moment here to comment on the prose. The case studies are written in a refined but accessible manner. In this sense, even those outside the bar or the academy might find this text enjoyable, enlightening, and informative. In the final analysis, White has made a persuasive case that whether a given defendant lives or dies at the hands of the state is largely dependent on the skill set of the attorney. That a penalty of such severity and finality is meted out based upon resources or the luck of the draw (in the case of appointed attorneys) seems to be unconscionably arbitrary. As the random nature of the application of the death penalty becomes more well known—thanks in part to this book—perhaps the defenders of the status quo will begin to rethink their positions. Until the death penalty is an artifact of history, this volume will remain a vibrant and compelling condemnation of the current system. **jsj**