

The Role of Defense Lawyers in Capital Cases

The story of the modern era of capital punishment is inextricably entwined with the story of the lawyers who represent capital defendants. In a series of cases culminating in *Furman v. Georgia*,¹ decided in 1972, a small band of lawyers led by Anthony Amsterdam, a brilliant law professor, convinced the Supreme Court that the then-existing system of capital punishment was unconstitutional.² As a result, every state's pre-1972 capital sentencing statute was invalidated and 631 death sentences were vacated.³

In the four years following *Furman*, thirty-five states enacted new capital punishment legislation, allowing death sentences to be imposed pursuant to new capital sentencing procedures.⁴ In five cases decided in 1976, the Court upheld three of these statutes⁵ and invalidated the other two.⁶ These rulings provided the foundation for the modern or post-*Furman* era of capital punishment.

Capital trials conducted during the post-*Furman* era differ from those conducted in the pre-*Furman* era primarily in two respects: first, capital trials are now bifurcated so that, if the defendant is convicted of the capital offense, there is a separate penalty trial at which both the government and

1. 408 U.S. 238 (1972).

2. For an account of these cases, see Michael Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment* (1973).

3. *Id.* at 292–93.

4. Franklin E. Zimring & Gordon Hawkins, *Capital Punishment and the American Agenda* 41 (1987).

5. See *Jurek v. Texas*, 428 U.S. 262 (1976) (upholding Texas's statute); *Proffitt v. Florida*, 428 U.S. 242 (1976) (upholding Florida's statute); *Gregg v. Georgia*, 428 U.S. 153 (1976) (upholding Georgia's statute).

6. See *Roberts v. Louisiana*, 428 U.S. 325 (1976) (invalidating Louisiana's statute); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (invalidating North Carolina's statute).

the defense are permitted to introduce additional evidence relating to the defendant's background and the circumstances of his offense; second, the jury is given guidelines for determining whether the defendant should be sentenced to death or a lesser punishment. In later decisions, the Court explained that these procedural reforms reduced the likelihood that the death penalty would be arbitrarily applied, thereby rendering death penalties imposed under the post-*Furman* system constitutionally acceptable.⁷

During the early years of the post-*Furman* era, few defendants were executed. From 1976 to 1983, only 11 executions took place.⁸ During the 1980s and 1990s, however, the pace of executions accelerated. In the five-year period from 1984 to 1989, nearly 20 defendants per year were executed.⁹ And during the years 1996 through 2000, the number of executions reached its highest level since the mid-1950s. During that five-year period, executions averaged 74 per year, with the peak occurring in 1999 when 98 defendants were executed.¹⁰

During the early part of the twenty-first century, concerns about the administration of capital punishment slowed the pace of executions. Exonerations of death row defendants have been particularly significant. Evidence showing that at least 119 defendants sentenced to death were in fact innocent¹¹ led two states to impose moratoriums on capital punishment until the system can provide safeguards that will minimize the possibility of innocent people being executed.¹² Nevertheless, the number of defendants executed has still been significant: during the years 2001 to 2005, about 65 defendants per year have been executed.¹³

Throughout the modern era of capital punishment, attorneys representing capital defendants have continued to play an integral part in the story of capital punishment. Although Anthony Amsterdam no longer argues cases before the Supreme Court, he continues to teach and assist lawyers

7. See, e.g., *McCleskey v. Kemp*, 481 U.S. 279, 306–12 (1987).

8. *Death Row*, U.S.A., winter 2005, at 9 (quarterly newsletter published by the NAACP Legal Defense and Educational Fund, Inc.) [hereinafter *Death Row*, U.S.A.].

9. *Id.*

10. *Id.*

11. Death Penalty Information Center, *Innocence and the Death Penalty*, at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=412> (Mar. 18, 2005).

12. See *My Concern Is Saving Lives, Innocent Lives*, Chi. Trib., Jan. 31, 2000, at 8 (Gov. George Ryan announces a moratorium on executions in Illinois); *Still Unfair*, Wash. Post, June 9, 2004, at A20 (“Then-Gov. Parris N. Glendening (D) imposed a moratorium on executions in 2002; Gov. Robert L. Ehrlich Jr. (R) lifted that moratorium upon taking office the next year.”).

13. The numbers were 66 in 2001, 71 in 2002, 65 in 2003, and 59 in 2004, yielding an average of 65.3 over the four-year period. See *Death Row*, U.S.A., *supra* note 8, at 7.

who represent capital defendants. Over the past thirty years, as the Rehnquist Court replaced the remnants of the Warren Court, the Supreme Court has become much more conservative; as a result, the legal arguments likely to resonate with courts in capital cases are different today than they were in the pre-*Furman* era. Nevertheless, as Amsterdam proved during the pre-*Furman* era, telling a powerful and coherent tale of injustice has always been a critical component for a defense attorney seeking to win a capital case. Inspired in part by Amsterdam's teaching and example, a new band of dedicated lawyers has vigorously represented capital defendants, seeking to prevent their executions. In subsequent chapters, I will explain some of the work of these lawyers and the impact it has had not only in specific capital cases but also on the protections afforded capital defendants.

Unfortunately, less dedicated lawyers have also had a part in the story. As the pace of executions increased, it became increasingly clear that defense attorneys' representation of capital defendants was sometimes shockingly inadequate. In 1990, a Task Force Report by the American Bar Association (ABA)¹⁴ documented the deficient quality of representation frequently afforded indigent capital defendants:¹⁵ "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."¹⁶ The report went on to state that "[e]xamples like these are legion"¹⁷ and to quote witnesses who "described the current state of affairs for indigent criminal [capital] defendants as 'scandalous,' 'shameful,' 'abysmal,' 'pathetic,' 'deplorable,' and 'at best, exceedingly uneven.'"¹⁸

Over the past fifteen years, the ABA has made a concerted effort to improve the quality of representation afforded capital defendants. Among other things, it has promulgated detailed guidelines for attorneys representing capital defendants,¹⁹ and it has persuaded state legislatures to adopt

14. Task Force on Death Penalty Habeas Corpus, ABA Criminal Justice Section, *Toward a More Just and Effective System of Review in State Death Penalty Cases* (Ira P. Robbins rep., 1990) [hereinafter ABA Task Force Report].

15. *Id.* at 48–60.

16. *Id.* at 54.

17. *Id.* at 55.

18. *Id.* (footnote omitted).

19. American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (rev. ed. Feb. 2003), at <http://www.abanet.org/deathpenalty>.

provisions designed to improve the quality of capital defense lawyers' representation.²⁰ Nevertheless, in some parts of the country, the quality of representation afforded capital defendants has not only failed to improve but has probably deteriorated.

Stephen Bright, the director of the Southern Center for Human Rights, who has both represented capital defendants himself and extensively studied other lawyers' representation of capital defendants,²¹ concludes that in at least four states—Alabama, Mississippi, Louisiana, and Texas—defense attorneys' trial representation of capital defendants is "as bad or worse" than it was in 1990 when the ABA Report was written. Bright observes, moreover, that in parts of other states—Georgia and Pennsylvania, for example—defense attorneys' performance in capital cases is at best "hit or miss," with some capital defendants receiving shockingly inadequate trial representation.²²

The states with the most executions have done the least to ensure that capital defendants are provided with effective representation at trial. Texas, which, during the post-*Furman* era, has executed more than three times as many defendants as any other state,²³ provides the most shocking examples of capital defense attorneys' inadequate representation. As in many other states, the roots of Texas's problems are an inadequate structure for

20. As one example, the Arizona Rules of Criminal Procedure state that in order to be appointed lead counsel in a capital case, an attorney "[s]hall be familiar with the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. . . ." Ariz. R. Crim. P. 6.8(b)(iii) (West 2004), available at <http://azrules.westgroup.com/home/azrules/default.wl> (last visited July 20, 2004). For another, Rule 20 of the Rules of Superintendence for the Courts of Ohio ("Appointment of Counsel for Indigent Defendants in Capital Cases") specifies that indigent defendants must be appointed two attorneys. Although there is a grandfather clause for attorneys certified prior to 1991, Rule 20 sets out detailed requirements for experience and training that appointed attorneys must have. The rule also specifies that attorneys may not carry a workload that interferes with effective representation of each indigent capital defendant. Finally, Rule 20 establishes a Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases, which consists of five attorneys (including no more than one judge) with "[d]emonstrate[d] . . . knowledge of the law and practice of capital cases." The committee has several responsibilities, including maintaining a list of certified capital defense attorneys, reviewing the performance of appointed attorneys, and approving a training program. Rules of Superintendence for the Courts of Ohio, Rule 20.

21. For articles by Bright relating to lawyers' ineffective representation in capital cases, see, e.g., Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835 (1994); Stephen B. Bright, *Death by Lottery—Procedural Bar of Constitutional Claims in Capital Cases Due to Inadequate Representation of Indigent Defendants*, 92 W. Va. L. Rev. 679 (1990).

22. Telephone Interview with Stephen Bright (June 15, 2004) [hereinafter Bright Interview].

23. As of January 1, 2005, Texas had 336 executions, and Virginia, the state with the second highest number, had 94. See *Death Row, U.S.A.*, *supra* note 8, at 10.

appointing attorneys for indigent capital defendants and inadequate pay for the attorneys who are appointed.²⁴ Because there are few public defender offices in Texas, most indigent defendants rely on court-appointed lawyers²⁵ who receive low pay. Until the mid-1990s, moreover, lawyers in most of Texas's 254 counties needed no special qualifications to be appointed to death penalty cases.²⁶

Barring unusual circumstances, low-paid appointed attorneys will not have the skill or resources necessary to mount a vigorous defense on behalf of a capital defendant. In Texas, public officials' indifference exacerbates the problem. "Advocates for indigent defendants contend that in court-houses across the state, judges frequently dispense court-paid cases—including capital cases—as a form of patronage to lawyers who help them politically."²⁷ To some judges, these lawyers' ability to represent a capital defendant was apparently irrelevant. During the 1980s and 1990s, judges in some Texas counties appointed the same attorneys to represent capital defendants in case after case, even after it appeared that these lawyers' representations of their clients were invariably inept.

A study conducted by the *Washington Post* provides some striking examples. The study "revealed instances in which lawyers in capital trials slept through key testimony, failed to file crucial legal papers correctly or on time, or had been cited for professional misconduct repeatedly in their careers."²⁸

Perhaps the most egregious example was Houston judges' repeated appointment of Joe Cannon, the sleeping attorney. During the 1980s, judges frequently appointed Cannon to represent capital defendants, at least a dozen of whom were sentenced to death and several of whom were executed.²⁹ In some of these cases, Cannon was observed by jurors and others to have been sleeping during the defendant's trial, generally "nodding off" in the afternoon.³⁰ When Carl Johnson was tried in 1989 for fatally shooting a Houston security guard during a food store holdup, for example, Cannon was observed to be asleep during portions of the trial.³¹ In fact,

24. Bright Interview, *supra* note 22.

25. Paul Duggan, *George W. Bush: The Record in Texas; Attorneys' Ineptitude Doesn't Halt Executions*, Wash. Post, May 12, 2000, at A1.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

David R. Dow, a University of Houston law professor who later represented Johnson, “recalled being aghast” when he reviewed the transcript of Johnson’s capital trial: “It was like there was nobody in the room for Johnson,”³² Dow remembered. He observed that the transcript “goes on for pages and pages, and there’s not a whisper from anyone representing him.”³³ Dow’s efforts to obtain relief, however, were unsuccessful. The Texas Court of Criminal Appeals, the highest Texas court to review criminal cases, had previously ruled that Cannon’s assistance to Johnson was not ineffective.³⁴ Petitions for state and federal postconviction relief failed to reverse this ruling.³⁵ Although the Texas courts did not address the issue of Cannon’s sleeping during the trial in this case, Texas judges indicated in other cases that the defendant’s right to the assistance of counsel does not include the right to an attorney who is awake throughout the trial.³⁶ Johnson was executed on September 19, 1995.³⁷

Ronald Mock, who was also frequently appointed to represent Houston capital defendants, has been described as “an attorney who has become an emblem of the troubles with capital defense in Texas.”³⁸ According to state records, “Mock has been disciplined by the bar at least five times.”³⁹ Nevertheless, during the 1980s and early 1990s, Houston judges repeatedly appointed Mock to represent capital defendants, even though his record on behalf of his clients seemed unimpressive. During that period, Mock represented Gary Graham and three other defendants who were later executed and “many more” who were sentenced to death.⁴⁰ In his analysis of Mock’s defense of Graham, a defendant who many believe was innocent, Professor Dow concluded that Mock “didn’t interview any witnesses who could have

32. *Id.*

33. *Id.*

34. *Johnson v. State*, 629 S.W.2d 731, 736–37 (Tex. Crim. App. 1981).

35. The opinions for Johnson’s habeas petitions were not published. For a history of the case from the point of view of one of Johnson’s postconviction lawyers, see David R. Dow, *The State, The Death Penalty, and Carl Johnson*, 37 B.C. L. Rev. 691 (1996).

36. One Texas judge, replying to the question of a journalist who had seen a defense lawyer sleep through much of a trial, stated that “[t]he Constitution says everyone’s entitled to the attorney of their choice, and [the defense attorney] was their choice The Constitution doesn’t say the lawyer has to be awake.” Rick Casey, *Lawyer Sleeps? Court: So What?*, San Antonio Express-News, Mar. 10, 2000, at 3A.

37. Duggan, *supra* note 25.

38. Ken Armstrong & Steve Mills, “*Until I Can Be Sure*”: *How the Threat of Executing the Innocent Has Transformed the Death Penalty Debate*, in *Beyond Repair: America’s Death Penalty* 94, 103 (Stephen P. Garvey ed., 2003).

39. *Id.* at 104.

40. *Id.*

testified Graham wasn't the shooter. He literally put on no defense."⁴¹ Gary Graham was executed on June 22, 2000.⁴²

Cannon and Mock are not the only blatantly incompetent attorneys who have been appointed to represent Texas capital defendants. The attorney who represented death row inmate Joe Lee Guy⁴³ acknowledged in an interview that he was "an active alcoholic" and cocaine user at the time of Guy's trial, although he said he was sober while representing Guy in court.⁴⁴ And the lawyer appointed for Anthony Ray Westley was arrested in the courtroom during the jury selection of Westley's trial and charged with contempt of court for failing to file legal papers on behalf of an earlier client who had been sentenced to death. According to a judicial report, the lawyer's subsequent representation of Westley was so poor that it resulted in a "breakdown of the adversarial process."⁴⁵ Nevertheless, Texas's highest criminal court rejected the report's recommendation that Westley be granted a new trial. Westley was executed on May 13, 1997.⁴⁶

As these cases illustrate, 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. Not surprisingly, Elisabeth Semel, the head of the American Bar Association's Washington-based Death Penalty Representation Project, concluded that "[a]t every stage of the death penalty process, Texas is far below any measure of adequacy in terms of the legal representation it provides."⁴⁷

Although Texas's record with respect to providing legal representation to capital defendants is probably the worst in the nation, examples of egregious representation in capital cases have been documented in many other parts of the country. In 1999, the *Chicago Tribune* published an extensive

41. David R. Dow, *The Death Penalty's Degrees of Guilt*, Christian Science Monitor, June 26, 2000, at 9.

42. *Death Row*, U.S.A., *supra* note 8, at 23.

43. In January 2004, the Texas Board of Pardons and Paroles unanimously recommended that Governor Rick Perry commute Joe Lee Guy's sentence to life in prison, but Perry took no action. On June 25, 2004, U.S. District Judge Sam Cummings overturned Guy's death sentence and ordered that a new sentencing hearing take place in state court. Because the prosecutor and state court judge signed a petition in favor of clemency for Guy, it appears likely that he will receive a life sentence. Diane Jennings, *As Inmate Awaits Perry Action, Hearing Ordered. New Sentencing Set; Board Urged Clemency for Death-Row Prisoner*, Dallas Morning News, June 26, 2004, at 4A.

44. Duggan, *supra* note 25.

45. *Id.*

46. *Death Row*, U.S.A., *supra* note 8, at 18.

47. Duggan, *supra* note 25.

review of capital punishment in Illinois.⁴⁸ The *Tribune* investigators found that at least thirty-three individuals sentenced to death during the post-*Furman* era were represented by attorneys who had been, or would be, suspended or disbarred. One attorney named Herbert Hill was disbarred and reinstated, then represented four capital defendants who were sentenced to death. Other capital defenders, while not subject to disciplinary action, were nevertheless plainly unqualified, such as a “tax lawyer who had never before tried a case, civil or criminal.”⁴⁹

Examples of blatantly inadequate representation may be found in nearly every state. “An Alabama defense lawyer asked for time between the guilt and penalty phases so that he could read the state’s death penalty statute.”⁵⁰ A Pennsylvania lawyer “inexplicably read to the jury from, and tailored his [penalty phase] presentation to, a Pennsylvania death penalty statute that had been declared unconstitutional three years earlier.”⁵¹ In a Georgia case, the court appointed a younger lawyer to assist a retained attorney who was elderly and frail. The two presented conflicting theories of the case. In the closing argument, the retained attorney asserted that there was a reasonable doubt whether his client had committed the crime, while the appointed attorney argued that the defendant was insane.⁵²

Even California, which is considered to have a relatively high-quality public defender system, is not immune from poor capital defense. In the city of Long Beach, California, an attorney named Ron Slick was frequently tapped as a court-appointed defender. Eight of his clients were sentenced to death. The supervisor of the public defender’s office later explained that “judges liked Slick because he was always ready to go to trial.” Whereas most attorneys would want a continuance to prepare the case, Slick “would try the case. . . . The courts loved it.”⁵³

In contrast to lawyers who provide inept representation for capital defendants, there are dedicated attorneys who have not only achieved remarkable results on behalf of individual capital defendants but also, in

48. Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty; Illinois First State to Impose Moratorium on Executions*, Chi. Trib., Jan. 31, 2000, at 1.

49. *Id.*

50. Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1842 n.49 (1994) (citing Record at 1875–76; State v. Smith, 581 So. 2d 497 (Ala. Crim. App. 1990)).

51. Frey v. Fulcomer, 974 F.2d 348, 359 (3d Cir. 1992).

52. Ross v. Kemp, 393 S.E.2d 244, 245 (Ga. 1990).

53. Ted Rohrlich, *The Case of the Speedy Attorney: Eight of a Long Beach Lawyer’s Clients Have Been Sentenced to Die. Some Defense Attorneys Take Months To Try Capital Cases; This One Is Known to Spend a Few Days, Or Less*, L.A. Times, Sept. 26, 1991, at 1.

important respects, altered the public's perception of capital punishment. Craig Cooley and Michael Arif's representation of seventeen-year-old Lee Malvo, who, along with forty-two-year-old John Muhammad, was shown to have perpetrated the sniper killings in and around Washington, D.C., during the fall of 2002, is perhaps the most publicized recent capital case in which lawyers' extraordinary trial performance transformed the jury's perception of an individual defendant. Before Malvo's trial, the public perceived Malvo as one of the most cold-blooded killers imaginable. Along with Muhammad, Malvo had ruthlessly and systematically wiped out ten innocent lives. Based on the evidence presented by Cooley and Arif at Malvo's trial, however, a different picture emerged: Malvo was shown to be a gentle, vulnerable youth who was desperate for a father and therefore unable to resist the influence exerted by the charismatic Muhammad.⁵⁴ Most informed observers originally predicted Malvo's jury would sentence him to death. Upon considering Cooley and Arif's defense evidence and Cooley's eloquent closing argument, however, the jury quickly decided to spare Malvo's life, sentencing him to life imprisonment.

In other less famous cases, defense attorneys have been able to achieve similar results even when the prosecutors' case was in some ways more aggravated than the government's case against Malvo. In the Malvo case, the seventeen-year-old defendant obviously had some redeeming qualities: he was young, there were people who cared about him, and he did not have a history of violent conduct. In other capital cases, the prosecutor has been able to show not only that the defendant committed one or more horrendous killings but also that he had been perpetrating violent criminal acts for decades. Even in these cases, talented defense attorneys have been able to transform the jury's view of the defendant, leading it to understand and empathize with him, or at least to conclude that he should not be sentenced to death.

Skilled defense attorneys may have saved even more lives by negotiating favorable plea bargains on behalf of capital defendants. A defendant who is charged with a capital offense will often be understandably reluctant to enter into a plea bargain that will require him to serve a long prison term. In some cases, the defendant's reluctance is justified. There are undoubtedly some attorneys who are too eager to have their clients plead guilty.⁵⁵ In many capital cases, however, experienced capital defense attorneys main-

54. For a full account of Malvo's trial, see *infra* Chapter 5.

55. See generally Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L.J. 1179, 1182-98 (1975) (describing cop-out lawyers).

tain that attorneys representing capital defendants can best serve their clients by negotiating a favorable plea offer from the prosecutor and persuading the defendant to accept it. Attorneys representing capital defendants have demonstrated remarkable skill and patience in obtaining favorable plea bargains, thus reducing the pool of defendants who face the risk of execution.

As in the pre-*Furman* era, capital defendants' attorneys have also continued to seek postconviction relief on behalf of condemned inmates that will not only assist individual inmates but also establish safeguards in other capital cases or eliminate the risk of capital punishment for classes of defendants. Over the past three decades, the climate for lawyers seeking postconviction relief in capital cases has changed. When arguing in the Supreme Court or most lower courts, lawyers are unlikely to encounter judges who are eager to establish new rights for capital defendants.

In most instances, lawyers arguing on behalf of capital defendants have sought smaller victories, seeking to obtain relief for individual defendants or a decision that provides new protections for a relatively small number of defendants. Nevertheless, over the past few years, lawyers have obtained some significant victories. In 2002, the Supreme Court decided *Ring v. Arizona*⁵⁶ and *Atkins v. Virginia*,⁵⁷ both of which overruled prior decisions and established new protections for capital defendants. *Ring* held that juries are required to make the factual determinations necessary to justify the imposition of a death sentence, and *Atkins* held that mentally retarded defendants may not be sentenced to death. In 2003, the Court's decision in *Wiggins v. Smith*⁵⁸ arguably strengthened a capital defendant's right to the effective assistance of counsel. And in 2005, the Court held in *Roper v. Simmons*⁵⁹ that it is no longer constitutional to execute anyone for a crime committed when he or she was under the age of eighteen years. In all of these cases, talented lawyers' skillful advocacy played a critical role in producing the Court's decisions.

This book will focus on the work of capital defense attorneys, examining both good and bad lawyers' efforts on behalf of capital defendants at various stages of the proceedings. Over the past three years, I have interviewed more than thirty lawyers who have been identified as among the most skilled capital defense attorneys in the country. I have also interviewed sev-

56. 536 U.S. 584 (2002).

57. 536 U.S. 304 (2002).

58. 123 S. Ct. 2527.

59. 125 S. Ct. 1183 (2005).

eral other people who have closely studied our system of capital punishment or have had wide experience in dealing with capital cases.⁶⁰ In addition to these interviews, I have examined portions of many trial transcripts of capital cases, including cases in which attorneys superbly represented capital defendants and others in which their representation was problematic for some reason. Through examining defense attorneys' roles in capital cases, I hoped to accomplish several objectives: first, to determine whether the Court's decisions relating to ineffective assistance of counsel in capital cases provide adequate protection for capital defendants; second, to give examples of some of the ways in which the best capital defense attorneys represent their clients in various contexts; third, to show the extent to which the quality of a capital defendant's attorney will affect the outcome of a capital case; and, finally, through explaining cases in which some of the best capital defense attorneys deal with significant issues, to illuminate some of the concerns that are especially significant in the modern era of capital punishment and thereby provide a clearer understanding of our system of capital punishment.

In chapter 2, I will examine the law governing effective assistance of counsel in capital cases. This chapter focuses especially on the Court's decision in *Strickland v. Washington*,⁶¹ which describes the principal test for determining whether a lawyer's trial representation of a capital defendant was constitutionally ineffective, and on two later cases that have refined the *Strickland* test. Although the protections afforded by the *Strickland* test seem weak, I will show that the Court's later decisions have considerable potential for strengthening it. At the end of the chapter, I will identify two significant questions that the post-*Strickland* cases have left unresolved. In subsequent chapters, I will present data pertinent to answering those questions.

As I have already indicated, the exoneration of at least 119 death row defendants has had a profound impact on the public's perception of our system of capital punishment. In chapter 3, I will focus on cases in which death row defendants were exonerated, examining the extent to which their attorneys' trial representation may have contributed to their wrongful conviction and whether courts' subsequent review of their attorneys' representation provided adequate protection against wrongful convictions and death sentences resulting from ineffective assistance of counsel. In chapter

60. In the Methodology Appendix, I describe my methodology, explaining why particular people were interviewed and how the interviews were conducted.

61. 466 U.S. 668 (1984).

4, I will explore some of the problems that arise for attorneys representing capital defendants who have strong claims of innocence, focusing especially on the ways in which highly skilled defense attorneys deal with these problems.

In chapters 5 through 7, I will continue to focus primarily on skilled capital defense attorneys, examining their representation of capital defendants in various contexts. Chapter 5 deals with attorneys representing capital defendants in aggravated capital cases, providing three accounts of cases in which attorneys were able to obtain life sentences for such defendants. Chapter 6 explores plea bargaining in capital cases, explaining approaches employed by skilled defense attorneys to obtain favorable plea bargains in capital cases and providing numerous examples of cases in which attorneys obtained such pleas. Chapter 7 explores skilled attorneys' efforts to obtain postconviction relief on behalf of capital defendants. After providing an overview of the obstacles attorneys must overcome to obtain such relief in capital cases, this chapter examines cases in which skilled postconviction attorneys represented mentally retarded defendants seeking relief from the Supreme Court and two arguably innocent death row defendants seeking state and federal postconviction relief. Finally, in chapter 8, I will conclude with observations on the role of defense attorneys in the modern era of capital punishment.