

EIGHT Concluding Observations

*A*s in the pre-*Furman* era, skilled defense attorneys have played a vital part in shaping the modern system of capital punishment, altering both the Court's and the public's perception of how the system works and the issues that should be viewed as significant. In addition, both skilled and unskilled defense attorneys' performances in capital cases illuminate two critical issues addressed by the Supreme Court in seeking to regulate our system of capital punishment during the post-*Furman* era: whether the death penalty's application is less arbitrary than it had been during the pre-*Furman* era; and how the two-pronged *Strickland* test should be applied in assessing whether defense attorneys provided effective assistance to defendants in capital cases. I will begin this chapter by discussing these two issues and then conclude by considering some of the ways in which skilled defense attorneys have altered our perception of capital punishment and by speculating as to the issues capital defense attorneys are likely to be addressing in the near future.

Capital Defense Attorneys' Impact on Whether the Death Penalty Is Arbitrarily Applied

From examining defense attorneys' work in capital cases, it seems clear that the post-*Furman* reforms designed to reduce the death penalty's arbitrary application have not been and probably will not be effective. As Stephen Bright has documented,¹ capital defendants who have the "worst lawyers" are likely to get the death penalty regardless of the nature of their crimes. The accounts of capital cases in chapters 5 and 6 demonstrate that the con-

1. Stephen Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 Yale L.J. 1835, 1883 (1994).

verse is also true: capital defendants who have the best lawyers are unlikely to get the death penalty regardless of their crimes or the government's aggravating circumstances. As chapter 6 shows, the best attorneys are able to negotiate pleas that will avoid the possibility of a death sentence in the great majority of capital cases, including those in which defendants committed atrocious crimes involving multiple victims. In capital cases that do go to trial, moreover, the examples presented in chapter 5 show that the best attorneys are able to persuade juries to impose life sentences in even the most aggravated cases.

Indeed, the cases considered in chapter 5 indicate that the post-*Furman* reforms designed to reduce the death penalty's arbitrary application may have exacerbated the impact that a capital defense attorney's skills or resources will have on the likelihood of a defendant receiving a death sentence. The two primary post-*Furman* reforms involved providing a penalty trial at which the prosecution and the defense could introduce evidence of aggravating and mitigating circumstances relating to the defendant's offense and personal characteristics and establishing guidelines that would instruct the jury to make its penalty determination by weighing the relevant aggravating and mitigating circumstances. Accounts of capital cases indicate that there is an extraordinarily wide disparity between skilled and unskilled capital defense attorneys' abilities to utilize these reforms in a way that will be beneficial to the defendants they are representing.

Whereas unskilled capital defense attorneys often introduce little or no evidence at the defendant's penalty trial, skilled attorneys such as Michael Burt and Craig Cooley introduce extensive mitigating evidence that provides a multilayered picture of the defendant, allowing the jury to understand and empathize with him even if he has been shown to have perpetrated atrocious capital crimes. As Craig Haney's testimony at William White's penalty trial indicated, moreover, capital defense teams have become increasingly sophisticated at educating jurors as to the significance of particular types of mitigating evidence, enabling them to persuade the jury that in some cases mitigating evidence relating to the defendant's background should preclude a death sentence even when the prosecutor has established powerful aggravating circumstances.

As a result, the post-*Furman* reforms may have exacerbated the extent to which a capital defendant's attorney and defense team can affect the likelihood that the defendant will receive a death sentence. Even if stricter enforcement of ABA Guidelines enhances the performance of capital defense attorneys in the future—mandating that a capital defendant's

attorney investigate mitigating evidence to be introduced at the defendant's penalty trial, for example—there will always be a marked disparity between skilled and unskilled defense attorneys' abilities to present and develop mitigating evidence in a way that will be meaningful to a penalty jury. Because of the paramount role played by defense attorneys in capital defendants' trials, there is thus no reason to believe that the post-*Furman* reforms have diminished or will diminish the extent to which the death penalty will be arbitrarily applied.

*Applying Strickland's Two-Pronged Test to Defense Attorneys'
Representation in Capital Cases*

Defense attorneys' shockingly inadequate representation of capital defendants has been a pervasive problem throughout the modern era of capital punishment. In *Strickland v. Washington*,² the Court addressed this problem by holding that in order to establish ineffective assistance of counsel a defendant has to meet both prongs of the *Strickland* test: showing that his attorney's performance fell below an objective standard of reasonableness and that he was prejudiced by his attorney's deficient performance.

While the *Strickland* test appeared to provide capital defendants with relatively weak protection, the Court's opinion left many questions open. Among other things, the Court failed to explain what guidelines, if any, should govern a capital defense attorney's obligation to prepare for the penalty trial that would take place if the defendant was convicted of the capital offense, and it provided little guidance for determining the circumstances under which a defendant would be deemed to have been prejudiced by his attorney's deficient performance.

In two more recent cases, *Wiggins v. Smith*³ and *Williams v. Taylor*,⁴ the Court obliquely addressed these questions, indicating that the *Strickland* test may have evolved so that it provides enhanced protection for capital defendants. In *Wiggins*, the Court concluded that the ABA Guidelines relating to capital defense attorneys' obligation to investigate for mitigating evidence provided the standard against which trial counsel's performance should be measured. And in *Williams*, the Court held that the defense attorney's inexcusable failure to introduce mitigating evidence relating to the defendant's troubled background and mental impairment resulted in

2. 466 U.S. 668, 687 (1984).

3. 123 S. Ct. 2527 (2003).

4. 529 U.S. 420 (2000).

prejudice in that case, even though the aggravating circumstances were quite strong.

Through embracing the provisions of the ABA Guidelines relating to a capital defense attorney's obligation to investigate for mitigating evidence, *Wiggins* perhaps signaled to lower courts that at least these guidelines should be viewed as providing professional norms. Even if lower courts adopt this approach, however, they will still have to decide the circumstances under which a defense attorney can make a reasonable strategic decision to curtail the investigation for mitigating evidence because of a belief that the mitigating evidence likely to be found would not be introduced at the defendant's penalty trial.

The practices of skilled capital defense attorneys indicate that these attorneys will rarely, if ever, decide to curtail investigation for mitigating evidence for any reason. The cases discussed in chapters 4 and 5 indicate that a capital defendant's attorney must have a full understanding of the nature of the available mitigating evidence in order to decide on the defense strategy to be adopted at the penalty trial. Moreover, regardless of the arguments presented at the penalty trial, the defense will nearly always want to introduce enough mitigating evidence to provide the jury with a full understanding of the defendant's background, the problems he has faced, and his positive attributes.

Even if some of the available mitigating evidence is double-edged in the sense that it indicates the defendant is more likely to have violent or anti-social tendencies, the defense may want to introduce this 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. Courts should thus be extremely skeptical when assessing a capital defense attorney's claim that she made a strategic choice to curtail investigation for mitigating evidence because she didn't believe the mitigating evidence likely to be found would assist the defense. Courts 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.

The question left open by *Williams* concerns the circumstances under which defense counsel's inexcusable failure to introduce mitigating evidence at the penalty trial will prejudice a capital defendant who is sentenced to death. Prior to *Williams*, courts frequently concluded that an attorney's failure to introduce mitigating evidence did not establish prejudice because, given the aggravated nature of the government's case, the jury

would have sentenced the defendant to death even if it had considered the mitigating evidence the defense attorney inexcusably failed to introduce. While *Williams* indicated that the attorney's failure to introduce mitigating evidence at the penalty trial can result in prejudice even when the government has established powerful aggravating circumstances, it did not provide lower courts with criteria for determining when defense mitigating evidence not presented at the penalty trial will be sufficient to establish prejudice.

The accounts of the three cases in chapter 5 indicate that, even in the most aggravated capital cases, introducing mitigating evidence at the penalty trial can dissuade the jury from imposing the death sentence. In all three cases, the defendant was shown to be guilty of multiple killings; in the *White* and *Gonzalez* cases, the prosecutor was also able to establish significant additional aggravating circumstances based on the defendant's pattern of prior violent behavior. Nevertheless, the defense's presentation at the penalty trial led the juries to impose life sentences in all three cases.

The cases also indicate that determining whether particular mitigating evidence should be viewed as powerful will be difficult because so much depends on the way in which the defense attorney presents the evidence and explains its significance to the jury. In Lee Malvo's case, for example, the mitigating evidence showing that Malvo was raised by multiple caretakers while growing up in Jamaica was significant because it showed why Malvo was desperately seeking a father figure and would thus be especially vulnerable to the influence of a charismatic older man like John Muhammad. The Jamaican tradition of telling a person entrusted with the care of a child to "punish this child, save the eye" animated this evidence by emphasizing to the jury the extent to which Malvo was isolated from any real parents; during a major portion of his life, a series of caretakers had complete control over him. By ending his closing argument with the phrase "Punish this child, save the eye," Cooley was able to recall the evidence to which the phrase related in a way likely to resonate with the jurors, reminding them of Malvo's troubled history while at the same time communicating that they—like his prior caretakers—now had responsibility for determining his destiny.

The mitigating evidence relating to Martin Gonzalez's conduct following his head injury provides an even more striking example. The evidence—that the defendant had to be tied up in a dusty corral after he chased people with a machete—was mitigating only because it showed that the defendant's behavior had dramatically changed after the head injury he

suffered in a motorcycle accident. While the evidence in itself might not seem especially powerful, Carlos Garcia, Gonzalez's lawyer, was able to make it vivid to the jury by introducing photos that allowed them to visualize the dusty corral in which Gonzalez was restrained. In Garcia's closing argument, moreover, his reference to the defendant's bestial behavior—characterizing him as one who “foams at the mouth, brays like an animal”—provided an effective counterpoint to his eloquent religious appeal in which he asked the jury to emulate those who have “improve[d] our race” by showing mercy and choosing life. In essence, Garcia used the mitigating evidence to present the defendant as a terribly flawed person, damaged as a result of something beyond his control, and then implicitly suggested to the jurors that in order to demonstrate the contrast between them and the flawed defendant they needed to exemplify what is best in the human species by dispensing mercy to him.

As these cases indicate, assessing the effect that mitigating evidence will have on a penalty jury is very difficult because so much depends on the skill of the attorney presenting the evidence. In seeking to assess the potential impact of defense mitigating evidence for the purpose of determining whether the defendant can establish prejudice within the meaning of *Strickland*, however, reviewing courts have to consider the evidence in a vacuum. They will be unable to determine the context in which a skilled attorney would have introduced the evidence or the ways in which she might have been able to make that evidence resonate with the jury. Barring unusual circumstances, courts should thus be circumspect in concluding that a defense attorney's inexcusable failure to introduce mitigating evidence relating to the defendant's background at the penalty trial did not prejudice the defendant.

How Defense Attorneys Have Altered Our Perception of Capital Punishment

Over the past three decades, the legal climate within which capital defense attorneys operate has changed significantly. During the 1970s and early 1980s, the Supreme Court was receptive to arguments relating to the capital punishment system's fairness and was thus willing to expand the protections afforded capital defendants. By the mid-1980s, however, the Court became increasingly concerned with ensuring that capital cases were disposed of expeditiously.⁵ As a result, death row defendants' attorneys' argu-

5. See Welsh S. White, *The Death Penalty in the Nineties: An Examination of the Modern System of Capital Punishment* 5 (1991).

ments designed to significantly broaden capital defendants' protections invariably failed.

During this period, postconviction attorneys focused on developing narratives of injustice designed to obtain relief for individual death row defendants. In view of the procedural barriers developed by the Court, even obtaining this kind of relief was difficult. In order to obtain relief, the capital defendant's attorney often had to almost strike a court's nerve, altering its perception of the relevant events so that, instead of perceiving that the defendant had been properly convicted of a capital crime, the court would conclude that the defendant was the victim of a manifest injustice.

Over the past several years, the legal climate has changed again. Defense attorneys' successes in developing compelling narratives of injustice in a series of cases have altered our perception of capital punishment so that courts and the public have become aware of at least three significant problems relating to the way in which the death penalty is applied: first, too many innocent defendants are sentenced to death; second, too many capital defendants are not afforded adequate representation by their defense attorneys; third, at least in some cases, death sentences are imposed on defendants whose diminished moral culpability does not justify this punishment.

The proliferation of cases in which death row defendants have been shown to be wrongfully convicted has undoubtedly played the greatest role in altering the Court's and the public's perception of our system of capital punishment. Cases such as those involving Earl Washington, Anthony Porter, and Joseph Amrine, in which attorneys narrowly saved innocent defendants from execution, indicate that the execution of an innocent defendant has probably already occurred⁶ and, in any event, is inevitable.⁷ Since most would agree that executing an innocent defendant is a paramount evil to be avoided, these cases strike a particularly sensitive nerve. The surprisingly large number of wrongful convictions in capital cases demonstrates that there are fundamental problems with our system of capital punishment.

The numerous cases in which capital defendants have been wrongfully convicted have fueled recognition that capital defendants' inadequate representation at trial is also a serious problem. Knowledgeable authorities, such as those involved in developing the ABA Guidelines for capital

6. See Hugo Adam Bedau, Michael L. Radelet & Constance E. Putnam, *Convicting the Innocent in Capital Cases: Criteria, Evidence and Inference*, 52 Drake L. Rev. 587, 590-91 & n.16 (2004).

7. See *id.* at 591.

defense attorneys, have recognized for decades that capital defense attorneys' trial representation is frequently inadequate and often abysmal. Examination of cases in which capital defendants have been wrongfully convicted, however, reveals the profound consequences of inadequate representation. Although the Supreme Court suggested otherwise in *Strickland*, the stories of the Washington, Porter, and Amrine cases, among others, demonstrate that there can be no assurance of reliable results in capital cases unless the defendant's attorney provides effective representation throughout the capital trial. In many of the cases in which death row defendants were wrongfully convicted, the defense attorney's inadequate performance at trial was at least a contributing factor to the wrongful conviction.

The right to the effective assistance of counsel, however, is not merely designed to protect the innocent. As the Court recognized in *Wiggins* and *Williams*, a capital defendant must be afforded effective representation at the penalty trial even if he is clearly guilty of the capital offense. Through embracing at least some of the ABA Guidelines, the *Wiggins* case provided a starting point toward delineating the nature of a defense attorney's obligation to represent the defendant at the penalty trial; and the *Williams* case took an important step toward developing a reasonable approach for assessing the circumstances under which the attorney's deficient penalty trial performance requires a new penalty trial.

Enhanced concern that the death penalty not be imposed on those with diminished moral responsibility was most clearly evidenced by the Court's decision in *Atkins v. Virginia*.⁸ *Atkins*, which overruled a relatively recent precedent to hold that executing mentally retarded defendants is no longer consistent with our "evolving standards of decency,"⁹ was based on the conclusion that mentally retarded defendants lack sufficient culpability to be subject to the penalty of death. In reaching this conclusion, the Court drew not only on recently enacted state statutes protecting mentally retarded individuals from the death penalty but also on its own criteria for assessing moral culpability.

While *Atkins* was not the first case in which the Court protected a class of defendants from execution because of their diminished moral culpability,¹⁰ the Court's analysis was significant because it recognized the special

8. 536 U.S. 304 (2002).

9. *Id.* at 312.

10. See *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (holding unconstitutional the execution of a person who was under the age of 16 at the time he or she committed his or her crime).

problems with assessing the moral culpability of mentally impaired individuals. In particular, it recognized that these defendants' impairments diminish the efficacy of their procedural protections, thereby increasing the risk of erroneous guilt or penalty determinations. The Court thus evidenced an enhanced concern for ensuring that the death penalty not be imposed on defendants with diminished moral culpability and a sensitivity to the need for imposing safeguards designed to protect such defendants from wrongful execution.

Capital Defense Attorneys' Role in the Near Future

In view of the altered perception as to the magnitude of death row defendants' wrongful convictions, protecting the innocent from wrongful execution will continue to be a dominant concern. In addition to seeking to demonstrate the innocence of individual death row defendants, capital defense attorneys are likely to address this issue in at least three ways: they will seek to remove procedural barriers designed to prevent litigation of issues relating to innocence; they will seek to obtain safeguards designed to protect capital defendants from wrongful conviction; and they will seek to persuade public officials to impose a moratorium on the death penalty until sufficient reforms to protect innocent defendants from execution are in place. Over the short term at least, their success in obtaining these objectives is likely to vary.

Defense attorneys are likely to be successful in removing procedural barriers designed to prevent litigation relating to whether a capital defendant is innocent. Most important, the Missouri Supreme Court's decision in the *Amrine* case, which allows a death row defendant to obtain relief solely on the basis of evidence showing that he is innocent of the capital crime, is likely to be followed in other jurisdictions and perhaps eventually by the Supreme Court. As the Missouri Supreme Court justices' response to the attorney general's argument in *Amrine* indicated, the principle at stake in these cases is whether it is "a matter of manifest injustice . . . to execute an innocent man." Given the concern relating to wrongful convictions in capital cases, capital defendants' attorneys may be able to persuade courts and legislatures not only to accept this principle but also to provide safeguards, such as greater access to DNA testing in capital cases, that will increase the likelihood of its vigorous enforcement.

Defense attorneys may also have some success in obtaining broader safeguards in capital cases. Concerns about the proliferation of innocent death

row defendants have precipitated proposals of safeguards designed to decrease the likelihood of erroneous verdicts in capital cases.¹¹ Some legislatures have adopted some of the proposed reforms—providing protection against coercive police interrogation practices, for example, by requiring electronic recording of most police interrogations.¹² Through emphasizing the concern for preventing wrongful convictions in capital cases, defense attorneys may be able to obtain additional safeguards, perhaps including new restrictions on police interrogation practices¹³ or the admission of defense expert testimony to assist the jury in assessing the reliability of categories of government evidence that have contributed to wrongful convictions in past capital cases.¹⁴

Based on Governor Ryan's stated reason for declaring a moratorium on Illinois executions, defense counsel will also seek to persuade responsible officials to suspend executions until sufficient reforms to provide adequate protection against wrongful convictions in capital cases are in place. Although this argument undoubtedly has force, it is unlikely to be successful in more than a few jurisdictions. Despite the concerns that have been raised about our system of capital punishment, the death penalty is still viewed by many as an important aspect of our administration of justice, at least in states where the death penalty is widely applied. Governor Ryan's declaration of the Illinois moratorium was in fact a politically courageous act. Barring unusual circumstances, most other public officials are unlikely to follow his example in the near future.

As a result of the Court's decisions in *Wiggins* and *Williams*, the overall quality of defense attorneys' representation of capital defendants is likely to improve. The decisions in both cases will lead lower courts to monitor

11. See State of Ill., Report of the Governor's Commission on Capital Punishment (Apr. 15, 2002); Jim Dwyer, Peter Neufeld & Barry Scheck, *Actual Innocence: Five Days to Execution, and Other Dispatches from the Convicted* app. 1 (A Short List of Reforms to Protect the Innocent) (2000); James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973–1995* (June 12, 2000), available at <http://justice.policy.net/jpreport/section1.html> (last visited Aug. 20, 2004).

12. See, e.g., 125 Ill. Comp. Stat. 5/103–2.1 (2000 & Supp. 2004) (effective July 18, 2005); D.C. Code Ann. § 5–133.20 (2004).

13. See Welsh S. White, *Confessions in Capital Cases*, 2003 U. Ill. L. Rev. 979, 993.

14. In some jurisdictions, expert testimony relating to the reliability of eyewitness testimony and expert testimony relating to the circumstances under which police-induced false confessions are likely to occur are already admissible. See *id.* at 1030–31. Based on data showing the sources of error leading to wrongful convictions in capital cases, such expert testimony may become more widely admissible in capital cases. In addition, expert testimony relating to the problems in assessing the reliability of certain types of forensic evidence—comparison of hair samples, for example—may become more widely admissible, especially in capital cases.

defense attorneys' representation in capital cases more closely, which in turn should lead states to impose stricter standards for attorneys representing capital defendants and to provide capital defense attorneys with more resources so that they will be better able to meet the standards for effective representation.

Wiggins's explanation of the standards for evaluating a defense attorney's performance in a capital trial is likely to be especially significant. As a result of *Wiggins*, defense attorneys representing capital defendants will be more likely to follow the ABA Guidelines, especially with respect to preparing for the penalty trial. There will thus be fewer penalty trials in which the defense counsel introduces little or no mitigating evidence and more in which the defense presents a multilayered picture of the defendant, providing the jury with an opportunity to understand the defendant and perhaps to empathize with him. As a result, the extent to which juries impose death sentences will continue to decrease.¹⁵

In addition, capital trials will become increasingly expensive. As a result, prosecutors will be likely to become more circumspect about bringing capital charges and more eager to avoid trials by agreeing to plea bargains that will allow the defendant to avoid the possibility of a death sentence. These changes will further reduce the extent to which death sentences will be imposed.

For the near future, defense attorneys' successes in obtaining Supreme Court rulings providing new protections for capital defendants are most likely to occur in cases involving defendants with diminished moral responsibility. In *Roper v. Simmons*,¹⁶ decided in 2005, the court held that the Constitution prohibits the execution of youths who were under the age of eighteen at the time of their offenses. Drawing from the arguments that were successful in *Atkins v. Virginia*,¹⁷ defense attorneys were able to convince the Court that, like individuals who are mentally retarded, juveniles as a class lack the requisite moral responsibility to be subject to the death penalty. Building upon their victories in *Atkins* and *Simmons*, defense attorneys may be able to convince the court that other categories of defendants with severe mental impairments or marked signs of immaturity should not be eligible for execution.

15. The number of death sentences has dropped from a peak of 320 in 1996 to 144 in 2003. See Death Penalty Information Center, Death Sentences in the United States from 1977 to 2003 (citing Bureau of Justice Statistics: Capital Punishment Annual Reports, 1977–2003), available at <http://www.deathpenaltyinfo.org/article.php?scid=9&did=847> (last visited September 14, 2005).

16. 125 S.Ct. 1183 (2005).

17. See 536 U.S. 304 (2002).

Conclusion

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. As a result, defendants in capital cases will have increased protections, and the pace of executions is likely to slow. In view of the strong commitment to capital punishment that still exists in many parts of the country, however, change is likely to be incremental and slow. Many of the problems that exist now will continue to exist. The number of executions over the next few years is likely to be considerable, remaining in excess of fifty per year. In the long run, however, just as a defense attorney's compelling narrative of injustice can produce a favorable result for a particular capital defendant, defense attorneys' compelling narratives of the series of injustices perpetrated by the modern system of capital punishment may lead to a continuing decline in the use of the death penalty, and eventually to its outright abolition.