LITIGATING IN THE SHADOW OF DEATH
Litigating in the Shadow of Death

Defense Attorneys in Capital Cases

WELSH S. WHITE

THE UNIVERSITY OF MICHIGAN PRESS  Ann Arbor
To Anthony Amsterdam,
who blazed the path
for the many outstanding lawyers
who represent capital defendants
in the modern era of capital punishment.
Acknowledgments

Although nearly all of the analysis contained in this book is new, I have at various points drawn from my previously published work in presenting accounts of either particular cases or Supreme Court doctrine. I would thus like to thank the following copyright holders for permission to excerpt material from the original sources.


I would also like to thank the attorneys whom I have interviewed over the past three years. In the Methodology Appendix, I have named the ones who were willing to have their names identified. These attorneys, as well as several others who preferred not to have their names mentioned, were incredibly generous not only in spending time explaining their work to me but also in providing materials and other information that would enable me to have a better understanding of their cases and the ways in which skilled capital defense attorneys represent their clients. Without the help of these attorneys, this book could not have even been contemplated. Although all of the attorneys deserve thanks, I would especially like to thank Stephen
Bright, Michael Burt, Michael Millman, David Bruck, and Russell Stetler for their invaluable comments on drafts of several of the chapters in the book.

I would also like to thank several people whose assistance enhanced the quality of the book. Albert Alschuler encouraged me to undertake this project and advised me as to how it should be approached. Andrew Taslitz gave me helpful advice relating to methodological issues. In addition to the others I have named, Stephen Garvey, John Parry, and David Harris read drafts of chapters and made helpful suggestions.

Finally, I would like to express my appreciation to the people who provided indispensable assistance in putting the manuscript together: the members of the Document Technology Center, LuAnn Driscoll, Karen Knochel, Darleen Mocello, and Barbara Salopek who did a superb job in preparing my manuscript; my research assistants, Timothy Lyon, Sara Chandler, and Paige Forster, who did an outstanding job in finding difficult sources and editing the manuscript; and my wife Linda, whose proofreading and other support were invaluable.
Contents

ONE
The Role of Defense Lawyers in Capital Cases 1

TWO
Effective Assistance of Counsel in Capital Cases 13

THREE
Defending Capital Defendants Who Are Innocent 37

FOUR
Defending Capital Defendants Who Have Strong Claims of Innocence 77

FIVE
Defending a Capital Defendant in an Aggravated Case 105

SIX
Plea Bargaining in Capital Cases 145

SEVEN
Seeking Postconviction Relief in Capital Cases 173

EIGHT
Concluding Observations 197

Methodology Appendix 209
Table of Cases 213
Index 217