

In 2003, the ABA Guidelines for the first time recognized that attorneys representing a capital defendant have an obligation to seek negotiated pleas in capital cases.¹ Experienced defense attorneys have long understood that aggressively seeking negotiated resolutions in capital cases is a vital aspect of effective representation.

Indeed, as Russell Stetler has observed, the number of defendants sentenced to death “might have been greatly diminished” if attorneys representing capital defendants over the past three decades had sought to eliminate the “grave risk of death” involved in a capital trial by seeking negotiated pleas.² Stetler concludes that “[p]leas have been available in the overwhelming majority of capital cases in the post-*Furman* era, including the cases of hundreds of prisoners who have been executed.”³

Attorneys with wide experience in capital cases agree. Millard Farmer, a Georgia attorney who has represented hundreds of capital defendants, estimates that 75 percent of the defendants who have been executed since 1976 could have avoided the death sentence by accepting a plea offer.⁴ Other knowledgeable attorneys state that, because plea bargaining is conducted in a twilight zone “with both parties maintaining a posture of plausible denial if negotiations fail,”⁵ it is difficult to determine the percentage of cases in which prosecutors actually offered pleas to defendants who were later exe-

1. The Guidelines state: “Counsel at every stage of the case have an obligation to take all steps that may be appropriate . . . to achieve an agreed upon disposition.” American Bar Association, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 10.9.1, at 91 (2003).

2. Russell Stetler, *Commentary on Counsel’s Duty to Seek and Negotiate a Disposition in Capital Cases (ABA Guideline 10.9.1)*, 31 Hofstra L. Rev. 1157, 1157 (2003).

3. *Id.*

4. Telephone Interview with Millard Farmer (Oct. 13, 2003) [hereinafter Farmer Interview].

5. Stetler, *supra* note 2, at 1157.

cuted.⁶ Nevertheless, they estimate that more than half of these defendants at some point had an opportunity to enter a guilty plea that would have eliminated the possibility of a death sentence.⁷ And they are confident that, if the defendants' attorneys had aggressively pursued the possibility of obtaining favorable plea bargains, the percentage of executed defendants who could have saved their lives by entering a plea would have been even higher.⁸

Attorneys with experience in capital cases emphasize that lawyers representing capital defendants need to be trained in the art of plea bargaining. In his position as adviser to attorneys who represent federal capital defendants, David Bruck states that it is often necessary to alter the attorney's mind-set. An attorney appointed to represent a federal capital defendant may believe that he has received a "prestige appointment" that will allow him to "demonstrate his trial skills."⁹ When advising such an attorney, Bruck's first priority is to convince him that what is often needed is not a skilled trial lawyer but a "world class cop-out artist."¹⁰ In many cases, a capital defendant's attorney can best achieve an optimal result for his or her client by resolving the case through negotiations with the prosecutor.

As might be expected, many lawyers who represent capital defendants do not relish the role of "world class cop-out artist." Even if a lawyer is aware that a plea offer may be obtainable, she would sometimes prefer to focus on litigating the case rather than negotiating with the prosecutor or engaging in conduct that will increase the likelihood of a favorable offer. And, if there is an offer, the lawyer will soon realize that persuading her client to accept the offer is likely to present a daunting challenge. Plea bargains offered by prosecutors in capital cases will nearly always require the defendant to serve a long prison term—often life without the possibility of parole. Persuading the defendant to accept such an offer may be extremely difficult, and the difficulty may be compounded by racial barriers between the defendant and the attorney, the defendant's mental problems, his attitude toward the death penalty, and myriad other circumstances.

Nevertheless, as the ABA Guidelines now recognize, seeking to resolve a capital case through a favorable negotiated plea is a "core component of

6. *Id.*

7. Telephone Interview with Stephen Bright (Nov. 29, 2003) [hereinafter Bright Interview]; Telephone Interview with Michael Burt (Oct. 23, 2003) [hereinafter Burt Interview].

8. Bright Interview, *supra* note 7; Burt Interview, *supra* note 7. See also Stetler, *supra* note 2, at 1158.

9. Telephone Interview with David Bruck (Nov. 25, 2003) [hereinafter Bruck Interview].

10. *Id.*

effective representation.”¹¹ In many, if not most, capital cases, a competent defense attorney should thus seek to obtain a favorable plea offer from the prosecutor and, if such an offer is obtained, seek to persuade the defendant to accept it.

Obtaining a Favorable Offer from the Prosecutor

In many capital cases, a favorable plea offer from the prosecutor will be any offer that allows the defendant to avoid the possibility of a death sentence. A prosecutor’s willingness to make such an offer varies depending on a wide range of factors, including the jurisdiction in which the case arises, the nature and circumstances of the crime, the defendant’s history, the amount of publicity the case has received, the prosecutor’s political aspirations, and the wishes of the surviving members of the victim’s family.

In some jurisdictions, the prosecutor will be willing to allow a capital defendant an opportunity to avoid the death penalty by entering a guilty plea in nearly every case. Ironically, even prosecutors known as strong advocates of the death penalty have adopted this policy. The district attorney of Philadelphia, for example, has been characterized as the “deadliest D.A.” because of her policy of seeking the death penalty in nearly all cases in which the defendant is eligible to receive it.¹² While Philadelphia prosecutors seek the death penalty in nearly all capital cases that go to trial, however, they allow capital defendants the opportunity to avoid the death penalty through negotiated pleas in all but the rarest cases.

Jules Epstein, a private attorney who has been involved in more than a hundred capital cases, states that, with the exception of murder cases in which the victim was a police officer, Philadelphia prosecutors are almost invariably receptive to a negotiated resolution through which the defendant can avoid the death sentence.¹³ Marc Bookman, an attorney with the Defender Association, has had a similar experience in his regular dealings with the same office. He reports that Philadelphia prosecutors are strong supporters of the death penalty but also see the wisdom of resolving even the most egregious case through negotiation. Although the district attorney has no stated policy, Bookman believes the office has come to the reasonable conclusion that a plea to life without parole protects the commu-

11. Stetler, *supra* note 2, at 1157.

12. Tina Rosenberg, *The Deadliest D.A.*, N.Y. Times, July 16, 1995, § 6 (Magazine), at 22.

13. Telephone Interview with Jules Epstein (Dec. 18, 2003) [hereinafter Epstein Interview].

nity and assures finality. They see this sort of negotiated plea as “a very propitious way” to resolve a capital case.¹⁴

Similarly, even though the state of Texas has executed far more defendants than any other state,¹⁵ prosecutors in some Texas counties routinely offer capital defendants an opportunity to avoid a death sentence through entering a plea in even the most aggravated cases. Mike Charlton, an attorney with wide experience in capital cases, states that Texas prosecutors in smaller rural counties are generally willing to offer pleas because of budgetary considerations, especially when they are dealing with an experienced defense attorney; these prosecutors are aware that the trial of a capital case will “cost the county more than it can afford.”¹⁶ Similarly, the prosecutor of Travis County, which includes the city of Austin, has a liberal policy with respect to plea offers. Gary Taylor, another experienced capital defense attorney, reports that, when representing a capital defendant in Travis County, he can generally obtain a favorable plea offer in even the most aggravated cases if he shows the prosecutor he “will work hard and will be able to raise difficult issues relating to either [the defendant’s] guilt or penalty.”¹⁷

Even in jurisdictions that have a relatively firm policy against offering pleas in certain types of capital cases, defense attorneys will often be able to obtain favorable offers by persistently seeking them and at the same time engaging in conduct designed to convince the prosecutor that offering a plea will be more advantageous to the government than litigation. In order to show the prosecution that litigating the case will cause serious problems, the defense attorney will often file pretrial motions that demonstrate not only that the case involves difficult issues that reduce the prosecutor’s chances of obtaining a death sentence but also that litigating the case will be time consuming, expensive, and potentially harmful to the government.

Consider the case of Sampson Armstrong, a thirty-five-year-old African American man who was charged in Hardee County, Florida, with the first-degree murder and robbery of an elderly white couple.¹⁸ At his first trial,

14. Telephone Interview with Marc Bookman (Nov. 22, 2003) [hereinafter Bookman Interview]. Bookman stated that cases involving the killing of a police officer are rare, and he has not represented a defendant charged with such a crime. *Id.*

15. Texas has executed 323 people. Death Penalty Information Center, *Number of Executions by State and Region since 1976*, available at <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186> (last modified July 22, 2004). This total exceeds by 1 the sum of the 5 next most execution-prone states—Virginia (92), Oklahoma (74), Missouri (61), Florida (59), and Georgia (36). *Id.*

16. Telephone Interview with Michael Charlton (Dec. 9, 2003) [hereinafter Charlton Interview].

17. Telephone Interview with Gary Taylor (Dec. 9, 2003).

18. See *Armstrong v. Dugger*, 833 F.2d 1430 (11th Cir. 1987).

the jury found Armstrong guilty and sentenced him to death.¹⁹ Subsequently, however, a federal court vacated his death sentence on the ground that he had been denied effective assistance of counsel at his penalty trial.²⁰

For the new penalty proceeding, Armstrong was represented by Edward Stafman of Tallahassee, Florida, a lawyer who has represented capital defendants throughout Florida. With the help of an investigator, Stafman delved into every aspect of Armstrong's background. He learned that Armstrong weighed two pounds five ounces at birth, apparently because he suffered from fetal alcohol syndrome during his mother's pregnancy;²¹ he was beaten severely by his parents from the time he was a small child; he had been significantly affected by the extreme hardships he experienced as a migrant worker over a period of two decades;²² he had never learned to read or write; he had an IQ of seventy-two, which suggested he was possibly mentally retarded;²³ he had severe hearing problems; and he was brain damaged (apparently as the result of a blow to the head).

Stafman used these facts to petition the court for compensation for several experts to assist in preparing for Armstrong's resentencing.²⁴ After numerous ex parte proceedings, the court authorized Stafman to retain six experts, including a medical doctor to testify about the effect that fetal

19. *Id.* at 1432.

20. *Id.* at 1436. For a fuller account of Armstrong's first death penalty trial, see Welsh S. White, *Effective Assistance of Counsel in Capital Cases: The Evolving Standard of Care*, 1993 U. Ill. L. Rev. 323, 327-28.

21. Fetal alcohol syndrome is a condition resulting from alcohol abuse during pregnancy. It is characterized by prenatal and postnatal growth retardation, mental retardation, and facial deformities. See generally Ernest L. Abel, *Fetal Alcohol Syndrome* 55-87 (1990).

22. As a child, Armstrong worked as a fruit picker in order to supplement his grandmother's income. This resulted in irregular school attendance and a lack of adequate adult supervision throughout his formative years. *Armstrong*, 833 F.2d at 1433.

23. The American Association on Mental Deficiency (AAMD) defines mental retardation as having an upper boundary IQ of approximately 70. *American Ass'n on Mental Deficiency, Classification in Mental Retardation* 23 (Herbert J. Grossman, M.D. ed., 1983). This compares with a population mean score of 100. The AAMD cautions that the number 70 is a guideline only and may be extended upward depending on the reliability of the particular IQ test used. Besides IQ, the AAMD considers other impairments in adaptive behavior when deciding if an individual should be classified as mentally retarded. See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 *Geo. Wash. L. Rev.* 414, 422 & n.44 (1985).

24. Stafman's motions were predicated upon the Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985). Telephone Interview with Edward Stafman, attorney in Tallahassee, Florida (May 8, 1992) [hereinafter Stafman Interview]. In *Ake*, the Court held that if an indigent defendant makes a preliminary showing that his sanity at the time of the offense is to be a "significant factor" at trial, the State must, "at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense." 470 U.S. at 83.

alcohol syndrome has upon behavior, a mental retardation expert²⁵ to explain the effect of Armstrong's borderline mental retardation, and a neurologist to testify about the effect of Armstrong's brain damage.²⁶

During the early stages of the case, Stafman also filed several pretrial motions relating to discovery of the prosecutor's aggravating evidence and voir dire of the prospective jurors. In addition, Stafman's investigator met with members of the victims' family to explain some of the background of the case and to discuss with them their feelings about the death penalty.

Following the authorization for the retention of six experts, Stafman met with the prosecutor and other officials to negotiate a plea bargain. One of Stafman's arguments was that the compensation for the expert witnesses, which likely would exceed \$100,000 if the case went to trial, would severely burden the county's financial resources. Stafman pointed this out in separate meetings with each of the county's five commissioners. Tactfully, he suggested that spending county money for this purpose would not be a good use of resources. He proposed to the commissioners that Armstrong be allowed to plead guilty in exchange for a life sentence and that some of the money saved by avoiding trial "be used to provide a suitable memorial for the victims."²⁷ The county commissioners were persuaded and communicated their views to the prosecutor; in due course, the prosecutor agreed to allow Armstrong to plead guilty in exchange for a life sentence.

In another case, Mendes Brown, a middle-aged African American man, was charged with the first-degree murder and burglary of an elderly white man in San Francisco. Although San Francisco prosecutors are often willing to offer pleas that eliminate the possibility of a death sentence in felony-murder cases where there is only one victim and no sexual offense, torture, or other aggravating circumstances,²⁸ in this case the prosecutor was unwilling to offer a plea because the defendant had a significant prior record and the victim's son adamantly insisted that the prosecutor seek the death penalty.²⁹

25. Because mental retardation differs significantly from other forms of mental disability, a psychiatrist or other mental health professional whose training has been limited to evaluating mental illness is not qualified to testify as an expert with respect to mental retardation. *See* Ellis & Luckasson, *supra* note 23, at 484-90.

26. In addition, the court authorized Stafman to retain a clinical psychologist who would give the defendant neurological tests, a historian who would testify about the history of deprivation experienced by black migrant workers, and a cancer expert who would testify that the defendant presently suffered from cancer. Stafman Interview, *supra* note 24.

27. *Id.*

28. Burt Interview, *supra* note 7.

29. *Id.*

Brown was represented by Michael Burt, who was then an attorney in the San Francisco Public Defender's Office. Burt's strategy to obtain a plea offer in this case was to file pretrial motions showing that trying the case would not only take "a lot of time" but would involve "litigating issues that would cause the government concern in future cases."³⁰ Burt thus challenged the composition of both the grand and the petit jury, claiming among other things that the defendant's equal protection and due process rights were violated because, during the thirty-six years prior to the time of his grand jury indictment, "no Chinese-Americans, Filipino-Americans, or Hispanic-Americans had served as foreperson of a San Francisco indictment grand jury."³¹ As a result, the case was tied up in pretrial litigation for two and a half to three years. During this period, the victim's son became aware of the time it would take to litigate the case. In the interest of obtaining closure, he withdrew his opposition to a negotiated resolution that would allow the defendant to avoid the death penalty. The prosecutor then opened negotiations with Burt, and they eventually reached an agreement.

In some capital cases, political considerations have a vital effect on the possibility of a negotiated resolution. David Wymore, chief deputy public defender for the state of Colorado, says that "once somebody has a political bent on killing our client, it's tough to get a plea bargain."³² In a high-profile capital case, the prosecutor may be totally focused on the next election. He may think, "If I don't get the death penalty, I won't be reelected," or, "If I do get a death sentence, I'll be elected Governor."³³ In these kinds of cases, Wymore says the best strategy for the defense counsel is to try to "convince the prosecutor that he might not win."³⁴ If the prosecutor starts to believe he may not get the death penalty, he will start to listen because he realizes "the political damage for him will be less if he doesn't seek the death penalty than it will if he seeks it and fails to get it."³⁵ From the prosecutor's perspective, "If you don't win, you're going to bankrupt the county and you look like a boob."³⁶ In some high-profile murder cases, Wymore has even succeeded in persuading the prosecutor to try the case as a non-capital case, thus avoiding potential political damage to himself and sparing the county the huge cost of a capital trial.

30. *Id.*

31. *People v. Brown*, 89 Cal. Rptr. 2d 589, 592 (Cal. Ct. App. 1999).

32. Telephone Interview with David Wymore (Dec. 1, 2004) [hereinafter Wymore Interview].

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

Millard Farmer also views politics as a pervasive factor in capital punishment litigation. According to Farmer, the key to plea bargaining in capital cases is to “take away the political benefit to the prosecutor” of seeking the death penalty. Accomplishing this often involves “using an event to expose the hypocrisy or immorality of a person involved in the dispute and then restoring order in exchange for a fair disposition of the dispute.”³⁷ Farmer’s representation of Douglas Palmer provides a “magnified version” of the approach used by Farmer in many cases.³⁸ Palmer, a young Mexican American, Johnny Rey, and four other defendants were charged with capital murder in Randall County, Texas. The prosecution charged that the defendants killed Hilton Merriman, an elderly white man, by stomping him to death. Johnny Rey was tried first and received a death sentence.

In preparing for Palmer’s trial, Farmer investigated the work of Ralph Erdmann, the forensic pathologist who had performed the autopsy on Mr. Merriman and testified at Rey’s trial. The investigation showed that Erdmann’s autopsy report on Mr. Merriman contained “intentional misrepresentations of fact”³⁹ and that Erdmann had engaged in a pattern of misconduct in performing autopsies in numerous other cases.

Based on this information, Farmer filed a motion to exhume the victim’s body. At the hearing on this motion, two police officers testified that they had “watched Erdmann’s autopsies” in numerous cases, and his testimony about how he performed those autopsies was not truthful.⁴⁰ Contrary to Erdmann’s testimony, he “didn’t weigh organs” at the autopsies. Moreover, he “once testified to weighing a victim’s spleen” even though it was later shown that the “victim didn’t even have a spleen as it had previously been removed and, moreover, that the body had never been opened during the autopsy.”⁴¹ At the hearing, Farmer called Erdmann as a witness; in response to Farmer’s questions, the pathologist invoked the Fifth Amendment 237 times.⁴²

As a result of this hearing, the Randall County prosecutor indicted the two police officers for perjury and Farmer for tampering with a witness (the pathologist). In response, one of the nation’s largest law firms and many of

37. Millard Farmer, *Conflictineering, Y2K5, The Introduction*, at <http://www.goextranet.net/Seminars/Content/MillardFarmerIndexAll.htm> (last visited Apr. 6, 2005).

38. Farmer Interview, *supra* note 4.

39. *Id.*

40. *Id.*

41. Donna Flenniken, *Amarillo Observer* (Tex.), Apr. 1992, vol. 2, No. 4.

42. Lee Hancock, *Pathologist Gave Wrong Tissue in Murder Case, Official Says Erdmann Cites 5th Amendment 237 Times at Hearing*, *Dallas Morning News*, Apr. 3, 1992, at 1A.

the most prominent criminal defense lawyers in Texas came to the aid of Farmer and the two police officers, all of whom sought injunctive relief in the federal district court.⁴³ Although it is very unusual for a federal court to intervene in a state prosecution, the federal court issued a temporary injunction ceasing the prosecution against Farmer and the police officers, after which the defendants in the federal court litigation settled the issues by paying \$300,000 damages and dismissing the criminal charges.⁴⁴

During the federal court hearing, other police officers “started spilling their guts about the forensic pathologist,” and many more improprieties were revealed.⁴⁵ Based on the information disclosed, Rey’s death sentence was overturned, and he received a life sentence. Eventually, Palmer was given a plea bargain under which he also received a life sentence.⁴⁶

The Role of the Victim’s Family

As was seen in the Mendes Brown case, the attitude of one or more members of the victim’s family often plays a critical part in determining whether the prosecutor will offer a favorable plea bargain. In federal cases, the views of family members are especially important because a federal regulation specifically provides that the prosecutor should consider the family members’ views in deciding whether to seek the death penalty.⁴⁷ A few states have a similar requirement.⁴⁸ Even when there are no relevant statutory provisions, however, state prosecutors will generally give significant weight to the views of interested family members. Experienced capital defense attorneys can cite many cases in which family members’ feelings played an important part in precipitating plea offers.

As one example, Michael Burt recalls a federal case in which Pierre Rausini, a young white man, was charged with being the head of a drug

43. William Hubbard, *Substantial Evidence: A Whistleblower’s True Tale of Corruption, Death and Justice* (1998).

44. Farmer Interview, *supra* note 4.

45. *Id.*

46. *Id.*

47. The United States Attorneys’ Manual requires federal prosecutors to “consult with the family of the victim concerning the decision whether to seek the death penalty.” U.S. Dep’t of Justice, United States Attorneys’ Manual, § 9-10.060 (2004), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm#9-10.060. Furthermore, the U.S. Attorney should “include the views of the victim’s family” about the death penalty “in any submission made to the [Justice] Department” and inform the family of “all final decisions regarding the death penalty.” *Id.*

48. See, e.g., Ala. Code § 15-23-71 (2003); Ind. Code. Ann. § 35-35-3-5 (Michie 2004).

trafficking conspiracy and numerous other crimes, including the murder of two government informants. Since government informants are viewed as arms of law enforcement, the government is generally inclined to seek the death penalty in cases in which informants were murder victims, especially when it has a strong case, as it did against Rausini. Nevertheless, the prosecutor decided to plea bargain the case after the mother of one of the victims “urged him not to seek the death penalty” because she had “come to feel that [it] was wrong.”⁴⁹

Russell Stetler recounts an even more aggravated case in which the views of the victims’ families played a significant part in producing a plea offer. Kendall Francois, a young African American man, was charged with killing eight young women (some of whom were prostitutes) in and around the city of Poughkeepsie, New York. The prosecutor initially insisted that the case be tried as a capital case, stating that “if the death penalty is going to be imposed in any case, it should be imposed in this one.”⁵⁰ Eventually, however, the prosecutor changed his mind and allowed the defendant to plead guilty in exchange for a sentence of life without the possibility of parole. Several factors—including the defense’s mitigating evidence and the community’s awareness of the probable cost of litigating the case—contributed to the prosecutor’s changed position. One very significant factor, however, was that “some of the victims’ families came to prefer a negotiated resolution of the case”⁵¹ because “they did not want their daughters’ activities as prostitutes to be brought out during the defendant’s trial.”⁵²

Since a family member’s views as to whether the death penalty should be imposed are often critical, an attorney representing a capital defendant will frequently seek to influence those views. Toward this end, experienced attorneys and mitigation experts agree that a member of the defense team should contact one or more members of the victim’s family as soon as possible. Although some defense attorneys will visit a family member’s home,⁵³ more frequently the first contact will be made at a court proceeding.⁵⁴ A member of the defense team may approach a family member, tell him or her that the defense attorney or another member of the defense would like to arrange a meeting, and explain why such a meeting might be mutually beneficial.⁵⁵

49. Burt Interview, *supra* note 7.

50. Telephone Interview with Russell Stetler (Nov. 13, 2003) [hereinafter Stetler Interview].

51. *Id.*

52. *Id.*

53. Burt Interview, *supra* note 7.

54. Stetler Interview, *supra* note 50.

55. *Id.*

Victims' family members will often initially be reluctant to meet with anyone associated with the defendant. In some cases, however, the family members will be "yearning for information"⁵⁶ and the defendant's lawyer (or other team member) will be able to establish rapport with family members by demonstrating a willingness to disclose information that has not been disclosed by the prosecutor. Family members will often want to know "how the process works," including how long it will be until the defendant is brought to trial, how long the trial will take, what happens after the trial, and how long it will be until the defendant could possibly be executed.⁵⁷ By disclosing this kind of information, the defense team can begin to establish a relationship of trust with the victim's family members.

Once such a relationship has been established, the family members often realize that, regardless of their views as to the death penalty, the immediate benefits of resolving the case through a negotiated plea may outweigh the speculative gains of the defendant's possible execution. Most obviously, of course, resolving the case through a negotiated plea can bring closure. The family members need not go through the agonizing ordeal of a trial and lengthy posttrial procedures in a possibly vain effort to obtain the defendant's execution.

In addition, after meeting with members of the defense team, family members may learn that a negotiated plea can lead to assurances that will address their specific concerns. The defense may be able to promise the victim's family that no one associated with the defense will make statements about the case, for example, or that the defendant will promise not to supply material to people interested in writing about the case or to engage in any other conduct that could enrich the defendant. In some cases, moreover, the victim's family may want the defendant to disclose information. At the family's request, the plea bargain may require the defendant to reveal information relating to the circumstances of the killing. As part of a negotiated plea bargain, some family members have even sought and obtained one or more meetings between family members and the defendant so that the family members could obtain a fuller understanding of why the crime took place.⁵⁸

Persuading the Defendant to Accept a Favorable Plea Offer

In the great majority of capital cases, a skilled and persistent defense attorney will eventually be able to convince the prosecutor to offer a favorable

56. Burt Interview, *supra* note 7.

57. *Id.*

58. Stetler Interview, *supra* note 50; Burt Interview, *supra* note 7.

plea bargain that allows the defendant to avoid a death sentence. Persuading the defendant to accept the plea offer, however, usually presents an even more formidable challenge. Indeed, experienced capital defense attorneys invariably agree that persuading a client to accept a favorable plea bargain generally poses the most difficult obstacle to obtaining a negotiated resolution of a capital case.

Why are capital defendants generally reluctant to accept favorable plea bargains? One reason is simply the nature of the choice that confronts them. In exchange for avoiding the death sentence, the defendant will be sentenced to a long prison term, often life without the possibility of parole. Typically, capital defendants are young men who have only a vague sense of the future. A twenty-year sentence might seem equivalent to a life sentence; and a life sentence, of course, is endless. When confronted with the choice between risking a death sentence and agreeing to spend the rest of his life in prison, a young defendant will often feel that, regardless of the likely outcome, it is better to “roll the dice.”⁵⁹ In response to the attorney’s explanation of a plea offer, a defendant will thus often respond that he has no interest in spending the rest of his life in prison. He instructs his attorney, “Free me or fry me.”⁶⁰

In many cases, the defendant’s distrust of his attorney will also be a factor. When the lawyer is a public defender or court-appointed, the defendant may initially believe that, rather than being someone he can trust, the lawyer is simply “part of the system.”⁶¹ The defendant’s distrust will be magnified, moreover, if the lawyer meets with the defendant only once or twice and then urges him to accept a plea bargain that will require him to spend the rest of his life in prison. Unfortunately, however, that is how many attorneys operate. Jules Epstein states that in Philadelphia there are some capital defense lawyers “who visit their clients more than twenty times” but many more who “visit them only twice.” The lawyers who make only two visits “are never going to get their clients to accept a plea bargain.”⁶²

In some cases, the attorney’s difficulty in overcoming the defendant’s mistrust may be compounded by racial or cultural differences. For example, white attorneys are often appointed to represent African American defendants. Even if the white attorney meets with the client often, communi-

59. Burt Interview, *supra* note 7.

60. Bright Interview, *supra* note 7.

61. Epstein Interview, *supra* note 13.

62. *Id.*

cates fully, and does everything that should be done to establish rapport, a racial or cultural barrier may still prevent the client from fully trusting the attorney. The same problem may arise, of course, whenever the lawyer and client are of different races. It may also arise when they come from markedly different cultures or backgrounds.

Even if the attorney establishes a good relationship with her client, moreover, she may have to deal with the defendant's unrealistic expectations. Regardless of the strength of the case against him, the defendant may believe that "the attorney can get him off," or that there is at least a good chance of a favorable outcome. His mistaken expectations may result from "rumors that circulate in the prison,"⁶³ advice he receives from other prisoners or friends, or simply his own distorted perceptions of the system.⁶⁴ In order to obtain a negotiated plea, the defendant's attorney must overcome the obstacles posed by these expectations.

In some cases, the defendant's reluctance to admit guilt presents still another problem. A defendant may be reluctant to admit guilt because he has told his family and friends he is innocent and doesn't want to change his story. Or he may view a guilty plea as political capitulation. Even if he realizes a trial is not in his best interest, he may refuse to plead guilty because he views a plea as a "surrender to the system."⁶⁵ Some defendants, moreover, may be especially averse to entering a plea that will require them to actually admit to their participation in the crime. Defense attorneys may try to assuage these concerns by seeking to negotiate a plea in which the defendant does not have to admit anything in court,⁶⁶ in some cases, however, prosecutors insist on the defendant's admission of guilt as a prerequisite to the plea bargain.⁶⁷

And, finally, some defendants present what might appear to be an insur-

63. *Id.*

64. Burt Interview, *supra* note 7.

65. Epstein Interview, *supra* note 13.

66. The Supreme Court has held that the Constitution does not prohibit a judge from allowing a criminal defendant to plead guilty even though he maintains he is innocent. *See North Carolina v. Alford*, 400 U.S. 25, 37-40 (1970). Defendants who refuse to admit their guilt may thus seek to enter *Alford* pleas in which they maintain their innocence or at least insist that they should be allowed to plead guilty without being required to admit their guilt.

67. In *Alford*, the Court made it clear that the defendant does not have a constitutional right to enter an *Alford* plea. In some situations, judges may refuse to accept such pleas. In offering a plea bargain, moreover, the prosecutor may make it a condition that the defendant admit guilt at the time he enters the plea. Mike Charlton recalls a case in which the defendant refused to accept the prosecutor's plea offer solely because the defendant refused to admit guilt. As a result, the defendant went to trial and was convicted, sentenced to death, and eventually executed. Charlton Interview, *supra* note 16.

mountable problem: they tell their attorneys they would prefer execution to life in prison. A defendant who takes this position will obviously not accept a plea bargain that avoids the death sentence in exchange for a sentence of life without parole or even life with the possibility of parole. In rare cases, the defendant may state that he will plead guilty only if he receives the death sentence.⁶⁸ More frequently, the defendant will simply insist that, regardless of the likelihood that a trial will result in a death sentence, his directions to his attorney are “Free me or fry me.”⁶⁹

Overcoming the Obstacles

Despite these obstacles, experienced attorneys reiterate that a capital defendant’s attorney simply needs persistence. Given enough time, a talented and creative attorney can overcome all obstacles and obtain a plea from even the most recalcitrant defendant.

The lawyer must first gain the trust of his client. Skilled defense attorneys and mitigation experts agree that the defense attorney and other defense team members need to spend many hours with the defendant. In order to fully gain the client’s confidence, however, the attorney may also have to demonstrate that he is a skilled advocate who is willing to do everything he can to help the client. David Bruck states that, ordinarily, he will not even try to convince a defendant to accept a favorable plea offer until he has shown that “he will fight for him.” He shows this by “investigating every lead [the client] has thought of and some [he] hasn’t thought of.”⁷⁰ According to Bruck, you need to show the client you have “the heart,” “the willingness,” and the “ability to go to trial.”⁷¹ Once the client is convinced of this, the attorney may be able to convince him that it is truly in his interest to accept the prosecutor’s plea offer.

In some cases, however, the lawyer’s demonstration that he has the “ability to go to trial” may increase the defendant’s reluctance to accept a plea. When the defendant sees evidence of his lawyer’s ability—the fact that she has won a pretrial motion, for example—he may start to believe that he should not plead guilty because his lawyer will be successful at trial.

When this happens, lawyers employ various approaches to deal with the

68. Epstein Interview, *supra* note 13.

69. Bright Interview, *supra* note 7.

70. Bruck Interview, *supra* note 9.

71. *Id.*

defendant's unrealistic expectations. David Wymore says that, when the government has a strong case and is offering a favorable plea bargain, you have to "strip the client of hope." He will tell the defendant, "You are dying. And I am an amateur surgeon. The only way to save your life is to take the plea offer."⁷² Other attorneys remember cases in which they have "leaned pretty hard" on defendants to get them to accept plea offers, sometimes without success. The most common approach for dealing with a client's unrealistic expectations, however, is to explain the nature of the process in painstaking detail. This gives the client an accurate view of what will happen if he goes to trial and helps him conclude that it is in his best interests to accept the offer.

Even with apparently rational defendants, this approach sometimes fails. Jules Epstein recalls a case in which he represented a defendant who was charged with killing a drug dealer. A distinctive item had been taken from the victim, and the defendant was seen pawning it shortly after the victim's death. The defendant's defense was that someone else had stolen the item between the time of the killing and the time the defendant was seen pawning it. The defendant, who was very intelligent, originally told Epstein that if there was no viable defense, he would consider a plea. Epstein investigated his client's defense. He interviewed the witnesses suggested by the defendant as well as others. He eventually concluded that the defense would not stand up. He told the defendant, "I've tried everything. I've talked to the witnesses. They didn't pan out. The prosecution has a strong case. If we go to trial, there's no argument I can make."⁷³ The defendant eventually decided, however, that he would prefer to go to trial and risk a death sentence rather than accept a plea bargain that would require him to serve the rest of his life in prison.

When the attorney's best efforts are not enough to induce the defendant to accept a favorable plea bargain, the attorney will often seek the help of a third party. At the attorney's request, either a member of the defendant's family, another lawyer, or someone else who is not associated with the defense team will seek to persuade the defendant to accept the prosecutor's offer.

The participation of a defendant's family members or loved ones will often be critical. Many attorneys state that, when they are seeking to persuade the defendant to accept a favorable plea bargain, they begin by trying

72. Wymore Interview, *supra* note 32.

73. Epstein Interview, *supra* note 13.

to gain the trust and support of the people the defendant “will listen to.”⁷⁴ This may include one or both of his parents, his spouse or girlfriend, and his close friends. The attorney tries to convince one or more of these people that he or she must convince the defendant to plead guilty “to save himself.”⁷⁵ When the person agrees to do so, his or her appeal to the defendant is likely to be exceptionally powerful not only because the defendant relies on this person for advice but also because, in urging the defendant to accept a plea bargain that will allow him to live, the person can convince the defendant that, even if he spends the rest of his life in prison, his life will be important to those who are close to him.

If the defendant’s reluctance to plead guilty stems from a refusal to admit guilt, moreover, a defendant’s family member or loved one may be able to assuage this concern. In the case recounted by Epstein, for example, the defendant insisted that he would not plead guilty because he was innocent. Epstein knew that the defendant was close to his mother, a strong, proud African American woman. He spent weeks with the defendant’s mother, finally convincing her that, in view of the prosecution’s overwhelming case, it was in the defendant’s best interests to accept the prosecutor’s offer. Epstein obtained permission from the warden for the defendant’s mother to meet with him in prison. During their meeting, the defendant said to her, “I’m innocent.” She responded, “I know that. But I want you alive. I want you to plead guilty and we’ll fight another day.”⁷⁶ Although the defendant still refused to plead guilty, he eventually agreed to have his case tried before a judge rather than a jury, which in Philadelphia greatly reduces the likelihood of a death sentence. The defendant was found guilty of first-degree murder and given a life sentence.⁷⁷

In some cases, the defendant’s lawyer will obtain the assistance of a lawyer or expert not associated with the defense team to persuade the defendant to accept a favorable plea offer. When a white lawyer perceives that she cannot persuade an African American defendant to accept a favorable plea because of racial barriers, she will sometimes seek the assistance of an African American attorney. Gary Parker, an African American attorney who practices in Georgia, has frequently helped white attorneys who encounter this difficulty. Over the past few years, Parker has persuaded at least fifteen African American defendants (all of whom were represented

74. Farmer Interview, *supra* note 4.

75. *Id.*

76. Epstein Interview, *supra* note 13.

77. *Id.*

by white attorneys) to accept plea bargains. Although Parker has used different approaches in different cases, he believes that the key to his success has always been his shared race with the defendant. According to Parker, when a white attorney represents an African American defendant, “there is a racial and cultural divide that is sometimes difficult for even the most dedicated lawyer to bridge.”⁷⁸ Parker, however, shows these defendants that he understands their situation. When dealing with an African American defendant who is charged with killing a white victim in a small Southern community, for example, he will emphasize to the defendant that “he is in a bad place,” explaining that he is being tried in a hostile environment in which one should not underestimate “the difficulty of avoiding a death sentence.”⁷⁹ If the defendant states that he would rather “die than spend the rest of [his] life in prison,” Parker will shift the focus from the defendant to those who care about him. He will emphasize that the defendant’s execution will inflict “pain on his parents.”⁸⁰ Invariably, Parker’s intervention has been successful. In every case in which he was asked to talk to a defendant represented by another attorney, the defendant eventually accepted the prosecution’s plea offer.⁸¹

In other cases, a defense attorney may seek the assistance of an outside attorney or expert not because of the individual’s race but because of his or her reputation or special talents. Millard Farmer, who is white, has often been asked by other attorneys to persuade clients of various races to accept favorable plea bargains. Farmer is a nationally prominent defense attorney who has represented hundreds of capital defendants. His reputation enhances the likelihood that a capital defendant will follow his advice. Through fully gaining a capital defendant’s trust, moreover, Farmer hopes that the defendant will come to view him as a “father figure, someone whose direction he will follow even if he doesn’t understand why he should follow it.”⁸² Farmer adds that it is still often difficult to persuade a defendant to accept a favorable plea bargain. One reason is that many capital defendants have mental or emotional problems that interfere with their ability to make reasonable decisions. The defendant’s attorney thus has to

78. Telephone Interview with Gary Parker (Dec. 8, 2003) [hereinafter Parker Interview].

79. *Id.*

80. On this point, Gary can speak from personal experience as his own son committed suicide, a tragedy that caused tremendous suffering to Gary and his family. In appropriate cases, Gary will discuss this personal loss with a defendant in order to emphasize the extent to which his execution will inflict pain on his family. *Id.*

81. *Id.*

82. Farmer Interview, *supra* note 4.

try “to get someone who is not well equipped to make a good decision to make a good decision” with respect to his capital case. In order to help the defendant transcend his own limitations, Farmer says that the most important factor is often to prove to the defendant that “you absolutely have his best interest at heart.”⁸³ This can be done by spending a great deal of time with him, assisting him if he has disputes with the jail staff, and helping him in myriad other ways.

When the defendant’s mental problems pose an obstacle to effective representation, the attorney may seek the help of a mental health professional who will recognize the nature of the defendant’s problems and be able to communicate with him. Most experienced capital defense attorneys remember cases in which psychiatrists, psychologists, or other professionals with a mental health background played a critical part in persuading a defendant to accept a favorable plea bargain.

Even in cases in which the defendant does not have profound mental problems, moreover, experts from outside the defense team have participated in persuading capital defendants to accept favorable plea bargains. In the *Rausini* case, for example, Michael Burt developed a rapport with Rausini’s parents, and they soon perceived that it would be in their son’s best interest to accept the plea offered by the government. Over a period of time, both Burt and Rausini’s parents tried to convince Rausini to accept the plea, stressing that “his execution would have a devastating effect on his parents.”⁸⁴ Nevertheless, the defendant refused to accept the plea. He said, “If I lose, fuck it. Death is no big deal.”⁸⁵ Burt felt that this was bravado rather than a genuine preference for the death penalty, but the defendant was adamant in his position. The key in this case, as in many others, was to “think creatively about how the defendant could be brought to see how his death would affect the lives of others.”⁸⁶

Toward this end, Burt asked Scharlette Holdman, a mitigation expert who was not a part of Rausini’s defense team, to meet with Rausini. Burt brought her in because he believed her earlier experiences with executed defendants’ family members would make her especially effective in communicating with Rausini. Holdman then had a three-hour meeting with Rausini in which she talked about her experiences in “attending Florida executions.” Among other things, she talked about the anguish suffered by

83. *Id.*

84. Burt Interview, *supra* note 7.

85. *Id.*

86. *Id.*

Ted Bundy's mother when she witnessed Bundy's execution. Bundy's mother not only had to witness her son's execution but was taunted and harassed by death penalty supporters. Holdman's talk, which was one of the most eloquent Burt has ever heard, brought home the reality of what the execution of a defendant means for the defendant's family. After hearing what she said, Rausini said, "I'll think about it."⁸⁷ Later, he accepted the government's offer.

Russell Stetler, another mitigation expert, says that he has also been asked and has agreed to try to persuade capital defendants to accept plea offers in cases where he was not a part of the defense team. Stetler believes it is sometimes helpful to have an outsider come in and provide the defendant with another perspective. Even if the outsider says essentially the same thing as the defendant's attorney, hearing it from someone else may cause the defendant to change his position. Because he has been involved in many cases, moreover, Stetler believes he can sometimes assist defendants by providing them with a broader perspective. In particular, when the defendant tells him he would prefer to be executed than to spend the rest of his life in prison, Stetler will respond, "I've seen a lot of cases where defendants decided not to accept plea bargains because they thought they would prefer the death penalty. After they received the death penalty and spent time on death row, though, they changed their minds. And then it was too late."⁸⁸

As Stetler's comment indicates, a death sentence does not result in immediate execution. Barring unusual circumstances,⁸⁹ a defendant who is sentenced to death will probably spend ten years or more on death row before he is executed.⁹⁰ When dealing with a defendant who states he

87. *Id.*

88. Stetler Interview, *supra* note 50.

89. When a defendant "volunteers" for execution by waiving some or all of the postconviction attacks he could make on his conviction or death sentence, the time between his sentence of death and execution may be substantially shortened. See Richard Garnett, *Propter Honoris Respectum: Secular Reflections on Lawyers' Ethics and Death Row Volunteers*, 77 *Notre Dame L. Rev.* 795, 801 (2002). In the case of the first "volunteer," Gary Gilmore, a Utah man who "fought to be executed by firing squad" after his 1976 murder conviction, the time between death sentence and execution was only three and a half months. David Bianculli, *A Personal Look at Public Death*, N.Y. Daily News, Mar. 27, 2002, at NOW 40.

90. According to the Department of Justice's most recent statistics, the average time spent on death row "between the imposition of the most recent [death] sentence received and execution" was ten years and three months. U.S. Dept. of Justice, Bureau of Justice Statistics, NCJ201848, *Capital Punishment, 2002*, at 11 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cp02.pdf>.

would prefer a death sentence over life in prison, defense attorneys will thus often try to dissuade the defendant from this choice by comparing conditions on death row with those in the normal prison population. Prisoners who have been on death row assert that “death row’s best conditions are worse than [the ordinary prison] population’s worst nonsolitary conditions.”⁹¹ Communicating this reality in a way that is meaningful to the capital defendant will often play a critical part in persuading him to accept a favorable plea offer.

One approach is simply to emphasize to the defendant the positive aspects of living in a normal prison population. The attorney or defense team member can explain that, if he is not on death row, the people who are important to him can continue to play a significant part in his life. They can have contact visits. In due course, the defendant and family members can spend a day together—in a trailer, perhaps, or some other relatively private setting—and their time together “could be a truly pleasant experience for everyone involved.”⁹² If the defendant was sentenced to death, on the other hand, his life would be totally different. There would be no contact visits from friends, very little contact with anyone, twenty-three hours of isolation, a few brief showers a week, and constant surveillance.⁹³

In seeking to highlight the differences between incarceration on death row and incarceration anywhere else, some attorneys are able to draw on special resources. Marc Bookman, a Philadelphia public defender, states that he has obtained letters from former clients who were on death row and then, after their death sentences were vacated, were sent to regular prisons. In their letters they talk about the specific differences between life on death row and life in the normal prison population.⁹⁴

In one case, Bookman had a client whose initial view was that he would rather have a death sentence than spend the rest of his life in jail, particularly because he thought that refusing a plea offer would be making “a political statement” in the sense that it would be “standing up for his rights.”⁹⁵ Bookman knew that his client admired another prisoner who was on death row. At Bookman’s request, that inmate wrote his client a letter.

91. For example, David Herman, a death row inmate in Texas, stated: “Death Row’s best conditions are worse than [the regular prison] population’s worst nonsolitary conditions.” *Welcome to Hell: Letters and Writings from Death Row 100* (Jan Arriens ed., 1997).

92. Stetler Interview, *supra* note 50.

93. See *Welcome to Hell*, *supra* note 91, at 55, 87–90.

94. Bookman Interview, *supra* note 14.

95. *Id.*

The letter stated that “going to trial and getting a death sentence is not a political statement.” It would just mean another person on death row. The inmate then spelled out the differences between death row and the normal prison population. In addition to explaining the desolate atmosphere on death row, he emphasized that the defendant would be able to further himself and to make a contribution to society if he accepted the plea offer: he would be able to have a job, take courses, and see his family. After considering this advice, Bookman’s client decided to accept the plea.

The Carzell Moore Case

The *Carzell Moore* case illustrates the possibility of resolving a capital case through a negotiated plea even when this possibility initially seemed almost nonexistent. The result in Moore’s case attests to the adage endorsed by many experienced capital defense attorneys: no matter how difficult it may appear, a capital defendant’s attorney “should never assume a case cannot be plea bargained.”⁹⁶

On December 12, 1976, Teresa Allen, an eighteen-year-old white college student, was abducted while she was working as a part-time cashier at a convenience store in Cochran, Georgia. Two days later, her body was found on a rural dirt road in Monroe County, Georgia; tests showed that she had been raped and killed by two shots fired from a high-powered rifle.

Subsequently, the police arrested two suspects: Carzell Moore, an African American man who was then in his mid-thirties, and Roosevelt Green, a younger African American man who had known Moore when they were both in prison. Green was reputed to be Moore’s follower. By the time the case was ready for trial, the government’s case against both defendants was strong. Because it was such an “awful, tragic case,” the community and the victim’s family were strongly in favor of the death penalty for both defendants. The prosecutor was reluctant to consider the possibility of a plea bargain for either defendant, especially Moore, who appeared to be the actual killer as well as the ringleader.⁹⁷

If the prosecutor was initially disinclined to offer a plea, Moore was adamant about refusing to accept one. Stephen Bright, who represented Moore, recalls that of all his clients, Moore was probably the most reluctant to consider a plea. When the possibility was first raised, Moore

96. Telephone Interview with Denny LeBoeuf (Oct. 15, 2003).

97. Bright Interview, *supra* note 7.

insisted that he would “prefer execution over spending the rest of [his] life in prison.”⁹⁸ When Bright raised the possibility again, as he did at various times during the ensuing litigation, Moore reiterated, “I am not interested in a plea. Don’t talk to me about pleading any more.”⁹⁹

In the meantime, the case had a tortuous history. In June 1977, Moore was tried and received the death sentence. Later, Green was tried and also received a death sentence. Subsequently, the U.S. Supreme Court reversed Green’s death sentence on the ground that a witness’s testimony as to Moore’s statement admitting that he and not Green fired the shots that killed the victim was improperly excluded from Green’s penalty trial. Green’s second penalty trial was held in November 1979. He again received a death sentence and was executed on January 9, 1985.¹⁰⁰

Moore raised various challenges to his conviction and death sentence in the state courts, all of which were denied.¹⁰¹ When his state remedies were exhausted, he filed a writ of habeas corpus in the federal court, again attacking his conviction and death sentence on various grounds. Although the federal district court denied his petition, the Eleventh Circuit Court of Appeals reversed Moore’s death sentence on the ground that the trial judge had improperly instructed the jury about the circumstances under which they should impose a death sentence.¹⁰² Based on this ruling, Moore was entitled to a resentencing at which the question would be whether he would be sentenced to death or life imprisonment with the possibility of parole.¹⁰³

When Moore’s litigation in the federal courts finally ended,¹⁰⁴ it was 1992, more than twenty-five years after the crime. Throughout the case, Bright had periodically spoken to the prosecutor about the possibility of a plea bargain. As the case moved toward the point where Moore was entitled to resentencing, the prosecutor started to say, “Well, is your man willing to take it?” The prosecutor explained that he was not going to raise the

98. *Id.*

99. *Id.*

100. M. Watt Espy & John Ortiz Smykla, *Executions in the U.S., 1608–1987: The Espy File* [computer file]. Second ICPSR ed. Compiled by M. Watt Espy & John Ortiz Smykla, University of Alabama. Ann Arbor, Mich.: Inter-university Consortium for Political and Social Research [producer and distributor], 1992, available at <http://www.deathpenaltyinfo.org/ESPYname.pdf>.

101. *Moore v. Kemp*, 809 F.2d. 702, 707 (11th Cir. 1987).

102. *Id.*

103. *Id.*

104. *Moore v. Zant*, 972 F.2d 318 (11th Cir. 1992) (holding that the state of Georgia may resentence Moore despite delay in providing for resentencing in accordance with the Eleventh Circuit’s earlier ruling).

possibility of a plea bargain with the victim's family unless he could be sure that the defendant was actually going to agree to one. Even though the prosecutor was never explicit, however, it became more and more apparent to Bright "that if we could get our client on board, a plea could be worked out."¹⁰⁵

Given Moore's attitude, however, getting the client on board appeared to present an insurmountable problem. Although Moore had mellowed over the years, he had never deviated from his position that he didn't want to consider a plea. Instead of directly raising the possibility of a plea, Bright thus began his discussions with Moore by focusing on the options that would be available at the resentencing. At the time of Moore's first trial, the jury had a choice between imposing a death sentence and a life sentence with the possibility of parole. At the resentencing, Moore could have the jury presented with the same choice. Bright explained to Moore, however, that if the jury were presented with only these options it would undoubtedly opt for death rather than allowing even a theoretical possibility that Moore would be granted parole. Bright explained that, in order to have a realistic chance of avoiding the death sentence, it would thus be necessary for the defense to agree that the jury should also be given the option of sentencing the defendant to life without the possibility of parole. Moore eventually agreed.

Bright then pointed out to Moore that if life without parole was the best result they could hope for at the resentencing, it would make sense to avoid the resentencing and simply accept the prosecutor's offer of life without parole. Nevertheless, Bright and the rest of the defense team had to spend a lot of time with Moore to convince him to accept the offer. Chrystal Redd, an African American investigator in her mid-twenties, was particularly effective in surmounting Moore's "reality gap." She made him see that going through another trial would not only be counterproductive for him but difficult for his family, especially his daughter, who still lived in the community where the crime had occurred.

As in other cases, moreover, emphasizing to Moore the difference between death row and the living conditions he would have if he accepted the plea was critical. While he was under sentence of death, Moore had been on death row. After his death sentence was reversed, he was moved to a prison in Reidsville, which he found to be a much more pleasant environment. It was not only less "lonely and depressing" than death row but

105. Bright Interview, *supra* note 7.

also a place where “he had a job” and could have regular visits with his family.¹⁰⁶ In working out the plea, the defense asked for and obtained the condition that Moore would be able to go back to his “same cell” at the prison in Reidsville.

Moore eventually agreed to the plea. Despite his initial preference to avoid a life sentence at any cost, he subsequently indicated that he was happy with this decision.¹⁰⁷

Some Further Thoughts

If the information I have presented provides an accurate view of plea bargaining in capital cases, what general conclusions should be drawn with respect to plea bargaining’s impact on our system of capital punishment? From a capital defense attorney’s point of view, plea bargaining provides an important weapon that may be used to save clients’ lives. When the system is viewed from a broader perspective, however, plea bargaining in capital cases has several unfortunate consequences.

First, plea bargaining exacerbates a well-documented weakness of the death penalty: its arbitrary application. Factors such as the time and place where the crime was committed, the victim’s characteristics,¹⁰⁸ the effectiveness of the defendant’s lawyer, and other factors that have no connection to the magnitude of the defendant’s crime affect the likelihood that he will receive a death sentence. Based on the material in this chapter, it appears that plea bargaining aggravates the effect of these and other factors and thus increases the extent of the death penalty’s arbitrary application.

The prosecutor’s plea bargaining policy at the time and place where the crime occurs plays a critical part in determining whether a capital defendant will be afforded an opportunity to avoid the death penalty. In Philadelphia, for example, it appears that even capital defendants charged with very aggravated crimes will be offered a plea bargain that will eliminate the possibility of capital punishment. Similarly, in many rural counties, a prosecutor will plea bargain even the most atrocious capital cases because she knows that the community cannot afford the expense of a cap-

^{106.} *Id.*

^{107.} *Id.*

^{108.} See, e.g., David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 Cornell L. Rev. 1638, 1657–60, 1683–1715 (1998) (empirical data showing race of the victim is an important factor in determining whether a capital defendant will be sentenced to death).

ital trial. On the other hand, a defendant will not be afforded the opportunity to plea bargain if he commits a similar or less atrocious crime in a place that has a policy against plea bargaining, or at a time when the prosecutor believes that seeking a death sentence is politically essential.

The victim's family members' feelings about whether the defendant should be sentenced to death will also be a critical factor. But as the examples in this chapter indicate, the family members' feelings often have nothing to do with the nature of the crime. The family may insist that the prosecutor not seek the death penalty because they are adamantly opposed to capital punishment; they may request that the defendant be offered a favorable plea bargain because they do not want to undergo the anguish of a protracted capital trial; or they may prefer a negotiated resolution because the defense will then be able to take action that will assist the family in obtaining closure. In all such cases, the prosecutor's deference to the family members' wishes enhances the death penalty's arbitrary application.

The defense's effectiveness in plea bargaining, moreover, will often be the most critical factor in determining whether the defendant will be able to avoid a death sentence. If, in David Bruck's words, the attorney is able to be a "world class cop-out artist," she will be able to negotiate a plea bargain that will allow the defendant to avoid the death sentence in all but the rarest cases. Whether a lawyer has the ability to be a "world class cop-out artist," of course, has little to do with whether the defendant's crime merits the death penalty. The lawyer's plea bargaining ability thus also magnifies the death penalty's arbitrary application.

Plea bargaining may also have the perverse effect of increasing the percentage of cases in which capital defendants are wrongfully sentenced to death. If the defendant is in fact innocent, he will be more likely to reject any government offers to plea bargain. His attorney may also be disinclined to plea bargain, believing that defendants who maintain their innocence should go to trial.¹⁰⁹ But just because the defendant is innocent of the capital crime does not mean the jury will acquit him. Earlier chapters have shown that, even when the defendant has a strong defense, the jury frequently convicts and sentences him to death. Capital defendants who are guilty are thus 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.

109. See Albert Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L.J. 1179, 1278–80 (1975).

Plea bargaining in capital cases may also impair the attorney-client relationship. A client's belief that his attorney is focused exclusively or primarily on avoiding the possibility of a death sentence can lead him to have a negative perception of the attorney. As one example, a prisoner on death row wrote:

People outside who are dedicated to abolishing the death penalty are usually dedicated to the sanctity of life, period. When fighting the death penalty they're too often satisfied with just keeping someone alive, even if they're locked in Hell for all of eternity. And lawyers are the world's worst about that. That's what my first appeal attorney did to me. He refused to touch any reversal or acquittal arguments in any way. All he thought he should do is just get me a life sentence. He actually thought that was the best compromise for both sides.¹¹⁰

While this prisoner was complaining primarily about his attorney's failure to raise issues rather than his efforts to resolve the case through negotiation, defendants who perceive a conflict between their attorneys' priorities and their own will often point to the attorney's focus on avoiding a death sentence through plea bargaining, suggesting that this focus proves that the attorney cares only about preventing the client's execution and not about zealously seeking to obtain the client's goals.

Capital defendants and their attorneys undoubtedly sometimes have conflicting views as to the importance of avoiding a death sentence. The attorney's vehement opposition to capital punishment or her concern that her client not be executed may lead her to differ with her client as to the relative importance of avoiding a death sentence. When avoiding the death sentence through plea negotiations involves relinquishing options that could lead to the defendant's acquittal or lesser sentence, the attorney may thus have to confront difficult ethical choices. The canon of ethics, of course, provides that the attorney must pursue the client's legitimate objectives.¹¹¹ For an attorney who is representing capital defendants because she

110. Welcome to Hell, *supra* note 91, at 82.

111. The *ABA Standards for Criminal Justice* provide that "[o]ur system has concluded, in order to protect the innocent, that persons whose conduct does not fall within the charges brought by a prosecutor should not be permitted to plead guilty." *ABA Standards for Criminal Justice: Pleas of Guilty* 14-1.6 commentary at 66 (3d ed. 1999) [hereinafter *Standards*]. The *Standards* require courts to determine that there is a factual basis for a guilty plea, especially when the defendant claims that he is innocent. *Id.* at 14-1.6.

is committed to minimizing executions, determining the nature of the client's legitimate objectives may be very difficult in some cases.

But even when the attorney is clearly representing the client's best interests, the capital defendant may not understand this. As the examples in this chapter indicate, there will be many cases in which a capital defendant's attorney will be convinced that a life sentence is the best outcome the defendant could ever hope to achieve. But even if the lawyer's basis for this conclusion is clearly sound, that does not mean that the defendant will accept it. If there is some chance that the lawyer's opposition to capital punishment may distort her judgment, there is a much greater chance that the defendant's ignorance of the criminal justice system will distort his. As cases discussed in this chapter indicate, even a relatively intelligent capital defendant may believe he has a realistic chance of acquittal when in fact he has none. Even though the lawyer is acting in a completely ethical fashion, the client's perception that the lawyer is placing his concern for avoiding the death sentence ahead of the client's interests may impair the attorney-client relationship.

The best capital defense attorneys—Michael Burt, Stephen Bright, David Bruck, Millard Farmer, and others mentioned in this chapter—have generally been able to avoid impairing the attorney-client relationship by establishing a firm rapport with the client before they even broach the topic of resolving the case through plea negotiations. Attorneys who are less able to establish a relationship of trust with their clients in the beginning, however, may run the risk that their emphasis on avoiding the death sentence through plea negotiations will impair their relationship with their clients. Ironically, in addition to harming the attorney's representation in other ways, the impaired relationship may make it more difficult for the attorney to convince the client to accept a favorable plea offer.