Prosecutors’ Perspectives on Death Penalty Cases
Examining
Prosecutors’ Perspectives
on Death Penalty Cases

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Introduction

A local prosecutor’s decision whether to seek the death penalty is among
the most far-reaching and critical decisions in the criminal justice system,
because, if a death sentence is imposed, it commits the State’s resources to
enforcing the state sanctioned irremediable execution of a person. Despite the
grave implications of this decision, the United States Supreme Court has never
required that any procedures or guidelines be promulgated to control the
process employed by prosecutors when reaching the decision to initiate this
process. As a formal matter, the prosecutor’s decision whether to seek a death is
by definition the most explicitly arbitrary element of the capital punishment
system. This discretion makes arbitrariness essentially inherent in the decision
whether to seek the death penalty.

Indeed, perhaps the most important variable affecting whether a
defendant will be subject to the death penalty is often the particular ideology of
the prosecutor in a respective jurisdiction. There are, however, less overt forms of arbitrariness, such as bias based upon race, gender and class, that may directly or indirectly—as a matter of intent or effect—pervade the process. In addition, political considerations, including direct public pressure, can have a significant impact on the decision. As the visionary capital defense attorney Millard Farmer always maintained, the death penalty is a political crime.

Thus, despite the fundamental assertions that the death penalty must be reserved for “the worst of the worst,” the wide range of discretion and factors influencing that discretion, and the potential influence of bias, inappropriate political considerations and subjective judgments, there is no assurance, and no institutional effort to assure, on the front line that the death penalty is limited in such a manner.

The dangers inherent in the present situation, and the lack of meaningful controls over the exercise of prosecutorial discretion in the decision whether to seek the death penalty, imposes on defense counsel the duty to examine, identify, and address the factors that are likely to influence the particular prosecutors’ decision in a jurisdiction, or the prosecutors’ decision in particular cases. These materials and the accompanying panel discussion will set out general components that evidence shows influence the decision-making process in capital cases, as well as some component particular to prosecutors or to specific kinds of cases or circumstances. The materials also will outline controls that have been considered as alternatives to the current system that can be considered in contrast to the positive and negative aspects of the current system.

I. Prosecutorial Discretion

Prosecutors are intended to function as the "gatekeepers" of the criminal justice system. They decide whether to charge suspects, and, if so, for what crime. They are invested with the largely unscrutinized power to decide who to prosecute, who not to prosecute, when to prosecute, and for what to prosecute. Within this system, idiosyncratic policies of prosecutors toward the death penalty have a great impact upon its utilization from county to county. Other forms of arbitrariness also can impact the decision, including race, class, gender, and political and subjective judgments.

A. The Nature and Scope of Prosecutorial Discretion

Prosecutorial discretion encompasses the power to charge or to refrain from charging an individual with a crime; to reduce charges to a lesser offense prior to trial; to not charge prior offenses; to dismiss or request court dismissal after a trial commences; or to recommend a lesser sentence. Sidney I. Lezak & Maureen Leonard, The Prosecutor’s Discretion: Out of the Closet, Not Out of Control, in DISCRETION, JUSTICE, AND DEMOCRACY: A PUBLIC POLICY PERSPECTIVE 44 (Carl F. Pinkele & William C. Louthan eds., 1985) (stating that
prosecutorial discretion is, essentially, the power of a prosecutor to selectively enforce the laws). This is not generally considered to be a single decision like, for example, a decision to arrest. Instead, it is a process involving a group of interrelated judgments made in no predetermined order. In making this decision, prosecutors must balance the opposing demands on the victim and the accused, the accusations of the police and societal expectations regarding the punishment of the defendant. Prosecutors attempt to balance these concerns while working within the confines of a criminal justice system replete with ambiguous statutes, and subject to continual variation due to ever-shifting political and social priorities. Moreover, prosecutors must consider the “infinite variety of detailed facts which human conduct continually presents.” POUND, CRIMINAL JUSTICE IN AMERICA 36. Thus, the criminal justice system not only allows for the exercise of prosecutorial discretion, but also requires the flexibility it provides.

**B. Judicial Review of Prosecutorial Discretion**

A prosecutor’s use of discretion to determine whether to prosecute an individual, and if so, for what crime or degree of crime generally is not reviewable, and it is subject to highly deferential constitutional limitations. These limitations constrain primarily, selective prosecution, United States v. Armstrong, 517 U.S. 456, 464 (1996) (selective prosecution violates Due Process) and vindictive prosecution, see Moran v. Burbine 475 U.S. 412, 466 (1985) (dissenting opinion) (vindictive prosecution violates due process) (citing Blackledge v. Perry, 417 U.S. 21(1974)). Selective prosecution occurs when the decision whether to prosecute is "deliberately based upon an unjustifiable standard such as race, religion, or arbitrary classification." Oyler v. Boles, 368 U.S. 448, 456 (1962).

Selective prosecution may be demonstrated when "the administration of a criminal law is 'directed so exclusively against a particular class of persons... with a mind so unequal and oppressive' that the system of prosecution amounts to 'a practical denial' of equal protection of the law." Armstrong, 517 U.S. at 464-65 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 373 (1886)). Vindictive prosecution may result when a prosecutor uses the charging process to penalize the exercise of constitutional or statutory rights, thus resulting in a due process violation. Katherine Lowe, Prosecutorial Discretion, 81 GEO. L.J. 1029, 1035 (1993). A rebuttable presumption of vindictiveness is recognized whenever a prosecutor increases "the number or severity of charges after a defendant has asserted legally protected rights. Id.

Even when equal protection or due process rights are at issue, however, courts are reluctant to intrude upon the "'special province'" of the prosecutor. For example, when unconstitutional selective prosecution is alleged, a court will continue to presume the prosecutor acted correctly unless there is "clear
evidence to the contrary. *Armstrong*, 517 U.S. at 465 (quoting *United States v. Chemical Foundation*, 272 U.S. 1, 14-15 (1926)).

Several factors form the basis of the great judicial deference given to the prosecutor’s decision-making process. First, the decision whether to prosecute is especially ill-adapted to judicial review because the decision involves factors that are not easily open to the type of analysis that is within judicial competence, such as the strength of the evidence in the case, the general deterrent value of the prosecution, and the relation to the enforcement priorities and the "overall enforcement plan" of the government. Second, courts are reluctant to encroach upon the operation of this essential executive constitutional role by interfering with the exercise of discretion by prosecutors in their administration of criminal prosecutions. Third, judicial examination of prosecutorial decisionmaking leads to problematic "systemic costs," including the delay of criminal proceedings, and the chilling of law enforcement by exposing a prosecutor’s decision-making process, as well as the enforcement policy of the prosecutor’s office, to external scrutiny.

1. Judicial Review of Prosecutorial Discretion in the Context of the Death Penalty

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court addressed whether the death penalty was cruel and unusual punishment. In his concurrence, Justice Douglas placed particular emphasis on the "practically untrammeled discretion" judges and juries possess in deciding whether to impose the death penalty. 408 U.S. at 248. The extent of this discretion allowed for the selective application of the death penalty. As a result, Justice Douglas found that, as imposed at that time, the death penalty violated the requirement of equal protection "implicit in the ban on 'cruel and unusual punishment.'"

Just a few years later, in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court specifically addressed the role of prosecutorial discretion in the decision whether to seek the death penalty. The petitioner asserted that a prosecutor’s “unfettered authority” to select whom to prosecute for a capital offense was arbitrary and capricious, and therefore, unconstitutional under *Furman*. The Court, however, rejected the argument that the mere existence of “discretionary stages” violated *Furman*.

The Court explained that *Furman* held that the decision to impose the death penalty must be "guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.” The Court determined that this was necessary to “minimize the risk that the death penalty would be imposed on a capriciously selected group of individuals.” Moreover, the Court reasoned that *Furman* did not suggest that the decision to “afford an individual defendant mercy violates the Constitution.” The Court further noted that if the discretion to remove defendants from consideration as candidates for the death penalty was found unconstitutional, as
the petitioner suggested, prosecuting authorities would be required to charge a
capital offense whenever there arguably had been a capital murder. The
Supreme Court then rejected this result, stating that it would lead to a “system .
. totally alien to our notions of criminal justice.”

C. The Influence of Individual District Attorneys
   on the Death Penalty Decision

Prosecutors are generally elected by vote of their jurisdictional
constituents. This election structure allows for a wide disparity in the utilization
of the death penalty from county to county, as each prosecutor determines the
criminal justice policies of their respective jurisdictions. One can imagine the
contrast between the policies of a staunch opponent of the death penalty and
those of its most zealous advocate, and the dramatic influence that a particular
prosecutor’s policy would have on the utilization of the death penalty as a form
of punishment.

D. Other Forms of Influence on the Death Penalty Decision

1. The Influence of Race
   on the Decision Whether to Seek the Death Penalty

   In McCleskey v. Kemp, 481 U.S. 279 (1987), the Supreme Court directly
addressed the influence of race on the decision whether to seek the death
penalty. In McCleskey, a defendant relied solely on a statistical study entitled the
"Baldus study" to prove that Georgia administered its sentencing process in a
racially discriminatory manner. In one of its models, the study concluded that
defendants charged with the murder of white victims were 4.3 times as likely to
be subject to the death penalty as defendants charged with murdering African-
Americans. The model also concluded that African-Americans were 1.1 times
as likely to have the death penalty imposed against them as other defendants.
The Supreme Court determined that the statistical evidence did not prove that
the decision-makers in the defendant’s case acted with discriminatory intent. As
such, the Court concluded that the study failed to show that the death penalty
was administered in a racially discriminatory manner. Unlike other limited
contexts where statistics alone are sufficient proof of intent to discriminate, the
Court noted that the decision to seek the death penalty rests upon “innumerable
factors that vary according to the characteristics of the individual defendant
and the facts of the particular capital offense.” Thus, because of the essential role
discretion plays in the criminal justice process, the Court requires “exceptionally
clear proof” to draw an inference of abuse of discretion.

Regardless of the outcome of McCleskey, there is legitimate concern
regarding the influence of race on the decision whether to seek the death
penalty. In the aftermath of McCleskey, Congress’ General Accounting Office
released a 1990 review of death sentencing research that concluded that there is “a pattern of evidence indicating racial disparities in the charging, the sentencing, and the imposition of the death penalty after the Furman decision.”

2. The Influence of Class on the Decision Whether to Seek the Death Penalty

Although the socioeconomic status of a defendant should have no influence upon the determination of whether that defendant is put to death, this status influences the whole death penalty process because indigent defendants typically are defended by attorneys with neither the skills, resources nor commitment to litigate death penalty cases. When competent representation by the attorney is lacking, the “most fundamental component of the adversary system” is absent, and the process of determining who should be subject to the death penalty fails. “This results in the arbitrary imposition of the death penalty,” as it is imposed “not upon those who commit the worst crimes, but upon those who have the misfortune to be assigned the worst lawyers.”

3. The Influence of Gender on the Decision Whether to Seek the Death Penalty

In his concurrence in Furman v. Georgia, Justice Marshall noted that there was “overwhelming evidence” that the death penalty is utilized “against men and not women.” In 1990, for example, only 30 of the 2,347 death row inmates were women. Moreover, even though one out of every eight persons arrested for murder is a woman, a mere one out of a hundred is a death row inmate. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 46 (2d ed. 1988). The execution of a woman is such an anomalous event that it fuels the perception that there is a reluctance to sentence women to death that may be based, in part, upon a notion of chivalry.

4. The Effect of Improper Political Influence and Subjective Judgments on the Decision Whether to Seek the Death Penalty

As elected officials, prosecutors are concerned about their political well-being. Prosecutors deciding whether to seek the death penalty have the opportunity to state their intentions during press conferences, and to be seen on television while in the courtroom arguing a case. Because potential death penalty cases place prosecutors in the limelight, there is legitimate concern that media attention focused on these cases may be sought for political advantage. Death penalty decisions also provide platforms for political foes. For example, a failure to seek the death penalty would give opponents an opportunity to broadcast charges from a victim’s family that the prosecutor is "soft on crime" and thus damage the district attorney’s public support. Although allowing political considerations to affect the decision whether to seek the death penalty
clearly is inappropriate, it is extremely difficult to prove that these considerations have affected the decision.

In addition to its vulnerability to improper political considerations, a district attorney’s decision to seek the death penalty is fraught with subjective judgments. It is an unavoidable outcome of prosecutorial discretion that the decision whether to seek the death penalty will be influenced by the particular "philosophical, ethical, religious or other views" of a district attorney. For example, a prosecutor may dislike certain offenses or offenders for personal reasons, and the prosecutor may vary leniency on this basis. This creates a dangerous possibility “not accounted for in the assumption of rational, autonomous actors.”

II. Previously Proffered Controls of the Exercise of Prosecutorial Discretion

It is fair to assume that most prosecutors are professionals who take their jobs seriously, and will attempt to avoid the political damage that would accompany the exposure of improper charging practices. However, these assumptions are not sufficient to protect against the potential for arbitrariness and influence of bias inherent in the death penalty decision, particularly in light of the great deference granted prosecutors by the judiciary. As a result of this situation, authors have proffered four primary controls to check or limit the use of prosecutorial discretion: internal controls, legislative controls, judicial controls and administrative controls.

A. Internal Controls

Internal guidelines generally involve the promulgation of policy statements that guide the exercise of decision-making within a particular prosecutor’s office. The goal of internal guidelines is to promote consistent prosecutorial decision-making by providing each prosecutor with some notion of the criteria that others employ. This can be accomplished by creating guidelines that set out factors to be considered in a comprehensive and detailed manner. Internal guidelines generally do not encroach on a prosecutor’s decisional autonomy.

Typically, prosecutors’ offices have an unofficial system of internal controls in order to provide inexperienced prosecutors with guidance and supervision from experienced prosecutors. As prosecutors already have accepted a form of internal guidelines, the arguments against their utilization generally focus on their ineffectiveness, rather than their degree of intrusion into decisional autonomy. For example, one author argues that because of the need to preserve the hierarchical relationship between superior officers and their subordinates, the superior officer’s examination of a subordinate’s decision may not be decided solely on the merits, thus the effectiveness of the guidelines.
would be undermined. It also is asserted that it would be impossible to draft a
set of guidelines that could anticipate every conceivable situation that might
occur. In addition, it is argued that internal guidelines currently do not control
prosecutorial discretion effectively because instead of eliminating discretion
completely, they only push the unreviewable exercise of discretion upward to
higher-ranking prosecutors.

Unlike the implementation of internal guidelines, the actual publication of
these guidelines could lead to significant controversy regarding the effect that
the outside examination of prosecutorial policies could have on the
administration of the criminal justice system. Prosecutors generally object to the
publication of internal controls because they fear that if an office's policy is
lenient towards certain offenses, it would appear as if the office was “soft' on
crime.” Prosecutors also fear that published guidelines would become “litigation
weapons” with which individual prosecutorial decisions could be attacked.

Moreover, even if publication was allowed, a prosecutor’s desire to
maintain as much flexibility as possible for unusual cases would likely result in
guidelines that are “hedged with general exceptions” to maintain the greatest
amount of flexibility for departures from the policy. One proponent of the
publication of internal guidelines argues that the publication of prosecutorial
policy will subject a prosecutor’s decision-making to outside examination and,
therefore, to “scrutiny, evaluation, and criticism.”

It is argued that this scrutiny and criticism will lead prosecutors to both
exercise a greater degree of care in the formulation of policy, and to revise and
improve policy. It also is argued that the secrecy inherent in the non-publication
of prosecutorial policy, and the lack of accountability that accompanies it, invites
corruption, irrationality, and discrimination in decision-making. However,
because a storm of controversy engulfs the decision to seek the death penalty,
one advocate of published prosecutorial guidelines concedes that publication
should not be required under such politically sensitive circumstances, because it
likely would hinder the formulation of the death penalty policy.

B. Legislative Controls

One author asserts that legislative bodies should take an “affirmative
obligation to ensure that the laws it enacts are enforced.” The author argues that
this can be accomplished through “vigorous oversight” of prosecutors that
involves the sharing of information concerning "law enforcement strategies and
the development of prosecutorial criteria. Another author contends that
prosecutors should be required by law to issue both guidelines for making
decisions and reports summarizing the analysis used to reach these decisions.

Opponents of legislative controls object to their utilization based upon a
fear of the politicization of the prosecutorial decision-making process, and the
disclosure of law enforcement documents and policies. One proponent of legislative controls, however, argues that any concerns about the confidentiality of ongoing investigations and law enforcement strategies could be accommodated. For example, sensitive information could be examined in non-public hearings. Another believes that it should be feasible to effectuate general legislative “oversight” over case management without offending law enforcement concerns. However, one opponent of legislative controls counters that legislators may have neither the time, the expertise, nor the inclination necessary to effectuate anything more than general formulations.

C. Judicial Controls

Judicial controls over prosecutorial discretion are the least likely controls to be implemented because the doctrine of separation of powers prohibits the review of a prosecutor’s exercise of discretion by the judiciary. Despite this widely recognized policy, it has been argued that reliance upon the separation of powers doctrine is misguided because, unlike the time when the doctrine first was developed, judicial review of administrative discretion currently is allowed.

Today, courts review executive action to guard against abuses of administrative discretion while avoiding assumption of executive power. Moreover, it is argued that because there is a stronger need for judicial review of the exercise of prosecutorial discretion than that for administrative discretion—as abuse by prosecutors is prevalent, injustice could be prevented, the issues are suitable for judicial review, and significant interests are involved—it is even more critical that judicial controls be implemented.

Opponents of judicial controls note two practical problems with their adoption. First, given the confined scope of review that likely would be applied to prosecutorial decision-making, and considering the lack of general standards to guide courts, judges are likely to be extremely hesitant to overturn a prosecutor’s decision whether to prosecute unless the abuse is “extreme.” Even if there were general standards to guide the courts, judicial review would add “a whole new layer of pretrial review that dwarfs any of the efficiencies that guidelines can achieve.”

Second, to ask a judge to review charging decisions is diametrically opposed to the traditional role of judges in the adversarial system, in which judges maintain a “neutral and passive role” regarding “charging decisions and the development of evidence at trial.” Unless one is prepared to alter this role, it is an inescapable reality that judicial review of a prosecutor’s decision will be a mere “formality.”

D. Administrative Controls
One author proffered a provocative alternative check on prosecutorial discretion in the form of a legislatively enacted administrative death penalty committee. In support of his proposition, the author asserts that previous solutions “fail[ed] to solve all of the discretionary problems present in the capital context,” and argues that the dangers inherent in prosecutorial discretion warrant the removal of prosecutors from participating in the decision whether to seek the death penalty. The author further contends that removing a district attorney from the decision to seek the death penalty and vesting the decision with a committee will increase both the legitimacy of the decision-making process and the “public accountability of the decision-maker.” The author argues this would result in a less political decision that avoids the discriminatory imposition of the death penalty.

Whether or not evidence shows that these kinds of controls are effective or preferable to the unscrutinized discretion now in place is open to debate. If, however, the current system is to remain in place—and there is not a perceivable groundswell in favor of another system—it will require vigilance on the part of capital defense counsel to see that it is maintained with a meaningful degree of fairness and consistency.
GUIDEline 10.9.1—The Duty to Seek an Agreed-Upon Disposition

A. Counsel at every stage of the case have an obligation to take all steps that may be appropriate in the exercise of professional judgment in accordance with these Guidelines to achieve an agreed-upon disposition.

B. Counsel at every stage of the case should explore with the client the possibility and desirability of reaching an agreed-upon disposition. In so doing, counsel should fully explain the rights that would be waived, the possible collateral consequences, and the legal, factual, and contextual considerations that bear upon the decision. Specifically, counsel should know and fully explain to the client:

1. the maximum penalty that may be imposed for the charged offense(s) and any possible lesser included or alternative offenses;

2. any collateral consequences of potential penalties less than death, such as forfeiture of assets, deportation, civil liabilities, and the use of the disposition adversely to the client in penalty phase proceedings of other prosecutions of him as well as any direct consequences of potential penalties less than death, such as the possibility and likelihood of parole, place of confinement and good-time credits;

3. the general range of sentences for similar offenses committed by defendants with similar backgrounds, and the impact of any applicable sentencing guidelines or mandatory sentencing requirements;
4. the governing legal regime, including but not limited to whatever choices the client may have as to the fact finder and/or sentencer;

5. the types of pleas that may be agreed to, such as a plea of guilty, a conditional plea of guilty, or a plea of nolo contendere or other plea which does not require the client to personally acknowledge guilt, along with the advantages and disadvantages of each;

6. whether any agreement negotiated can be made binding on the court, on penal/parole authorities, and any others who may be involved;

7. the practices, policies and concerns of the particular jurisdiction, the judge and prosecuting authority, the family of the victim and any other persons or entities which may affect the content and likely results of plea negotiations;

8. concessions that the client might offer, such as:

   a. an agreement to waive trial and to plead guilty to particular charges;

   b. an agreement to permit a judge to perform functions relative to guilt or sentence that would otherwise be performed by a jury or vice versa;

   c. an agreement regarding future custodial status, such as one to be confined in a more onerous category of institution than would otherwise be the case;

   d. an agreement to forego in whole or part legal remedies such as appeals, motions for post-conviction relief, and/or parole or clemency applications;
e. an agreement to provide the prosecution with assistance in investigating or prosecuting the present case or other alleged criminal activity;

f. an agreement to engage in or refrain from any particular conduct, as appropriate to the case;

g. an agreement with the victim’s family, which may include matters such as: a meeting between the victim’s family and the client, a promise not to publicize or profit from the offense, the issuance or delivery of a public statement of remorse by the client, or restitution;

h. agreements such as those described in Subsections 8(a)-(g) respecting actual or potential charges in another jurisdiction;

9. benefits the client might obtain from a negotiated settlement, including:

a. a guarantee that the death penalty will not be imposed;

b. an agreement that the defendant will receive a specified sentence;

c. an agreement that the prosecutor will not advocate a certain sentence, will not present certain information to the court, or will engage in or refrain from engaging in other actions with regard to sentencing;

d. an agreement that one or more of multiple charges will be reduced or dismissed;

e. an agreement that the client will not be subject to further investigation or prosecution for uncharged alleged or suspected criminal conduct;
f. an agreement that the client may enter a conditional plea to preserve the right to further contest certain legal issues;

g. an agreement that the court or prosecutor will make specific recommendations to correctional or parole authorities regarding the terms of the client’s confinement;

h. agreements such as those described in Subsections 9(a)-(g) respecting actual or potential charges in another jurisdiction.

C. Counsel should keep the client fully informed of any negotiations for a disposition, convey to the client any offers made by the prosecution, and discuss with the client possible negotiation strategies.

D. Counsel should inform the client of any tentative negotiated agreement reached with the prosecution, and explain to the client the full content of the agreement along with the advantages, disadvantages and potential consequences of the agreement.

E. If a negotiated disposition would be in the best interest of the client, initial refusals by the prosecutor to negotiate should not prevent counsel from making further efforts to negotiate. Similarly, a client’s initial opposition should not prevent counsel from engaging in an ongoing effort to persuade the client to accept an offer of resolution that is in the client’s best interest.

F. Counsel should not accept any agreed-upon disposition without the client’s express authorization.

G. The existence of ongoing negotiations with the prosecution does not in any way diminish the obligations of defense counsel respecting litigation.
History of Guideline

Guideline 10.9.1 is based on aspects of Guidelines 11.6.1, 11.6.2, and 11.6.3 of the original edition. New language has been added to clarify the importance of pursuing an agreed-upon disposition at every phase of the case, not just as a substitute for proceeding to trial initially. The current version of the Guideline also requires that counsel enter into a continuing dialogue with the client about the content of any such agreement, including advantages, disadvantages, and potential consequences.

This Guideline omits the requirement, which appeared in Guideline 11.6.1 of the original edition, of client consent to initiate plea discussions, in recognition of the possible unintended consequence of premature rejection of plea options by a suicidal or depressed client. However, Guideline 10.9.2(A) does require counsel to obtain the client’s consent before accepting any agreed-upon disposition.

Related Standards


Commentary

Guidelines 10.9.1–2 both deal with the subject of agreed-upon dispositions. They and their associated commentaries should be read together.
“Death is different because avoiding execution is, in many capital
cases, the best and only realistic result possible”; as a result, plea
bargains in capital cases are not usually “offered” but instead must be
“pursued and won.”

Agreements are often only possible after many
years of effort. Accordingly, this Guideline emphasizes that the
obligation of counsel to seek an agreed-upon disposition continues
throughout all phases of the case. As in other sorts of protracted
litigation, circumstances change over time (e.g., through replacement of
a prosecutor, death of a prosecution witness, alteration in viewpoint of a
key family member of the client or the victim, favorable developments
in the law or the litigation, reconsideration by the client) and as they do
new possibilities arise. Whenever they do, counsel must pursue them.

In many jurisdictions, the prosecution will consider waiving
the death penalty after the defense makes a proffer of the mitigating
evidence that would be presented at the penalty phase and explains why
death would be legally and/or factually inappropriate. In some states and
the federal government, this process is formalized and occurs before a
decision is made whether to seek the death penalty. In other

242. Kevin McNally, Death Is Different: Your Approach to a Capital Case Must be Different,
Too, THE CHAMPION, Mar. 1984, at 8, 15; see also Doyle, supra note 180.
243. Examples of agreed-upon dispositions after extended litigation include the cases of Calvin
Burdine, see Henry Weinstein, Inmate in Texas Sleeping-Lawyer Case Pleads Guilty, L.A. Times,
June 20, 2003, at 14 (client agrees to three life sentences), Michael Wayne Williams, see Jamie C.
Ruff, Williams Pleads Guilty to Murders, RICHMOND TIMES-DISPATCH, Mar. 25, 2003, at B1 (client
waives parole eligibility and agrees to life term), Lloyd Schulp, see Tim O’Neil, Killer Who
Escaped Execution Over New “Evidence” Pleads Guilty, ST. LOUIS POST-DISPATCH, Mar. 25,
1999, at A15 (client pleads guilty to second-degree murder after new evidence appeared), and Paris
Carriger, see Samuel R. Gross, Lost Lives: Miscarriages of Justice in Capital Cases, 61 LAW &
CONTEMP. PROBS. 125, 139-40 (1998) (following affirmation of federal habeas corpus relief by
Carriger v. Stewart, 132 F.3d 463 (9th Cir. 1997) (en banc), client pleaded guilty to lesser offense
and was released). Numerous other instances are reported in LIEBMAN ET AL., supra note 46, Apps.
C, D; see also James Kimberly, Inmate Swaps Death Sentence for 20 Years, HOUS. CHRON.,
Aug. 12, 2003, at 1 (Paul Colella pleads to twenty-year term “just days before a federal judge was to
hear evidence on . . . allegations of prosecutorial misconduct and ineffective assistance”); Lynn
Thompson, Life Without Parole in Massacre: Mak Sentenced Again for 13 Wah Mee Deaths in
decides not to appeal judge’s order that death penalty is unavailable).
244. See UNITED STATES ATTORNEYS’ MANUAL, supra note 162, § 9-10.030. New York law
gives the District Attorney a 120-day “deliberative period” to decide whether to file a notice of
tent to seek the death penalty. See N.Y. CRIM. PROC. LAW § 250.40(2) (McKinney 2002);
Francois v. Dolan, 731 N.E.2d 614, 616 (N.Y. 2000). During that time, with the assistance of the
Capital Defender’s Office, counsel is appointed and may attempt to persuade the prosecutor not to
file a notice. See N.Y. JUD. LAW § 35-b (McKinney 2002). The notice may also be withdrawn at
any time. See N.Y. CRIM. PROC. LAW § 250.40(4) (McKinney 2002). Between 1995 and mid-2003,
District Attorneys in New York formally investigated seeking the death penalty against 780
defendants, but only filed notice that they were seeking the death penalty against forty-eight of
jurisdictions, the process is not formalized and may occur after the prosecution has announced its intention to seek the death penalty. In either event, the mitigation investigation is crucial to persuading the prosecution not to seek death.\(^{245}\)

Although, for the reasons explained in the History to this Guideline, counsel does not need to have obtained client consent before entering into plea discussions, counsel does need to have thoroughly examined the quality of the prosecution’s case and investigated possible first-phase defenses and mitigation, as discussed in the commentary to Guideline 10.7. Counsel must also consider the collateral consequences of entering a plea. For example, when the resulting adjudication of guilt could be used as an aggravating circumstance in another pending case, counsel should endeavor to structure an agreement that would resolve both cases without imposition of the death penalty.

In some cases, where there is a viable first-phase defense, it may be possible to negotiate a plea to a lesser charge. And if it is trial counsel’s perception that the death penalty is being sought primarily to allow selection of a death-qualified (and therefore conviction-prone) jury, counsel should seek to remedy the situation through litigation in accordance with Guideline 10.8 as well as through negotiation. In many capital cases, however, the prosecution’s evidence of guilt is strong, and there is little or no chance of charge bargaining. In these cases, a guilty plea in exchange for life imprisonment is the best available outcome.

These considerations mean that in the area of plea negotiations, as in so many others, death penalty cases are \textit{sui generis}. Many bases for bargaining in non-capital cases are irrelevant or have little practical significance in a capital case,\(^{246}\) and some uniquely restrictive legal principles apply.\(^{247}\) Emotional and political pressures, including ones from the victim’s family or the media, are especially likely to limit the government’s willingness to bargain. On the other hand, the complexity,

\begin{footnotesize}
\footnote{See supra text accompanying note 162; Doyle, \textit{supra} note 180; White, \textit{supra} note 3, at 328-29.
\footnote{A number of concessions that the parties might exchange in the capital context appear in Subsection B.
\end{footnotesize}
expense, legal risks, and length of the capital trial and appellate process may make an agreement particularly desirable for the prosecution.248

A very difficult but important part of capital plea negotiation is often contact with the family of the victim.249 In some states, the prosecution is required to notify and confer with the victim’s family prior to entering a plea agreement.250 Any approaches to the victim’s family should be undertaken carefully and with sensitivity. Counsel should be creative in proposing resolutions that may satisfy the needs of the victim’s family, including providing more immediate closure by expressly foregoing appeals or arranging an apology or meeting between the victim’s family and the client if the client is willing and able to do so. As described supra in the text accompanying note 226, the defense team should consider seeking the assistance of clergy, a defense-victim liaison, or an organization of murder victims’ families in the outreach effort and in crafting possible resolutions. In any event, because the victim’s family can be critical to achieving a settlement,251 defense counsel should make the decision regarding contact on a fully informed and professional basis, rather than because of nervousness over entering a situation that might be emotionally stressful or in reliance on an unsupported guess as to what the response to an approach might be.

Except in unusual circumstances, all agreements that are made should be formally documented between the parties concerned (e.g., in a writing between the client and representatives of the victim). In any event, counsel has an obligation under Guideline 10.13 to maintain in his or her own files a complete written description of any agreement.

Agreements for action or nonaction by government actors in exchange for a plea of guilty are governed by Guideline 10.9.2(B)(2) and, for the client’s future benefit, should be set forth as clearly as possible on the record.252

In addition to persuading the prosecution to negotiate a resolution to the case, counsel must often persuade the client as well. As discussed

248. Plea offers are extended prior to trial in a significant proportion of cases and also commonly occur after protracted litigation, see supra note 243.
249. See Stetler, supra note 226, at 42; see also Gail Gibson & Laura Willis, Tears and Remorse Precede Life Term in Dawson Deaths, BALTIMORE SUN, Aug. 28, 2003, at 1 (as part of arrangement for life sentence, Darrell L. Brooks makes emotional apology in open court to families of seven victims of his arson).
251. See supra text accompanying note 226.
252. See Ricketts v. Adamson, 483 U.S. 1, 7, 10-12 (1987) (where defendant was deemed to have breached terms of plea agreement by refusing to testify against co-defendant at a retrial, double jeopardy did not preclude state from vacating defendant’s plea of guilty to second degree murder, trying him for capital murder and sentencing him to death).
in the commentary to Guidelines 10.5 and 10.9.2, a relationship of trust with the client is essential to accomplishing this. The entire defense team must work from the outset of the case with the client and others close to him to lay the groundwork for acceptance of a reasonable resolution.

If the possibility of a negotiated disposition is rejected by either the prosecution or the client when a settlement appears to counsel to be in the client’s best interest, counsel should continue efforts at persuasion while also continuing to litigate the case vigorously (Subsection G).