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OVERLOOKED VICTORIES: TECHNIQUES FOR NEGOTIATING NON-CAPITAL OUTCOMES

BY: LESLEY MEREDITH JAMES

I. THE IMPORTANCE OF NEGOTIATING

Plea bargaining plays an important role in capital cases and has unique problems associated with it. There are endless ways to plea bargain a case, limited only by the attorney's own innovation and creativity. Plea bargaining is a vital part of the defense attorney's role in trying a capital case as it is one of the few options available that guarantees the client will not be executed. It is also an alternative that is often overlooked as the defense attorney is faced with the overwhelming enormity of preparing for a capital trial.

In order to take advantage of this often life-saving opportunity, it is important to begin negotiating with the Commonwealth for a non-capital disposition immediately upon accepting a capital case or at least after thorough investigation sufficient to satisfy counsel that the Commonwealth can prove defendant guilty of some crime. In some cases, it may be beneficial to begin negotiating a non-capital disposition before the media brings the defendant into the spotlight.

The negotiation process should not end until the defendant has been found guilty of capital murder and sentenced to death. Initially, the Commonwealth may resist, but circumstances change throughout the course of a trial. The possibility always remains that as the trial process unfolds the Commonwealth's perception of the strength of the case, the defendant, the costs involved and the amount of work and time required to continue seeking death may drastically alter the prosecutor's reluctance to reach a non-capital disposition through negotiation.

The majority of both civil and criminal cases are settled. The reason this occurs is that rarely is it beneficial to only one side to reach a negotiated settlement. It is important for defense counsel to embrace this reality and act on it.

In those cases where the evidence of guilt is strong and a death sentence is a likely possibility, defense counsel, at a minimum, must always explore the possibility of negotiating a non-capital disposition. This is true, although, as will be discussed in a later section of this article, there are times when a plea agreement will not be in the best interests of the client. However, the most effective way to prevent the client from receiving a death sentence is to remove the option of a death sentence from possible outcomes.

The benefits of negotiating a non-capital disposition may also extend to the family members of the victim. A plea agreement permits closure for the victim's family, prevents the reopening of old wounds every six to eight months as the case progresses from the pre-trial stage through years of appellate review and still affords penalties that are adequate to do justice.

This article is intended to serve as a guide to negotiating a non-capital disposition. It provides a general strategy for capital negotiations and a method for specifically implementing the strategy based on a method developed by Roger Fisher and William Ury in the book *Getting to Yes: Negotiating an Agreement Without Giving In*.¹ In addition, the article will set forth the legal framework in Virginia for negotiating a capital plea agreement and suggests particular circumstances in which agreeing to a plea arrangement may not be in the best interest of the client. The article also discusses the legal caveats involved in reaching a successful non-capital disposition.

II. GENERAL STRATEGY

There is no single approach for negotiating a non-capital disposition of a death penalty case. However, one method that has proven successful in Virginia, and in other states that employ the death penalty, is a simultaneous implementation of the following two strategies.

A. The Hard Sell

The primary technique used in effectuating the "hard sell" is one of imposing costs upon the Commonwealth for seeking the death penalty. Counsel should make a case to the prosecutor that a capital sentence is not worth pursuing. Defense counsel should demonstrate to the Commonwealth the potential expense involved in trying a capital case and should make clear that he will employ any means permitted by law to ensure a verdict of life, regardless of the expense to the Commonwealth.

After an initial offer to discuss a non-capital disposition has been rebuffed, it is both responsible lawyering and productive of further negotiation to begin imposing these costs without further delay. This should be considered good lawyering because even if defense counsel believes a negotiated outcome is possible, the state is still officially trying to kill the client. The imposition of these costs provides a solid basis for negotiation, as the increased costs, required only by the capital nature of the case, create currency for negotiation. These are increased costs not only because of direct trial costs, but also because potential appellate issues are created that may defeat the death penalty altogether or magnify the costs ten-fold in the future.

While there is no need at this point to engage in ongoing discussion, counsel can make sure that the prosecutor and the trial judge are aware that the costs being imposed are solely the responsibility of the prosecutor, as they end as soon as the death sentence is no longer sought.

Specifically, counsel should note the costs of voir dire, investigators, and experts and that these costs will be twice the amount involved in a non-capital trial, as they will be incurred at both the guilt/innocence trial and at the penalty trial.

Pretrial practice affords defense counsel opportunities to impose costs on the Commonwealth. This can be accomplished through the use of the Bill of Particulars to create issues, spawn further motions, and require evidentiary hearings; through the use of Virginia's "3:1" mental health expert statute²; and through the procurement of resources mandated by *Ake v. Oklahoma*.³

The first device that can be used to impose costs on the Commonwealth is the Bill of Particulars. The cost, in terms of both time and money, to the Commonwealth that can be created through pre-trial motions and evidentiary hearings, based on the Bill of Particulars alone, is considerable. For example, a Bill of Particulars requesting the Commonwealth to identify the aggravating factors it intends to rely upon in support of a death sentence can be a starting point for imposing costs. If the Commonwealth refuses to specify the factor(s) to be used, defense counsel can continue to impose costs by producing a motion to prohibit

¹ Roger Fisher & William Ury, *Getting to Yes: Negotiating an Agreement Without Giving In* (Penguin Books 1981).

² Va. Code Ann. § 19.2-264.3:1 (1990) [hereinafter "3:1"].

³ 470 U.S. 68 (1985).

The imposition of the death penalty based on *Gardner v. Florida*.⁴ The Bill of Particulars also asks that if vileness is one of the factors to be relied upon, a constitutionally sufficient narrowing construction be given to permit meaningful distinction among murders and so that a defense to it can be prepared. If this request is denied, defense counsel can further impose costs through a motion to prohibit the imposition of the death penalty based on *Godfrey v. Georgia*⁵ and *Lankford v. Idaho*.⁶

If a narrowing construction is provided it will most likely be that which is set out in *Smith v. Commonwealth*.⁷ If a narrowing construction is, in fact, given, counsel can continue cost imposition by filing a motion to prohibit the imposition of the death penalty based on the inadequacy of the Commonwealth's narrowing construction based on *Shell v. Mississippi*.⁸

In addition, counsel may find in some cases that a motion to prohibit the imposition of the death penalty is proper on the basis that the evidence is insufficient as a matter of law to establish the vileness aggravating factor. For example, if the facts of the case reveal that the victim was killed by a single shot, this may not be sufficient to establish the aggravating factor as a matter of law.

If the Commonwealth responds that it will rely on future dangerousness, counsel should supplement the Bill of Particulars under the unadjudicated act statute⁹ to request notice of the unadjudicated acts the Commonwealth intends to rely on to establish future dangerousness.

Once the unadjudicated acts have been disclosed, defense counsel can begin to impose costs by filing a blanket pre-trial motion to exclude all evidence of unadjudicated misconduct in the present case. This motion will most likely be denied. A motion can then be generated to require the jury, before considering unadjudicated misconduct, to find by some standard of proof that each of the acts were actually committed by the defendant. Motions in limine contending that the disclosed acts have no relevance to future dangerousness can also be filed to continue the imposition of costs on the Commonwealth.

The creation of "mini-trials" through issuing subpoenas, making additional requests for investigators, producing motions and requesting evidentiary hearings on whether or not the defendant actually committed the unadjudicated acts disclosed by the Commonwealth lead to even further imposition of costs.

Further, the Commonwealth must comply with a court's order to reveal the grounds upon which it seeks to rely for proof of future dangerousness within a reasonable amount of time before trial. If the prosecution fails to provide such notice within a reasonable time before trial,

counsel can impose additional costs on the Commonwealth by generating a motion to exclude the introduction of such evidence altogether on due process grounds.¹⁰

In addition to motions spawned by the Commonwealth's use of unadjudicated acts, motion practice with respect to the use of a defendant's prior convictions can also be used to impose costs. For example, the validity of convictions can be challenged¹¹ and motions in limine can be produced addressing the relevance, or lack of relevance, of the convictions to future dangerousness.

Finally, a motion can be filed to prohibit the imposition of the death penalty on the basis that the evidence is insufficient as a matter of law to establish future dangerousness.

This practice on the part of defense counsel will also set in motion, with respect to each unadjudicated act, additional responsibilities of discovery, litigation over potential *Brady* materials, evidentiary hearings, experts, and investigators and will give defense counsel another opportunity to generate relevant motions.

When imposing costs through the use of pretrial motions, the importance of filing motions to have the jury instructed accurately on the defendant's parole eligibility, or lack thereof, if sentenced to life should not be overlooked.

Virginia's mental health expert statute, Virginia Code section 19.2-264.3:1 (hereinafter "3:1") applies only to capital cases and, thus, is a cost that can only be imposed when the Commonwealth seeks a death sentence. Under this statute the defendant is entitled to psychiatric expert assistance regarding issues of sanity and competency and in preparing a case in mitigation, all at the Commonwealth's expense. The defendant must only make the showing that (1) the defendant is indigent and (2) that the defendant is charged with capital murder. This is not a difficult showing for the defense to make, thus, this is an immediate and easily obtainable cost that can be imposed on the Commonwealth.¹²

An additional requirement of 3:1 states that if the defendant intends to introduce the mental health testimony obtained under 3:1, the Commonwealth may require the defendant to submit to its own expert evaluation. The forced submission of the defendant to the Commonwealth's own experts is typically viewed as one of the disadvantages of obtaining a mental health expert under 3:1. However, as a tool for imposing costs, this twist in the statute works to the defendant's advantage. As in the portion of the statute pertaining to the defendant's right to an expert, subsection F provides that the court shall order one or more qualified experts to perform the evaluation.¹³ Thus, the

⁴ 430 U.S. 349 (1977) (holding that a defendant must have opportunity to rebut the State's case for death).

⁵ 446 U.S. 420 (1980) (holding death sentence invalid due to the failure of the state court to provide a constitutional limiting construction to the aggravating circumstance providing for the death penalty for a murder "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." "There is no way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not.").

⁶ 111 S. Ct. 1723 (1991) (ruling that death sentence, imposed by judge after state gave written notice that it did not intend to seek death penalty and presented no evidence in support thereof, is unconstitutional; risk that the adversary system malfunctioned where defense not ready to contest case).

⁷ 239 Va. 243, 389 S.E.2d 871 (1990).

⁸ 498 U.S. 1 (1990) (holding that definition of "heinous, atrocious or cruel" is inadequate; concurrence on disjunctive quality of instruction, where one of three elements is inadequate, the aggravating circumstance is invalid). See case summary of *Shell*, Capital Defense Digest, Vol. 3, No. 2, p. 3 (1991). See also case summary of *Smith v. Dixon*, 14 F.3d 956 (4th Cir. 1994), Capital Defense Digest, this issue.

⁹ Va. Code Ann. § 19.2-264.3:2 (1993) (requiring that written notice be given to the defendant of all prior unadjudicated act conduct which the Commonwealth intends to introduce at sentencing).

¹⁰ See Fenn, *Anything Someone Else Says Can and Will Be Used Against You in a Court of Law: The Use of Unadjudicated Acts in Capital Sentencing*, Capital Defense Digest, Vol. 5, No. 2, p. 31 (1993).

¹¹ See *Johnson v. Mississippi*, 486 U.S. 578 (1988) (holding that use of invalid prior conviction as aggravating circumstance must result in reversal of death sentence even where conviction not vacated until after imposition of death sentence).

¹² In addition, the language of the statute provides that the judge "shall appoint one or more qualified mental health experts." As the specific language provides for the possibility of employing more than one expert, defense counsel may be able to demonstrate to the Commonwealth further additional costs by seeking a second or even third expert. Additional experts are quite likely to be necessary, for example, where there are indications that the defendant is mentally retarded. See Simpson, *Confessions and the Mentally Retarded Capital Defendant: Cheating to Lose*, Capital Defense Digest, this issue.

¹³ Va. Code Ann. § 19.2-264.3:1(F) (1990).

Commonwealth's right to reciprocal expert examination is itself a cost to the prosecutor. In addition, it may raise issues of defendant's right to counsel at the examination,¹⁴ of the use of defendant's statements when not informed of his constitutional rights¹⁵ and issues of preclusion under 3:1.¹⁶

Another possibility for imposing costs is the implementation of the defendant's right to expert assistance as granted by *Ake v. Oklahoma*.¹⁷ *Ake* also requires that the defendant be provided with funds for expert testimony. The showing necessary to obtain experts under *Ake* is more difficult to meet than the showing required under 3:1. The appointment of an expert for an indigent client is not automatic. Under *Ake*, the defense must make the showing that the matter on which defendant needs expert assistance is critically important to his defense. Thus, *Ake* provides defense counsel with the "basic tools" necessary to ensure a proper defense. However, this does not mean that the assistance granted must be equal to the Commonwealth's resources.

Ake is not bound by the limitations presented by 3:1 which provides only for mental health experts. *Ake* holds that the defendant is entitled to any expert assistance necessary in preparing and presenting a defense. Thus, although the showing under *Ake* is more difficult to meet, the potential for imposition of costs on the Commonwealth is enormous and, again, is a cost as a pretrial matter peculiar to capital cases. In addition, counsel can demonstrate that the showing for procuring an expert under *Ake* should be easier because the importance of confronting the Commonwealth's forensic evidence is heightened in capital cases, as the defendant's life is literally at stake. The showing should also be less rigorous to satisfy at the mitigation stage due to the broad scope of relevance applicable to defense penalty trial evidence which, in turn, makes the granting of a defense investigator even more crucial to the defendant's case. Specifically with regard to *Ake*, if the prosecutor intends to introduce a ballistics, blood, DNA or any other type of forensic expert, defense counsel can demand experts of their own, all at the Commonwealth's expense. Defense counsel may also be able to impose costs by employing these experts, when appropriate, at both the guilt/innocence trial and the penalty trial. In some instances, this serves to double the cost imposed on the Commonwealth.

Imposing costs on the Commonwealth not only demonstrates to the prosecutor that pursuing a death sentence may not be worthwhile but also puts defense counsel in a better bargaining position as he communicates to the prosecutor that the Commonwealth is battling a well-prepared adversary.

B. The Soft Sell

The other approach that may be pursued, along with the imposition of costs, is what might be termed the "soft sell." The soft sell serves to give the Commonwealth a rational basis for moving the client's file out of the "seek death" stack of his caseload. This section discusses how to investigate, prepare and selectively reveal the case in mitigation in order

to allow the prosecutor to fairly conclude that seeking death for this defendant is not all important, particularly in light of the costs being imposed.

There are several means that may be employed to effectuate this strategy. However, at the core of each of these theories is the development of a strong theme of mitigation. Just as plea negotiations should begin at the onset of the case, it is important to begin the mitigation investigation immediately upon accepting a capital case.¹⁸ The information gained from this investigation may serve to provide counsel with a foundation for a successful negotiation theory.

One possible method for giving the Commonwealth a rational basis for moving the client out of the capital murder category centers around three primary ideas: the idea of "no-fault impairment"; the idea of "shared responsibility"; and the idea of "struggle by the defendant." These three theories should be used in conjunction with one another to subtly reveal the case for mitigation and to provide the prosecutor with rationally-based reasons to not seek a death sentence. It is important when using these three theories to communicate to the prosecutor, as it is when these theories are presented to a jury, that these mitigating factors are not an excuse but a possible explanation for the defendant's actions.

The idea of "no-fault impairment" revolves around the premise that at some point in the defendant's life an event, or series of events, took place that impaired the defendant. These must be events that markedly affected the defendant's life but cannot fairly be said to be completely the defendant's own fault. Further, it is essential that the impairment bear a relationship to the crime with which he is charged. Impairments not the fault of the defendant that help to explain the crime are often not hard to find.

For example, if the killing is drug related and if the defendant is a drug abuser and counsel, during mitigation investigation, discovers that his client's parents used drugs in the presence of the defendant from the time he was a child or the parents actually forced the defendant himself to use illegal drugs, counsel may be able to convince the Commonwealth that the defendant wasn't entirely to blame for his actions. Or, if the defendant was sexually molested by his priest as a child and is on trial for killing his homosexual lover¹⁹ the prosecutor may accept the connection between the childhood event and the crime as a basis for, at a minimum, not seeking execution of the defendant. Further, if the client suffers from organic brain damage or mental retardation and the crime the client is on trial for can be linked to this mental disorder, this may be a factor the Commonwealth can use to justify a sentence less than death.

The second alternative centers around the idea of "shared responsibility." This involves examining the social surroundings of the defendant (both past and present), the economic factors, the education of the defendant and any discrimination to which the defendant may have been subjected. Revelation of socio-economic factors affecting the life of the defendant may provide an explanation for the Commonwealth to use in agreeing to a non-capital disposition. When collecting evidence and presenting the prosecutor with the idea of shared responsibility, it is impor-

Sixth, and Fourteenth Amendments).

¹⁶ See Bennett, *Is Preclusion Under Va. Code Ann. § 19.2-264.3:1 Unconstitutional?*, Capital Defense Digest, Vol. 2, No. 2, p. 24 (1989).

¹⁷ 470 U.S. 68 (1985).

¹⁸ Attorneys actually defending a capital case may obtain *Defending A Capital Murder Case in Virginia*, Virginia Capital Case Clearinghouse, pp. 1-14 (1993 Manual), for specific techniques on mitigation investigation. Mitigation investigation should involve a massive "paper trail" and collection of information (schools, hospitals, court records, etc.). A thorough investigation should also include interviews with all who have come in contact with the defendant. For details, see above reference materials.

¹⁹ See *Savino v. Commonwealth*, 239 Va. 534, 391 S.E.2d 276 (1990).

¹⁴ See *Satterwhite v. Texas*, 486 U.S. 249 (1988) (holding that use, in capital sentencing, of psychiatric evidence obtained in violation of accused's Sixth Amendment right to have counsel receive advance notice of examination held not harmless error under circumstances); *Powell v. Texas*, 492 U.S. 680 (1989) (State's use of psychiatric testimony on issue of future dangerousness violated the Sixth Amendment where no notice to defense counsel that examination by psychiatrist would be for that purpose; defendant did not waive his Sixth Amendment right to counsel at the examination by introducing psychiatric testimony in support of insanity defense; error was not harmless beyond a reasonable doubt).

¹⁵ See *Estelle v. Smith*, 451 U.S. 451 (1981) (holding that testimony of psychiatrist based upon court-ordered psychiatric examination where defendant was not advised of his constitutional rights violates the Fifth,

tant to emphasize that the shared responsibility is **minimum** shared responsibility. It is **not** a claim that "it's all society's fault." Rather, it is a claim that, because of the failures of others who had a responsibility towards the defendant, he and he alone should pay for the crime, but by life in prison, not by death. This involves finding people who, in fact, had a responsibility to the defendant, such as social workers, medical actors, school personnel or court officers. With this theory, defense counsel can develop the idea that there were people in the defendant's life who had official responsibilities with regard to the defendant's well-being but they, in some way, failed him. And, this failure is relevant to the crime with which the defendant is charged. For example, a medical actor left a head injury untreated because the defendant could not afford medical treatment and the defendant now suffers from some mental condition. Or, a social worker failed to remove the defendant, when he was a child, from his home where his parents were severely abusing him and he is now on trial for sexually molesting and beating his own children to death. This is where the idea of **minimum** responsibility plays a role. It is important to relay to the Commonwealth that no other person, or persons, is solely to blame or will in any way pay for the defendant's actions. But rather, due to these failed responsibilities, the defendant is not deserving of death.

The last of this trilogy of ideas involves the "struggle by the defendant." This is the situation in which the defendant has struggled against the impairment and tried to become "good," but has failed. Defense counsel should investigate and attempt to find out the reasons for the defendant's failure in his attempts to reform. As with the previous two theories, counsel should try to tie in defendant's failure to the present actions.

For example, assume the defendant has suffered a troubled and abusive childhood and that he has been in and out of juvenile correction programs. While in these structured institutions, the defendant was able to adapt to society. However, either while in the institution or after the defendant was released, certain events occurred (events that are fact specific to the individual case) and the defendant's assimilation was disrupted. For example, the defendant spent two years in a juvenile detention center. Investigation reveals that the defendant adapted well to the institutionalized environment. However, when the defendant was released, he returned home to live with his older brother who was still a substance abuser. After a period of time, the older brother was able to coerce the defendant into returning to his old habits. Again, this may provide the Commonwealth with a rational basis for offering a sentence of less than death. The prosecutor may see that the defendant has the capacity to adapt to society in certain conditions and, thus, perhaps incarceration is the just solution and death is unwarranted.

An alternative or addition to the three theories presented above, in some cases, is one in which defense counsel may be able to emphasize the defendant's positive attributes. Investigation may reveal exemplary qualities of the defendant or may indicate that the defendant's actions were an aberration in the defendant's life.

Further, when attempting to justify a non-capital disposition to the Commonwealth, defense counsel should emphasize that a primary concern involved in any criminal case is public safety, in other words, keeping the defendant "off the streets." If the defendant accepts a plea agreement, public safety concerns are satisfied by very lengthy, sometimes permanent, incarceration. Additionally, if a plea is agreed to, the defendant waives the opportunity to appeal the conviction and, therefore, the Commonwealth is able to avoid this lengthy and expensive process. Counsel may also collect and refer to other cases whose facts appear more aggravated than the facts in the case at hand, but were returned with a life sentence. This is simply to say that a reasonable Commonwealth's attorney, having seen a wider range of cases than jurors will have seen, may be more receptive to a non-capital disposition.

Finally, defense counsel should attempt to contact the victim's family to determine their feelings regarding a capital sentence. These witnesses are not the clients of the Commonwealth's attorney and no notice to him is required. Discussions with the victim's family can prove extremely beneficial to the defense. Besides, there is nothing to lose. If the family is not supportive of a death sentence, this may also help to convince the prosecutor to accept a plea agreement for a non-capital disposition. In addition, this can often be a service to the family as the prosecutor may not have informed the family that in seeking a death sentence the legal system will reopen the wounds every six to eight months as the case progresses from pre-trial through years of appellate review. Because the victim's family may be a genuine concern of the responsible prosecutor, getting support from the family to not pursue a death sentence may prove to be an invaluable bargaining tool for the defense.

III. IMPLEMENTING THE STRATEGY

The pre-trial practice and collection of evidence described above is essential to negotiation. Without it, there is no negotiation in any real sense, because there is nothing on the table. Creating negotiating currency moves plea negotiation to something more than "plead" negotiations. Once that is done, it helpful to have a framework for the actual discussions.

If defense counsel chooses to employ the method of simultaneously using a hard and soft sell approach, the following section discusses a specific tactic that can be implemented when actually dealing with the Commonwealth. This strategy is based on a successful negotiation method developed by Roger Fisher and William Ury as explained in their book *Getting to Yes: Negotiating an Agreement Without Giving In*.²⁰

There are two basic negotiating strategies that can be implemented when negotiating for a non-capital disposition: (1) positional bargaining and (2) principled bargaining.

When positional bargaining is used, negotiations are conducted in a more competitive atmosphere. If defense counsel chooses to take a positional bargaining approach he must thoroughly analyze the case to determine its strengths and weaknesses. Counsel must develop a bottom line or the weakest plea arrangement upon which he will still accept a bargain. Counsel should attempt to conduct open discussions with the prosecutor to extract as much information as possible about the Commonwealth's case while giving up as little information as possible.

Positional bargaining requires that defense counsel decide what result he ultimately wants to achieve, take a "position" more extreme than his ultimate goal, and using various techniques, engage in a give-and-take exchange with the adversary until some middle ground is reached. When this type of negotiation is successful the "middle ground" and result should be close to counsel's previously established goal.

However, this type of negotiation strategy is rarely successful. Fisher and Ury explain that:

When negotiators bargain over positions, they tend to lock themselves into those positions. The more you clarify your position and defend it against attack, the more committed you become to it. The more you try to convince the other side of the impossibility of changing your opening position, the more difficult it becomes to do so.²¹

The authors further state that once this begins to happen a person's ego becomes identified with the position. Needless to say, this is an especially big factor to avoid in a capital negotiation as it may become a life-threatening situation. It may be life threatening for the defendant and it may prevent the prosecutor from doing justice more economically and

²⁰ Roger Fisher and William Ury, *Getting to Yes: Negotiating an Agreement Without Giving In* (Penguin Books 1991) [hereinafter

"Getting to Yes"].

²¹ *Id.* at 4, 5.

efficiently. *Getting to Yes* also reasons that when this type of situation begins to occur and more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties and agreement becomes less likely.²²

The second negotiating theory, and usually the more effective theory, is defined as "principled" negotiation. This method, as detailed in *Getting to Yes*, encompasses four basic components: (1) separate the people from the problem; (2) focus on interests, not positions; (3) invent options for mutual gain; and (4) insist on using objective criteria.

The first step in principled bargaining is to separate the person the negotiator is dealing with from the substantive goal he wants to achieve. *Getting to Yes* explains that one of the major problems with positional bargaining is that it puts relationship and substance in conflict. Framing a negotiation as a contest of will over positions aggravates the entangling process.²³ This creates both an inefficient and unproductive negotiation. To avoid this type of situation the authors suggest that the negotiator base the relationship on accurate perceptions, clear communication, appropriate emotions, and a forward-looking, positive outlook.

The relationship between the negotiators in a capital plea negotiation is, by nature of the roles played by the defense attorney and the prosecutor, inherently adversarial. Because, in effect, the two parties are often negotiating whether or not a person will live or die, negotiations have the tendency to quickly descend to a personal level. During the negotiation process, defense counsel should be careful not to deal with the prosecutor as someone who has out to kill his client, though it should be a guiding assumption when actually imposing costs. If the prosecutor is met with a sense of personal hostility on the part of defense counsel, he may feel less inclined to work out an agreement. Whether right or wrong, from the prosecutor's point of view, he is simply doing his job. If he feels he is being personally attacked for what he believes he is paid to accomplish, he may respond defensively and create a barrier to compromise. This does not mean that counsel should avoid making any appeal to the prosecutor's emotions. It simply means that the negotiations should center around getting the client a non-capital sentence by communicating clearly and focusing on the facts of the case versus attacking the prosecutor for his position on the death penalty and his role as the "executioner."

The second step in principled bargaining is to focus on interests, not positions. The basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side's needs, desires, concerns, and fears.²⁴ *Getting to Yes* explains that "such desires and concerns are interests. Interests motivate people; they are the silent movers behind the hubbub of positions."²⁵ This is particularly true in capital negotiations where each side is representing a vital interest: the defense attorney is representing his client's life while the prosecutor is representing the interests of the community as a whole. Defense counsel should focus on understanding and recognizing what the Commonwealth's interests are. In particular, counsel should keep these interests in mind and genuinely seek to accommodate them, without sacrificing the client's interests. Politically, the prosecutor must look "tough." Still, defense counsel may be able to convince the Commonwealth to agree to a first degree life sentence versus a capital life sentence. This could save the client ten years on his sentence²⁶ and the prosecutor is still able to show the public a sentence that is in fact severe, though not as severe as it appears.

Another interest of the Commonwealth may be to ensure that the defendant receives a sufficiently lengthy sentence. The prosecutor may be

concerned that if the defendant is granted a non-capital sentence he may be eligible for parole in too short a period of time. This concern, as will be discussed in detail in the following section, can be remedied in an appropriate case by fashioning a plea agreement that states that the defendant will not seek parole. These types of agreements have been successfully negotiated in Virginia. Thus, when negotiating a plea, defense counsel should be knowledgeable on the issues of parole so that he may make the Commonwealth aware of precisely when the defendant will be parole eligible.

Finally, defense counsel should keep the focus of the negotiations on the prosecutor's primary concern: getting the defendant "off the streets." As stated previously, defense counsel should remind the prosecutor that if a plea agreement is reached, the Commonwealth's concern for public safety will be satisfied as the defendant will be incarcerated. If an agreement is reached between the two parties there is no chance that the defendant will "walk." Thus, defense counsel should emphasize to the prosecutor that the Commonwealth's interests can be met and a "win-win" situation for both sides can be accomplished without the imposition of a sentence of death.

The third aspect of principled bargaining involves inventing options for mutual gain. This aspect is closely related to the above phase of principled bargaining that focuses on the parties' interests and concerns. However, this step in principled bargaining involves the ability to separate the process of thinking up possible alternatives from the process of selecting among them.²⁷ There are endless possibilities as to the finer details of a plea agreement in a capital case. Fisher and Ury write that:

[f]or a negotiator to reach an agreement that meets his own self-interest he needs to develop a solution which also appeals to the self-interest of the other. Yet emotional involvement on one side of an issue makes it difficult to achieve the detachment necessary to think up wise ways of meeting the interests on both sides. There also frequently exists a psychological reluctance to accord any legitimacy to the views of the other side; it seems disloyal to think up ways to satisfy them. Shortsighted self-concern thus leads a negotiator to develop only partisan positions, partisan arguments and one-sided solutions.²⁸

If defense counsel has made the decision that any agreement short of a death sentence is to be considered a victory but is having difficulty in getting the prosecutor to agree to any type of plea agreement, there is nothing lost in attempting to set up a "brainstorming" session with the Commonwealth. Remember that generating possible solutions does not mean commitment to any possibility either side suggests.

If the Commonwealth agrees to participate in a "brainstorming" session, defense counsel should establish a set of guidelines for the two sides to follow. *Getting to Yes* suggests that the parties: (1) clearly define the purpose of the session; (2) choose a time and place that distinguishes the session as much as possible from regular negotiations; (3) design an informal atmosphere; (4) employ a facilitator, if possible, to keep the meeting on track; and (5) establish a "no-criticism" rule. The purpose of the session is to generate ideas and possibilities, not to immediately commit to any suggestion that is put on the table.²⁹ An additional meeting should be set up to attempt to implement any of the suggestions the two parties come up with.

²² *Id.* at 5.

²³ *Id.* at 20.

²⁴ *Id.* at 40.

²⁵ *Id.*

²⁶ The possibility of reducing the defendant's sentence by agreeing to plead guilty to a first degree life sentence versus a capital life sentence results from the difference in parole eligibility for these two offenses

under Virginia's parole eligibility statute. Va. Code Ann. § 53.1-151. For a further discussion on parole eligibility considerations, see "The Legal Framework in Virginia", section IV, *infra*.

²⁷ See Fisher and Ury, *Getting to Yes*, *supra* note 20, at 60.

²⁸ *Id.* at 59.

²⁹ *Id.* at 61.

However, in order to protect the client's interests during the session, distinguish the brainstorming session explicitly from a negotiating session where official views are stated and are part of the record.³⁰

If counsel is able to convince the Commonwealth to participate in this type of session it may prove to be invaluable to the client and a successful plea agreement. This type of session affords counsel the opportunity to find out precisely what the Commonwealth's concerns are in the case at hand and provides defense counsel with the opportunity to make an attempt to meet the Commonwealth's needs and find common ground on which to negotiate a non-capital disposition.

The final aspect to principled bargaining is to base the negotiations on objective criteria. *Getting to Yes* explains that "the more you and the other side refer to precedent and community practice, the greater your chance of benefitting from past experience. An agreement consistent with precedent is less vulnerable to attack."³¹

In a capital negotiation, defense counsel should research other capital cases that have either reached a successful plea arrangement or were returned with a life sentence at the penalty phase. By comparing the facts of other cases that did not result in a sentence of death to the facts of the case at hand, counsel may be able to convince the prosecutor that the case being negotiated does not warrant a death sentence. Although there is no concrete "objective" standard for evaluating a death-eligible case, a fact-specific comparison may provide the prosecutor with a frame of reference to use in justifying a non-capital disposition.

Agreeing upon a non-capital disposition should be easier under the *Getting to Yes* method than other types of negotiation, either civil or criminal. This is simply because negotiating a non-capital disposition really is in both party's interest. It is not in the interests of the citizens of the Commonwealth (who are the "clients" of the responsible prosecutor) to spend hundreds of thousands of tax dollars in a process that might fail to produce a death sentence or result in eventually having to repeat the entire process over again. In addition, the result at best may bring about an execution five to ten years down the road, reopening the wounds for the victim's family every six to eight months only to come out with nothing that has been demonstrated to be of any value to the citizens of the Commonwealth.

³⁰ *Id.* at 63.

³¹ *Id.* at 83. The Virginia Capital Case Clearinghouse can assist attorneys in providing this factual information as the Clearinghouse's data bank contains examples of trial level dispositions that have not shown up in appellate opinions.

³² See Va. Code Ann. § 53.1-151 for procedures governing parole eligibility.

³³ Va. Code Ann. § 53.1-151(C) (1990).

³⁴ Va. Code Ann. § 53.1-151(C) (1990).

³⁵ The concurrence of the trial judge will not be a problem in the vast majority of negotiated cases. If the trial judge will not commit to the elimination of the penalty trial, it is possible that if the Commonwealth's commitment not to offer any evidence at the penalty trial is strong enough, defense counsel's motion to strike both aggravating factors should be granted as a matter of law. See *Beavers v. Commonwealth*, 245 Va. 177, 427 S.E.2d 379 (1993). See also case summary of *Beavers*, Capital Defense Digest, Vol. 6, No. 1, p. 26 (1993). In any event, an important characteristic of this alternative is that it does not require waiving the jury trial. If this is successful and the jury sentences the defendant to life, the judge will not be able to impose a sentence of death.

IV. THE LEGAL FRAMEWORK IN VIRGINIA

There are many alternatives available to the defendant in terms of what plea to accept and what sentence to offer and accept at the negotiating table. The following are a few of the options available in order of desirability. The first alternative is a guilty plea to a lesser offense, such as first degree murder.³² This option can be done with or without an agreement as to sentence and the defendant will not be eligible for parole for fifteen years.³³

The second alternative available to the defendant during negotiations is a trial on the capital murder charge without the possibility of imposition of the death penalty. Here, the defendant is not pleading guilty to any charges. The advantages to the Commonwealth with this option are that it will save time, effort and money at the trial level and will remove all issues at the appellate level that are peculiar to capital cases. In addition, this alternative guarantees that if the defendant is found guilty he will not be parole eligible for at least twenty-five years.³⁴ When seeking to employ this alternative it is important to obtain a commitment from the trial judge agreeing that there will not be a penalty trial.³⁵

The next alternative involves the defendant pleading guilty to non-capital murder and a combination of predicate offenses. For example, the defendant could agree to plead guilty to the non-capital murder (i.e. non-class one felony) in addition to a combination of two offenses that carry life sentences. In Virginia, first degree murder, rape and robbery all carry a life sentence. Specifically, in Virginia, first degree murder is punishable as a class two felony³⁶ the punishment for which is "imprisonment for life or for any term not less than twenty years."³⁷ Virginia Code section 18.2-61 states that a conviction for rape shall be punishable by "confinement . . . for life or for any term not less than five years." Likewise, a conviction for robbery is punishable by "life or any term not less than five years."³⁸ Thus, the defendant pleading guilty to non-capital murder in addition to a combination of two other life sentences will not be eligible for parole for twenty years.³⁹

The fourth alternative is to have the defendant agree to plead guilty to capital murder with an agreement from the Commonwealth that it will not seek the death penalty.⁴⁰ This option may be easier to convince the Commonwealth to approve than the agreement that allows the defendant to simply plead guilty to a lesser offense. This is because with this option the defendant will be admitting that he committed the crime of capital murder. As a result, this type of agreement may be more acceptable to the Commonwealth, as the defendant will not be eligible for parole for at least twenty-five years.⁴¹

Thus, it is important not to plead guilty without an agreement from the trial judge, unless it is clear that the Commonwealth will present no evidence of aggravating factors, and to avoid a bench trial without an agreement from the judge not to impose a sentence of death.

³⁶ Va. Code Ann. § 18.2-32 (1988).

³⁷ Va. Code Ann. § 18.2-10(b) (1988).

³⁸ Va. Code Ann. § 18.2-58 (1988).

³⁹ Va. Code Ann. § 53.1-151(D) (1990).

⁴⁰ Again, although it may not be necessary to obtain a formal commitment from the trial judge, the Supreme Court of Virginia's holding in *Dubois v. Commonwealth*, 246 Va. 260, 435 S.E.2d 636 (1993), reveals the consequences of not receiving any assurance, formal or informal, that the judge will not impose a sentence of death. For further discussion of *Dubois*, see section VII, "Caveats of Negotiating a Capital Plea," *infra*. Concurrence of the trial judge is the first option, with a firm agreement by the prosecutor to put on no evidence of aggravating factors as a last resort.

⁴¹ Va. Code Ann. § 53.1-151(C) (1990).

Another possibility that can be agreed to involves parole eligibility of no less than thirty years and does not require that the acts be part of the same transaction. This thirty year parole eligibility combination can be achieved by pleading guilty to capital murder and pleading guilty to an additional life sentence offense.⁴² For example, the defendant may plead guilty to capital murder in the commission of a robbery and be sentenced to life and then enter an additional guilty plea to rape that also carries a life sentence. This would guarantee that parole will not be granted for thirty years and does not require that the offense be part of separate transactions.

The final, and least desirable, alternative is to structure an agreement that will result in no parole eligibility for a sentence of life imprisonment. There are two options. One is a sworn, written pledge by the defendant not to apply for parole.⁴³ Although it is possible for a prisoner to later litigate the validity of parole eligibility, courts are not likely to be sympathetic to a prisoner who later decides to challenge an agreement into which he voluntarily entered. The second way in which this particular outcome can be structured, in an appropriate case, is through mutual agreement concerning the meaning of the Virginia "three-time loser" statute.⁴⁴ This section states:

Any person convicted of three separate felony offenses of (i) murder, (ii) rape, or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.⁴⁵

As this statute establishes no eligibility for parole when a person has been convicted of three separate felony offenses but requires that the offenses not be a part of a common act, transaction or scheme, the parties can include in the agreement a provision that the offenses to which the defendant will plead guilty are agreed to be part of separate transactions. This will ensure that the defendant will never be eligible for parole. Sometimes, the facts of the case will make the "separate transaction" issue a close one, so the agreement of all parties is important. Often, however, the parties will not have to "manipulate" the language of the statute to create separate transactions, as separate transactions will often be a reasonable interpretation of the events. For example, if defendant committed murder of victim 1 at the victim's home, then proceeded to rape victim 2 and several hours later robbed a convenience store, it would be reasonable to interpret the charges as separate transactions without any specific agreement to a creative interpretation of the language of the statute and offenses.

*Garrett v. Commonwealth*⁴⁶ addressed the language of the "three-time loser" statute with respect to its "common act, transaction or scheme" requirement and held that it was for the parole board, and not the court, to determine whether the convictions constituted a common scheme for purposes of defendant's parole eligibility.⁴⁷ However, the parole board in Virginia has yet to exercise its power in this area and, thus, should not impede any agreement reached between the defendant and the Commonwealth.

Because with this plea arrangement the defendant will never be eligible for parole, it is far less desirable than the other alternatives and should only be pursued as a last resort.

V. NEGOTIATING WITH THE CLIENT

In addition to negotiating with the Commonwealth, defense counsel must focus on his relationship with the client. It is often very difficult to convince the client that it is in his best interest to accept a plea offer. It is the defendant who may have to detail in open court the reasons that will cause him to spend the rest of his life, or most of it, in prison. Postponing the day of reckoning is human nature, as is an unrealistically optimistic outlook on available defenses. Defense counsel must establish, by innovation and work, a relationship that allows the defendant to feel confident that counsel will fight for him and that the recommendations are in his best interest. In rare cases (such as when a defendant is being held over in a remote jurisdiction for another charge) it may be necessary to negotiate the agreement first and then "sell" it to the client. However, it is much more effective and desirable to involve the defendant at every stage.

As stated above, the attorney must work at building a trust relationship between himself and the client. It is important to communicate and listen to the client. Many times there is a great sense of distrust on the part of the client towards the defense attorney. The police, prosecutor and judge are all part of a system that the client may believe is working against him. The client often views defense counsel as merely another actor in this system. Counsel should be conscious when he visits the client not to simply tell him what he has to tell and engage in talking "at" him. This requires the attorney to listen closely to what the client is telling him and to understand the client's own concerns. This type of attitude will help to foster a trust relationship between the attorney and his client. Thus, if a plea agreement is offered, the attorney will be better able to help the defendant make a decision that serves his best interests.

The attorney-client relationship, by its nature, must be professional. However, counsel should keep in mind that the defendant may have lost his friends and family and most likely feels alienated and alone. The attorney must ensure that there is someone with whom the client is able to speak comfortably. The case investigator, a clerk, or co-counsel are all people who may be able to establish this type of personal relationship with the client. Counsel may also want to consider having the client speak with someone whom the client trusts will be frank and candid with him about the possibilities with which he will be faced.

VI. KNOWING WHEN TO SAY "NO"

When defense counsel is preparing to negotiate with the Commonwealth, he should engage in a thorough analysis of the case and of the sentencing factors. There are numerous situations in which defense counsel may find that it is in the best interests of the client to say "no" to an offered plea agreement. Counsel might examine whether or not the conduct the Commonwealth will be able to prove actually fits the capital murder statute: whether the evidence, in fact, establishes one of the threshold qualifiers. For example, when the Commonwealth seeks to impose the death penalty under the multiple murder prong⁴⁸ of the Virginia capital murder statute and there is proof, or strong indications, that the murders were not a part of the same transaction or there were less than two **premeditated** murders, counsel should not readily accept a plea agreement involving an admission of capital murder.

Counsel should also make a determination as to whether or not he believes the Commonwealth will be able to prove the aggravating factors necessary to support a death sentence, even after conviction of capital

⁴² Va. Code Ann. § 53.1-151(D) (1990).

⁴³ This option has been successfully implemented in Virginia. The Virginia Capital Case Clearinghouse can supply attorneys with details and examples.

⁴⁴ Va. Code Ann. § 53.1-151(B)(1) (1990).

⁴⁵ *Id.*

⁴⁶ 14 Va. App. 154, 415 S.E.2d 245 (1992).

⁴⁷ *Id.*

⁴⁸ Va. Code Ann. § 18.2-31(7) (1988).

murder. This requires a careful examination of the Commonwealth's case at the penalty phase. For example, if the client has no prior record it may be difficult for the Commonwealth to prove future dangerousness.⁴⁹ Or, if the capital offense involved only a single shot, the Commonwealth may have difficulty in establishing vileness.⁵⁰ The facts of a case involving a single shot will rarely be sufficient to satisfy the vileness factor.

Another situation in which defense counsel should proceed cautiously, when determining whether or not to enter into a plea agreement, is one in which the defendant may be liable only as an accomplice. Excluding murder-for-hire, the Virginia legislature has limited the death eligible class of defendants to actual perpetrators.⁵¹ Thus, in order to convict a defendant of an offense greater than first degree murder, the Commonwealth must prove beyond a reasonable doubt that the defendant was the triggerman.⁵² If defense counsel believes that the Commonwealth will be unable to meet this standard of proof, this may be a situation in which defendant should not plead guilty to capital murder, even with a life sentence agreement.

In addition, counsel should examine the strength of the Commonwealth's case-in-chief. Defense counsel should consider suppression potential, whether or not there is a confession by the defendant, the reliability of any snitch testimony being offered by the Commonwealth,⁵³ the quality of the Commonwealth's witnesses and how likely it will be for the Commonwealth to prove the predicate felony. If there is great potential for suppression of evidence or genuine concerns as to the reliability of the Commonwealth's witnesses, informants or otherwise, defense counsel should give careful consideration before saying yes to any agreement that is offered.

Further, defense counsel should examine his own case in mitigation. If there is an overwhelming case for mitigation making the possibility of the jury returning a life sentence highly probable, that is a factor counseling in favor of rejecting some proposals.

Finally, when defense counsel's client is a juvenile he should thoroughly explore the possibility that his client may not be eligible for capital murder due to the client's age.⁵⁴

These are all factors that defense counsel should consider when deciding whether or not to accept a plea offer from the prosecutor. Knowing when to say "no" is an important aspect of a successful non-capital negotiation.

⁴⁹ Under Va. Code Ann. § 19.2-264.4(C), the Commonwealth is required to prove future dangerousness by establishing that the defendant "would constitute a continuing serious threat to society"

⁵⁰ In order to prove vileness, the Commonwealth must establish that the defendant's "conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim." Va. Code Ann. § 19.2-264.4(C) (1990).

⁵¹ Va. Code Ann. § 18.2-31(2) (1988).

⁵² *Cheng v. Commonwealth*, 240 Va. 26, 393 S.E.2d 599 (1990). The court in *Cheng* held that there was insufficient evidence that Cheng was in fact the triggerman. Because the evidence was insufficient to maintain a capital conviction, the court reversed the judgement and the death sentence, remanding the case for a new trial on a charge no greater than first degree murder. The court specifically noted that, while the confession and the circumstantial evidence permitted an inference that Cheng was the triggerman, a mere probability or suspicion of guilt, no matter how strong, was insufficient to convict Cheng of capital murder. See case summary of *Cheng*, Capital Defense Digest, Vol. 3, No. 1, p. 20 (1990).

VII. CAVEATS OF NEGOTIATING A CAPITAL PLEA

As in any case, civil or criminal, negotiating a settlement means some benefit to each party. There is no benefit to pleading guilty to capital murder before a judge who will not give a formal or very strong informal assurance that the sentence will not be death.

Thus, one consideration in proceeding with a plea agreement is determining how firm must be the commitment to not seek a death sentence when the plea bargain requires the defendant to plead guilty to capital murder. The best position for the defense is to procure an agreement signed by all parties involved, including the prosecutor and the presiding judge. The defendant should not plead guilty to capital murder without a strong official or unofficial commitment from the judge. The consequences of not obtaining this type of assurance can be seen by examining the tragic outcome of *Dubois v. Commonwealth*.⁵⁵ In *Dubois*, the defendant pled guilty to five charges, including capital murder, pursuant to an agreement with the Commonwealth that it would not seek the death penalty. The Commonwealth presented its evidence against Dubois and Dubois reaffirmed his plea. At the sentencing hearing, the defendant stated that he had read the pre-sentence report, understood the consequences, and maintained his plea of guilty to capital murder and four other charges. The defendant neither questioned the author of the pre-sentence report nor presented any evidence in mitigation. Subsequently, defense counsel stated that the record did not support imposition of the death penalty, and the Commonwealth informed the court that it was not seeking the death penalty.

Disregarding the agreement between the Commonwealth and the defendant, the trial judge sentenced the defendant to death based on a finding of future dangerousness. Dubois appealed and challenged the trial court's imposition of the death penalty. The Supreme Court of Virginia upheld the conviction and sentence and held that although the trial court "was obliged to consider" the Commonwealth's agreement not to seek the death penalty as a factor in its decision, the court was not bound to accept its recommendation.⁵⁶

As evidenced by the outcome of *Dubois*, having no indication as to what sentence the trial judge will impose can have devastating consequences. However, it may not always be necessary, when seeking a non-capital disposition, to obtain official assurances from the trial judge. In rare cases, if there are strong unofficial indications from the judge that he will not impose a sentence of death, it may be safe to proceed with the guilty plea.

See also *Rogers v. Commonwealth*, 242 Va. 307, 410 S.E.2d 621 (1991) (reversed conviction where defendant admitted rape but denied killing; there was a possibility, but no direct evidence that there was an accomplice). See case summary of *Rogers*, Capital Defense Digest, Vol. 4, No. 2, p. 7 (1992).

⁵³ See Miles, *Subtle Influences: The Constitutionality of Jailhouse Informant Testimony in Capital Cases*, Capital Defense Digest, Vol. 5, No. 1, p. 51 (1992), for an insightful discussion on the different types of challenges and constitutional arguments available against the use of such testimony at the pretrial, guilt and sentencing stages of capital murder trials.

⁵⁴ See VanBuskirk and Clunis, *Applying the Virginia Capital Statute to Juveniles*, Capital Defense Digest, Vol. 5, No. 2, p. 42 (1993), for a thorough discussion on when the Virginia statute may be applied to juveniles.

⁵⁵ 246 Va. 260, 435 S.E.2d 636 (1993). See case summary of *Dubois*, Capital Defense Digest, Vol. 6, No. 1, p. 28 (1993).

⁵⁶ *Dubois*, 246 Va. at 265, 435 S.E.2d at 639.

This step should not be taken, however, without recognition that the consequences of pleading guilty to capital murder with no plea agreement can be devastating to the defendant. In *Savino v. Commonwealth*,⁵⁷ the Supreme Court of Virginia held that because the defendant knowingly and voluntarily pled guilty to the charges and waived his right to a trial on these charges, he was found to have waived all defenses except a jurisdictional challenge. Further, in *Stout v. Commonwealth*,⁵⁸ the defendant, Larry Allen Stout, pled guilty to both the capital murder and robbery charge. Subsequently, the court rejected the majority of the defendant's assignments of error. Citing *Beaver v. Commonwealth*,⁵⁹ the court held that because Stout knowingly and voluntarily pled guilty, such assignments were not cognizable.

As evidenced by the preceding case law, counsel should be extremely cautious in allowing a defendant to plead guilty to capital murder with no plea agreement. Without a formal trial, the majority of issues that could have been raised on appeal will not be available or will be defaulted. When this occurs there is little recourse for the defendant and the damage resulting from a bargainless guilty plea stands little or no chance of being remedied.

Although not discussed in *Dubois*, the issue of adequate notice may and should be raised at the last moment if no mitigation evidence has been offered in reliance on an agreement and it appears that the judge will disregard the agreement and sentence the defendant to death. Defense counsel may be able to rely on *Lankford v. Idaho*⁶⁰ for relief. *Lankford* held that "[p]etitioner's lack of adequate notice that the judge was contemplating the imposition of the death sentence created an impermissible risk that the adversary process may have malfunctioned in the case."⁶¹ In *Lankford*, a silent judge listened to arguments about sentencing length

and never indicated that the real issue was whether or not to impose a death sentence. Thus, the court further held that the defendant and his counsel did not have adequate notice that the judge might impose a death sentence; therefore, the sentencing process violated Fourteenth Amendment due process requirements.⁶²

Thus, upon first learning that expectations are not going to be met, counsel may be in a position to argue on the record lack of notice and a Fourteenth Amendment due process violation under *Lankford* in order to, at a minimum, establish a foundation for appellate review. Obviously, every effort should be made to avoid this situation.

VIII. CONCLUSION

The most important goal from defense counsel's perspective in the run of capital murder cases is to ensure that the defendant does not receive a death sentence. The most effective way to accomplish this goal is simply to remove that option from possible outcomes. Thus, the negotiation process is of vital importance and must be afforded serious efforts. Juries may be less likely to return a life sentence in part because, unlike the prosecutor, they have not been exposed to the range of circumstances under which homicides are committed. As a result, negotiating a plea with a responsible prosecutor is often defense counsel's best opportunity to guarantee a non-capital disposition of the case. Negotiating without the currency generated by imposing costs on the Commonwealth and presenting mitigation without thorough knowledge of both the law of capital murder and the law of sentencing, and without creativity and good client relations, will usually result in the loss of a life-saving opportunity.

⁵⁷ 239 Va. 534, 538, 391 S.E.2d 276, 279 (1990). See case summary of *Savino*, Capital Defense Digest, Vol. 3, No. 1, p. 15 (1990).

⁵⁸ 237 Va. 288, 376 S.E.2d 288 (1989). See case summary of *Stout*, Capital Defense Digest, Vol. 1, No. 2, p. 4 (1989).

⁵⁹ 232 Va. 521, 526-27, 352 S.E.2d 342, 345 (1987).

⁶⁰ 111 S. Ct. 1723 (1991). See case summary of *Lankford*, Capital Defense Digest, Vol. 4, No. 1, p. 9 (1991).

⁶¹ *Lankford*, 111 S. Ct. at 1733.

⁶² *Id.* at 1731.