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THE CLINICIAN AS ETHICAL ROLE MODEL IN THE CRIMINAL APPELLATE LITIGATION CLINIC

J. Thomas Sullivan*

I. INTRODUCTION

An appellate litigation clinic offers law students a unique opportunity to experience the actual process that creates much of the law school's traditional curriculum. The clinical experience, unlike traditional courses or simulation-based classes, forces students to address the same kinds of problems that practitioners face, the exception being the problems of setting and collecting fees. The student in an appellate clinic confronts the very difficulties absent from the usual moot court experience that is often advertised as an opportunity for students to learn about litigation through brief writing and oral argument. But the real-world experience is one of deficient trial records, unpreserved error, and existing caselaw that

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1 In Duplantis v. State, 644 So. 2d 1235 (Miss. 1994), the court declined to review the merits of the issue raised on appeal where the record was insufficient to demonstrate factual support for the appellant's claim that he had been denied a required disclosure of a witness's statement or the transcript of the preliminary hearing. "Duplantis's failure to present a proper record to this Court prevents review of this issue." Id. at 1250.

2 Under Mississippi law, failure to properly preserve a challenge to sufficiency of the evidence to support a conviction waives appellate review of this issue. Holland v. State, 656 So. 2d 1192, 1197 (Miss. 1995). In Holland, the state supreme court held that the evidence was insufficient to support the conviction, but
is not deliberately equally balanced to ensure that both sides in the appeal have a fair and equitable chance in argument.

The clinical education experience also achieves a broader goal than the training of individual students. It brings the world of practice into the law school. In this sense, the jurisdiction and its courts become active partners with the law school in the educational experience, and the law school engages the court system in the discharge of the representation function. The criminal appellate clinic functions much like an appellate defender's office, although on an admittedly much smaller scale. Not only do student attorneys serve the important role of providing representation for the clinic clients, but the clinic itself may make valuable contributions to the development of the law of the jurisdiction. Because the clinic will handle a number of cases under the supervision of an experienced appellate lawyer, it offers the potential to identify significant issues that may lead to development of the law. The clinic can also provide a reference point for trial lawyers throughout the jurisdiction who are concerned about issues and preservation of errors arising during the course of pretrial and trial litigation.

For all of these reasons, the professionalism of the clinic director and supervising attorneys remains of paramount importance in the educational experience afforded clinical students, in the performance of the clinic in representing clinic clients in the appellate courts, and in the representation of the law school before those courts. The experience demands that clinicians recognize the unique position of role model created by the student/teacher relationship in the context of the clinic experience and strive to maintain high standards of ethical behavior and effective performance in directing the appellate litigation clinic.

that the claim was barred due to counsel's failure to preserve error. Id.

3 "[A] State may also allow properly supervised law students to represent indigent defendants." Jones v. Barnes, 463 U.S. 745, 757 n.3 (1983) (Brennan, J., dissenting).
II. THE DUAL ROLE OF THE CLINICIAN

The clinical professor and supervising attorney in any live-client clinical setting work in dual roles: they are responsible not only for ensuring the quality of the educational experience for the student, but also for guaranteeing that the institution affords its live-clients adequate representation. In reality, clinical student representation is typically more than adequate, and not infrequently may exceed the quality of representation afforded similarly situated clients by the practicing bar. This is probably attributable to the fact that the educational experience dominates the representation, rather than the financial aspect of representation in private cases or the often-unrealistic caseloads handled by publicly-funded attorneys. The educational experience is typically guided by experienced attorneys committed to clinical instruction who have been hired based on their own academic success and reputation in practice.

Further, clinical students are highly motivated to perform at high levels of competence, both because of the prospect of evaluation by their instructors and the significant commitment to the experience that is required for completion of the usual clinical course. Because course caseloads are managed to permit students adequate time to properly learn to litigate without the pressures that often compromise performance in private practice, students are able to focus far greater time and energy on individual cases than will be common in their practices later.

The competence, professionalism, and dedication of the clinical professor are pivotal to the success of the clinical student and the overall success of the clinic as counsel for the client.

A. The Clinician as a Role Model for Clinical Students

Clinical faculty are often viewed as being different from traditional faculty in terms of teaching methodologies employed, scholarship expectations, professional experience as a factor in hiring decisions, and, regrettably, status within the
faculty as a whole. Different faculties and institutions approach clinical education differently, of course, reflecting institutional commitment ranging from sincerely held convictions that clinical education is an essential element of the curriculum to grudging accommodation of student demands that legal education be made more "relevant" in terms of preparing students for practice. Within a given law faculty, the perception of the role and value of clinical faculty within the total program will almost certainly vary among individual professors, but the formal status of clinicians will either tend to validate the importance of clinical education within the institution or reflect a perspective in which clinical education is relegated to a subordinate position within the institutional hierarchy. What is almost certainly true about clinical faculty is that their involvement with students in on-going matters of representation of live-clients requires them to serve not only as instructors, charged with explaining much of the law to their students, but also as role models, demonstrating on a daily basis the proper ways in which lawyers perform, discharging their obligations to their clients and to the legal system.

1. The Unique Relationship Between Clinician and Clinical Students

An important feature of clinical education that justifies its labor intensive character and substantially higher per student cost than traditional classroom instruction lies in the socialization of the law student through the clinical experience. In contrast to the traditional classroom course, in which the professor dominates the environment and interaction between the students and professor will tend to be more formalized, if only because it must be designed to engage non-participating students simultaneously in the learning process, the relationship between clinical student and clinical instructor must necessarily be more intimate.

The difference is demanded by the nature of instruction: regardless of whether a traditional class is conducted in the format of Socratic dialogue based on appellate opinions, the give-and-take of discussion of hypothetical problems or simula-
tion exercises, or the less-interactive lecture format, traditional courses all typically are characterized by their reliance on non-live or hypothetical clients. In contrast, the clinical experience is dominated by the existence of a live-client involved in an ongoing litigation or transactional experience that would likely be duplicated in the context of a public or private law practice if the client was not represented by law students enrolled in a clinical law program.

2. Modeling Ethical Appellate Advocacy

A discussion of the ethics component of a criminal appellate clinical curriculum should focus not only on accepted general principles for the conduct of appellate litigation, but also on the role of the advocate in the adversarial process and the broader questions of how the lawyer should represent the client ethically, aggressively, and effectively. Not only does the appellate lawyer owe primary duty to the client, but often there are secondary considerations that may bear on the conduct of an appeal, including the value of appellate litigation in promoting the rule of law and consistency in its application.\(^4\)

At the outset, the clinician should consider the potential sources of ethical commands that may bear on appellate practice and form an integral part of the instructional approach taken in an appellate clinic that includes representation in criminal appeals. Generally, the Model Rules of Professional Conduct incorporate recognized professional norms that gov-

\(^4\) For instance, the ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARD 21-1.2 PURPOSES OF THE CRIMINAL APPEAL, describe the functions of the direct criminal appeal as:

(a) The purposes of the first level of appeal in criminal cases are:
   (i) to protect defendants against prejudicial legal error in the proceedings leading to conviction and against verdicts unsupported by sufficient evidence;
   (ii) authoritatively to develop and refine the substantive and procedural doctrines of criminal law; and
   (iii) to foster and maintain uniform, consistent standards and practices in criminal process.

ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARD 21-1.2 (1980).
ern practice. But in the context of criminal cases, a second set of norms is also significant. The general considerations of effectiveness recognized as a component of the Sixth Amendment guarantee of assistance of counsel provide additional guidance, particularly in light of the Supreme Court's recognition of the ABA Standards for Criminal Justice as authoritative directives for the conduct of representation. Third, the problem of frivolous appeals must typically be addressed by

6 The three elements of the Model Rules most applicable to appellate practice are perhaps:
1). Rule 1.1, which directs: "A lawyer shall provide competent legal representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." MODEL RULES OF PROF'L CONDUCT R. 1.1 (2001). This rule requires counsel to represent the client ably and professionally in very general terms.
2). Rule 3.3, which directs counsel to disclose known controlling authority to the court and opposing counsel:

A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2001), and;
3). Rule 3.1, which authorizes appellate counsel to ask the appellate court to overturn or modify existing precedent when a good faith reason for doing so exists:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.


6 In Smith v. Robbins, 528 U.S. 259, 285-86 (2000), the Court recognized the application of the two-prong test for evaluating claims of ineffective assistance of counsel adopted in Strickland v. Washington, 466 U.S. 668 (1984), to challenges based on counsel's representation on direct appeal. The test requires a showing of both defective performance by counsel and the reasonable probability that but for counsel's error or errors the outcome of the proceeding would have been different. Robbins, 528 U.S. at 285-86.

7 Wiggins v. Smith, 539 U.S. 510, 524 (2003) ("Counsel's conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)-standards to which we long have referred as 'guides to determining what is reasonable.') (quoting Strickland, 466 U.S. at 688 and citing Williams v. Taylor, 529 U.S. 362, 396 (2000)).
the criminal lawyer and should be part of the discussion of ethical performance in the criminal appellate clinic. Finally, apart from the "rules" that govern representation in criminal appeals, the appellate lawyer routinely makes decisions that implicate professional values, but do not necessarily suggest ethical or unethical behavior. These include the determination of which issues should be raised in the appellate brief, the decision whether to challenge precedent that would otherwise require the appellate court to reject claims factually supported by the record, and the decision to raise unpreserved claims of error, and the decision to seek discretionary review.

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8 See Robbins, 528 U.S. at 278 n.10, affirming counsel's obligation under Anders v. California, 386 U.S. 738, 744 (1967), to review the record on appeal to determine existence of potential claims before certifying to the appellate court that in his opinion the appeal is frivolous. Under Anders, the Court had suggested that counsel also be required to identify potentially meritorious claims in his brief to the appellate court. Robbins, 528 U.S. at 268.


11 For instance, in United States v. Olano, 507 U.S. 725, 732-34 (1993), the Court affirmed the authority of a federal circuit court reviewing an unpreserved claim of error to grant relief from prejudice caused by the error pursuant to Federal Rules of Criminal Procedure 52(b). Mississippi appellate courts retain authority to review unpreserved claims. Tate v. State, 784 So. 2d 208, 214 (¶ 25) (Miss. 2001). ("[I]n order to prevent a miscarriage of justice, this Court retains the inherent power to notice error notwithstanding trial counsel's failure to preserve the error.") (citing Johnson v. Fargo, 604 So. 2d 306, 311 (Miss. 1992)); accord Johnson v. State, 452 So. 2d 850, 853 (Miss. 1984); cf. MISS. R. EVID. 103(d) (Mississippi Supreme Court may notice plain errors that affect substantial rights).

12 The ABA Standards for Criminal Justice recognize counsel's duty to continue to provide representation in the discretionary review process, whether in representing the litigant petitioning for review or in responding to a petition for discretionary review brought by the prosecution following a reversal of the client's case by the intermediate court. Standard 21-3.2 Counsel on Appeal, provides, in pertinent part:

(d) In a jurisdiction with an intermediate appellate court, counsel for a defendant-appellant or a defendant-appellee should continue to represent the client if the prosecution seeks review in the highest court, unless new counsel is substituted or unless the highest court permits counsel to withdraw. Similarly, in any jurisdiction, such appellate counsel
The extensive range of issues and sources for considering ethical and professional behavior may themselves form a substantial core of instructional materials for teaching even the conventional law school course in professional responsibility. But in a clinical setting, in which representation in ongoing litigation is the primary means of transmission of professional skills and values, the amount of time devoted to formal consideration of all potential issues in a traditional context would likely impinge on the ability to focus on representation and the need to provide effective representation to clinic clients. Consequently, the clinician's role is critical in terms of affording students a role model demonstrating an approach to representation and litigation that will provide them with a framework upon which to address new problems they will ultimately encounter after graduation. It is precisely

should continue to represent the client if the prosecution seeks review in the Supreme Court of the United States.

ABA Standards for Criminal Justice, Standard 21-3.2 (1980). But, in Ross v. Moffitt, 417 U.S. 600 (1974), the Supreme Court rejected the argument that indigent state court defendants were entitled to assistance of appointed or publicly compensated counsel in petitioning for Supreme Court review of federal constitutional claims decided adversely to the defendant by the state courts. The Court also held that counsel is not required to file discretionary appeals even when requested by the client if the issues raised are not meritorious and would potentially subject counsel to sanctions. Austin v. United States, 513 U.S. 5 (1994).

Professors Justine Dunlap and Peter A. Joy observe:

As is true with all good teaching, one must decide upon the overall goals for the classroom component and the goals for each class session before planning the substantive content of the classes. In some clinical programs, the classes are used to focus on lawyering skills, such as client interviewing, counseling, negotiation, pretrial, and trial skills. Other clinical programs focus upon the substantive law and procedure of the clinical course's particular subject matter, such as community development, consumer law, criminal defense, or family law. In these latter programs, the class sessions usually focus on aspects of the procedure and substantive law involved in representing clinic clients. Still other clinical programs use the classroom component for case conferencing or case rounds focusing on the students' cases and strategies they are considering.

because the full range of potential ethical problems that arise in practice cannot be discussed thoroughly during the traditional component of a clinical class or anticipated in representation in the clinical experience that the clinician as role model offers the greatest insight into ethical and professional behavior.¹⁴

Nevertheless, the clinician should present an organized, comprehensive approach to the doctrines touching on effectiveness in appellate representation, and the remainder of this article is devoted to one possibility in this respect. Other models will undoubtedly offer alternative benefits, still others may be better suited to the particular personal experience of the clinician or culture of the jurisdiction in which the clinic operates. But any organized approach requires a starting point and this article offers one.

B. The Clinician's Role in Ensuring Competent Representation

The clinician's success as a role model for clinical law students is dependent on a number of factors, some of which are similar to general characteristics that facilitate successful practice. For example, the clinical instructor blessed with charisma in the teaching setting may well be relying on a personal trait that also translates well into performance before a jury in trial. Some clinicians may be lacking in charisma, but offer a degree of interpersonal understanding and empathy that fosters a positive learning environment, particularly for students less than confident in the social skills assumed to be required for success in practice.

But in a concrete sense, the clinician must always be

¹⁴ “In the clinic, much of the important learning occurs in the course of lawyering, not in the confines of the classroom. While the classroom component is important in assisting clinical students to become effective and reflective practitioners, do not overstate its importance either to your students or yourself.” Id. at 77. Dunlap and Joy draw upon the work of DONALD SCHÖN, EDUCATING THE REFLECTIVE PRACTITIONER (1987), who advocates that the work of professionals must be taught within the experience of practice. Reflection-in-Action, supra note 13, at n.4.
grounded in the law and practice skills necessary for the clinical experience. For the clinician directing an appellate clinic, and particularly one specializing or emphasizing criminal appellate representation, the clinician’s behavior and practices must necessarily reflect the best model for practice. The need to ensure that the clinic’s representation reflects competence and professionalism dictates that the clinician address supervision of the student’s work on the appeal in an organized and diligent fashion, demanding that the student also approach the case in a similarly organized and diligent fashion. Otherwise, the representation may fail and the client’s legitimate expectations may be frustrated in the process. In order to maximize the prospects for successful representation, the clinician as role model should approach the clinic case relying on the same “best practices” that would be employed in private practice.

1. Reviewing the Record

Initially, the clinician must be familiar with the trial record, which serves as the record on appeal, in order to properly consult with the student and ensure that the student then properly advises the client. The advice to the client encompasses both the identification of issues that may be argued in the brief and assessment of the potential for success on appeal. Chief Justice Burger, writing for the majority in Jones v. Barnes, noted: “There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review.”\(^\text{15}\)

2. Identifying Potential Issues and Arguments

Once thoroughly familiar with the record of the proceedings in the court below, the clinical instructor and student attorney must evaluate potential issues that may be raised in the appellate brief and the likelihood of success in order to

\(^{15}\) 463 U.S. 745, 752 (1983).
properly advise the client. In *Jones v. Barnes*, the majority concluded that the ultimate decision concerning which issues should be argued in the appeal is committed to the discretion of counsel, rather than the appellant. Counsel’s decision not to pursue a particular issue desired by the client does not result in ineffective assistance.

At this point, counsel’s professional judgment must ultimately override a student’s objection that a point should not be raised or lacks support in the record. However, where the student argues in favor of inclusion of a point in the record against the clinician’s judgment, the issue should certainly be presented to the client, if close. Regardless of general pronouncements that appellate counsel should reduce the number of claims raised as a convenience to the appellate courts, adopt-

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16 ABA Standards for Criminal Justice, Standard 21-3.2(B)(i) provides, in pertinent part:

Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal. Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence, including any that might require initial presentation in a postconviction proceeding. Counsel should advise on the probable outcome of a challenge to the conviction or sentence.

*Id.*

17 *Jones*, 463 U.S. at 754. The *Jones* majority rejected the position advanced in the ABA Standards for Criminal Justice, Standard 21-3.2. Justice Brennan offered a strongly worded dissent, observing:

The Court subtly but unmistakably adopts a different conception of the defense lawyer’s role—he need do nothing beyond what the State, not his client, considers most important. In many ways, having a lawyer becomes one of the many indignities visited upon someone who has the ill fortune to run afoul of the criminal justice system. I cannot accept the notion that lawyers are one of the punishments a person receives merely for being accused of a crime. Clients, if they wish, are capable of making informed judgments about which issues to appeal, and when they exercise that prerogative their choices should be respected unless they would require lawyers to violate their consciences, the law, or their duties to the court.

*Id.* at 755, 764 (Brennan, J., dissenting).

18 In *Smith*, 528 U.S. at 278 n.10, the Court observed: “An indigent does, in all cases, have the right to have an attorney, zealous for the indigent’s interests, evaluate his case and attempt to discern nonfrivolous arguments.”
tion of this approach in the clinical setting may serve to undermine both the client's legitimate expectations for aggressive representation and the student's interest in litigating aggressively.

The clinician's expertise is particularly important in ensuring not only that potential issues be properly identified and evaluated, but that alternative theories supporting the argument be considered. This is particularly important in two respects. First, the argument should be framed to provide alternative grounds for relief predicated on both federal and state constitutional authority supporting theories for relief when appropriate. For example, Mississippi courts have consistently upheld the right of the criminal defendant to address the jury personally in closing argument, even when represented by counsel. This right is specifically grounded in the language of the state constitution which provides "[i]n all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both." A comparable express right is not found in the Fifth or Sixth Amendments to the United States Constitution and a state court appellant relying on the federal constitution as support for a claim based on

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19 See Commentary to ABA STANDARDS FOR CRIMINAL JUSTICE, STANDARD 21-3.2. COUNSEL ON APPEAL:

Counsel has the professional duty to give to the client fully and forcefully an opinion concerning the case and its probable outcome. Counsel's role, however, is to advise. The decision is made by the client. 'A defense lawyer in a criminal case has the duty to advise his client fully . . . as to the prospects of success on appeal, but it is for the client to decide . . . whether an appeal should be taken.'

20 Mississippi, for instance, recognizes reliance on state constitutional protections as an alternative basis for relief. See, e.g., Cannaday v. State, 455 So. 2d 713, 721-22 (Miss. 1984) (recognizing that Mississippi constitution includes same protections as the Fifth and Sixth Amendments for state court defendants demonstrating "an adequate and equal basis" for relief on state constitutional grounds); Orick v. State, 105 So. 465, 466 (Miss. 1925) (relying on United States Supreme Court reasoning in holding that Mississippi constitution afforded similar protections to state court defendants).

21 See, e.g., Armstead v. State, 716 So. 2d 576, 580 (Miss. 1998).

22 MISS. CONST. art. 3 § 26.
denial of the right would likely lose either in the state courts or on certiorari to the United States Supreme Court.\textsuperscript{23}

Second, the brief presented to state appellate courts should include federalized claims when possible to permit the client to present federal constitutional arguments to the United States Supreme Court by petition for writ of certiorari or through the federal habeas corpus process once the litigant has exhausted the state court process.\textsuperscript{24} Even though a specific federal constitutional provision may not be advanced by trial counsel as the basis for objection, appellate counsel should cite supporting federal constitutional grounds because an appellate court's ruling on the merits of the federal constitutional claim will preserve the claim for later review in the federal system.

For instance, in Cannaday v. State,\textsuperscript{25} the state supreme court noted that the precise constitutional claim had not been made by trial counsel in his repeated objections to improper argument alluding to the defendant's statement taken in violation of her Fifth and Sixth Amendment rights to remain silent and to assistance of counsel.\textsuperscript{26} Nevertheless, the court

\textsuperscript{23} The Supreme Court could exercise its certiorari jurisdiction to consider a state court's reliance of Federal Constitutional protections in ruling for the defendant in such a situation, eventually reversing the state court if it concluded that the Federal Constitution does not protect an accused's right to address the jury personally. See Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (Court exercises its right to review state court decisions purportedly relying on Federal Constitutional provisions to ensure uniform construction of federal law, presuming that state courts rely on Federal Constitution unless clearly articulating an adequate and independent ground for decision under state law).


\textsuperscript{25} 455 So. 2d 713 (Miss. 1984).

\textsuperscript{26} Cannaday, 455 So. 2d at 721-22. The court noted the State's argument that trial counsel had failed to preserve error:

The error assigned on appeal is that this statement was elicited from Ms. Cannaday in violation of her U.S. constitutional rights under the Fifth and Sixth Amendments. The state argues that the Fifth and Sixth Amendment right objection was not made at trial, and therefore, it is procedurally barred and not before this Court.

\textit{Id.} at 721.
concluded that the objections were sufficient to alert the trial court, observing: "[T]his Court is compelled to note that objection was repeatedly made by defense counsel although not based on the specific ground of the right to counsel." The court then proceeded to consider the claim on the merits of both federal and state constitutional guarantees, concluding:

Although counsel was not as articulate in his first objection of "prejudicial" or "inflammatory" as he might have been, the objection was made, and the repeated objections cannot be ignored where fundamental constitutional rights are involved. *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed. 246 (1964). The gravity of this statement is evidenced by the fact that on the motion for a new trial, Judge Griffin stated: "I think that part about the head is probably what brought the death sentence." In view of defense counsel's objection, we address this issue on its merits in this capital murder case.28

The *Cannaday* court then agreed with appellate counsel's theory of the violation, finding, however, that the error was harmless as to the defendant's conviction for capital murder, but also that the prejudice resulting from the inflammatory nature of her statement required reversal of the death sentence imposed.29

3. Developing a Theme to Support the Prejudice Argument

Students, due to their inexperience in litigation, may have difficulty in developing a theory of the case essential to demonstrating the requisite level of prejudice necessary to obtain a reversal on an erroneous ruling in the trial court. This is, in fact, a common problem for even experienced criminal practitioners when proceeding at trial against either overwhelming evidence or when relying on a defensive theory at trial to the exclusion of alternative explanations that could have been

27 Id.
28 Id.
29 Id. at 724.
advanced. On appeal, counsel must typically be able to demonstrate some degree of prejudice in order to obtain reversal on all claims other than structural error, for which prejudice is presumed. Even the most favorable standard of review for criminal defendants, the harmless error test of *Chapman v. California* requiring reversal for constitutional error unless the error is found to be harmless beyond a reasonable doubt, requires some showing of probable prejudice for constitutional trial errors. Non-constitutional error is typically governed by a standard requiring the appellant to demonstrate some degree of prejudice in order to secure reversal.

An example of the use of the trial record to demonstrate probable prejudice is presented in *Hickson v. State*. The defendant, charged with sexual battery, prospectively challenged admission of his prior conviction for a similar offense by motion in limine. The state supreme court granted certiorari to review the court of appeals' holding that the claimed error had not been preserved. The trial court had noted the probable admissibility of the prior conviction, stressing on the record that the prosecution might want to use it for purposes of impeachment. The supreme court concluded that the trial court had failed to conduct the necessary probative value/prejudice balancing test prior to ruling essentially that the prior convic-

30 386 U.S. 18 (1967).
31 *Chapman*, 386 U.S. at 24. See supra note 20 for a discussion of constitutional trial error based on the Supreme Court's decision in *Arizona v. Fulminante*, 499 U.S. 279 (1991), overruling *Payne v. Arkansas*, 356 U.S. 560 (1958), where the Court held that prejudice requiring reversal of the conviction would be presumed from the admission of a coerced confession against the accused at trial. In *Fulminante*, the Court held that claims of constitutional error committed during the course of trial that could be evaluated in terms of prejudice by looking at the entire trial record would be governed by *Chapman*, not requiring reversal if the error is harmless beyond a reasonable doubt in light of the whole record. *Fulminante*, 499 U.S. at 308-09.
33 697 So. 2d 391 (Miss. 1997).
34 *Hickson*, 697 So. 2d at 393.
35 Id.
36 Id. at 396.
tion would be admissible for impeachment.\textsuperscript{37} Hickson argued that the prospect of its admission chilled his exercise of his right to testify in his own defense.\textsuperscript{38}

The supreme court explained that the trial court's failure to conduct the proper test in determining admissibility of Hickson's prior conviction had, in fact, abused its discretion: "The judge's ruling that evidence of the prior conviction could be admitted had a chilling effect on Hickson's testifying, and he did not testify."\textsuperscript{39} The court then explained why the error required reversal, rejecting the intermediate court's claim that Hickson had failed to support his claim with an offer of proof. It concluded:

Hickson entered a plea of not guilty to the offense. He presented three alibi witnesses that he was in Memphis, Tennessee, at the time of the alleged acts. As counsel points out, common sense and logic tell you that Hickson's testimony would mirror that of his alibi witnesses.

Hickson's testimony was obviously critical to his defense, both as to his alibi defense and because he was the only witness that could address issues surrounding the purported fingerprint from a public video store introduced by the State. An on the record proffer would not have added one iota to the record already before the Court. Pet. for Cert. at 8-9.

Counsel would appear to be correct, and this factor distinguishes this case from \textit{Saucier} [562 So. 2d 1238 (Miss. 1990)]. Additionally, pursuant to the many cases cited above,

\textsuperscript{37} \textit{Id.} at 396-97.

\textsuperscript{38} \textit{Id.} at 397. Mississippi law requires the trial court's weighing of the probative value and potential prejudice in admission of evidence otherwise subject to exclusion appear on the record:

Procedurally, the balancing requirements of [Evidence Rule] 609(a)(1) require a court to make an on-the-record finding of admissibility. \textit{Johnson v. State}, 529 So. 2d 577, 587 (Miss. 1988); \textit{Peterson}, 518 So. 2d [632,] 638. Our case law requires the trial judge to make an on-the-record ruling on admissibility prior to admission of evidence from the witness of a prior conviction. \textit{McInnis}, 527 So. 2d [84,] 87 [Miss. 1988]; \textit{Peterson}, 518 So. 2d at 636.

\textit{Id.}

\textsuperscript{39} \textit{Id.}
because the judge did not make an on the record analysis of the Peterson factors, or any analysis at all concerning his denial of Hickson's motion in limine, this error requires that the case be reversed and remanded for a new trial.\textsuperscript{40}

The court's explanation demonstrates the thrust of the prejudice argument, that the trial court's ruling effectively deprived the appellant of the critical evidence that might have convinced the jury of his lack of culpability or raised a reasonable doubt.\textsuperscript{41} Because his was the only testimony that could not only support his alibi, but explain the fingerprint evidence, the trial court's abuse of discretion in preemptively indicating its position that his prior conviction would be admissible to impeach his trial testimony effectively deprived him of evidence critical to his defense.\textsuperscript{42}

In arguing the case for reversal, a showing of actual or probable prejudice may be required, but will always be valuable if it is grounded in common sense and logic and supported by the record evidence. The clinician's experience in developing a theory of the case that supports a claim of prejudice attributable to trial court error will prove essential in many instances. The clinical student learns this part of the appellate craft by having to address prejudice in analyzing the claims urged in the appellate brief and developing the argument supporting the claims.

4. Reviewing the Applicable Law

The clinical instructor or supervising attorney plays an additional role of extreme importance in ensuring effective representation for clinic clients. While clinic students may be adept at legal research and finding the applicable law governing the outcome of a case, the experience of the clinician may be particularly important when the law is unsettled, even though it may appear that the legal issue has been resolved.

\textsuperscript{40} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
An example arises in the context of the proper application of the ex post facto prohibition enumerated in the Constitution. The constitutional prohibition is designed to prevent unfair retroactive application of law in criminal cases. In Calder v. Bull, the Court recognized four categories of ex post facto violations, including, briefly: new laws criminalizing conduct not criminal at the time of its commission; changes in law that retroactively increase punishment over that available on the date of the offense; changes in law denying the defendant a defense available on the date of the offense; and changes in law reducing the prosecution's burden of proof from that required to prove the offense on the date of its commission.

However, in the 1925 case of Beazell v. Ohio, the Court's opinion did not include any reference to the fourth category of ex post facto violation. The three remaining categories were subsequently identified as constituting the parameters of the protection in Collins v. Youngblood. In neither case was the fourth category expressly overruled. Nevertheless, any practitioner or clinical student lawyer might have concluded that Collins was controlling with respect to the parameters of the

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43 U.S. CONST. art. I, § 10, cl. 1. Of course, the experienced clinician will also be aware of the possibility that comparable state constitutional provisions may also be available to afford relief. See, e.g., Hill v. State, 659 So. 2d 547, 551 (Miss. 1994) (deciding case based on Mississippi constitutional ex post facto prohibition in Art. III, § 16 of state constitution).

44 3 U.S. (3 Dall.) 386, 390 (1798).
45 Calder, 3 U.S. (3 Call.) at 390-91.
47 497 U.S. 37, 52 (1990). The Collins majority discussed the fourth category in addressing the holding in Calder v. Bull, id. at 42, but omitted it from its conclusion:

The Texas statute allowing reformation of improper verdicts does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed. Its application to respondent therefore is not prohibited by the Ex Post Facto Clause of Article I, Section 10.

Id. at 52.
Some state rules relating to the quality of evidence necessary for conviction suggest the significance of the fourth category. For instance, in many jurisdictions, the testimony of an accomplice is not sufficient for conviction unless corroborated by independent evidence linking the accused to commission of the crime. A second rule of evidentiary sufficiency applicable in Mississippi prosecutions involves the degree of proof required to sustain a conviction based entirely on circumstantial evidence. In such cases, a minority of jurisdictions require the State to offer evidence sufficient to not only establish all elements of the offense beyond a reasonable doubt, but also establish guilt "to the exclusion of every reasonable hypothesis other than that of guilt." In Stringfellow v. State, the Mississippi Supreme Court noted that this rule had been discarded in other jurisdictions, while rejecting the State's appeal that the court similarly abandon its application in Mississippi prosecutions.

The ex post facto question is presented when a jurisdiction does abandon a rule of evidentiary sufficiency, applying a more lenient rule retroactively to cases pending prior to the change in law. This was precisely the issue before the United States

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49 E.g., ARK. CODE ANN. § 16-89-111(e)(1)(A) (2005) (requiring corroboration of accomplice testimony to support conviction for felony or juvenile offense; corroboration must tend to connect defendant to offense and not simply show that the offense was committed or the circumstances under which it was committed); TEX. CRIM. PROC. CODE ANN. art. 38.14 (Vernon 2000) (requiring accomplice testimony corroboration). Under Mississippi law, the testimony of an accomplice is viewed with suspicion, but may be adequate to support conviction even if uncorroborated unless it is unreasonable, improbable, self-contradictory, of impeached. Jones v. State, 368 So. 2d 1265, 1267 (Miss. 1979). However, a cautionary instruction regarding the reliability of accomplice testimony is required if the prosecution relies on uncorroborated accomplice testimony inculpating the defendant. Strahan v. State, 729 So. 2d 800, 805 (Miss. 1998); accord Mangum v. State, 762 So. 2d 337, 342 (Miss. 2000) (affirming conviction where jury instructed on reliability of accomplice testimony by viewing testimony "with great suspicion and distrust" because on slight corroboration required to sustain conviction).
50 Stringfellow v. State, 595 So. 2d 1320, 1322 (Miss. 1992).
51 Id.
Supreme Court in *Murphy v. Kentucky*, in which the defendants were convicted on uncorroborated accomplice testimony although at the time of the offense state law required corroboration of this type of evidence in order to sustain conviction. In dissenting from the denial of certiorari on the claimed ex post facto violation, Justice White noted a split in jurisdictions previously reaching this issue in arguing, consistent with his traditional view, that the Court should resolve the split.

The unresolved question presented for practitioners in light of *Collins* is whether a change in state law relating to abolition of accomplice corroboration or heightened scrutiny of circumstantial evidence implicates ex post facto prohibitions. It is not unlikely that many lawyers would have concluded that relief would not be forthcoming on such claims following *Collins*. But a thoughtful criminal appellate lawyer, the type of lawyer ideally supervising criminal appellate clinical students, would have been sufficiently familiar with *Calder, Beazell* and *Collins* to realize that the Court had never formally rejected the fourth category of ex post facto protections.

In fact, in the Court's 2000 decision in *Carmell v. Texas*, the fourth category was explicitly discussed by both the majority and dissent in the review of a change in Texas statuto-

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53 *Murphy*, 465 U.S. at 1072-73.
54 Justice White observed in concluding his opinion respecting the denial of certiorari:

> Because of the evident confusion among lower courts concerning the application of the *Ex Post Facto* Clause to changes in rules of evidence and procedure-and because some 15 other states have accomplice-corroboration requirements that they may choose to abolish, see App. to Pet. for Cert. in No. 83-5352, p. 15—we disregard our duty when certiorari is denied. Respectfully, I dissent.

56 *Carmell*, 529 U.S. at 521-34.
57 *Id.* at 553 (Ginsburg, J., dissenting). Justice Ginsburg's dissent characterized the change in law as one involving only a matter of evidentiary admissibility
ry law permitting conviction for a sexual assault offense without the former requirement of "outcry" on the part of the complainant. The majority held that the legislative abolition of the outcry requirement constituted an ex post facto application of law where the defendant was tried for an offense allegedly committed before the date of the legislative change in the law, but after the effective date of repeal of the outcry provision. Because there was no "outcry" corroboration of the complainant's testimony, Carmell successfully argued that his conviction rested on insufficient evidence.

Finally, one other consideration would be particularly significant in determining whether a departure from traditional rules of evidentiary sufficiency violates the protection afforded by the Ex Post Facto Clause. That is, whether any change in the law is the result of legislative, rather than judicial action. In Rogers v. Tennessee, a 5-4 majority of the Court held that judicial abrogation of the common law "year and a day rule" prohibiting a homicide prosecution where death did not occur within a year and a day following the commission of the act causing death did not implicate ex post facto principles because the Clause itself is restricted to legislative action. The majority further rejected the argument that retroactive application of the state court's ruling violated due process under the Fourteenth Amendment. Instead, the majority distinguished legislative action from judicial retroactivity in reaching its conclusion that the constitutional limitations on the former do not necessarily apply to the latter.

that traditionally had been held not to implicate ex post facto protections in Hopt v. Utah, 110 U.S. 574, 589-90 (1884) and Thompson v. Missouri, 171 U.S. 380, 380-82, 386-88 (1898). Id. at 570-71.

Rogers, 532 U.S. at 453.
Id. at 455. The majority noted that although the petition presented his claims in terms of a Fourteenth Amendment due process violation, he predicated much of his argument on the protections afforded by the ex post facto prohibition. Id.

"We have observed, however, that limitations on ex post facto judicial decisionmaking are inherent in the notion of due process." Id. at 456.
Id. at 460-62. Justice Scalia, in dissent, disputed the majority's conclusion
Thus, not only would a change in either the accomplice witness or circumstantial evidence rules raise the question of constitutional retroactive application again revisiting the close decisions in Carmell and Collins, but also the distinction splitting the Court in Rogers. Evaluation of a retroactivity claim implicating these difficult issues requires that the clinician have not only a broad understanding of criminal law in order to advise students within the clinical setting, but also sufficient depth to articulate proper application of precedent in evaluating likely success of issues that might be urged on appeal. With regard to the example of changes in standards of proof, the narrow majorities in controlling United States Supreme Court decisions indicate the potential significance of these issues not only in the direct appeal from conviction, but for further review in state courts of last resort or in the Supreme Court.

5. Reserving Rebuttal Argument to Cure Defects

Oral argument remains a significant step in the appellate process in many appeals. Of particular concern to counsel is

on this point. Id. at 467, 469 (Scalia, J., dissenting, joined by Justices, Stevens and Thomas and by Breyer in part). Justice Stevens filed a separate dissent, as well. Id. at 467 (Stevens, J., dissenting).

Oral argument is no longer considered a matter of right in many jurisdictions. For example, the Mississippi rule governing oral argument provides, in pertinent part:

(a) When Allowed. Oral argument will be had in all death penalty cases. In all other cases, oral argument will be allowed unless the court, or the panel to which the case is assigned, unanimously agrees that:
(1) the appeal is frivolous; or
(2) the dispositive issue or set of issues has been recently authoritatively decided; or
(3) the facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument.


The rules also require that parties specifically request oral argument or notify the court of their intention to waive argument. Miss. R. App. P. 34(b). The rule requires the party requesting oral argument to explain in their brief (Appellee's principal brief or Appellant's reply brief) or by separate letter why oral argument will “be helpful to the court.” Id. The court also retains discretion to order oral argument even if not requested by either of the parties. Id.
that oral argument is often most important because questioning from the bench may lead to admissions that will result in the appeal being lost, rather than the reverse—that the oral argument will provide an opportunity to win the appeal. For instance, the Supreme Court expressly noted in *Dretke v. Haley.*

Petitioner here conceded at oral argument that respondent has a viable and "significant" ineffective assistance of counsel claim. Tr. of Oral Arg. 18 ("[W]e agree at this point there is a very significant argument of ineffective assistance of counsel"); see also id., at 7 (agreeing "not [to] raise any procedural impediment" to consideration of the merits of respondent's ineffective assistance claim on remand).

Here, counsel's admission was deemed sufficiently significant to be noted in the Court's opinion. In the context of clinical representation, the concern is that the student attorney is unlikely to be prepared to respond to a question from the bench that might evoke a dispositive concession or an admission warranted neither by the factual record or controlling caselaw.

Experienced attorneys may use oral argument to clarify the client's position on appeal or resolve a troubling dispute over the contents of the record. Oral argument affords the only opportunity in the typical appeal to address the appellate court in circumstances permitting counsel to determine whether a particular point is understood by the judges themselves.

The clinician should consider reserving the option of addressing the court during oral argument to provide backup to the far less experienced student advocate. This may involve reserving rebuttal or requesting that the panel permit counsel to split the argument. For clinicians, splitting oral argu-

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66 *Dretke*, 541 U.S. at 394 (alteration in original).
67 Of course, clinical representation in the direct appeal process almost necessarily dictates that the caseload will primarily include appeals in which the clinic represents appellants, with the occasional prosecution appeal a possibility. Therefore the clinic will likely have the opportunity to open the argument and close with rebuttal. See, e.g., MISS. R. APP. P. 34(e).
ment—when permitted by the court—provides an opportunity to ensure that the inexperience of the student will not result in the case being compromised. The clinic may well lose the case, but active participation of the clinician during oral argument may prevent a loss that results from an unfortunate answer offered in response to an unanticipated question from the bench or the student's confusion over a critical point of law.

C. Dangers Inherent in Accepting Failure as a Legitimate Education Tool

The role of a lawyer involved in clinical legal education is often complicated by the competing interests of the educational process and the goal of providing effective representation for the clinic's clients. The education of the clinical law student may be furthered in some situations by permitting the student to complete the representation of the client without intervention by the clinic director or supervising attorney, even when the student's lack of knowledge, experience, or expertise may result in failure. In maintaining a "hands-off" policy, the

68 See Reflection-in-Action, supra note 13, at 67. In their study of clinical teaching methods based on a survey of younger clinical faculty, Justine A. Dunlap and Peter A. Joy discuss the demands of clinical teaching that often prove most difficult for lawyers engaged in clinical education. They note:

[N]ew clinicians should realize that teaching students in a clinic is different from supervising other lawyers or even law students in a legal practice. The experience of supervision in practice settings and the skills involved in such supervision may be helpful to understanding clinical pedagogy, but clinical teaching requires an emphasis on helping students develop their ability to learn from experience. Rather than telling a clinic student what to do, clinical methodology calls for asking the student what he or she thinks needs to be done and why.

Next, the clinician discusses the student's plan for accomplishing the work, reviews and critiques the student's work when it is complete, and then discusses what the student believes to be the next steps. Many new clinicians were surprised by the demands of clinical teaching and the fact that the experience of supervising law clerks or other lawyers does not transfer wholesale to clinical teaching.

Id. They also note the particular response of one clinician surveyed who had practiced before undertaking clinical teaching: "This is nothing like handling your own cases and having student interns." Id. at 67 n.60.

69 See id. at 89 n.148. A number of experienced clinical teachers have pre-
clinician makes a calculated decision that the adverse consequences can be so pedagogically valuable in exposing students to the reality of failure as an experience that must be addressed in real-world practice that compromising the client’s interests are justified.\footnote{This approach seems particularly naive in the context of appellate representation for a number of important reasons. Perhaps most significant is the fact that accepting avoidable failure may influence the student’s perception of the clinician as mentor and role model, leading to acceptance of failure in litigation as an acceptable norm. Of course, virtually all trial and appellate lawyers suffer failure as a consequence of taking cases; undoubtedly, few enter into representation without some consideration of the potential consequences of failure. In fact, the failure option is often the most important consideration for previously discussed the role of ethical conduct in clinical representation. See generally Alexis Anderson, Arlene Kanter & Cindy Slane, Ethics in Externships: Confidentiality, Conflicts, and Competence Issues in the Field and in the Classroom, 10 CLINICAL L. REV. 473 (2004); Naomi R. Cahn, Critical Theories and Legal Ethics: Inconsistent Stories, 81 GEO. L.J. 2475 (1993); George Critchlow, Professional Responsibility, Student Practice, and the Clinical Teacher’s Duty to Intervene, 26 GONZ. L. REV. 415 (1991); Peter A. Joy, The Ethics of Law School Clinic Students as Student Lawyers, 45 S. TEX. L. REV. 815 (2004); Peter A. Joy, The Law School Clinic as a Model Ethical Law Office, 30 WM. MITCHELL L. REV. 35 (2003); Peter A. Joy & Robert E. Kuehn, Conflict of Interest and Competency Issues in Law Clinic Practice, 9 CLINICAL L. REV. 493 (2002); James E. Moliterno, In-House Live-Client Clinical Programs: Some Ethical Issues, 67 FORDHAM L. REV. 2377 (1999).} \footnote{See Reflection-in-Action, supra note 13, at 62. Respondents in the Dunlap/Joy survey noted that the seventh most difficult aspect of clinical teaching is “[k]nowing how much or when to intervene.” Id. Perhaps somewhat telling, earlier data from 2001 indicated that clinical teachers considered the ninth most difficult aspect of clinical teaching being “[a]staying out of the way.” Id. at 63.} \footnote{See Moliterno, supra note 69, at 2387-89. Professor Moliterno argues that acceptance of failure sends the message that the interests of the lawyer, reflected in the clinician’s interest in the educational goals of the clinic rather than in the success of representation, can be deemed more valuable than the client’s interests. Id.}
lawyer and client in discussing alternative courses of action. In some instances, counsel and client will proceed in an action virtually certain that the outcome will be unsuccessful, but the process of raising and litigating an issue or defense is important enough for a day in court.

For clinical law education purposes, discussion of potential outcomes and possible failures should be included in the discussions concerning alternatives available to the client. But this is far different from accepting failure as a consequence of trial error—including student lawyer error—that can be avoided by intervention by a seasoned supervising attorney. In fact, clinicians should consider the criminal defendant's constitutional right to effective assistance on appeal as the paramount concern for clinical representation. The right of effective counsel cannot be ethically compromised for educational purposes, regardless of the otherwise appealing logic that learning is often advanced by the experience of failure.

III. CONCLUSION

The criminal appellate litigation clinic offers the law school and law students a unique educational opportunity. The institution is able to afford criminal appellate clinic students an unparalleled instructional experience in the way actual cases are litigated. The learning experience is not exclusively confined to the processes by which counsel actually pursues the appeal on behalf of the client—reviewing the record, formulating a theme or combination of themes for the brief, researching the law, drafting the legal argument—but also includes an intensive review of the criminal trial process. For students, the appellate litigation clinic is an exercise in which substantive concepts, procedural rules, trial tactics, and evidentiary considerations are integrated in a single case. The clinical student,

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74 Id.
like the practitioner, deals with law in the context of the litigation process, rather than in the abstract discussion that often characterizes traditional classroom instruction.

For the institution, the criminal appellate clinic also serves additional important purposes. The institution, through the clinic, becomes actively involved in the organic process of development of the law through litigation in the jurisdiction's appellate courts. Through the clinician and student representation, the institution also makes valuable contributions to professional and public service in providing representation to clients, whose cases require skilled representation, and to the broader interests of improving the quality of appellate practice in the jurisdiction.