Denver Law Review

Volume 80 | Issue 1 Article 6

January 2002

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ETHICAL AND AGGRESSIVE APPELLATE ADVOCACY: THE "ETHICAL" ISSUE OF ISSUE SELECTION

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INTRODUCTION

Briefs should be brief.[1]

The persistent,[2] and perhaps overstated, message of judges,[3] clerks, experienced appellate lawyers,[4] and law professors is that the secret to effectiveness on appeal is producing a tightly-drafted, narrowly-focused appellate brief that will not distract the reader with extraneous matters and multiple issues not meriting relief.[5] As former United States Supreme Court Justice Robert Jackson candidly admitted:

> The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines

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1. *See* People v. Galimanis, 728 P.2d 761, 762 (Colo. Ct. App. 1986). The court observed: "A cardinal rule governing an attorney in the preparation of an appellate brief is that the document be as named—brief!" *Galimanis*, 728 P.2d at 762.

2. The Ninth Circuit has cautioned: "Leave to file a fat brief 'will be granted only upon a showing of diligence and substantial need.'" United States v. Molina-Tarazon, 285 F.3d 807, 808 (9th Cir. 2002) (citing 9TH CIR. R. 32-2).

3. "Appellate judges repeatedly complain, with justification, that many briefs they must read are prolix or incoherent." STANDARDS RELATING TO APPELLATE COURTS § 3.31, cmt. (1977). *Webster's* defines "prolix" as "wordy or long-winded." WEBSTER'S NEW INTERNATIONAL DICTIONARY 1814 (3d ed. 1986). In *Molina-Tarazon*, the Ninth Circuit observed:

> The United States seeks leave to file a Petition for Rehearing and Rehearing en Banc that is 19 pages and 5505 words long . . . . The government's proposed petition raises a single issue, based on a straightforward and compact factual record; the applicable caselaw involves a manageable handful of cases. The opinion the United States wants us to reconsider is itself only about 3500 words, and in that space deals with two issues.

Molina-Tarazon, 285 F.3d at 808.

4. John W. Davis, *The Argument of An Appeal*, 26 A.B.A.J. 895, 897 (1940), *reprinted in* 3 J. APP. PRAC. & PROCESS 745, 747 (2001) ("I shall assume that these briefs are models of brevity . . . .").

5. The *Galimanis* court discussed the number of issues presented in the opening brief and noted the observations of J.M. PURVER & L.E. TAYLOR, HANDLING CRIMINAL APPEALS § 91, at 142 (1980): "One of the primary difficulties experienced by appellate counsel is the hesitance to limit the number of issues presented . . . . Effective advocacy requires the recognition that if there are one or two strong arguments for reversal, these should be presented forcefully and others of less merit eliminated." *Galimanis*, 728 P.2d at 763.

> as the number of assigned errors increases. Multiplicity hints at lack of confidence in any one. . . . [E]xperience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.[6]

As the United States Supreme Court recognized in *Jones v. Barnes*,[7] there is no aspect of appellate representation so reflective of the exercise of discretion by counsel as the determination of which issues should be raised and argued in the appellate brief.[8]

> 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. This has assumed a greater importance in an era when oral argument is strictly limited in most courts—often to as little as 15 minutes—and when page limits on briefs are widely imposed.[9]

The Court proceeded to reinforce the desirability of limiting the number of issues argued on appeal, citing leading authorities for the general proposition that mixing weak issues with stronger ones will dilute the overall strength of the appellant's position.[10] The majority emphasized the professional duty of counsel to present the most effective appellate argument, rejecting the Second Circuit's conclusion that the Sixth Amendment guarantee of effective assistance required counsel to argue all non-frivolous claims on the direct appeal, as his indigent criminal defendant client had directed.[11] In so holding, the majority effectively concluded that the conduct of the appeal itself was a matter for counsel's judgment, rather than the client's.[12]

This approach was implicitly reaffirmed in *Martinez v. California*,[13] wherein the Court held that a criminal appellant does not have a right to

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6. Robert Jackson, *Advocacy Before the United States Supreme Court*, 25 TEMPLE L.Q. 115, 119 (1951).

7. 463 U.S. 745 (1983).

8. *See Jones*, 463 U.S. at 752-53.

9. *Id.*

10. *See id.* at 753 (citing Davis, *supra* note 4, at 897, *reprinted in* 3 J. APP. PRAC. & PROCESS 745, 747 (2001); John Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 SW. L.J. 801, 809 (1976) ("[C]ounsel must select with dispassionate and detached mind the issues that common sense and experience tell him are likely to be dispositive. He must reject other issues or give them short treatment.")); *see also* R. STERN, APPELLATE PRACTICE IN THE UNITED STATES 266 (1981) ("The effect of adding weak arguments will be to dilute the force of the stronger ones.").

11. Barnes v. Jones, 665 F.2d 427, 433 (2d Cir. 1981), *rev'd*, 463 U.S. 745 (1983).

12. In *Smith v. Murray*, 477 U.S. 527 (1986), the Court reemphasized this approach to narrowing the issues to be argued on appeal, noting that the "'process of winnowing out weaker arguments on appeal and focusing on' those more likely to prevail, far from being evidence of incompetence," reflects competent appellate advocacy. *Smith*, 477 U.S. at 536.

13. 528 U.S. 152 (2000). The Court previously held that a criminal defendant had a right to self-representation at trial in *Faretta v. California*, 422 U.S. 806, 807 (1975).

self-representation on appeal,[14] effectively vesting all matters of strategy in the conduct of the appeal in counsel. Furthermore, when a defendant *is* accorded the option of self-representation on appeal, he relinquishes the right to complain of ineffective assistance in the appeal, even if counsel acts in an advisory capacity. The Colorado Court of Appeals addressed this precise situation in *People v. Downey*.[15] In *Downey*, the defendant was appointed a public defender on appeal, but instead chose to proceed *pro se* upon motion to the court.[16] On his *pro se* appeal, the defendant paid a $3,000 retainer to a private attorney to draft the opening brief, but the client himself filed the brief *pro se*.[17] The defendant's election to proceed with hybrid representation was apparently motivated by negative prior dealings with attorneys and his desire to determine what issues would be included in the appeal.[18] After the convictions were affirmed on appeal, the defendant subsequently filed a motion for post-conviction relief, alleging ineffective assistance of appellate counsel.[19] The court found that "although defendant did delegate responsibility for the actual drafting of the briefs, the record supports the trial court's conclusion that defendant did not relinquish his right to self-representation."[20] Thus, the defendant was denied the ability to assert a claim of ineffective assistance of appellate counsel on collateral attack.[21]

It is clear that the concepts of ethical and effective representation are not synonymous. Yet, it is equally clear that both involve questions of professionalism in the conduct of the appeal that merit reflection. There are undoubtedly some instances in which the refusal of counsel to comply with a client's directive regarding issue selection and presentation will raise ethical concerns, particularly if counsel deliberately misrepresents her willingness to proceed in accord with the client's wishes. This conduct arguably could result in the imposition of sanctions. However, most discussion of ethical representation on appeal focuses on avoiding frivolous appeals, properly representing the facts and controlling law,[22] and disclosing adverse authority to the court.[23] Issue determi-

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14. *Martinez*, 528 U.S. at 163.

15. 994 P.2d 452 (Colo. Ct. App. 2000).

16. *Downey*, 994 P.2d at 453.

17. *Id.* at 454. Although it is not uncommon for lawyers to "ghostwrite" briefs and petitions for criminal clients, the procedure in *Downey* might raise an interesting ethical question if the *pro se* filing could be taken to suggest some fraud upon the court, particularly when the non-disclosure of the attorney's involvement is essentially a term of the representation agreement with the client.

18. *Id.* at 454-55.

19. *Id.* at 453.

20. *Id.* at 455.

21. *Id.*

22. For a devastating critique of inadequate briefing that included misrepresentations and allegations of misrepresentations by both sides, see *Laitram Corp. v. Cambridge Wire Cloth Co.*, 905 F.2d 386 (Fed. Cir. 1990).

nation may impact each of these concerns, but it involves a broader question of counsel's exercise of discretion that is not so easily pegged to ethical norms expressed in the Rules of Professional Responsibility.

The conventional wisdom of the experts demands that counsel not only write sparingly,[24] but also that counsel not overburden the appellate court with multiple questions to consider.[25] Today, appellate practitioners face a regime of enforced brevity that focuses on word count[26] and font,[27] irrespective of any assessment of the merits, even though appellate courts retain the option of permitting expansion upon their word, line, and page limits.[28]

Given the preference for shorter, tighter briefs, appellate lawyers today must develop strategies in order to address the pressures—from both courts and colleagues alike—for brevity, while at the same time recognizing the increasingly complex bodies of case law,[29] statutes, and ad-

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23. ABA MODEL R. PROF. CONDUCT 3.3(a)(3)(2001). The rule states: "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." *Id.*

24. *See, e.g.*, Miriam Kass, *The Ba Theory of Persuasive Writing*, LITIG., Winter 1986, at 47, 47 *reprinted in* APPELLATE PRACTICE MANUAL 179, 179-80 (Priscilla Anne Schwab ed., 1992).

> Think of the reader's mind as a small container. Do not fill it with dead words, bloated sentences, or other garbage that makes reading feel like eating boney fish or fat meat. Garbage hogs the space and wastes the mind's energies cleaning house. Adopt the marketing strategy of Mark Twain: "I never write 'metropolis' for seven cents when I can get the same price for 'city.'"

Id. at 47, *reprinted in* APPELLATE PRACTICE MANUAL 179, 179-80 (Priscilla Anne Schwab ed., 1992).

25. Former Louisiana Supreme Court Justice Albert Tate observed:

> The questions should be few in number. Rare is that appeal with many reversible errors; when a great number of questions are presented as serious issues, the judge's expectation that most or all of them are insubstantial is rarely disappointed. It has sometimes seemed to me that a large number of insubstantial issues raised might have been abandoned, and the argument section more tightly concentrated on the arguable issues, if counsel had attempted to articulate concisely the precise questions for the court to decide *before* writing the brief.

Albert Tate, *The Art of Brief Writing: What a Judge Wants to Read, in* APPELLATE PRACTICE MANUAL 197, 201 (Priscilla Anne Schwab ed., 1992)(emphasis in original).

26. For example, Rule 32(a)(7) of the Federal Rules of Appellate Procedure provides that a "principal brief is acceptable if . . . it contains no more than 14,000 words; or . . . it uses a monospaced face and contains no more than 1,300 lines of text . . . ." To see how enforcement of the brief length rules may actually impact on counsel in the individual case, see Clifford S. Zimmerman, *A (Microsoft) Word to the Wise—Beware of Footnotes and Gray Areas: The Seventh Circuit Continues to Count Words*, 2 J. APP. PRAC. & PROCESS 205, 206-10 (2000).

27. *See, e.g.*, FED. R. APP. P. 32(a)(5) (providing that a proportionally spaced typeface used in a brief must include serifs and must appear in 14-point or larger size, while a monospaced typeface may not contain more than 10½ characters per inch); FED. R. APP. P. 32(a)(6) (requiring use of a "plain, roman style" typeface, while noting that italics or boldface may be used for emphasis).

28. *E.g., Galimanis*, 728 P.2d at 762-63 (granting leave to file 80 page opening brief in complex case, exceeding usual 30 page limit imposed by Rule 28(g) of the Colorado Appellate Rules).

29. The classic example of the pressure created by the complexity of developed law and issues arising in the course of complex trials may be illustrated by reference to capital litigation. In a

ministrative rules that may impact appeal worthy issues in any single case. Sacrificing analysis for the sake of brevity or simplicity is simply not the option that it might have been half a century ago; in making the sacrifice, counsel runs the risk of failing to thoroughly argue the case on appeal. Nevertheless, counsel can ill afford to ignore the reiterations from the appellate bench and wisdom of experienced advocates by routinely straining the limits of a court's patience with overly long, overly complex briefs. Perhaps more than anything else, this realization suggests the need to carefully consider which issues to brief and which to orally argue.

I. THREE THOUGHTS ON THE CONVENTIONAL WISDOM ON ISSUE SELECTION

At the outset, the one clear ethical command driving the decision-making process should be that appellate counsel competently represent her client. This is, after all, the basic command of the Rules of Professional Responsibility: "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."[30] Therefore, the conventional wisdom dictates careful selection of potential issues and refinement of the brief to include only those issues most likely to be meritorious.[31]

But the conventional wisdom is fraught with problems.[32] First, the narrowing of issues may convenience the court, but it is unlikely to comfort the client, particularly the criminal defendant whose loss of liberty may be difficult to accept. Second, the narrowing of issues theory presupposes that counsel can always accurately assess precisely which is-

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notorious capital case, the Colorado Supreme Court was critical of appellate counsel's conduct in the litigation, which included the filing of a 138 page "so-called partial brief" and counsel's representation that it was not possible to file a complete brief within the time limits imposed by the court. People v. Rodriguez, 794 P.2d 965, 971 (Colo. 1990). The court noted that counsel had been afforded four extensions of time for filing the opening brief, resulting in a two year delay from the docketing of the case. *Id.* Nevertheless, despite this criticism, the court recognized that the defense had raised a number of constitutional claims requiring it to address issues preserved for appeal "at some length." *Id.*

30. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2001).

31. "A brief that raises every colorable issue runs the risk of burying good arguments—those that, in the words of the great advocate John W. Davis, 'go for the jugular.'" *Jones*, 463 U.S. at 753 (citing Davis, *supra* note 4, at 897, *reprinted in* 3 J. APP. PRAC. & PROCESS 745, 747 (2001)).

32. Some problems are inherent in the context of the appeal itself. For example, the conventional wisdom is directly challenged in the context of capital appeals by the recommendation that appellate counsel raise "all arguably meritorious issues, including challenges to any overly restrictive appellate rules." AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES § 11.9.2D (1989). This same approach is reflected in the Supreme Court's admonition in *Zant v. Stephens*, 462 U.S. 862 (1983): "Thus, although not every imperfection in the deliberative process is sufficient, even in a capital case, to set aside a state court judgment, the severity of the sentence mandates careful scrutiny in the review of *every colorable claim of error.*" *Zant*, 462 U.S. at 885 (emphasis added).

sues will not prove successful on appeal. And third, the narrowing of issues often distorts, rather than illuminates, the nature of the trial on which the claims of error are predicated.

A. Advocate or officer of the court?

The temptation for appellate counsel to be overly concerned with the expectation of the appellate court in terms of brief length is understandable as courts have threatened and sanctioned appellate lawyers in recent years for filing frivolous appeals.[33] The Supreme Court has addressed the proper approach to disposition of frivolous appeals and, of necessity, frivolous issues, in criminal appeals, recognizing the conflict inherent in counsel's duties, as both an officer of the court and as the client's advocate, when the case presents no meritorious issues.[34] However, the problem posed by the issue selection convention supported by the *Jones v. Barnes* majority and other commentators does not arise in the context of frivolous appeals. Instead, the question presented in *Jones* addressed counsel's strategic decision to forego argument on potentially meritorious claims, but only in the context of criminal appeals.[35]

The Sixth Amendment posture in which *Jones v. Barnes* was issued does not address counsel's ethical or professional obligations with regard to issue selection in civil appeals. Nevertheless, if the conventional wisdom that appellant's counsel should limit the number of issues raised and argued on the direct appeal is sound, it should apply with equal or perhaps greater force to civil appeals.[36] Although similar tactical considera-

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33. For an excellent treatment of one court's practices in this regard, see Brent E. Newton, *When Reasonable Jurists Could Disagree: The Fifth Circuit's Misapplication of the Frivolousness Standard*, 3 J. APP. PRAC. & PROCESS 157 (2001). Sanctions may be authorized where a lawyer is found to have filed frivolous appeals, such as attempting to appeal non-appealable interlocutory orders. *See* People v. Smith, 937 P.2d 724, 725-26 (Colo. 1997) (imposing sanctions for previous frivolous filings in the interlocutory orders).

34. The Court has addressed this problem in a series of cases from *Anders v. California*, 386 U.S. 738 (1967), through, most recently, *Smith v. Robbins*, 528 U.S. 259 (2000). For a thorough discussion of the Court's original and current views on the proper disposition of frivolous appeal filings, see James E. Duggan & Andrew W. Moeller, *Make Way for the ABA:* Smith v. Robbins *Clears a Path for* Anders *Alternatives*, 3 J. APP. PRAC. & PROCESS 65 (2001).

35. State courts may apply *Jones* to reject claims based on appellate counsel's failure or refusal to raise colorable claims on behalf of the appellant in a criminal appeal. *See, e.g.*, Howard v. State, 727 S.W.2d 830, 835 (Ark. 1987) (denying post-conviction relief on claim that appellate counsel raised regarding insufficient evidence on appeal; holding that ineffectiveness allegation would presumably require showing that counsel failed to raise some possibly meritorious issue). "An attorney need not advance every argument, regardless of merit, urged by his client." *Id.* (citing *Jones*, 463 U.S. at 754.

36. The practical reality is, of course, that civil appellate lawyers will not face the prospect of responding to claims of ineffectiveness in representation on direct appeal, often an avenue of some hope for criminal defendants. For instance, in *Bell v. Lockhart*, 795 F.2d 655 (8th Cir. 1986), counsel's erroneous advice that led to the defendant waiving his right to appeal constituted ineffective assistance. *Bell*, 795 F.2d at 656; *accord* Roe v. Flores-Ortega, 528 U.S. 470, 480 (2000)

tions may apply, a civil appeal may present counsel with different issues for counseling the client on the approach to be taken on appeal.

In the civil appeal, of course, counsel is relatively free to discuss with the client the omission of these issues from the appellate brief and probably even encouraged to overrule a client's request that these issues be raised. Often, the client is less likely than counsel to conclude that his case will not be treated favorably on a claim of preserved error. Indeed, a part of the attorney's professional judgment is predicated on the attorney's more experienced understanding of the relative value of claims, as well as evidence, alternative theories, and the entire realm of decisions confronting litigators. Experienced attorneys learn, or may instinctively sense, that some errors committed at trial will not result in reversal or modification of a judgment on appeal. Clients may simply view error by the trial judge as a flaw in the process invariably unfair to them as losers in the lawsuit. Because the client retained counsel, and proceeds with at least a hope of compensation, the will of the client may well influence an appellate attorney in viewing issue selection as more a matter of the client's determination than the majority's perspective in *Jones v. Barnes* would admit.

Moreover, the potential for sanctions imposed by an appellate court in civil cases is not complicated by the same constitutional concerns that have governed Sixth Amendment claims of ineffectiveness of counsel in criminal cases. Older Colorado decisions, for example, demonstrate that the application of this remedy is not of recent origin. For instance, the Colorado Supreme Court imposed a twenty percent penalty on a damage award in a civil action in *Florence Oil & Refining Company v. McRae*,[37] based on the court's conclusion that the appeal, "entirely without merit," had been taken "solely for delay."[38] In an earlier case, *Rohrig v. Pearson*,[39] the Colorado Supreme Court apparently considered imposing a penalty upon the appellant for "trifling with [the] appellee's rights," but proceeded to review the single claim presented, despite the fact that it was supported by a one paragraph argument of less than half a page and without citation to any authority.[40]

(ruling that even failure to advise of right of appeal following conviction on plea of guilty may result in ineffectiveness determination that defendant was prejudicialy deprived of counsel on appeal).

37. 90 P. 507, 508 (Colo. 1907).

38. *Florence Oil*, 90 P. at 508. The same party, represented by the same attorney, had been sanctioned the previous year in *Florence Oil & Refining Co. v. First Nat'l Bank of Canon City*, 88 P. 182 (Colo. 1906), when the supreme court complained that the appellant had "needlessly consumed the time of this court with a question previously settled in this jurisdiction, and vexatiously delayed and harassed appellee in the collection of a conceded debt . . . ." *Florence Oil*, 88 P. at 183.

39. 24 P. 1083 (Colo. 1890).

40. *Rohrig*, 24 P. at 1083. The brief filed by appellant's counsel was, in this instance, too brief in the eyes of the court, which noted that the trial record consisted of "more than 80 folios." *Id.*

More recent Colorado decisions have addressed the standard by which frivolousness determinations should be made. In *Mission Denver Co. v. Pierson*,[41] the Colorado Supreme Court reversed a decision by the court of appeals imposing sanctions for the filing of a frivolous appeal.[42] The supreme court addressed both the substantive grounds for imposing sanctions, as well as the process by which the rights of the party or counsel being sanctioned were to be protected.[43] In reversing the court of appeals' judgment awarding damages and double costs,[44] the supreme court cautioned that sanctions authorized by the appellate rules[45] should be imposed only in "clear" cases.[46] The court held that a lawyer might advance a claim unrecognized by existing law if it could be supported "by a good faith argument for an extension, modification, or reversal of existing law."[47] The supreme court reversed because the sanctioned party presented a rational argument in the court of appeals, which was not characterized as merely being brought for harassment or delay.[48]

Should counsel accede to the client's request that specific errors committed by the trial court be targeted on appeal, despite counsel's best judgment that they are not likely to result in reversal? This is a difficult question because while lawyers do serve as officers of the court, most are, after all, practicing law to earn a living. A client's perception of unfairness may be correct; the lawyer's pessimism a jaded product of unhappy experience. And the appellate court may, in fact, agree with the more idealistic expectations of the client. Or, the need to maintain a healthy relationship with the client—particularly the institutional or business client for whom long term representation is a factor in the rela-

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41. 674 P.2d 363 (Colo. 1984).

42. *Mission Denver*, 674 P.2d at 364.

43. *Id.* at 365-66.

44. *Id.* at 364.

45. Rule 38(d) of the Colorado Appellate Rules authorizes the award of damages and "single or double costs to the appellee." COLO. APP. R. 38(d). The rule does not expressly provide a remedy for impropriety in advancing a frivolous argument in the appellee's defense of a judgment, although it is not unreasonable to assume that misconduct in use of authority or misrepresentation of the trial record could warrant imposition of sanctions upon an appellee. Statutory authority for addressing attorney misconduct appears to provide a basis for imposition of monetary sanctions upon an offending party or their counsel regardless of which side commits the infraction in litigation at the trial or appellate level. COLO. REV. STAT. ANN. § 13-17-102 (West 2002).

46. *Mission Denver*, 674 P.2d at 366.

47. *Id.* at 365 (citing MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102, *superceded by* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2001)).

48. *Id.* at 366. The "rational argument" test now governs frivolousness determinations under Colorado law. *See, e.g.*, Zivian v. Brooke-Hitching, 28 P.3d 970, 975 (Colo. Ct. App. 2001) (ruling the appeal not frivolous where appellant a made rational argument that trial court erred); Bob Blake Builders, Inc. v. Gramling, 18 P.3d 859, 867 (Colo. Ct. App. 2001) (ruling the appeal not frivolous where appellant presented rational argument and obtained partial relief in remand on some claims); Citicorp Mortgage, Inc. v. Younger, 856 P.2d 52, 53 (Colo. Ct. App. 1993) (ruling the appeal not frivolous where HUD administrative regulations relied upon not previously held applicable to fact pattern in deficiency action).

tionship—may suggest the need to litigate more aggressively, even at the cost of incurring the "wrath" suggested by the conventional wisdom. This does not mean that counsel can afford to routinely advance meritless claims, even at the insistence of a client, because there is always the possibility that an appellate court will take action to discipline counsel.[49] On the other hand, almost all lawyers will run some risk of discipline if the incentives are great enough.

Proponents of the conventional wisdom on issue selection may have the benefit of speaking from the perspective of lifetime appointment to an appellate bench, an unlimited client base or pipeline through successful trial lawyers, or tenure-protected employment in law schools. What they may lack is the very dynamic of interaction with clients who expect aggressive litigation at the appellate level having already lost at trial. This concern was not lost on the dissent in *Jones v. Barnes*,[50] written by Justice Brennan, which recognized the frustration of criminal defendants whose appellate lawyers willingly sacrifice non-frivolous issues on the theory that they can, with certainty, ensure that the appellate courts will agree with their assessments of the merits of the issues briefed and argued.[51] Justice Brennan generally agreed with the majority's assessment of the conventional wisdom, noting:

> [T]he Court's advice is good. It ought to be taken to heart by every lawyer called upon to argue an appeal in this or any other court, and by his client. It should take little or no persuasion to get a wise client to understand that, if staying out of prison is what he values most, he should encourage his lawyer to raise only his two or three best arguments on appeal, and he should defer to his lawyer's advice as to which are the best arguments. The Constitution, however, does not require clients to be wise, and other policies should be weighed in the balance as well.[52]

Justice Brennan continued, however:

> It is no secret that indigent clients often mistrust the lawyers appointed to represent them. . . . A lawyer and his client do not always share the same interests. Even with paying clients, a lawyer may have a strong interest in having judges and prosecutors think well of him, and, if he is working for a flat fee—a common arrangement for criminal defense attorneys—or if his fees for court appointments are lower than he would receive for other work, he has an obvious finan-

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49. *See, e.g.*, Fin. Benefit Life Ins. Co. v. Weedman, 968 S.W.2d 624, 626 (Ark. 1998) (imposing sanction and award of fees for opposing party where counsel's arguments on appeal were unsupported by facts). And, at the trial level, where a claim asserted in a complaint is wholly unsupported by evidence, the claim may be characterized as frivolous. Bd. of Comm'rs v. Eason, 976 P.2d 271, 273 (Colo. Ct. App. 1998).

50. 463 U.S. 745, 755-64 (1983) (Brennan, J., dissenting).

51. *Barnes*, 463 U.S. at 761-62 (Brennan, J., dissenting).

52. *Id.* at 761 (Brennan, J., dissenting).

> cial incentive to conclude cases on his criminal docket swiftly. Good lawyers undoubtedly recognize these temptations and resist them, and they endeavor to convince their clients that they will. It would be naive, however, to suggest that they always succeed in either task.[53]

Justice Brennan was thus able to articulate at least one source of the problem posed when counsel attempts to justify not raising issues that the client has requested she argue. He explained that a potential threat to the attorney/client relationship lay in the majority's approach to Sixth Amendment effectiveness on appeal, in which the client's autonomy is accorded less value than counsel's expected exercise of sound professional judgment on the client's behalf. In the aggravated situation, the relationship may suffer a breakdown as a result of the client's mistrust of his counsel's motives. Justice Brennan concluded in this vein: "I cannot accept the notion that lawyers are one of the punishments a person receives merely for being accused of a crime."[54]

Justice Brennan's observations are correct in addressing the relationship of court-appointed counsel and their indigent clients. In fact, for any criminal defendant, whether able to retain counsel or not, counsel's explanation that the client's appeal is wholly lacking in merit will, in most cases, jeopardize any faith the client has in the attorney as his advocate as the client faces the prospect of not only losing the appeal, but losing any hope for relief.[55] The advice that the appeal is wholly lacking in merit represents a significantly less compelling problem for the relationship than the suggestion that certain claims should not be argued, at least from the theoretical perspective enjoyed by counsel. But for the client, criminal or civil, who is suspicious of the justice system and who, having just lost at trial, may be concerned that he has suffered injustice in the courts already, the message is often the same.

The problem of issue selection in criminal cases and its impact on the interests of the client is suggested by the recent decision of the Texas Court of Criminal Appeals in *Ex parte Graves*.[56] The court addressed the issue of successor applications for post-conviction relief in which the representation afforded by post-conviction counsel on the initial application was allegedly constitutionally defective. The petitioner's first post-conviction counsel failed to include a claim challenging suppression of evidence by the prosecution—that the accomplice's wife might have been present at the scene of the murder based on the accomplice's failure

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53. *Id.* at 761-62 (Brennan, J., dissenting).

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

55. For a discussion of the impact of frivolous appeal jurisprudence on the attorney-client relationship in the context of criminal practice, see Randall L. Hodgkinson, *No-Merit Briefs Undermine the Adversary Process in Criminal Appeals*, 3 J. APP. PRAC. & PROCESS 55 (2001).

56. 70 S.W.3d 103, 117 (Tex. Crim. App. 2002).

of a polygraph question on this point—in the application for relief.[57] The court rejected the argument that prior counsel's refusal to raise the issue constituted constitutionally ineffective assistance,[58] a relatively simple resolution because the United States Supreme Court had already held that the Sixth Amendment guarantee of effective assistance of counsel does not apply to post-conviction proceedings.[59] But what is so clear is the court's treatment of first counsel's decision not to raise the issue in the petitioner's initial application attacking his conviction and death sentence:

> As noted above, this claim has already been rejected as an abuse of the writ. The factual basis for it was known: 1) at the time of trial when the prosecutor referred to her possible presence at the murder scene during his closing argument, and 2) at the time of the filing of the original writ because second habeas counsel states that he urged the first habeas counsel to include it in the original writ. First habeas counsel declined to do so. *Perhaps he thought it lacked merit.*[60]

The Texas Court of Criminal Appeals concluded that the capital petitioner had received his "full and fair opportunity to present [his] claims in a single, comprehensive post-conviction writ of habeas corpus," despite the fact that the petitioner's first post-conviction counsel had not included the claim raised in the successor petition.[61] As the court's conclusion suggests, counsel's failure to raise the claim was not only unexplained, but his reasoning, if any, was ultimately irrelevant. The court offered no explanation to the petitioner facing execution regarding the rationale behind counsel's decision, except to hold that even deficient reasoning on the part of counsel would not afford the petitioner a basis for relief.

Many clients, as noted by Justice Brennan, will readily follow the advice of counsel to narrow the issues for briefing, and the mere assurances offered by a trusted attorney may be all that are required for both the attorney and client to proceed without conflict. But for a number of criminal and civil appellants, trust is impaired by failure at trial, or by the many other factors that may stress fiduciary relationships in general. In representing these clients, the conventional wisdom often ignores reality and the faithful adherence of counsel to the promises made by those espousing that wisdom might compromise the relationship, often leading to irreparable breach.

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57. *Graves*, 70 S.W.3d at 117.
58. *Id.*
59. Coleman v. Thompson, 501 U.S. 722; 752 (1991).
60. *Graves*, 70 S.W.3d at 117 (emphasis added).
61. *Id.*

B. Assessing the likely success of issues

Often counsel must confront the question of issue selection from the standpoint of the probability that more than one meritorious issue likely warrants reversal. If the disposition of the various issues would produce different outcomes, however, such as the situation in which both sufficiency and trial error claims might require reversal, but reversal for trial error will result in a new trial,[62] counsel must consider whether to raise both issues. In a criminal appeal, counsel should always raise insufficiency claims, even if potentially meritorious, because a favorable disposition will result in reversal and acquittal,[63] practically ensuring applicability of double jeopardy protections on retrial.[64] The Supreme Court's recent decision in *Weisgram v. Marley Co.*[65] also demonstrates the potential value to the client of seeking complete relief on a reversal for insufficient evidence in a civil case. In *Weisgram*, the Court held that a reviewing court might well determine that the plaintiff could never meet his burden, and thus the reviewing court could order rendition of judgment for the defendant.[66]

Part of the problem inherent in the strategic approach implicit in the conventional wisdom is that it is predicated on counsel being able to accurately assess the merits of the issues that may be raised and argued on appeal. This might appear an easy decision, but the problem is that counsel's assessment of error and prejudice warranting relief is probably not perfect, regardless of the weight of authority supporting counsel's position.[67] And when counsel misjudges the merits of the claims raised, those

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62. Even appellate courts may err with regard to the proper disposition on reversal. *See* Crisco v. State, 945 S.W.2d 383, 383-84 (Ark. 1997) (changing disposition from dismissal to remand for possibility of new trial on reversal based on exclusion of evidence).

63. *See* King v. State, 916 S.W.2d 732, 733-34 (Ark. 1996) (ruling that the court will address sufficiency challenge prior to considering trial error claims, disregarding claims of trial error to preclude remand for new trial when dismissal appropriate).

64. *See* Greene v. Massey, 437 U.S. 19, 24-25 (1978); Burks v. United States, 437 U.S. 1, 18 (1978).

65. 528 U.S. 440 (2000).

66. *Weisgram*, 528 U.S. at 456-57. For a thorough discussion of *Weisgram* and the context in which it arose, see Robert A. Ragazzo, *The Power of a Federal Appellate Court to Direct Entry of Judgment As a Matter of Law: Reflections on* Weisgram v. Marley Co., 3 J. APP. PRAC. & PROCESS 107 (2001).

67. This was the situation the author faced in *Fugate v. New Mexico*, 470 U.S. 904 (1985), *aff'g State v. Padilla*, 678 P.2d 686 (N.M. 1984). The issue involved application of the Double Jeopardy Clause to a state prosecution in which the defendant was convicted of driving while intoxicated (DWI) and careless driving in municipal court, and then prosecuted for homicide by vehicle in a subsequent proceeding in district court. *Padilla*, 678 P.2d at 687. Because the vehicular manslaughter charge required as an element either reckless driving (careless driving identical for statutory purposes) or DWI, the New Mexico Court of Appeals reversed on the basis of the United States Supreme Court's decision in *Brown v. Ohio*, 432 U.S. 161 (1977), which involved a similar factual scenario to the case in issue. *See* State v. Fugate, 678 P.2d 710, 711-12 (N.M. Ct. App. 1983). The New Mexico Supreme Court reversed, however, holding that the State would continue to apply

discarded claims may assume an unintended significance for both the attorney and the client. But the discarded claims will typically not trouble the appellate court because they simply have not been brought to the court's attention for consideration.

This is not universally true, of course, as appellate courts do sometimes engage in *sua sponte* review of claims not raised by appellate counsel. The exceptional case is, perhaps, *Caldwell v. Mississippi*.[68] At the defendant's capital trial, the prosecutor minimized the jury's role in sentencing by arguing that any error made in the imposition of the death penalty would be corrected on appeal.[69] Trial counsel preserved error by objecting, but appellate counsel elected not to raise the issue on direct appeal.[70] The Mississippi Supreme Court noted the claim, but dismissed the argument as insufficiently prejudicial to require reversal.[71] The United States Supreme Court, however, granted certiorari on the issue and eventually reversed.[72]

Caldwell represents the exception, however, and neither counsel nor the client can assume that an appellate court will review a claim not raised on direct appeal, unless the rules of appellate procedure contemplate such review. Some jurisdictions do impose such rules for appellate review, but these rules are typically limited to review in capital cases imposing the death penalty.[73] Otherwise, abandoned claims only present

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the "jurisdictional exception" to double jeopardy recognized by the United States Supreme Court in *Diaz v. United States*, 233 U.S. 442, 449 (1912). *See Padilla*, 678 P.2d at 687. In *Diaz*, the Court had ruled that a prior judgment rendered would not bar reprosecution if the court initially rendering judgment would lack jurisdiction over the later prosecution. *Diaz*, 233 U.S. at 449. Because Fugate's convictions for DWI and careless driving had been obtained in a municipal court that did not have jurisdiction over the prosecution of felonies under state law, the state supreme court applied *Diaz* in rejecting Fugate's claim in a consolidated appeal. *See Padilla*, 678 P.2d at 687. Despite the Supreme Court's reinforcement of *Brown* in a vehicular homicide/dangerous driving lesser-included charge case in *Illinois v. Vitale*, 447 U.S. 410, 415-21 (1980), the state supreme court persisted in its application of the "jurisdictional exception." *Padilla*, 678 P.2d at 687. At the United States Supreme Court, Fugate lost on a judgment affirmed by an equally divided Court. *Fugate*, 470 U.S. at 904. Justice Powell, who had authored the Court's decision in *Brown*, did not participate because of his absence from the Court while fighting cancer. *Id.* The overwhelming weight of authority, including *Brown* and *Vitale*, as well as *Waller v. Florida*, 397 U.S. 387, 394-95 (1970), and *Robinson v. Neil*, 409 U.S. 505, 510-11 (1973), supported Fugate's position, but because there is no opinion issued in a case affirmed by an equally divided Court, no Justice had to explain or defend their decision in writing.

68. 472 U.S. 320 (1985).

69. *Caldwell*, 472 U.S. at 325-26.

70. *Id.* at 326.

71. *Id.*

72. *Id.* at 323.

73. For example, the Arkansas system of appellate review has two different sources of authority for *sua sponte* review. First, Rule 4-3(h) of the Rules of the Arkansas Supreme Court has traditionally required review of all claims of preserved error, whether or not briefed on appeal, in cases reviewed on direct appeal by the Supreme Court involving sentences of life imprisonment or death. ARK. S. CT. R. 4-3(h). Second, Rule 10 of the Arkansas Rules of Appellate Procedure–Criminal now contemplates fundamental error of unpreserved claims in cases in which the death

a problem for counsel when the appeal fails and the client does not understand why the claims were abandoned in favor of others that proved unworthy of relief.

Abandonment of such claims by the appellate lawyer offers the client the option of arguing ineffective assistance of counsel in the direct appeal. In *Neill v. Gibson*,[74] the Tenth Circuit Court of Appeals clarified its standard for reviewing ineffectiveness claims based on appellate counsel's failure to raise a colorable issue on direct appeal.[75] The circuit previously had held that failure to assert a claim that could be characterized as a "dead bang winner" would establish ineffectiveness on the part of appellate counsel.[76] In *Neill*, the court concluded that its earlier requirement, that the petitioner demonstrate that he would necessarily have prevailed on the abandoned claim, was contrary to the general rule established by the Supreme Court in *Strickland v. Washington*,[77] requiring only a showing of a "reasonable probability" of success but for counsel's deficient performance in failing to raise the meritorious claim.[78]

Assuming that an appellate court will typically not reach out to redress an error by counsel in deciding to abandon a meritorious claim through the process of *sua sponte* review, counsel's judgment represents the ultimate buck-stopping point in appellate brinksmanship. Few appellant's counsel—with the exception of cross-appeals, it will be appellant's counsel who establishes the issues to be reviewed in the brief on direct appeal—are afforded the luxury of appealing cases in which reversal is ever guaranteed by precedent.

The problem is compounded by the fact that even the soundest exercise of discretion will not always permit an experienced appellate lawyer to make an accurate assessment of the relative merits of the points that might be asserted on appeal. This routinely happens when a court overrules the prior decisions on which the client's claim has been predicated. For example, in *Payne v. Arkansas*,[79] the Court held that the admission of a coerced confession at trial could not be treated as harmless error.[80] Fol-

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penalty has been imposed, incorporating the categories of fundamental error recognized in *Wicks v. State*, 606 S.W.2d 366 (Ark. 1980). ARK. R. APP. P. CRIM. 10(b)(ii)-(v). To the extent that state appellate systems contemplate such *sua sponte* review, the federal courts may review constitutional claims raised on certiorari or in federal habeas to the extent that review can be presumed in light of the applicable state law or policy. *See* Sochor v. Florida, 504 U.S. 527, 547-49 & n.7 (1992) (Stevens, J., concurring in part and dissenting in part); Joubert v. Hopkins, 75 F.3d 1232, 1241-42 (8th Cir. 1996).

74. 278 F.3d 1044 (10th Cir. 2001).

75. *Neill*, 278 F.3d at 1057.

76. *Id.* at 1057 n.5 (discussing United States v. Cook, 45 F.3d 388, 395 (10th Cir. 1995)).

77. 466 U.S. 668 (1984).

78. *Neill*, 278 F.3d at 1057 (citing *Strickland*, 466 U.S. at 687-91).

79. 356 U.S. 18 (1958).

80. *Payne*, 356 U.S. at 568.

lowing *Payne*, however, in *Chapman v. California*,[81] the Court concluded that all claims of constitutional error arising in the course of a trial could be reviewed for harmless error.[82] In so doing, however, the Court noted that, "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."[83] In a footnote following this statement, the Court set out three examples of such basic rights to a fair trial—*exclusion of coerced confessions*, right to counsel, and impartial judge.[84] Subsequently, in *Arizona v. Fulminante*,[85] the defendant, along with the Arizona Supreme Court below, relied on the statement from *Chapman* for the proposition that harmless-error analysis was inapplicable when faced with the admission of a coerced confession and that the holding of *Payne* was still good law.[86] The *Fulminante* Court, however, noted that the admission of a coerced confession, unlike the right to counsel or an impartial judge, involved a "classic 'trial error'" that could be addressed through a harmless-error analysis.[87] Thus, the Court held that the admission of a coerced confession by the trial court was subject to harmless-error analysis.[88] However, the Court found that the coerced confession admitted in *Fulminante* was, in fact, sufficiently prejudicial in light of the totality of evidence so as to require reversal because the admission of the confession was not harmless beyond a reasonable doubt.[89] Accordingly, while the defendant did not suffer as a result of the change of law, the law nevertheless changed in a manner not at all likely to have been foreseen by his attorney.

Often, however, the law does change in the process of appeal, or precedent can be limited in its application. In either case, appellant's counsel may find that even the best exercise of professional judgment did not include the anticipation that a reviewing court would essentially yank favorable law out from under the client's issues. For example, the Arkansas Supreme Court changed the process for preservation of error for appellate review on challenges to the exercise of peremptory strikes brought pursuant to *Batson v. Kentucky*[90] in *MacKintrush v. State*.[91] In doing so, the court overruled a series of decisions in which the process for preservation of *Batson* challenges had been established and adhered

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81. 386 U.S. 18 (1967).

82. *Chapman*, 386 U.S. at 24.

83. *Id.* at 23.

84. *Id.* at 24 n.8. In its list of basic rights to a fair trial, the Court cited to *Payne* and its holding that the admission of coerced confessions should not be treated as harmless error. *See id.*

85. 499 U.S. 279 (1991).

86. *See Fulminante*, 499 U.S. at 284.

87. *Id.* at 309-10.

88. *Id.* at 310.

89. *Id.* at 302.

90. 476 U.S. 79, 100 (1986).

91. 978 S.W.2d 293, 296 (Ark. 1998).

to by Arkansas appellate courts in criminal and civil cases.[92] The court rejected the defendant's *Batson* claims based on trial counsel's failure to rebut the prosecutor's race neutral explanation for its use of its peremptory challenges.[93] This requirement, apparently, had not previously been imposed on Arkansas litigants, but it was consistent with the United States Supreme Court's intervening holding in *Purkett v. Elem.*[94]

The problem of changes in legal doctrine, moreover, is not confined to criminal cases. In *Shannon v. Wilson*,[95] for instance, the Arkansas Supreme Court overruled some twenty years of precedent in recognizing a cause of action for dramshop liability.[96] Even in his dissenting opinion in *Shannon*, Justice Newbern observed:

> It is indeed proper for an appellate court of last resort to overrule a prior decision when that decision was made on the basis of a mistake or when conditions have changed so as to make it outmoded. *Stare decisis does not require stagnation.* The law develops through the application of tried-and-true principles to changing times.[97]

Justice Newbern was undoubtedly correct in his view of *stare decisis*, but defense counsel relying on prior decisions as a basis for exercising professional judgment in advising their clients would have likely preferred that he had the votes to sustain a majority reaffirming the old rule.

Similarly, in *Aka v. Jefferson Hospital Ass'n*,[98] the Arkansas Supreme Court overruled its recent decision on the issue of whether a wrongful death action would lie for medical malpractice resulting in the death of a viable fetus.[99] The prior decision was little more than five years old, but the shift represented a dramatic change in public policy, paralleling action being taken in the General Assembly.[100] The result might have correctly anticipated and served the ends of public policy, but it probably complicated the ability of counsel to properly advise clients engaged in litigation in which this issue and its disposition were critical.

Changing law not only impacts counsel's judgment with respect to the recognition of causes of action or defenses in civil or criminal actions, but changing views on procedural and evidentiary matters may

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92. *See MacKintrush*, 978 S.W.2d at 298.

93. *Id.*

94. 514 U.S. 765, 767-78 (1995).

95. 947 S.W.2d 349 (Ark. 1997).

96. *Shannon*, 947 S.W.2d at 358, *overruling* Carr v. Turner, 385 S.W.2d 656, 657-58 (Ark. 1965).

97. *Id.* at 359 (Newbern, J., dissenting) (emphasis added).

98. 42 S.W.3d 508 (Ark. 2001).

99. *Aka*, 42 S.W.3d at 637-38, 641-42, *overruling* Chatelain v. Kelly, 910 S.W.2d 215, 219 (Ark. 1995).

100. ARK. CODE ANN. § 5-1-102(13)(B) (Michie 2001); ARK. CODE ANN. § 16-62-102(a)(1)-(3) (Michie 2001).

also complicate counsel's ability to anticipate the likely success of an issue on appeal. For instance, in *State v. Earnest*,[101] the New Mexico Supreme Court reversed the defendant's capital murder conviction based on the admission of a non-testifying accomplice's custodial statement implicating himself and others in the commission of the murder.[102] Applying the United States Supreme Court's holding in *Douglas v. Alabama*,[103] the state supreme court concluded that admission of the statement violated Earnest's right to confrontation under the Sixth Amendment because he had never been afforded an opportunity for meaningful cross-examination of the declarant.[104] The New Mexico Attorney General petitioned for certiorari to the United States Supreme Court, arguing that an intervening decision in *Ohio v. Roberts*[105] cast doubt on the continuing validity of *Douglas*.[106] Following argument in *Earnest* and in light of its recent decision in *Lee v. Illinois*,[107] the United States Supreme Court reversed the judgment of the state supreme court, remanding the case for reconsideration.[108] This prompted Justice Rehnquist, in a concurring opinion, to suggest that the statement of Earnest's accomplice might bear sufficient indicia of reliability to warrant admission, even in the absence of an opportunity for meaningful cross-examination.[109] On remand, the New Mexico Supreme Court, having undergone a change in composition, affirmed Earnest's conviction, concluding that the accomplice's custodial statement bore sufficient indicia of reliability, as a declaration against his interest, to warrant admission, even in the absence of cross-examination.[110]

But Justice Rehnquist's opportunistic concurrence did not settle the issue. The Court has continued to grapple with the problem of accomplice statements and the interplay between hearsay exceptions and the dictates of the Confrontation Clause. Revisiting the issue in *Lilly v. Virginia*,[111] a plurality of the Court concluded that custodial statements given by accomplices do not warrant admission as declarations against penal interest when they tend to shift blame to others.[112] The statement

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101. 703 P.2d 872 (N.M. 1985).

102. *Earnest*, 703 P.2d at 875-76.

103. 380 U.S. 415, 418-20 (1965).

104. *Earnest*, 703 P.2d at 876.

105. 448 U.S. 56, 66 (1980).

106. *Earnest*, 703 P.2d at 876. The Attorney General argued that the United States Supreme Court had shifted from cross-examination to an indicia of reliability test as the basis for evaluating confrontation violations in the admission of out-of-court statements. *See Roberts*, 448 U.S. at 66.

107. 476 U.S. 530 (1986).

108. New Mexico v. Earnest, 477 U.S. 648, 648 (1986).

109. *Earnest*, 477 U.S. at 649-50 (Rehnquist, C.J., concurring).

110. State v. Earnest, 744 P.2d 539, 541 (N.M. 1986).

111. 527 U.S. 116 (1999).

112. *Lilly*, 527 U.S. at 133-34 (plurality opinion). The Court had previously limited the admission of codefendant statements to those expressly self-incriminating and jointly inculpatory

admitted against Earnest at his capital trial included the declarant's claim that he had been forced to participate in the murder and never intended to kill the victim.[113]

Despite *Lilly*, the New Mexico Supreme Court has persisted in holding that declarations against penal interest constitute a traditionally recognized exception to the hearsay rule under state law, as demonstrated in *State v. Martinez-Rodriguez*.[114] The state supreme court declined to apply *Lilly* to exclude evidence of an out-of court statement included in a letter written by a non-testifying co-defendant, reiterating the court's prior position that such statements are "firmly rooted exceptions to the hearsay rule."[115] Such a decision by the New Mexico Supreme Court directly contravenes the *Lilly* plurality, which stated: "The decisive fact, which we make explicit today, is that accomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule as that concept has been defined in our Confrontation Clause jurisprudence."[116]

The *Earnest* litigation demonstrates that counsel's best professional judgment may ultimately prove prophetic, but still not accurately assess the prospect for success before any particular court at any given point in time. Moreover, even assuming counsel makes a correct professional judgment, no guarantee remains that the reviewing court will accurately apply the law—requiring additional litigation.[117]

C. Presenting a complete picture of the client's case on appeal

Suppose the claim for relief presents both a narrow basis for granting relief and a far broader question of public policy. An example may be found in the ongoing attack on the imposition of the death penalty on mentally retarded capital defendants. In the initial post-*Furman v. Georgia*[118] challenge to executing the mentally retarded, *Penry v. Lynaugh*,[119] a majority of the Court rejected the claim that execution of the mentally retarded violates the Eighth Amendment.[120] However, the Court also concluded that the jury instructions given at Penry's trial were constitu-

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under the Federal Rules, reserving ruling on the Confrontation Clause issue. *See* Williamson v. United States, 512 U.S. 594, 600-01, 605 (1994).

113. *Earnest*, 744 P.2d at 540.

114. 33 P.3d 267 (2001).

115. *Martinez-Rodriguez*, 33 P.3d at 278; *see also* State v. Reyes, 52 P.3d 948, 961 (N.M. 2002) (continuing to reject *Lilly* plurality as controlling in New Mexico cases).

116. *Lilly*, 527 U.S. at 134 (plurality opinion).

117. New Mexico is apparently not the only jurisdiction to continue to rely on the declaration against penal interest exception to justify admission of statements made by accomplices. *See, e.g.*, Smith v. State, 24 P.3d 727, 732 (Kan.), *cert. denied*, 122 S. Ct. 668 (2001).

118. 408 U.S. 238 (1972).

119. 492 U.S. 302 (1989).

120. *Penry*, 492 U.S. at 339.

tionally deficient because they did not properly guide the jury in its consideration of the evidence of Penry's mental retardation as mitigating circumstance possibly warranting imposition of a life sentence, rather than death.[121] Penry returned to the Supreme Court again in 2001,[122] successfully arguing inadequacy of the jury instructions given in the proceedings on remand following his first reversal.[123] And finally, this past term, the Court overruled its first decision in *Penry*, holding that execution of the mentally retarded does violate the Eighth Amendment.[124]

Sound reasons exist for pursuing both broad policy issues and narrower issues in an appeal, even though an appellate court might prefer that the former be dropped if the other clearly affords a basis for reversal. But, realistically, developing a strategy incorporating both broad policy questions and narrower issues offers counsel a greater potential for assuring success, while also preserving options for further review in the event that success proves elusive on direct appeal.

Many appeals are resolved on narrow procedural issues, yet these issues arise in the context of far broader issues of public concern. Counsel may well elect to present multiple issues in which narrow procedural grounds for relief may be argued in addition to the broader public policy question. For instance, in any capital case in which the conviction rests on testimony of interested accomplices, in whole or in part, or on questionable eyewitness identification,[125] counsel might argue a preserved claim in which the general issue of the reliability of the trial process is called into question in light of recent executive, judicial, and prosecutorial decisions resulting in release of convicted capital defendants.[126] The broad question might be whether the death penalty should be imposed on the basis of uncorroborated accomplice or eyewitness testimony. Undoubtedly, few judges will be inclined to accept the proposition that errors in convictions in capital cases will warrant judicial abolition of the legislatively authorized death penalty.[127] However, the presence of nar-

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121. *Id.* at 328.

122. *See* Penry v. Johnson, 532 U.S. 782 (2001).

123. *Penry*, 532 U.S. at 803-04.

124. *See* Atkins v. Virginia, 122 S. Ct. 2242, 2252 (2002).

125. A leading study documents the significant problems of conviction based upon faulty eyewitness identification often later disproved by DNA testing. Walter F. Rowe, *Commentary, in* CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL xv (Connors et al. eds., 1996); *see also* Peter Neufeld & Barry C. Scheck, *Commentary, in id.* at xxviii (noting that DNA testing had exonerated an average of twenty-five percent of arrested suspects annually from 1989 until the date of the study).

126. For example, the Death Penalty Information Center reports that during the period from 1973-2002, 102 death row inmates were freed as a result of "doubts about their guilt . . . miscarriages of justice in potentially capital cases, . . . and '[i]n spite of innocence.'" *See* Death Penalty Information Center, *Innocence: Freed From Death Row, at* http://www.deathpenaltyinfo.org/Innocentlist.html (last visited Oct. 18, 2002).

127. Judges have expressed reservations about the wisdom of capital punishment in terms of public policy, even when concluding that the death penalty remains a constitutional alternative. *See*

rower procedural grounds for reversal may influence those judges concerned about the broader issues to view the alternative bases for relief more favorably.[128]

Conventional wisdom might dictate that counsel abandon the broad policy issue in favor of relying on those grounds more likely to result in reversal. But if judges are not afforded the opportunity to debate broader questions, or if they are not forced to consider policy consequences, the chance that reform will be forced on the justice system from the appellate courts is minimized, if not wholly negated. For example, it seems reasonable that any opponent of legalized abortion should take the opportunity to seek an overruling of *Roe v. Wade*,[129] even when arguing a case involving a parental notification rule.[130] Regardless of the disposition on the narrower claim, the continuing viability of *Roe* likely depends, at least in part, on lack of serious challenges to its underlying rationale.[131] If

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Singleton v. Norris, 108 F.3d 872, 876 (8th Cir. 1997) (Heaney, J., concurring) ("[A]lthough I am compelled to adhere to the law, I nonetheless announce my personal view that this nation's administration of capital punishment is simply irrational, arbitrary, and unfair. The problems are inherent in the enterprise itself."); New Mexico v. Clark, 990 P.2d 793, 821 (N.M. 1990) (Franchini, J., concurring). More recently, two federal district judges have held the Federal Death Penalty Act unconstitutional, at least in part because of concerns that procedural protections afforded capital defendants under the federal statute are insufficient to prevent wrongful convictions. *See* United States v. Quinones, 205 F. Supp. 2d 256, 267-68 (S.D.N.Y. 2002); United States v. Fell, 217 F. Supp. 2d 469, 489-91 (D. Vt. 2002). However, the Second Circuit reversed the district court's ruling in *Quinones*, finding that the Federal Death Penalty Act does not violate the accused's Fifth Amendment right to due process. *See* United States v. Quinones, 313 F.3d 49, 52-53 (2d Cir. 2002).

128. Consider Judge Franchini's recent opinion in a 3-2 split decision reversing an imposed death penalty because of trial court error in failing to properly admonish the defendant of his right to jury sentencing upon his plea of guilty to capital murder. State v. Martinez, 43 P.3d 1042, 1044 (N.M. 2002). It seems unlikely that Judge Franchini's swing vote to reverse was unrelated to his general reservations concerning the death penalty.

129. 410 U.S. 113 (1973); *see also* Doe v. Bolton, 410 U.S. 179, 194 (1973) (holding Georgia statutory scheme regulating abortion unconstitutional).

130. *E.g.*, H.L. v. Matheson, 450 U.S. 398, 425 (1981) (upholding notification scheme); Bellotti v. Baird, 443 U.S. 622, 651 (1979) (rejecting notification scheme).

131. In fact, the post-*Roe* history of challenges is replete with consistent attacks on the availability of abortion, in part, perhaps, explaining the significance of *Roe* as an issue in the judicial confirmation process. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914, 922 (2000) (finding a state statute banning "partial birth abortion" unconstitutional); Planned Parenthood v. Casey, 505 U.S. 833, 880-901 (1992) (upholding some restrictions on abortion practice as not imposing undue burden on patients seeking abortions); Rust v. Sullivan, 500 U.S. 173, 193 (1991) (upholding prohibition on abortion counseling by recipients of federal family planning funds); Webster v. Reprod. Health Servs., Inc., 492 U.S. 490, 492 (1989) (upholding statutory ban on use of public funds for abortion); Planned Parenthood Ass'n v. Ashcroft, 462 U.S. 476, 493 n.20 (1983) (upholding parental notification or alternative juvenile court consent as constitutional, while holding requirement for performance of abortions in a hospital after 12 weeks of pregnancy unconstitutional); Harris v. McRae, 448 U.S. 297, 326 (1980) (upholding Congressional limitations on use of federal funds to reimburse for costs of abortions); Beal v. Doe, 432 U.S. 438, 446-48 (1977); Maher v. Roe, 432 U.S. 464, 470-71, 474, 477, 480 (1977); Poelker v. Doe, 432 U.S. 519, 521 (1977) (non-funding of abortion for indigent patient does not violate equal protection); Planned Parenthood v. Danforth, 428 U.S. 52, 65, 67, 71, 75, 79, 81, 83-84 (1976) (striking down certain regulations on abortion procedures, while upholding statutory definition of "viability").

the party ultimately seeks to overrule *Roe*, then counsel should likely consider taking any reasonable opportunity to advance the client's ultimate position, rather than restricting the appeal to the more narrow issue on which a favorable ruling is far more likely.

II. TACTICAL GROUNDS FOR A POLICY OF ISSUE INCLUSION

There are two distinct tactical decisions confronting appellate counsel in the issue selection process. The first decision concerns the question of inclusion or rejection of issues likely to warrant reversal based on counsel's judgment. The troubling aspect of this problem, in light of the advice to eliminate issues, is that the advice-givers are essentially asking counsel to reject claims that probably warrant relief. This is often a difficult decision to make since there is no guarantee that the appellate court will agree with counsel's assessments that the trial court did err, or that prejudice warrants relief even if error is demonstrated.

The second decision concerns counsel confronting a well-preserved trial record involving the presence of preserved errors that are insufficiently prejudicial to warrant reversal. These claims—colorable or at least potentially meritorious, depending upon how one chooses to define "meritorious"—are subject to being discarded in the issue selection process because they do not offer serious prospects for relief.

There are, however, at least three valid reasons for including issues which have little prospect for success on appeal despite an obvious or arguable error on the part of the trial court and apart from the very real value in simply pleasing the client as her advocate. First, there are often issues that warrant review that will likely not benefit the client or the client's interest in the immediate case. Second, there are issues that should be raised to develop a theme of cumulative error, whether formal or informal, and to demonstrate the unfairness of the trial, even if the jurisdiction does not recognize a doctrine of cumulative error. And third, often reversing courts will address other issues to resolve questions likely to arise in the event of retrial.

With these thoughts in mind, it is possible to identify a number of tactical arguments for considering issue inclusion, rather than exclusion, as the underlying basis for appellate strategy.

A. Raise all issues truly meriting reversal to avoid the consequences of mistake in judgment

Because counsel may fail to appreciate flaws in the case or overestimate the controlling power of prior decisions, the best approach is to include all claims on which reversal can reasonably be expected in light of precedent. This avoids the problem of affirmance by surprise when the appellate court essentially disagrees with counsel's assessment of the

strength of precedent, its application to the issue precisely before the court, or the factual similarity of the immediate case to that underlying the application of the rule in prior cases.[132]

Even if prior decisions appear thoroughly persuasive and dispositive, counsel cannot dismiss the possibility that even the most established rule of law may be overruled by a court that is inclined to view it as outdated, in the event it is a long-standing rule,[133] or insufficiently grounded, if it is relatively recent. A change in the composition of an appellate court or the rising or diminishing influence of a key judge may lead to a rejection of precedent. This happened in *Booth v. Maryland*[134] with respect to the issue of admission of "victim impact" evidence in capital sentencing proceedings. In 1987, a majority of the United States Supreme Court rejected admission of such evidence as violative of the Eighth Amendment and due process considerations.[135] Two years later, in *South Carolina v. Gathers*,[136] a majority reaffirmed *Booth*, rejecting the admissibility of victim impact evidence.[137] Yet, a mere two years later, a shift in the majority of the Court with the retirement of Justice Brennan and appointment of Justice Souter resulted in an overruling of *Booth* and *Gathers* in *Payne v. Tennessee*.[138] In doing so, the Court noted that the two prior holdings "were decided by the narrowest of margins,

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132. The application of precedent is almost always governed by the factual similarities underlying the prior disposition and those presented in a subsequent case before an appellate court. In *People v. Wilson*, 838 P.2d 284 (Colo. 1992) (en banc), the issue before the Colorado Supreme Court was whether a trial court's failure to give a statutorily-prescribed admonition concerning the reliability of hearsay statements by children identified as victims of sexual assault would constitute plain error justifying relief in the absence of preservation by objection at trial. *Wilson*, 838 P.2d at 284-85, 288-89. In prior decisions, the court had concluded that similar omissions did not constitute plain error on the facts, but did warrant relief on the facts, like in *People v. McClure*, 779 P.2d 864, 867 (Colo. 1989) (en banc). *See also* People v. Wood, 743 P.2d 422, 428 (Colo. 1987) (en banc). Shortly after issuing *McClure*, the court again held that plain error was not committed. *See* People v. Diefenderfer, 784 P.2d 741, 751-52 (Colo. 1989). The *Wilson* court rejected the defendant's reliance on *McClure*, noting that the factual differences presented by the prior decisions governed the court's disposition in each case. *Wilson*, 838 P.2d at 290 ("the results of these cases turn on their particular facts").

133. *E.g.*, Ring v. Arizona, 122 S. Ct. 2428, 2443 (2002), *overruling* Walton v. Arizona, 497 U.S. 639 (1990) (holding that imposition of death sentence by trial judge, rather than jury, after determination of aggravating and mitigating circumstances violates federal constitutional protections).

134. 482 U.S. 496 (1987).

135. *Booth*, 482 U.S. at 501-02.

136. 490 U.S. 805 (1989).

137. *Gathers*, 490 U.S. at 810. Justice White, who dissented in *Booth*, joined in the majority opinion written by Justice Brennan in *Gathers*, noting in a separate concurrence that unless *Booth* was going to be overruled by the Court, he would join with the majority. *Id.* at 812 (White, J., concurring). Justice Powell, who had written the majority opinion in *Booth*, had left the Court.

138. 501 U.S. 808, 811, 827-30 (1981). Justice Souter replaced Justice Brennan, who had written the majority opinion in *Gathers* and joined Justice Powell in the majority in *Booth*. Justice Souter joined the *Payne* majority in overruling the prior decisions of the Court.

over spirited dissents challenging the basic underpinnings of those decisions."[139]

A recent development in the Arkansas Supreme Court reinforces the point that counsel cannot assume too much stability on the part of an appellate court. In two fairly recent decisions, *Brown v. State*[140] and *Hill v. State*,[141] the court had rejected claims of error based on the trial court's refusal to instruct on second-degree murder and manslaughter, respectively, as lesser-included offenses of felony murder.[142] In *McCoy v. State*,[143] the court "receded" from those and other decisions that had limited lesser-included offense analysis to exclude lessers not predicated on a strict elements analysis.[144] Both trial and appellate counsel might have justly concluded that the recent decisions would have remained viable, but, in fact, there were strong theoretical arguments countering the restriction on lessers under Arkansas law. McCoy's counsel preserved error and refused to give up on a potentially meritorious claim.

This point can hardly be stressed too vigorously. Counsel should never feel assured of victory based on even the best assessment of the merits of a claim or on the basis of the strength of the claim in terms of precedent or supporting facts.

B. Always give the appellate court an "out" in the tough case

All constitutional lawyers are aware of the traditional tendency of the United States Supreme Court to decline to consider broad issues of policy when narrower grounds for reversal are available to the Court. A classic example is presented by the Court's disposition of the claimed right to treatment for involuntarily committed mental patients, a core concern in the litigation in *O'Connor v. Donaldson*.[145] The Fifth Circuit addressed the issue directly, noting at the outset: "The question for decision, whether patients involuntarily civilly committed in state mental hospitals have a constitutional right to treatment, has never been addressed by any of the federal courts of appeals."[146] The court concluded that the patient had a constitutionally protected interest in treatment.[147]

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139. *Payne*, 501 U.S. at 829.

140. 929 S.W.2d 146 (Ark. 1996).

141. 40 S.W.3d 751 (Ark. 2001).

142. *Brown*, 929 S.W.2d at 148; *Hill*, 40 S.W.3d at 756. Capital felony murder is set out in section 5-10-101(a)(1)-(2) of the Arkansas Code. ARK. CODE ANN. § 5-10-101(a)(1)-(2) (Michie 2001). First degree felony murder is defined in section 5-10-102(a)(1) of the Arkansas Code. ARK. CODE ANN. § 5-10-102(a)(1) (Michie 2001).

143. 69 S.W.3d 430 (Ark. 2002).

144. *McCoy*, 69 S.W.3d at 437, *on State's petition for review from* 49 S.W.3d 154 (Ark. App. 2002). The court of appeals had also reversed on direct appeal. *Id.* at 431.

145. 422 U.S. 563, 573 (1975).

146. Donaldson v. O'Connor, 493 F.2d 507, 519 (5th Cir. 1974).

147. *Donaldson*, 493 F.2d at 520.

On certiorari, the Supreme Court concluded that Donaldson's rights had been violated, but did not adopt the Fifth Circuit's broad approach to the issues presented.[148] Instead, the Court noted:

> We have concluded that the difficult issues of constitutional law dealt with by the Court of Appeals are not presented by this case in its present posture. Specifically, there is no reason now to decide whether mentally ill persons dangerous to themselves or to others have a right to treatment upon compulsory confinement by the State, or whether the State may compulsorily confine a non-dangerous, mentally ill individual for the purpose of treatment. As we view it, this case raises a single, relatively simple, but nonetheless important question concerning every man's constitutional right to liberty.
>
> The jury found that Donaldson was neither dangerous to himself nor dangerous to others, and also found that, if mentally ill, Donaldson had not received treatment. That verdict, based on abundant evidence, makes the issue before the Court a narrow one. We need not decide whether, when, or by what procedures, a mentally ill person may be confined by the State on any of the grounds which, under contemporary statutes, are generally advanced to justify involuntary confinement of such a person—to prevent injury to the public, to ensure his own survival or safety, or to alleviate or cure his illness.[149]

The Court concluded, on a narrow ground, that Donaldson had been deprived of his freedom by the continued confinement without a showing of the necessity for institutionalization.[150] Instead of seizing the opportunity to make a powerful constitutional statement on the proper role of treatment in the involuntary commitment process, the Court narrowed the issue to the question of whether O'Connor, the superintendent of the state mental facility, could be held liable for monetary damages for his role in depriving Donaldson of liberty in his continued confinement.[151] The Court expressly directed the Fifth Circuit as follows:

> Upon remand, the Court of Appeals is to consider only the question whether O'Connor is to be held liable for monetary damages for violating Donaldson's constitutional right to liberty. The jury found, on substantial evidence and under adequate instructions, that O'Connor deprived Donaldson, who was dangerous neither to himself nor to others and was provided no treatment, of the constitutional right to liberty. That finding needs no further consideration. If the Court of

148. *O'Connor*, 422 U.S. at 573.

149. *Id.* at 573-74.

150. *Id.* at 577 n.12 (basing its holding on the absence of any evidence demonstrating that Donaldson presented a danger to himself or others).

151. *Id.*

> Appeals holds that a remand to the District Court is necessary, the only issue to be determined in that court will be whether O'Connor is immune from liability for monetary damages.[152]

The Supreme Court's approach in *O'Connor* illustrates the point that appellate courts often avoid substantial issues and rule on narrow grounds that may afford relief without establishing potentially troubling precedent.[153] While the interest of law reform may well only be served by attempting to force appellate courts to reach issues having broad policy implications, the individual client's interests may also only be served by affording the appellate court an alternative basis for deciding the case in the client's interest, even while avoiding the broader issues. Counsel, therefore, should always consider giving the appellate court an alternative ground for relief or review in the event the bigger question is one the reviewing court is not prepared to tackle.[154]

Often, the cases in which reversal is most appropriate arise in the context of flawed proceedings directly attributable to misconduct by the trial judge. Just as courts, including the United States Supreme Court, will search for ways to avoid overly broad rulings by choosing narrower bases for deciding cases, courts will often avoid rulings that embarrass lower court judges. For example, in *Ruth v. State*,[155] the Texas Court of Criminal Appeals reversed on the thirtieth issue raised by the appellant on a point that even the authoring judge found unpersuasive, but controlled by precedent.[156] The more significant points on appeal argued egregious misconduct by the retired judge sitting as a visiting judge at the defendant's trial. Many of those points attacked the trial judge's aggressive assistance in prosecuting the case on behalf of the District Attorney's Office, which otherwise had no difficulty in securing convictions.

The importance of providing a reviewing court with legal maneuverability is suggested by the decision of the Arkansas Supreme Court in *Brockwell v. State*,[157] in which Dewey Brockwell was convicted of second-degree murder in the shooting death of his son-in-law, Griffin.[158] The circumstances suggested a justified homicide, as Griffin was a vio-

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152. *Id.*

153. In *O'Connor*, the Court noted: "Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case." *Id.*

154. *E.g.*, Blecker v. Kofoed, 672 P.2d 526, 528 n.4 (Colo. 1983) ("Our disposition of this case makes it unnecessary to . . . consider the applicability of *Converse v. Zinke*, 635 P.2d 882 (Colo. 1981), relied on by petitioner as an alternative ground for relief.").

155. 653 S.W.2d 437 (Tex. Crim. App. 1983).

156. *Ruth*, 653 S.W.2d at 438 & n.1; *see* Brief for Appellant at 48, Ruth v. State, 653 S.W.2d 437 (Tex. Crim. App. 1983) (F78-5812-NQ).

157. 545 S.W.2d 60, 63-64 (Ark. 1976).

158. *Brockwell*, 545 S.W.2d at 60.

lent neighbor who had been abusive and threatened Brockwell's daughter and other family members.[159] Brockwell shot his son-in-law as he approached the front door of the Brockwell residence after making drunken threats directed at the defendant.[160] But Griffin was not armed and he had not tried to enter the Brockwell house when he was shot.[161] There was evidence that Brockwell warned another neighbor about possible violence, then prepared to defend himself by loading his shotgun with buckshot and warning his wife and daughter to go to the bedroom as Griffin approached the house.[162] The supreme court held the evidence legally sufficient to support conviction.[163]

However, a majority of the supreme court concluded that prejudicial error occurred in the admission of a photograph depicting Griffin with his shirttail tucked in after the shooting.[164] Justice Fogelman found admission of the photo to be prejudicial in light of Brockwell's trial testimony that he thought Griffin had a gun behind his back when he shot, apparently suggesting that Brockwell was lying.[165] This drew a sharp dissent from Chief Justice Harris.[166] He argued that there was no evidence in the record to support any conclusion that Brockwell's ability to observe a weapon had been obscured by the shirttail; whether it was out or tucked in would have logically made no difference in the jury's perception of the justification offered by the defendant.[167] Brockwell himself had testified that he could not see Griffin's hands because they were behind him, not because of Griffin's long shirttail.[168]

The majority, interestingly, also listed a number of issues identified, but not argued, in the appellant's brief that were deemed waived, as well as rejecting unpreserved claims of error in closing argument.[169] And the Chief Judge, in dissent, opened his opinion: "I cannot agree that the case should be reversed for the reason given by the majority."[170]

The tenor of the majority opinion suggests that the supreme court was convinced that Brockwell should not have been convicted on the facts of the case, probably because Griffin earned so little sympathy in his treatment of his ailing wife and threats made against her family.[171] In

159. *Id.* at 63.
160. *Id.*
161. *Id.* at 67.
162. *Id.*
163. *Id.* at 60.
164. *Id.* at 64.
165. *Id.*
166. *Id.* at 68 (Harris, C.J., dissenting).
167. *Id.* (Harris, C.J., dissenting).
168. *Id.* (Harris, C.J., dissenting).
169. *Id.* at 64.
170. *Id.* at 68 (Harris, C.J., dissenting).
171. *Id.* at 63.

order to afford the defendant a second chance, the majority may have simply grasped at an issue on which a reversal could be based in order to avoid an unjust conviction. At least some of the issues waived due to lack of briefing and argument might have suggested better grounds for reversal or, at least, grounds that might have persuaded the dissenting justices. Nonetheless, Brockwell did obtain a new trial because his appellate lawyer gave the reviewing court a way out.[172]

C. Preserve the opportunity to benefit from new law

Judicial doctrine governing retroactivity and prospective application of new decisions offers another rationale for including issues in the direct appeal and discretionary review process, rather than excluding them in the absence of precedent clearly suggesting success. Typically, issues may arise almost simultaneously in a number of cases as a result of new developments, such as amendments to legislation, or emerging trends in legal theory reflected in scholarly commentary, or appellate decisions rendered in other jurisdictions. Particularly when counsel is aware of these developments, it is important to realize the issues litigated at trial do not exist in a vacuum. Inclusion of issues on direct appeal that may offer the prospect for relief in the future may end up proving successful in the case at hand. This is because courts typically apply judicial decisions retroactively, but apply legislative enactments prospectively.[173]

Criminal appellate lawyers are well aware of the "new rules" doctrine articulated by the United States Supreme Court in *Teague v. Lane*.[174] *Teague* is not particularly popular because it essentially limits the retroactive application of new rules or principles of constitutional criminal procedure for cases on collateral review—the overwhelming majority of which will not be retroactive under the doctrine.[175] But the Court left intact an important principle of retroactivity that had been applied in *Griffith v. Kentucky*.[176] All litigants with preserved claims of constitutional criminal procedure error are entitled to benefit from a new rule announced by the Supreme Court, so long as their cases have not been finalized in the direct review process by the denial of certiorari prior to the announcement of the new rule.[177] Thus, error preserved at trial under an old regime may prove reversible if the Court announces a new rule or interpretation of an existing law while the direct appeal or

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172. *Id.* at 60.

173. *See* Martin Marietta Corp. v. Lorenz, 823 P.2d 100, 111-12 (Colo. 1992).

174. 489 U.S. 288 (1989).

175. *See, e.g.*, Morris v. Reynolds, 264 F.3d 38, 46 (2d Cir. 2001) (superceded by statute); *In re* Clemmons, 259 F.3d 489, 492 (6th Cir. 2001); *see also* Hanrahan v. Thieret, 933 F.2d 1328, 1337 n.19 (7th Cir. 1991) ("[W]e explicitly considered and rejected the *Teague* argument . . . .").

176. 479 U.S. 314 (1987).

177. *Griffith*, 479 U.S. at 323.

subsequent application for discretionary review remains pending in state or federal court.[178]

The practical benefits of *Griffith* are evident in major decisions of the Court that impose significant changes in procedure. For example, literally dozens of cases were affected by the Court's decision in *Apprendi v. New Jersey*.[179] The Court held that an element of the prosecution's sentencing case used to increase the sentencing range beyond the presumptive sentence imposed by statute must be pleaded in the charging instrument and proved to the jury beyond a reasonable doubt.[180] Not only has *Apprendi* spawned additional litigation governing its scope, with three cases being heard during the Court's current term, but clients' counsel who included issues on point in their briefs while the case was pending benefited from the application of the new rule in their cases.[181]

The principles governing retroactivity and prospective application in civil litigation are not as strongly articulated as in the constitutional criminal procedure context.[182] The Supreme Court has itself recognized fundamental underlying policy differences in criminal and civil litigation, which explains the application of less rigorous principles of retroactivity to pending civil cases than those applied in the criminal context of

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178. *Id.* at 326-27.

179. 530 U.S. 466 (2000). For example, the Supreme Court has granted certiorari in Eleventh Circuit cases in which *Apprendi* issues have been rejected by the circuit court and remanded for reconsideration in light of it. *See* Tapia v. United States, 531 U.S. 1136 (2001), *vacating* United States v. McGuire, 220 F.3d 589 (11th Cir. 2000); Cloud v. United States, 531 U.S. 1062 (2001) *vacating* United States v. Cloud, 211 F.3d 599 (11th Cir. 2000); Hayes v. United States, 531 U.S. 1062 (2001), *vacating* United States v. Hayes, 212 F.3d 598 (11th Cir. 2000); Ardley v. United States, 531 U.S. 1063 (2001) *vacating* United States v. Ardley, 202 F.3d 287 (11th Cir. 1999); Dore v. United States, 531 U.S. 1109 (2001), *vacating* United States v. Dore, 200 F.3d 819 (11th Cir. 1999); Griffiths v. United States, 531 U.S. 1109 (2001), *vacating* United States v. Walker, 194 F.3d 1322 (11th Cir. 1999); Ford v. United States, 532 U.S. 968 (2001), *vacating* United States v. Ford, 228 F.3d 417 (11th Cir. 2000); Bayona v. United States, 531 U.S. 1135 (2001), *vacating* United States v. Bayona, 213 F.3d 646 (11th Cir. 2000); Phillips v. United States, 531 U.S. 1109 (2001), *vacating* United States v. Phillips, 216 F.3d 1091 (11th Cir. 2000); Ravelo v. United States, 532 U.S. 955 (2001), *vacating* United States v. Torres, 229 F.3d 1166 (11th Cir. 2000); Wims v. United States, 531 U.S. 801 (2000), *vacating* United States v. Wims, 207 F.3d 661 (11th Cir. 2000); Brown v. United States, 531 U.S. 920 (2000), *vacating* United States v. Brown, 207 F.3d 662 (11th Cir. 2000); Curry v. United States, 531 U.S. 953 (2000), *vacating* United States v. Curry, 211 F.3d 129 (11th Cir. 2000); Potts v. United States, 531 U.S. 1006 (2000), *vacating* United States v. Potts, 211 F.3d 598 (11th Cir. 2000).

180. *Apprendi*, 530 U.S. at 490.

181. United States v. Cotton, 122 S. Ct. 1781 (2002); Harris v. United States, 122 S. Ct. 2406 (2002); *Ring*, 122 S. Ct. 2428.

182. The Colorado Supreme Court noted that the United States Constitution:

> neither prohibits nor requires retroactive application of a judicial decision, and the question of retrospective or prospective application of a state judicial decision to civil litigation in the state courts is a matter of state law when . . . the rule in question involves a matter of a common-law tort and is not based on federal constitutional or statutory law.

Martin Marietta, 823 P.2d at 112.

Griffith.[183] A majority of the Court formulated a multifactor approach in determining retroactivity applicability in civil cases in *Chevron Oil Co. v. Huson*.[184] The Court followed *Chevron* in *American Trucking Ass'ns, Inc. v. Smith*,[185] and explained that the impact of applying new rules to pending civil cases may unfairly penalize parties who relied on existing law at the commencement of litigation or earlier, when the facts giving rise to the litigation actually occurred.[186] The Court observed: "[W]hen the Court concludes that a law-changing decision should not be applied retroactively, its decision is usually based on its perception that such application would have a harsh and disruptive effect on those who relied on prior law."[187]

Although *Griffith* itself works some disadvantage for the prosecutor who had relied on prior law, the Court drew a line favoring limited retroactive application of new rules to benefit those defendants whose non-final cases raised issues addressed by changes in law announced by the Court during pendency of the appeal.[188] According to the *American Trucking* majority, the *Griffith* rule reflected a determination that it was simply preferable to expand the procedural protections afforded criminal defendants.[189]

Subsequently, in *Harper v. Virginia Department of Taxation*,[190] a different alignment of the Court rejected the argument that new rules applicable to civil litigation should be enforced differently than rules of criminal procedure.[191] Overruling *Chevron*, and thus applying the *Griffith* rationale to civil litigation, the *Harper* Court stated:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. This rule extends *Griffith*'s ban against "selective application of new rules." Mindful of the "basic norms of

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183. *Griffith*, 479 U.S. at 323.

184. 404 U.S. 97 (1971). *Chevron* required consideration of three factors in determining whether a new rule of civil law should be given retroactive effect: 1) Whether, in fact, a judicial decision has established a new rule of law, constituting a break with prior law or overruling precedent, or recognizing a new application of law not clearly foreshadowed by existing rules; 2) Examination of the history of the rule in question to determine its purpose and effect and whether retrospective application will further or retard the operation of the rule; and 3) Weighing the inequity imposed by retroactive application of the rule against the benefits of retroactive application. *Chevron*, 404 U.S. at 106-07.

185. 496 U.S. 167 (1990).

186. *American Trucking*, 496 U.S. at 191-94.

187. *Id.* at 191.

188. *Id.* at 198.

189. *Id.*

190. 509 U.S. 86 (1993).

191. *Harper*, 509 U.S. at 97.

> constitutional adjudication" that animated our view of retroactivity in the criminal context, we now prohibit the erection of selective temporal barriers to the application of federal law in non-criminal cases . . . . Our approach to retroactivity heeds the admonition that "the Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently."[192]

The decision in *Harper* recognized a different value than *American Trucking*. Rather than reflect concern for reliance on civil litigants to existing law, the *Harper* majority focused on unfairness to litigants who would be similarly situated in the litigation process, but suffer disparate impact from the limited application of new rules.[193]

Another way to view *Griffith* is that the limited retroactivity principles reward the creativity and diligence of counsel in preserving novel or emerging claims for review. Specifically, it avoids penalizing those defendants who might be unlucky enough not to have review granted in their cases, as the *American Trucking* majority had conceded.[194] Further, even though *Griffith* has not been extended as a matter of constitutional necessity to all civil litigation—being limited in *Harper* to issues of constitutional construction—the limited retroactivity rule may nevertheless favor civil litigants in state court proceedings.[195]

As might be expected, state courts are split with regard to their approaches to retroactivity of newly articulated principles of civil law.[196] For example, in *Beavers v. Johnson Controls World Services, Inc.*,[197] the New Mexico Supreme Court considered retroactive application of a cause of action in tort for conduct pre-dating its recognition in the state courts.[198] The court of appeals had held that liability could not be imposed on conduct occurring prior to recognition of the tort of outrage.[199] The state supreme court framed the question: "This case involves one of the great jurisprudential debates of the twentieth century: Whether an appellate court decision announcing a new rule of law, or changing an old one, should always be applied retroactively or may sometimes be

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192. *Id.* (citations omitted).

193. *Id.*

194. *American Trucking*, 496 U.S. at 190-91 ("As a practical matter, of course, we cannot hear each case pending on direct review and apply the new rule. But we fulfill our judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." (quoting *Griffith*, 479 U.S. at 323)).

195. *Griffith*, 479 U.S. at 322 (citing *Chevron*, 404 U.S. at 106-07).

196. *See, e.g.*, Beavers v. Johnson Controls World Servs., Inc., 881 P.2d 1376, 1381 (N.M. 1994); Robbat v. Robbat, 643 So. 2d 1153 (Fla. Dist. Ct. App. 1994); City of New Bern v. New Bern-Craven County Bd. of Educ., 450 S.E.2d 735 (N.C. 1994).

197. 881 P.2d 1376.

198. *Beavers*, 881 P.2d at 1386-87.

199. 859 P.2d 497, 499-500 (N.M. Ct. App. 1994).

applied only prospectively."[200] The New Mexico Supreme Court concluded that the cause of action would apply retroactively, even to conduct occurring prior to recognition of the tort.[201] It did not rely, however, on the United States Supreme Court's decision in *Harper* in reaching that result.[202] Instead, Justice Montgomery rejected the position that as a court of last resort it was forced to choose between a policy of "retroactivity and prospectivity in civil cases," as the majority in *Harper* viewed the limitation placed on the Supreme Court.[203] Instead, the state supreme court adopted a presumption favoring retroactivity in civil litigation and applied it to Beavers' cause of action for tort of outrage.[204]

Similarly, in *Martin Marietta Corp. v. Lorenz*,[205] a leading Colorado decision on retroactive application of newly announced wrongful discharge law, the Colorado Supreme Court split on whether recognition of a limitation on the traditional at will employment doctrine could apply to a termination occurring in 1975,[206] years before the court of appeals recognized a public policy exception to the doctrine of employment-at-will in *Cronk v. Intermountain Rural Electric Ass'n*.[207] Applying *Chevron*'s three-part analysis,[208] the majority concluded that the exception applied in *Cronk* afforded Lorenz a cause of action for wrongful discharge.[209] Justice Erickson, joined by Chief Justice Rovira and Justice Vollack, dissented in part, arguing that the exception should be recognized, but not applied retroactively because of unfairness in penalizing parties who relied on prior law. [210]

In contrast, the Arkansas Supreme Court engaged in prospective decision-making in *Aka v. Jefferson Hospital Ass'n*,[211] when it overruled its prior decision in *Chatelain v. Kelley*.[212] In *Chatelain*, the court held that the plaintiff could not sustain a wrongful death action for an injury that resulted in the death of a viable fetus.[213] Subsequently, in *Aka*, the court applied its determination that *Chatelain* should be overruled to benefit the party who expended the "time, effort and money to raise an attack

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200. *Beavers*, 881 P.2d at 1377 n.1.
201. *Id.* at 1383.
202. *Id.* at 1378.
203. *Id.* at 1381. For another interesting treatment of retroactivity analysis by a state court, see *In re Commitment of Thiel*, 625 N.W.2d 321, 327 (Wis. Ct. App. 2001) (declining to follow *Harper*; applying *Chevron* analysis).
204. *Beavers*, 881 P.2d at 1383.
205. 823 P.2d 100 (Colo. 1992).
206. *Martin Marietta*, 823 P.2d at 113.
207. 765 P.2d 619, 622-23 (Colo. Ct. App. 1988).
208. *Martin Marietta*, 823 P.2d at 112-14.
209. *Id.* at 114.
210. *Id.* at 117, 120 (Erickson, J., concurring in part and dissenting in part).
211. 42 S.W.3d 508, 518 (Ark. 2001).
212. 910 S.W.2d 215 (Ark. 1995).
213. *Chatelain*, 910 S.W.2d at 219.

upon existing unsound precedent[s],"[214] while electing not to burden others who had relied on existing law. The court explained:

> When this court overrules a prior decision and states the rule to be followed in the future, we also acknowledge the need to rely upon the validity of actions taken in faith upon the old decision. . . . However, given that the overruling of a decision relates back to the date of the overruled decision, we have also observed that no matter how a new rule of law is applied, the benefit of the new decision is denied to some injured persons.[215]

Thus, in sharp contrast to the positions taken by the *Harper* majority and the New Mexico Supreme Court in *Beavers*, the Arkansas policy appears to limit potential unfairness by adopting prospective application.[216] Nevertheless, *Aka* certainly reminds Arkansas lawyers of the potential for benefit from overruling of adverse precedent applicable to their clients' case, while reassuring counsel of a generally conservative policy favoring stability in the application of state law.[217] Moreover, practitioners litigating state and federal constitutional claims in the same case need to remain cognizant of the differing standards for retroactive application of new rules that may be applied in state and federal courts.

D. Preserving the cumulative error claim

One of the most compelling arguments against issue exclusion applies in those jurisdictions that recognize doctrines of cumulative error. In order to prevail on a claim of cumulative error, counsel must comply with preservation requirements for the presentation of the issue.[218] In some courts, combination of errors in a single issue relying on a cumulative error doctrine will preserve the issue for appellate review.[219] In others, it will be necessary to advance each claim of error independently and then argue a separate cumulative error claim.[220] Regardless, exclusion of preserved or even unpreserved, but cognizable, claims of error as part of the "winnowing" process advocated by proponents of the conventional wisdom may jeopardize the client's ability to seek relief based on com-

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214. *Aka*, 42 S.W.3d at 519.

215. *Id.* (citations omitted).

216. *Id.* at 518.

217. *Id.* at 515.

218. People v. Blue, 724 N.E.2d 920, 940-41 (Ill. 2000).

219. *See Blue*, 724 N.E.2d at 941.

220. For example, Texas recognizes cumulative error, but also requires that claims of error be presented and argued separately, and then reargued for cumulative error. *See, e.g.*, Feldman v. State, 71 S.W.3d 738, 757 (Tex. Crim. App. 2002) ("Appellant asserts in his twentieth and twenty-first points of error that the 'cumulative effect' of all of the above errors denied him due process under the federal constitution and due course of law under the Texas constitution. A number of errors may be found harmful in their cumulative effect." (citing Chamberlain v. State, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999))).

mission of multiple errors by the trial court that, independently, might not warrant relief.[221] Almost by definition, application of the cumulative error rule requires argument of the very type of issues that counsel is otherwise advised to discard in the issue selection process.

The Tenth Circuit explained the doctrine in *United States v. Rivera*:[222] "The cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error. The purpose of a cumulative-error analysis is to address that possibility."[223] The Colorado Supreme Court advanced a similar explanation in *Oaks v. People*,[224] in which the court reversed a murder conviction despite convincing evidence of the accused's guilt.[225] In reversing, the court explained that the cumulation of technical, as opposed to substantial, errors at trial might warrant reversal even though the technical errors would not individually justify relief from the conviction.[226] This may be a particularly important consideration in a close case, according to the *Oaks* court,[227] suggesting that counsel should always consider arguing cumulative error claims when a strong challenge can be made to the sufficiency of the evidence supporting the judgment. Although the principle espoused in *Oaks* may seem dated,[228] Colorado still recognizes the doctrine of cumulative error and presumably, in the proper case, the accumulation of non-reversible errors will still warrant reversal.[229]

Because the doctrine of cumulative error is designed to encompass harmless error, counsel's determination of harmlessness does not foreclose argument of the issue, although an attempt to include frivolous issues or issues not demonstrating error will undoubtedly, in this instance, jeopardize the credibility of the cumulative error claim.[230]

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221. Jones v. Barnes, 463 U.S. 745, 751-52 (1983).

222. 900 F.2d 1462, 1469-71 (10th Cir. 1990).

223. *Rivera*, 900 F.2d at 1469, *relying on* United States v. Wallace, 848 F.2d 1464, 1475 (9th Cir. 1988) and United States v. Canales, 744 F.2d 413, 430 (5th Cir. 1984).

224. 371 P.2d 443 (Colo. 1962).

225. *Oaks*, 371 P.2d at 445.

226. *Id.* at 446.

227. *Id.*

228. *See id.* at 451.

> The Machiavellian doctrine—that the end justifies the means—is stranger to, and wholly uncongenial with, our constitutional and common-law concepts. A wrong means to achieve a deserved result finds no sanction in our law; only a right means affecting a proper end finds justification in law. These are fundamental precepts which we affirm.

Id. at 446; *cf.* Burton v. Dormire, 295 F.3d 839, 849 (8th Cir. 2002) (noting substantial evidence offered in support of death row petitioner's claim of actual innocence, but concluding that despite being "trouble[d]" court must deny habeas relief because a showing of actual innocence does not provide a basis for granting the writ under current law).

229. People v. Roy, 723 P.2d 1345, 1349 (Colo. 1986); People v. Caldwell, 43 P.3d 663, 673 (Colo. Ct. App. 2001); People v. Dore, 997 P.2d 1214, 1222-23 (Colo. Ct. App. 1999).

230. *See Rivera*, 900 F.2d at 1470.

Interestingly, the Eighth Circuit has apparently rejected cumulative error analysis, at least for claims of ineffective assistance of counsel raised in the context of habeas corpus.[231] In *Girtman v. Lockhart*,[232] the court overruled prior authority relied on by the petitioner in asserting his claim of cumulative ineffectiveness of counsel.[233] This circuit split suggests a potentially "cert-worthy" issue as to whether the Supreme Court's seminal statement on Sixth Amendment ineffective assistance[234] contemplates cumulative error analysis of counsel's multiple flaws or permits lower courts to employ harm analysis in examining each claimed instance of deficient performance individually.

With respect to other claims, the Eighth Circuit has applied a cumulative error approach to the prejudice determination. Thus, when allegations of prosecutorial misconduct have been asserted on direct appeal, the court has looked to the "cumulative effect of such misconduct" in considering whether to reverse.[235] And it also appears that the circuit has implicitly recognized the viability of cumulative error analysis in civil appeals, as well.[236] In *Hofer v. Mack Trucks, Inc.*,[237] the court addressed an issue relating to allegedly improper admission of testimony concerning availability of collateral sources for recovery.[238] The court reviewed the claims and concluded, "We recognize that, under South Dakota law, the introduction of workers' compensation into a trial constitutes error. Here, however, the three areas of testimony complained of simply do not rise to the requisite level, *individually or cumulatively*. The breaches were slight, in not downright obscure."[239]

Arkansas practice appears to parallel that in the Eighth Circuit. The state courts do not consider ineffective assistance claims cumulatively,[240] but a criminal appellant may otherwise advance a cumulative error claim on direct appeal.[241] The Arkansas Supreme Court reiterated its preservation rule for presentation of cumulative error claims not involving inef-

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231. *See* Girtman v. Lockhart, 942 F.2d 468, 475 (8th Cir. 1991).

232. 942 F.2d 468.

233. *Id.* at 475 ("cumulative error does not call for habeas relief, as each habeas claim must stand or fall on its own" (quoting Scott v. Jones, 915 F.2d 1188, 1198 (8th Cir. 1990))).

234. *See* Strickland v. Washington, 466 U.S. 668, 686 (1984).

235. United States v. Johnson, 968 F.2d 768, 771 (8th Cir. 1992); *accord* United States v. Wadlington, 233 F.3d 1067, 1077 (8th Cir. 2000); United States v. Benitez-Meraz, 161 F.3d 1163, 1166 (8th Cir. 1998) (noting that counsel argued that each error warranted reversal individually, and cumulatively).

236. *See* Hofer v. Mack Trucks, Inc., 981 F.2d 377, 379 (8th Cir. 1993).

237. 981 F.2d 377.

238. *Id.* at 382.

239. *Id.* (citation omitted, emphasis added).

240. State v. Hardin, 60 S.W.3d 397, 399-400 (Ark. 2001).

241. *See* Noel v. State, 960 S.W.2d 439, 442 (Ark. 1998), *aff'd denial of post conviction relief*, 26 S.W.3d 123 (Ark. 2000), *and habeus corpus denied*, Noel v. Norris, 194 F. Supp. 2d 893 (E.D. Ark. 2002).

fective assistance in the capital appeal in *Noel v. State*.[242] The defense must preserve error by objecting to each instance of error at trial, make a separate cumulative error claim to the trial court, and obtain a ruling on that claim.[243] In Noel's case, the defense also moved for mistrial on each individual error and then preserved the cumulative error claim in the motion for directed verdict that was properly renewed at the close of all evidence.[244] Having obtained rulings on both motions, the court held the cumulative error claim was properly preserved for appellate review.[245]

Arkansas courts also recognize cumulative error claims raised in the context of civil appeals.[246] In *Edwards v. Stills*,[247] the Arkansas Supreme Court concluded that the appellant had failed to preserve her cumulative error complaint because no cumulative error motion had been made to the trial court for ruling.[248] The court, however, did consider the individual claims of error that had been properly preserved.[249]

Noel and *Edwards* demonstrate the significance of preservation of error for purposes of appellate review. Trial counsel's failure to recognize and raise a claim of cumulative error forecloses appellate review in Arkansas state courts,[250] a strong argument for communication between trial and appellate counsel during the course of proceedings in the trial court.

E. Obtaining directions for the trial court on remand

Often, an important reason for including issues in the appeal that might otherwise be unnecessary for success in the case lies in the need to assure that retrial will not be marred by errors that previously occurred. In this sense, inclusion of these issues is not designed to ask the appellate court to rule prospectively, but in light of the record before it, to ensure a fair trial on remand.

For example, in *Missouri Pacific Railroad Co. v. Arkansas Sheriff's Boys' Ranch*,[251] the Arkansas Supreme Court ordered remand on reversal and proceeded to consider "the other points which are raised on this appeal and will likely arise again upon retrial."[252] Further, the Arkansas Court of

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242. 960 S.W.2d at 442-43.
243. *Id.* at 442.
244. *Id.* at 442-43.
245. *Id.*
246. *See* Edwards v. Stills, 984 S.W.2d 366, 389 (Ark. 1998).
247. 984 S.W.2d 366.
248. *Id.* at 389.
249. *Id.*
250. *See Noel*, 960 S.W.2d at 442; *Edwards*, 984 S.W.2d at 389.
251. 655 S.W.2d 389 (Ark. 1983).
252. *Mo. Pac. R.R. Co.*, 655 S.W.2d at 392.

Appeals acted similarly in *Jorden v. Arkansas Department of Human Services*:[253]

> Consequently, it is not necessary to address the remaining issues raised by appellant except to the extent that such issues are likely to arise in the retrial of this case. The only issue that we anticipate is likely to arise again involves appellant's objection to hearsay testimony by the attorney *ad litem* in the case. With respect to that issue we simply remind the trial court that "[u]nless otherwise indicated, the Arkansas Rules of Evidence shall apply" to juvenile proceedings.[254]

Similarly, in *In re Casias*,[255] the Colorado Court of Appeals instructed the trial court in a divorce proceeding to make specific findings regarding factors forming the basis for division of property,[256] particularly with respect to the division of a 401(k) retirement account.[257] At other times, reversing courts expressly decline to address other issues not essential to the disposition of the case on appeal.[258]

F. The value of identification of error made by the trial court

In addition to those situations in which counsel should consider inclusion of issues arguably meriting reversal, there are at least three policy considerations that may dictate inclusion of issues in the appellate brief for which there is no reasonable prospect for reversal. These are claims that proponents of the conventional wisdom would certainly argue should be excluded from the brief, yet there are sound reasons for inclusion in special circumstances.

First, even when error does not merit reversal, the identification of error committed at trial by a trial court may prove important for a number of reasons. Whether in terms of abuse of discretion in the admission or exclusion of evidence, or in control of the trial process, or error that occurs in the interpretation and application of law, trial court error warrants correction in order to avoid future error on the part of the trial judge. The education of the trial judge is often an important part of the appellate process. For example, in *People v. Horrocks*,[259] the Colorado Supreme Court considered the use of hypothetical questions propounded to a psychologist through which defense counsel sought to elicit potential explanations as to why the ac-

253. 38 S.W.3d 914 (Ark. Ct. App. 2001).

254. *Jorden*, 38 S.W.3d at 916 (citation omitted).

255. 962 P.2d 999 (Colo. Ct. App. 1998).

256. *In re Casias*, 962 P.2d at 1003.

257. *Id.* at 1002.

258. *See, e.g.*, State v. Martinez, 43 P.3d 1042, 1044 (N.M. 2002) ("Because we reverse Defendant's sentence on the basis of the trial court's failure to adequately advise him of his right to be sentenced by a jury, we do not address any additional alleged errors.").

259. 549 P.2d 400 (Colo. 1976) (en banc).

cused attempted to flee following a shooting claimed to have been done in self-defense.[260] The victim had apparently attempted to withdraw from the confrontation after the defendant fired a warning shot, but the defendant fired again, killing the victim.[261] While affirming its commitment to the abuse of discretion standard, the court observed that the question posed was "comprehensive enough for the expert witness to formulate a rational opinion, and the court was overly restrictive in excluding it."[262] Nevertheless, the trial court's error in precluding use of the question was deemed harmless. [263]

The trial court in *Horrocks* had rejected the hypothetical question as failing to include all material facts in the case, but the Colorado Supreme Court pointed out that the trial court had not indicated in the record what material facts had been omitted that justified its conclusion that the question was objectionable.[264] The defendant was afforded relief on an alternate ground;[265] the trial court was educated on the propriety of developing defensive evidence through hypothetical questions propounded to experts.

Second, for institutional clients likely to have continuing litigation involving the same substantive issue or procedural claim, identification of error may well serve to avoid commission of a similar error in the next case. This is particularly true when a trial court demonstrates hostility toward a class of claims, clients, or particular attorneys. One of the important functions of appellate courts lies in the supervision of the trial courts, a function often compromised by application of the abuse of discretion doctrine.[266] For example, in *People v. Reaud*,[267] the Colorado Court of Appeals held that a trial court's restrictions on *voir dire* incorporated in its written "rules for jury selection," while not demonstrating an abuse of discretion requiring reversal on the facts of the case, improperly compromised counsel's right to *voir dire* prospective jurors.[268] Although the defendant gained no relief,[269] the disposition on appeal likely served to prevent reoccurrence of the trial court's improper restriction on *voir dire* in subsequent trials.

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260. *Horrocks*, 549 P.2d at 401.

261. *Id.*

262. *Id.* at 403.

263. *Id.*

264. *Id.* at 402.

265. *Id.* at 403-04. The court agreed with the defendant that a statutory ambiguity rendered his conviction for "reckless manslaughter" unfair because the language of the statutory provision essentially duplicated that defining criminally negligent homicide. *Id.* The court reduced the offense to the lesser crime and remanded for resentencing. *Id.* at 404.

266. For a discussion of the concept of "discretion," see Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 48-61 (2000).

267. 821 P.2d 870 (Colo. Ct. App. 1991).

268. *Reaud*, 821 P.2d at 872 ("[T]he particular restriction to which objection was made was improper.").

269. *Id.*

Third, appellate counsel may need to raise issues designed to educate an appellate court about a particular pattern of misconduct on the part of trial counsel. For instance, prosecutorial misconduct in closing argument may not warrant relief in the individual case, but repeated misconduct may ultimately lead to corrective measures being taken directly by appellate courts or trial courts acting on the directive of appellate courts.[270] One study of such misconduct noted the tendency of appellate courts to eventually apply sanctions or order reversal after repeated instances of misconduct were brought to their attention.[271] Repeated misconduct by a single prosecutor or by a prosecutor's office may eventually require intervention by the trial or appellate courts.[272]

People v. Rodriguez[273] provides an example of prosecutorial misconduct meriting appellate review. On direct appeal, the Colorado Supreme Court addressed the defendant's claims that the prosecutor engaged in twenty-three separate instances of misconduct in closing argument, even though there were numerous instances in which no contemporaneous objection had been made by trial counsel.[274] While the court did not reverse, the court did hold that misconduct not requiring reversal had occurred with respect to some of the claims.[275] For example, the court concluded that the prosecutor's suggestion that the General Assembly had determined that the death penalty was appropriate for Rodriguez did not lead to a literal interpretation by jurors; however, the court expressly discouraged this line of argument.[276] The court then concluded that the prosecutor committed misconduct not warranting reversal in improperly suggesting his evaluation of the case as one of the "worst."[277] The court also condemned the prosecutor's explicit argument that "it is cheaper to execute a defendant than to keep him or her in prison for the rest of their life."[278] While none of the arguments found improper by the majority warranted relief, the court's decision offers important guidance for the conduct of capital trials in the future.

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270. *See* Paul Spiegelman, *Prosecutorial Misconduct in Closing Argument: The Role of Intent in Appellate Review*, 1 J. APP. PRAC. & PROCESS 115, 169-83 (1999).

271. *See id.* at 169-71.

272. *Id.* at 171-83 (reviewing history of misconduct claims in the First Circuit coming from the United States Attorney's Office for the District of Puerto Rico).

273. 794 P.2d 965 (Colo. 1990), *cert. denied*, 498 U.S. 1055 (1991), *post conviction relief granted*, 914 P.2d 230 (Colo. 1996), *habeus corpus denied*, Rodriguez v. Zavaras, 42 F. Supp. 2d 1059 (D. Colo. 1999).

274. *Rodriguez*, 794 P.2d at 972.

275. *Id.* at 979.

276. *Id.* at 977.

277. *Id.*

278. *Id.* at 979.

G. Answering important questions of law not requiring reversal

The identification of error by the appellate court may be important for the development of the law generally, even though the individual litigant does not benefit from the appellate court's determination. For example, in *State v. Sinyard*,[279] the New Mexico Court of Appeals ruled on an issue of first impression—whether sentencing error could be raised as a matter of fundamental error.[280] Often, appellant counsel are called upon to assert claims not preserved by trial counsel, and the designation of such matters as fundamental claims addresses the lack of preservation problem. While Sinyard gained no relief from his sentence,[281] the court's opinion represented a small development in New Mexico law of importance to counsel handling criminal appeals.

In the post-conviction litigation in *People v. Rodriguez*, the Colorado Supreme Court considered 319 claims attacking the conviction and sentence of death.[282] The court refused to grant relief, but did find that one of the petitioner's convictions, for first-degree sexual assault, had to be vacated based on an incorrect jury instruction that permitted conviction on less than the statutorily required evidence.[283]

Similarly, in *People v. Stewart*,[284] the Colorado Supreme Court reviewed a reversal ordered by the Colorado Court of Appeals[285] in a case involving a conviction for reckless assault with a deadly weapon.[286] The court of appeals reversed the conviction, which specifically involved the defendant's use of his automobile to seriously injure another person.[287] One of the issues addressed by the intermediate court concerned the admission of testimony by an investigating officer as "expert testimony" requiring qualification.[288] It dealt with the issue based on its view that the evidence would likely be offered again at the retrial.[289] In reversing the court of appeals, the Colorado Supreme Court also addressed the admissibility of expert opinion offered through an investigating police officer.[290] The court engaged in an analysis of decisions from other jurisdictions on point[291] after generally reviewing Colorado evidentiary rules

279. 675 P.2d 426 (N.M. Ct. App. 1983).
280. *See Sinyard*, 675 P.2d at 427.
281. *Id.*
282. *Rodriguez*, 914 P.2d at 247.
283. *Id.* at 272-73.
284. 55 P.3d 107 (Colo. 2002).
285. *See* People v. Stewart, 26 P.3d 17 (Colo. Ct. App. 2000).
286. *Stewart*, 55 P.3d at 112.
287. *Stewart*, 26 P.3d at 19-20.
288. *Id.* at 25-26.
289. *Id.*
290. *Stewart*, 55 P.3d at 121-25.
291. *Id.* at 123-24.

governing admissibility of lay[292] and expert opinions.[293] Ultimately, the court concluded that officers testifying based on specialized training or education must be properly qualified as experts prior to offering what "amounts to expert testimony."[294] But the court declined to find that the error in admitting the testimony prejudiced the accused and thus affirmed.[295]

The *Stewart* litigation answered an important and continuing question in Colorado criminal trials involving the proper use of police officer expertise. While the disposition ultimately did not favor the accused,[296] the decisions of the court of appeals and supreme court clarified the issue for future litigants. Of course, it raised other issues as well, particularly regarding the likelihood that the training afforded an officer is sufficient to permit their qualification as an expert.[297] Thus, while Stewart lost his reversal in the court of appeals on the State's petition to the supreme court, prosecutors now will be required to qualify their officer witnesses as experts before developing their opinions in the guise of lay testimony.[298]

An analogous situation is sometimes presented in the appeal by the prosecution on a point of law following the acquittal of the defendant. For instance, after the defendant's acquittal on the defense of insanity, the prosecution sought a clarification of Idaho law in *State v. White*.[299] The prosecution was concerned that the trial court had improperly expanded upon state law in instructing the jury on volitional insanity, or the "irresistible impulse" test for insanity.[300] The Idaho Supreme Court took the opportunity to announce its adoption of the ALI Model Penal Code[301] test for insanity, which includes a volitional component.[302] Relying on state procedure permitting appeals by the prosecution even after acquittal, the State obtained an advisory opinion clarifying a controlling rule of law in Idaho criminal trials.[303]

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292. COLO. R. EVID. 701.

293. COLO. R. EVID. 702.

294. *Stewart*, 55 P.3d at 124.

295. *Id.* (pointing to Rule 35(e) of the Colorado Appellate Rules, which provides that error is not reversible unless it prejudices a substantial right of the party suffering an adverse ruling).

296. *Id.* at 112.

297. *Id.* at 123-24.

298. *Id.* at 123 n.10.

299. 456 P.2d 797, 799 (Idaho 1969).

300. *See White*, 456 P.2d at 801-02.

301. MODEL PENAL CODE § 4.01 (Official Draft 1962).

302. *White*, 456 P.2d at 802-03.

303. *See* IDAHO CODE §§ 19-2804(5), 19-2808 (repealed 1977). Such appeals are now authorized by Rule 11(c)(9) of the Idaho Rules of Appellate Procedure.

H. Reinforcing the client and trial counsel's confidence in appellate counsel

Finally, the identification of error in the appellate court may enhance the relationship between appellate counsel and trial counsel when different lawyers have represented the party at different stages of the proceedings. If trial counsel is rightly concerned that the trial court has erred, determination on appeal that the error in fact occurred, but was not sufficient to warrant relief, may serve a number of purposes. It may reassure counsel's perception of the proper disposition of the claim or motion at trial. It may also serve to dispel any perception that appellate counsel failed to acknowledge trial counsel's legitimate concern that the trial court acted improperly. Moreover, it may reinforce the perception of appellate counsel as a competent attorney in arguing the case on appeal, perhaps ensuring repeat business from the trial attorney or client.

Often, clients believe that they have been treated unfairly in the trial courts, and later, on appeal. Not infrequently, they are. The client's legitimate interest in retaining faith that counsel has not compromised the client's interests in the course of representation may, in such cases, be paramount to reinforcing the attorney/client relationship.[304] In these situations, counsel may well need to advance an argument at trial, or on appeal, even knowing that the disposition will be unfavorable to the client, if only to demonstrate loyalty to the client's position.[305] But counsel

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304. Justice Brennan noted this problem in the context of representation of criminal defendants in appointed appeals in his dissenting opinion in *Jones v. Barnes*, 463 U.S. 745, 755-56 (1983).

305. The author's experience in a recent case illustrates the point. In *Buckley v. State*, 76 S.W.3d 825 (Ark. 2002) [hereinafter *Buckley II*], the defendant, Buckley, insisted that trial counsel object to empanelling a new jury for resentencing after his case had initially been reversed for sentencing error in a prior appeal, *see* Buckley v. State, 20 S.W.3d 331, 337-39 (Ark. 2000). *See Buckley II*, 76 S.W.3d at 829. When trial counsel refused to assert the claim, Buckley stated the objection to the trial court personally, relying on a prior holding of the Eighth Circuit in which that court had concluded that Arkansas did not recognize a process for empanelling a sentencing jury after reversal for sentencing error, *see* Jones v. Arkansas, 929 F.2d 375, 381 n.17 (8th Cir. 1991). *See Buckley II*, 765 S.W.3d at 830. Trial counsel, however, concluded that Arkansas practice had been altered by legislation establishing bifurcation of the trial process. *See* ARK. CODE ANN. § 16-97-101 (Michie 2001). Further, while no Arkansas decision had expressly upheld the practice of limited remand before a jury charged solely on the issue of punishment, that conclusion was clearly foreshadowed by the Arkansas Supreme Court's holding in *Hill v. State*, 887 S.W.2d 275 (Ark. 1994), in which the parties had apparently proceeded by agreement to sentencing by a jury upon a plea of guilty, despite the absence of any statutory language authorizing this process. *Hill*, 887 S.W.2d at 277; *see* ARK. CODE ANN. § 16-97-101(5) (Michie 2001) (authorizing parties to waive jury sentencing after verdict of guilty returned by jury). The *Buckley II* court inferred from the change in sentencing procedure that the State now has a right to demand jury sentencing upon remand for resentencing when the appellate court finds reversible error in the punishment phase of the bifurcated trial. *Buckley II*, 76 S.W.3d at 830.

Buckley's disagreement with counsel over raising the jury resentencing issue resulted in a change of counsel for purposes of his appeal following his resentencing. On appeal, however, Buckley's insistence that the issue be asserted was respected, even though the outcome appeared clear to counsel. *See id.* at 829-31. The client's argument was certainly not frivolous and the opinion

is cautioned that appellate courts occasionally display hostility to aggressive litigation tactics.

An experienced appellate attorney was recently disciplined by the Indiana Supreme Court for remarks made in his brief seeking to transfer the appeal from the court of appeals to the state supreme court.[306] His complaint was that the decision of the intermediate court suggested to him that the court's decision-making was outcome driven and intellectually dishonest.[307] Following a disciplinary proceeding, the supreme court ordered him suspended from practice for a period of one month,[308] having previously ordered his brief supporting transfer to that court stricken. In its earlier action, the court had characterized the brief as a "scurrilous and intemperate attack on the integrity of the Court of Appeals."[309]

The Indiana Supreme Court decision imposing the suspension came on a 3-2 vote.[310] Ironically, one of the judges voting to impose the sanction had served on the court of appeals, concurring in the result without opinion.[311] The sanctioned lawyer undoubtedly has earned his client's belief that his loyalty has not been compromised. Of course, his effectiveness on the client's behalf likely has been jeopardized.

CONCLUDING THOUGHTS

The ethical rules direct counsel to "abide by the client's decisions concerning the objectives of representation" and to "consult with the client as to the means by which they are to be pursued."[312] The thrust of this directive makes excellent sense in terms of solidifying the attorney/client relationship. Ironically, the concern appears to have been lost on the *Jones v. Barnes* majority, which relegated control of the appeal to counsel.[313] Moreover, the Supreme Court's reliance on counsel's decision-making expertise seems somewhat peculiar in light of persistent

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in *Buckley II* stands as authority for jury sentencing on remand in the discretion of the prosecution, even over the objection of the defendant. *See id.* at 830-31.

306. *In re* Wilkins, 777 N.E.2d 714, 716-17 (Ind. 2002).

307. In the transfer petition, counsel stated:

> The Court of Appeals' published opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point. Clearly, such a decision should be reviewed by this Court. Not only does it work an injustice on appellant Michigan Mutual Insurance Company, it establishes dangerous precedent in several areas of the law. This will undoubtedly create additional problems in future cases.

Wilkins, 777 N.E.2d at 715. The attack was directed at the opinion issued in Michigan Mutual Insurance Company v. Sports, Inc., 698 N.E.2d 834 (Ind. Ct. App. 1998).

308. *Wilkins*, 777 N.E.2d at 719.

309. Mich. Mutual Ins. Co. v. Sports, Inc., 706 N.E.2d 555, 555 (Ind. 1999).

310. *Mich. Mutual*, 706 N.E.2d at 555.

311. *Mich. Mutual*, 698 N.E.2d at 845; *see* Gary Young, *Footnote Gets a Lawyer Suspended*, NAT'L L.J., Nov. 13, 2002.

312. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1999).

313. Jones v. Barnes, 463 U.S. 745, 751-54 (1983).

complaints from appellate judges about the quality of representation by lawyers practicing in their courts.

The motivation of proponents of the conventional wisdom should also be challenged. Clearly, appellate judges and their law clerks must be justly concerned about workloads. Overload in the judicial system is likely to compromise the quality of decision-making and opinion writing. Nevertheless, the explicit suggestion that fairness in disposition of pending appeals may be compromised by inclusion of colorable claims hardly promotes confidence in the appellate process. Appellate strategy should be dictated by reasonable considerations of accuracy and faithful adherence to precedent and principles of sound argument and logic, not by fear of page length and sanctions.

If the quality of appellate practice is truly compromised by the volume of work reaching the courts, it may be that remedial measures should be considered. One obvious solution lies in the creation of more judgeships and filling current vacancies.[314] Another may lie in the certification of appellate specialists whose training and experience will ensure a better product for the consideration of appellate courts.[315] What is true, regardless of the measures taken, is that the quality of appellate decision-making is, to some extent, dependent on the quality of appellate representation. The quality of representation should not be compromised by limitations on briefing that fail to recognize the incredible expansion of legal doctrine, judicial opinions, and statutory provisions that may be brought to bear on the argument and disposition of any single issue in an appeal. The solution to mounting caseloads that looks to counsel to limit the number of claims presented for review is simply shortsighted and unfair. It threatens counsel's exercise of professional judgment by promising better decision-making based on the proposition that advancing fewer claims will result in the appellate court giving better review to those fewer claims presented. This can hardly be the solution that promotes the highest quality of practice that judges and practitioners advocate.

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314. *See, e.g.*, William M. Richman, *An Argument on the Record for More Federal Judgeships*, 1 J. APP. PRAC. & PROCESS 37 (1999).

315. *See* Elliot L. Bien, *Toward a Community of Professionalism*, 3 J. APP. PRAC. & PROCESS 475 (2001).