CONFESSIONS OF AN ASSISTANT PUBLIC DEFENDER TURNED CRIMINAL APPEALS CLINIC PROFESSOR

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I. INTRODUCTION

On April 1, 1979, I began my career as an assistant public defender in the Appellate Division of the Miami-Dade County Public Defender's Office.[1] My experience in criminal appeals originated in the Appellate Division of the Miami-Dade County State Attorney's Office, where I was employed as an intern while attending law school at the University of Miami and briefly thereafter as an assistant state attorney. I worked in the Appellate Division of the State Attorney's Office from September 1976, until I joined the Public Defender's Office.

On April 1, 2004, I celebrated my twenty-fifth anniversary as an assistant public defender in the Appellate Division of what is now formally known as the Law Offices of Public Defender Bennett H. Brummer.[2] Over the course of those twen-

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[1] The Florida Legislature initially authorized a public defender system in Florida by chapter 63-409, Laws of Florida (1963), in response to the landmark United States Supreme Court decision in *Gideon v. Wainwright*, 372 U.S. 333 (1963). Graham v. State, 372 So. 2d 1363, 1365 n.2 (Fla. 1979). "From a staff of 16 attorneys in 1971, the Miami-Dade Public Defender's Office has expanded into the largest criminal defense law firm in the state of Florida." Miami-Dade Public Defender, Office History, *available at* http://www.pdmiami.com/history.htm (last visited Oct. 23, 2005).

[2] Bennett H. Brummer joined the Dade County Public Defender's Office as an assistant public defender in 1971. Miami-Dade Public Defender, Bennett H. Brummer, Biography, *available at* http://www.pdmiami.com/biography.htm (last

ty-five years, I have litigated hundreds of criminal appeals, with approximately five hundred reported decisions. I practiced primarily in the Third District Court of Appeal of Florida, which has jurisdiction over all appeals from the circuit courts in Miami-Dade County and Monroe County.[3] I also practiced in the Appellate Division of the Eleventh Judicial Circuit of Florida and handled a number of cases before the Florida Supreme Court.

Working as an appellate assistant public defender was an incredibly rewarding experience over those twenty-five years. However, as time wore on, the inevitable repetition in the innumerable transcripts I read began to take its toll. At times, I felt I would lose my sanity if I had to read another prosecution opening statement comparing that phase of the trial to a road map, a movie preview, or the cover of a jigsaw puzzle box. I began wondering if I could force myself to read yet another jury selection transcript in which the judge greeted the prospective jurors by telling them that the courtroom thermostat had only two settings: Ethiopia and Antarctica.[4]

On a more serious note, the combination of my many years of experience handling criminal appeals and the increased availability and sophistication of computer technology led to a growing temptation to revert to what I call "Appellate Auto-Pilot." I now had the ability to cut and paste relevant facts from transcripts on computer; relevant legal principles from legal research databases; and, in many cases, the argument itself from my personal database of briefs I had written over the years. Naturally, I always updated these arguments with the most recent case law. Nevertheless, the process still

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visited Oct. 23, 2005). Mr. Brummer was first elected as Dade County Public Defender in 1976, and he has been re-elected every four years since that date. *Id.*

[3] FLA. STAT. § 35.04 (2004).

[4] In a conversation with this judge a few years ago, I politely asked him to get some new material for the sake of the appellate attorneys who were forced to read the transcripts of his trials. The judge laughed and promised that he would do so. Alas, I very recently had occasion to review a transcript of a jury trial before this judge, and he greeted the prospective jurors in that trial with the same joke.

had an increasing tendency to become one which involved more rote and less reflection. Something was needed to reinvigorate both myself and the process of litigating criminal appeals.

That "something" presented itself in March 2004, a few weeks prior to my twenty-fifth anniversary as an appellate assistant public defender. I was approached by a colleague who asked if I would be interested in directing an Appellate Litigation Clinic at St. Thomas University Law School in Miami Gardens, Florida.[5] Unbeknownst to me, the new dean of the law school, Bob Butterworth, and my boss, Public Defender Bennett H. Brummer, had been discussing the formation of such a clinic for some time. Both Dean Butterworth and Mr. Brummer were eager to establish such a clinic in which third-year law students could work on real cases from the Public Defender's Office.

A few weeks after I was initially approached, I met with three representatives from St. Thomas University Law School: Professor Alfredo Garcia, Associate Dean of Academic Affairs; Assistant Professor Cece Dykas, Director of Clinical Programs; and Professor Amy D. Ronner. Assistant Public Defender Rory Stein, the Director of Training at the Public Defender's Office and a long-time adjunct law professor at St. Thomas, was also present at the meeting. During this meeting, everyone seemed to agree I would be a good choice to head the Appellate Litigation Clinic. We then turned to a discussion concerning how the clinic would operate.

I advised the St. Thomas officials that I intended to keep my position as a full-time assistant public defender, and therefore would not be able to maintain a presence on the law school campus during working hours. The school officials pondered this for a while and then responded that the problem could be overcome easily by operating the clinic as an externship at the Public Defender's Office, rather than an "in-house clinic." I sagely nodded my head in approval of this idea and jotted down a note to myself to look up the definition of

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[5] The St. Thomas University School of Law was founded in 1984.

the terms "in-house clinic" and "externship" as soon as possible. Everyone then agreed to start the Appellate Litigation Clinic as a one-semester, four-credit course in the spring of 2005. I subsequently met with Mr. Brummer and advised him about the details of the proposed clinic to be run, in large part, out of his office. He enthusiastically endorsed the planned clinic and graciously offered his full support of my efforts to set up the clinic within the Public Defender's Office.

In this article, I will recount my experiences of launching my Appellate Litigation Clinic at the St. Thomas University Law School and teaching the clinic during the spring semester of 2005. Also, I will discuss my plans for the future operation of the clinic, beginning in the fall semester of 2005.

II. (RE)STARTING THE APPELLATE LITIGATION CLINIC

Fortunately, I was not writing on a blank slate as I began to set up the Appellate Litigation Clinic at St. Thomas. Professor Amy D. Ronner started an in-house Appellate Litigation Clinic at St. Thomas in 1992.[6] That clinic operated under the direction of Professor Ronner until it was discontinued in 1999.[7] Appellate cases were transferred to the clinic from the Appellate Division of the Public Defender's Office. The transferred cases were selected from pending appeals in which the record had been filed and the defendant's brief was due. Professor Ronner's in-house clinic typically retained ten to fourteen third-year law students enrolled for two semesters. Under the student practice rules, the Florida Supreme Court certifies these students as legal interns, which allows them to

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[6] For an account of how the clinic began, see Amy D. Ronner, *Real Students, Real Appeals, Real Courts: The In-House Appellate Litigation Clinic at St. Thomas University School of Law*, II THE RECORD: J. APPELLATE PRAC. & ADVOC. SEC. FLA. B. 13 (1994).

[7] In an essay demonstrating how an in-house appellate clinic "synthesizes theory and practice while it trains students in appellate advocacy and professional responsibility," Professor Ronner describes her in-house appellate clinic and relates a number of her experiences in that clinic. Amy D. Ronner, *Some In-House Appellate Litigation Clinic's Lessons in Professional Responsibility: Musical Stories of Candor and the Sandbag*, 45 AM. U. L. REV. 859, 868 (1996).

appear in any Florida court.[8] Working under the supervision of Professor Ronner, and with the consent of their clients,[9] students wrote the briefs and argued the cases before the appellate court.

The clinic was a huge success, due in no small part to the phenomenal job done by Professor Ronner in directing the clinic. I have fond recollections of helping Professor Ronner select appropriate cases from my office and arriving at the lawyer's lounge of the Third District Court of Appeal to find a group of eager law students gathered around Professor Ronner as they prepared to argue one of the clinic's cases.

As I was planning to operate the Appellate Litigation Clinic as an externship at the Public Defender's Office, the clinic needed to be designed differently than Professor Ronner's "in-house clinic" at St. Thomas. In my clinic, each student would be required to be present at the Public Defender's Office at least sixteen hours a week. I would be the only attorney supervising the students. In addition, there would be a classroom component consisting of a two-hour class which I would teach one night each week. Due to these features of my clinic, particularly the numerous hours to be spent by the students in the Public Defender's Office under my supervision, it was determined that only four students would be chosen for the spring 2005 clinic. The four students would work on the appeals in two-person teams.

Another significant difference for the spring 2005 clinic was that the course would cover only one semester.[10] The students' first week in the Public Defender's Office was scheduled to begin on Monday, January 10, 2005, and the final week would end on Friday, April 29, 2005. To maximize the students' appellate experience in that four-month period, I

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[8] FLA. BAR. R. 11-1.2(b) ("An eligible law student may appear in any court or before any administrative tribunal in this state on behalf of any indigent person . . . .").

[9] Rule 11-1.2(b) requires that a client indicate in writing the approval of a student's appearance on the client's behalf.

[10] Starting with the fall 2005 clinic, students will enroll in the Appellate Litigation Clinic for two semesters.

decided to have the students assigned to what are known as "state appeals."[11] Such appeals are typically by the State from trial court rulings granting a defendant's motion to dismiss, motion to suppress, or motion to discharge based on a violation of the Florida Speedy Trial Rule.[12]

I believed that assigning state appeals to the students would have a number of advantages. To begin with, these types of appeals usually involve discrete legal issues, such as the Fourth Amendment search and seizure issues involved in a state appeal from a trial court order granting a motion to suppress. Procedurally, such appeals would give the students the best chance of writing a brief and participating in an oral argument before the end of the semester. I searched for two cases in which the record on appeal had been filed and the State had filed the initial brief of appellant. This would minimize any delays caused by the State moving for extensions of time. I anticipated that the students would have the answer brief ready to be filed in early March, two months after the clinic began. The oral argument would then most likely be scheduled sometime in late April.[13]

Assigning state appeals to the students in the clinic did present one potential problem. The Third District Court of Appeal grants only ten minutes per side in the majority of the cases which it schedules for oral argument. While counsel for the appellant can divide this time between the initial presentation and rebuttal, counsel for the appellee has only a single ten-minute period to present argument. As state appeals tend to involve a single issue, it seemed likely that only one member of each two-student team would be able to actually present the oral argument. Although I recognized this potential problem as soon as I decided to assign state appeals to the students, I was unsure how to resolve the problem. This was the

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[11] *See* FLA. R. APP. P. 9.140(c)(1) (setting forth the orders which the State may appeal in criminal cases).

[12] FLA. R. CRIM. P. 3.191 (establishing the legal rules for "speedy trials").

[13] The Third District Court of Appeal routinely grants all requests for oral argument, and the oral argument date is usually set upon the filing of the answer brief of appellee.

first of many problems in which I had no initial answer, but hoped to resolve over the course of the semester. Fortunately, I was able to determine satisfactory solutions for most of the problems which arose as a result of my lack of teaching experience. However, as detailed later in this article, my inability to find a completely satisfactory solution to the oral argument problem proved to be the major negative in my first experience as a clinical teacher.

To find cases to assign to the students, I gathered together approximately ten state appeals pending in the Appellate Division in which the record on appeal had been filed and the State had filed the initial brief of appellant. I reviewed the files in those appeals and found two promising candidates. Both cases were appeals by the State of Florida from a trial court order granting the defendant's motion to suppress. In both cases, the entire record on appeal was approximately one hundred pages, including the transcript of the hearing on the motion to suppress. Both cases involved interesting Fourth Amendment search and seizure issues. After reviewing and evaluating my cases for a few days, I selected two for the Spring 2005 Appellate Litigation Clinic.

III. EDUCATING PROFESSOR BLUMBERG

Needless to say, the classroom component of my clinic presented a daunting challenge to a fifty-something lifelong criminal appellate lawyer with no teaching experience. Over the years, I had supervised many new lawyers in the Appellate Division of the Public Defender's Office and this experience gave me confidence in my ability to supervise the clinical students as they wrote the brief and prepared for the oral argument. However, standing up in front of a group of students, no matter how small was another matter, not to mention such unfamiliar subjects as preparing a syllabus, developing a lesson plan for each scheduled class, and grading. I had approximately seven months between the time I was hired and the start of the clinic, however, I was unsure where to start my preparation for my "second career" as a teacher.

Happily, the answer to this question arrived quickly.

Shortly after I was hired, the clinical director at St. Thomas offered to send me to the Association of American Law Schools Workshop for New Law Teachers and New Clinical Teachers held on June 24-27, 2004, in Washington, D.C. At these workshops, I came into contact with numerous wonderful people who had been teaching law for many years in both clinical and non-clinical settings. I was exposed to vast amounts of information and I tried to absorb as much as possible. One piece of information which I repeatedly received made a particular impression. I was continuously told by speakers from the podium and in one-on-one discussions that I would love being a teacher; this information proved to be absolutely correct.

At the Washington, D.C. conference, I began to experience what I referred to as my "identity crisis" concerning the nature of the Appellate Litigation Clinic I was to be directing. My clinic was certainly not an "in-house clinic," as it would not be operated at the law school under the direction of a full-time law professor. However, my clinic did not fit within the structure of a typical externship, where students are usually sent to large public interest law firms to work under the supervision of lawyers in the firm who do not teach the students in a classroom setting. My proposed format differed significantly from this arrangement, as I was to be the sole supervisor of the students when they worked in my office and I was also to be their instructor in the classroom setting. At the conference, I asked many clinical instructors to describe the nature of their clinics to me and not one described a clinic quite like the one I was to direct. Needless to say, I found this experience fairly disconcerting. In meetings over the next few months with clinicians from the various South Florida law schools, I did not encounter anyone involved in a clinic similar to the Appellate Litigation Clinic I was designing. As the starting date for the clinic drew near, I realized that if my "identity crisis" was going to be resolved, the resolution would have to come from the actual operation of the clinic.

IV. THE BIRTH OF A CLINIC

On September 30, 2004, the director of the clinical programs at St. Thomas sent each law student a list of the clinical opportunities available for spring 2005. Number eight on the list, sandwiched between the long-running in-house Bankruptcy Clinic and the new Elder Law Externship,[14] was the Appellate Litigation Clinic. Nine third-year students applied for the four positions in my clinic. I received the applications in late October and reviewed them to determine the four best candidates.[15] Among the various factors I considered were academic performance, moot court experience, completion of courses related to criminal law and appellate practice, participation in internships in criminal or appellate courts, and internships in law firms specializing in criminal or appellate practice.

On November 1, 2004, I selected the four students for my first Appellate Litigation Clinic. In mid-November, I met with the four students for the first time and gave them a brief description of how I planned to run the clinic. I immediately confessed to the students my total lack of teaching experience, and told them of my sincere hope that my extensive experience handling criminal appeals would compensate for this deficiency.

In the approximately six-week period between my first meeting with the students and the start of the clinic, I developed my syllabus, including a list of topics to be covered in each classroom session and a work schedule for the two student teams. In the syllabus, I tried to impress upon the students the serious nature of their responsibilities in the clinic arising from their representation of real clients in real cases pending in the appellate court. I warned them that due to the differences between the two cases chosen for the clinic, there could be considerable differences with respect to the workloads for the two teams. Furthermore, I cautioned the students that

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[14] This positioning did not bode well for my clinical "identity crisis."

[15] St. Thomas officials allowed me to select the four best students for my first clinic.

deadlines for team assignments were rigid and inflexible because we were required to abide by the deadlines set by the appellate court. After briefly discussing the subject of grading, I reminded the students that the Appellate Litigation Clinic was to be graded and not simply pass/fail. Finally, I let the students know that I reserved the right to edit the final briefs submitted by the students, as I was the person ultimately responsible for the representation of the clients.

An interesting phenomenon occurred as I worked on my own appeals during the weeks leading up to the commencement of the clinic. Naturally, the clinic was constantly on my mind during these weeks. As a result of this preoccupation with the clinic, my "Appellate Auto-Pilot" disengaged itself as I worked on my cases. The process which previously had sometimes drifted toward one involving more rote and less reflection, was reversing itself. At each stage of a case, I was taking a mental recalculation and analyzing what I was doing in preparation for explaining that stage to the students.

For example, as I prepared for an oral argument during this time period, I examined the process of reducing the arguments in my brief and the arguments in the State's brief to their essential components, determining the critical points of contention between the two sides, and determining the best ways to convince the appellate court in ten minutes to resolve those points of contention in my favor. Of course, this is what I always did as I prepared for an oral argument. However, I generally did these things automatically without thinking about the actual process in which I was engaged. Focusing and reflecting on my actual thought processes so that I could be prepared to explain them to the students was very rewarding. This experience was repeated many times, and at the various stages of the appeals that I was working: reading the trial transcripts and analyzing the proceedings to determine potential appellate issues, researching those potential issues, deciding which issues to raise in the brief, writing the statement of the case and facts in the brief, and writing the argument portion of the brief.

While it had once seemed as if the start of my teaching

career would never actually arrive, the last few weeks sped by and on Monday, January 10, 2005, my four students arrived at the Public Defender's Office. After taking care of the necessary administrative tasks, such as office identification cards, computer user names and passwords, etc., I had the students immediately begin work on their cases. As the briefs were to be filed in less than two months, I had little choice in this matter. I randomly paired the students into two-person teams and assigned each team one of the state appeals I had chosen for the clinic.

Due to the nature of the students' first assignment, I did not immediately give the students a copy of the initial brief of appellant filed by the State in each case. The first assignment, due at the end of the first week, was a first draft of the statement of the case and facts for the answer brief of appellee, based solely on the record on appeal. The purpose of this assignment was to have the students present the essential facts of the case without knowing the significance of those facts in light of the arguments presented by the State in its initial brief. I felt this exercise would dramatically demonstrate to the students the difference between presenting the facts as a neutral observer and presenting the facts as an advocate. The assignment for the following week was a first draft of the statement of the case and facts for the answer brief of appellee, based on the record and the State's brief. The students worked individually on the first assignments, so that I could assess each student's performance before the students started to work together in their two-person teams.

With the students established in my office and working on their first assignment, one of the major struggles of the clinic began. This struggle was finding the proper supervisory balance between actually showing the students how to write a particular portion of a brief and letting the students continue to struggle on their own to find the best way to write that portion of the brief. With the first two assignments, I got off easy. As I wanted to gauge the abilities of each student, and as the filing date for the brief loomed seemingly far off in the distance, I told the students they were totally on their own for

the first two assignments. While I assured the students that I would always be available to answer questions and help them with their work as the semester proceeded, I told them to give me their best individual efforts on the first two assignments.

On Thursday, January 13, 2005, somewhere around 5:00 p.m., I entered classroom four at the St. Thomas University Law School to teach my first class. Scattered throughout a large classroom which seated over one hundred students, were the four students enrolled in the Appellate Litigation Clinic. I took my place at the rostrum in the front of the classroom. I began the class, as I began each subsequent class, discussing with the students interesting events related to my caseload which had taken place in the week preceding the class. In the first class, I discussed with the students an oral argument I had presented to the Third District Court of Appeal on the day before the class.

I spent the remainder of my first class giving a prepared lecture on the Florida Rules of Appellate Procedure. I broke down the appellate litigation process into four general categories: Technical (the actual skills needed to litigate an appeal); Creative (using those skills to effectively advocate the position of the client); Ethical (representing the client zealously but within the bounds of the law); and Practical (corresponding with clients, dealing with the clerk's office at both the trial and appellate level, etc.). I then went through the appellate rules trying to relate each rule to the four categories I had created and also trying to tell the students stories from my actual experience in the context of a specific appellate rule. For example, in discussing the appellate rule governing the record on appeal,[16] I explained to the students what documents actually make up a record on appeal and the pleadings an appellate attorney must file to make sure that a complete record on appeal is prepared and filed (Technical); how including or excluding certain documents could have a substantial effect on winning or losing the appeal (Creative); an appellate attorney's responsibility to provide the appellate court with all

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[16] FLA. R. APP. P. 9.200.

documents from the lower court relevant to a particular issue, even those documents which do not support your position on that issue (Ethical); and maintaining a close relationship with the trial and appellate court clerks to ensure that the record on appeal is properly filed (Practical). I then told the students about one of my appeals in which I made extensive efforts to locate a particular document and to ensure that the document was included in the record on appeal. The document ended up being the key factor in my winning that appeal.

While I felt that I had devised an effective and relatively entertaining way to cover the necessary but dry subject of the appellate rules, I must confess that my first class fell short of being a rousing success. At times it seemed as if I was just droning on and on and I could not tell if the students were absorbing any of the information I was giving them. One student simply stared at me the whole time, while another student spent the entire session typing away on his laptop computer. Granted, a lecture on the appellate rules is not likely to foster a lively exchange between teacher and student. Yet, after anticipating this first classroom session for so long, I walked out of the room at the end of class relatively uninspired. Fortunately, this was to change very quickly.

V. THE BRIEFS

Before relating my experiences over the next weeks as the students worked on the briefs, a short description of the two cases assigned to the students is in order. In the first case (hereinafter "The Unlawful Detention"), the trial judge had ruled that the defendant was legitimately stopped for a traffic citation but that the detention of the defendant should have ended once the citation was issued because the officer had no reasonable suspicion that a crime had been committed to justify further detention. Accordingly, the judge granted the defense motion to suppress the evidence obtained by the police as the result of that unlawful detention.

The issues in the second case (hereinafter "The Warrantless Search"), were considerably more complex. The trial judge in that case had suppressed a gun on both Fourth and Fifth

Amendment grounds. The judge first ruled that the arresting officer was required to advise the defendant of his Miranda[17] rights prior to questioning him concerning the details of a shooting and the location of a gun inside the defendant's house because the defendant was in custody for Miranda purposes at the time of the questioning. The court further ruled that the subsequent warrantless entry into the house to search for the gun violated the Fourth Amendment because there were no exigent circumstances and the defendant had not voluntarily consented to the entry and search of his home. Finally, the court ruled that the inevitable discovery doctrine[18] did not apply to allow for the admission of the illegally obtained evidence.

On the day before the second class, the students handed in their second assignment, the revised draft statement of the case and facts, based on the record and the arguments presented in the State's brief. In the second class we discussed the first two assignments in conjunction with my prepared lecture on "Effective Brief Writing Part One: The Statement of the Case and Facts." The nature of the briefs filed by the State greatly enhanced the effectiveness of the first two student assignments and also enhanced the interest level of the students during the second class.

In "The Unlawful Detention," the State had filed a very weak brief. The State's first argument in the brief was that the defendant lacked standing; the second argument was that the suppressed evidence was admissible under the inevitable discovery doctrine. Neither of these arguments had been made by the State in the lower court. In the last few pages of the brief, the State generally addressed the ground on which the trial court had granted the motion to suppress. The students assigned to "The Unlawful Detention" were mystified by the State's brief. Obviously, their first version of the statement of the case and facts had not addressed anything related to

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[17] Miranda v. Arizona, 384 U.S. 436 (1966).

[18] *See* 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.4(a) (4th ed. 2004).

standing or the inevitable discovery doctrine. The students wondered how the State could devote the majority of its brief to two issues not addressed in the lower court and discuss the issue litigated in the trial court as almost an afterthought.

The State's brief in "The Warrantless Search" had a number of similarly inexplicable aspects. The brief focused exclusively on the Fifth Amendment violations and basically ignored the Fourth Amendment issues. The State's brief did not directly address the warrantless entry of the house to retrieve the gun nor seek to justify that entry on grounds of consent or exigent circumstances.

At the outset of the second class, I had the students on each team describe their case to the other team. This exercise served to both familiarize each team with the nature of the other team's case and give the students an early opportunity to orally present the case in a concise manner. I then discussed with the students how their statement of the case and facts had changed based on their review of the State's brief. For the remainder of the class, I discussed with the students how they must craft their statement of the case and facts to tell the story of what happened in the case in an interesting fashion and also present the facts in a manner which would persuade the appellate court to uphold the trial judge's ruling and reject the arguments presented by the State in its brief. I integrated the draft briefs submitted by the students into this discussion, along with examples from briefs I had written. I fired questions at the students and they fired questions back at me. The students seemed to be totally engaged in the exercise and the time flew by quickly. After this class I understood what people were talking about when they said I would "love teaching."

As the students arrived at my office during the following week, I began my individual editing sessions with them. I had lengthy discussions with each student concerning the drafts they had previously submitted to me. I was now fully engaged in the supervision dilemma that was to be ever-present until the briefs were filed. I did my best to point out the things that needed to be corrected, to explain why they needed to be cor-

rected, and to give the students a general idea about how the corrections should be made. I repeatedly resisted the temptation to simply make the corrections myself and then explain to the students why I had made the corrections.

In the next two classroom sessions, we discussed the students' first and second individual drafts of the entire answer brief. I reviewed some basic principles of legal research with the students and gave them examples of how those principles could be employed to research the issues in their cases. I explained the importance of organizing the legal arguments to be presented in the brief. I described the process as: (1) listing the arguments presented by the State in the initial brief; (2) formulating the response to each of those arguments; (3) developing the arguments that needed to be presented independently of the arguments raised by the State; and (4) synthesizing these elements into a coherent whole which would convince the appellate court to affirm the lower court orders granting the motion to suppress. I continued to cite examples from both the students' cases and my own cases to demonstrate the points I was trying to make. Once again, this process seemed to fully engage the students and made for a lively and rewarding classroom experience for both myself and the students.

Just as everything seemed to be coming together nicely, the dreaded concept of grading reared its ugly head. In planning the clinic, I had decided to grade the final draft of each student's individual answer brief and the final draft of each team's answer brief. The final drafts of the individual briefs were due to be filed on the day before the fifth classroom session. Having never taught before, I struggled mightily in grading the final drafts of the individual briefs. As I was not teaching a substantive course on criminal law or constitutional law, I did not feel it was proper to grade the students on their mastery of the legal principles involved in their cases. As I was not teaching a course on legal writing, I did not feel it was proper to grade the students on how well their briefs were written.

After many hours of thought, I finally decided to base the

students' grade on: (1) the level of effort spent in the preparation of the brief; (2) how well the students had responded to the lessons in brief writing which I had tried to impart during the classroom sessions; and (3) how well the students had responded to the lessons in brief writing which I had tried to impart during the individual editing sessions. My task was made somewhat easier by the fact that all four students had worked very hard during the first four weeks of the clinic. Although the quality level of the four individual briefs submitted to me varied substantially, it was clear that each of the students had been listening in the classroom sessions and the individual editing sessions, and had tried their best to integrate what they had learned into the writing of those briefs. The progression from the first draft brief submitted by the students to the final draft of the individual brief was truly remarkable. In advising the students of their grades on the brief, I gave each student a brief explanation of what I thought they had done well and what I thought needed improvement. The students seemed to greatly appreciate this feedback.

Following the submission of the final drafts of the individual briefs, the students began work on the team briefs to be filed in the appellate court. At the beginning of the next class, I emphasized the fact that the liberty of two real people was at stake in their cases. Both clients had been released from custody on their own recognizance pending the State's appeal. In my experience, most clients think the case is over when the trial judge grants their motion to suppress, even though they are told that the State has filed an appeal and that if the suppression order is reversed they will again have to face the charges. The motions to suppress were most likely going to be dispositive of each case, and thus if the suppression orders were affirmed on appeal, the cases would be over and the clients could get on with their lives. However, if the suppression orders were reversed, the prosecution of each client would resume and they would be subject to substantial jail sentences if they were convicted. After weeks of actually working on the cases, this discussion seemed to have a very sobering effect on

the students.

In the classes leading up to the filing of the final team briefs, I moved more and more from a discussion of general principles of effective brief writing to more specific principles applicable to the students' cases. As I discussed a particular problem related to a section of the brief in one of the cases, I always tried to show how the solution to that problem could be used in the other case as well. For example, in both cases the State had presented arguments to the appellate court which had not been presented to the lower court. The students tended to focus on the merits of these arguments rather than the legal principles which barred the State from raising the issues for the first time on appeal. I told the students to thoroughly research these legal principles, paying particular attention to cases in which a particular argument raised by the State in their case had been rejected by an appellate court because it had never been presented to the lower court.[19]

Also, both teams had to find the proper balance between addressing the merits of the claim and the lack of preservation of that claim. Should the students not address the merits at all and simply point out that the arguments had not been presented to the trial court and cite the cases which establish that the arguments had been waived? Should they briefly mention that the issues were made for the first time on appeal and then address the merits in depth? These were of course decisions which I had made hundreds of times over the course of my career as an appellate assistant public defender. However, discussing these decisions with the students made me reexamine the process in-depth and gave me a greater appreciation for the nature of the work I had been doing for so many years.

As the deadline for filing the brief rapidly approached, the individual editing sessions with the students in my office

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[19] *See e.g.*, State v. Mae, 706 So. 2d 350 (Fla. Dist. Ct. App. 1998) (refusing to consider the State's standing argument in an appeal from an order granting a motion to suppress because no such argument was ever presented to the trial court).

lengthened and intensified. The temptation to actually write a critical portion of a brief myself became almost irresistible due to the time constraints involved and because, by this time, the students had been given multiple opportunities to "get it right." After all, in the final analysis, the interests of the clients had to take precedence over the education of the students. Fortunately, because I was blessed with excellent students who worked incredibly hard on the briefs, in most instances, the students eventually were able to write those critical portions of the brief by themselves based on my criticisms and suggestions.

The final drafts of the team briefs were submitted to me on February 23, 2005. I graded the briefs and did some minor technical editing, and on March 11, the briefs were filed in the Third District Court of Appeal, along with requests for oral argument.[20] The students were all very excited when I presented the final versions of the briefs to them for their signatures as certified legal interns. On March 18, the Third District Court of Appeal scheduled oral argument in both student cases for April 26, two days before the last classroom session of the clinic.

VI. THE ORAL ARGUMENT (HEADS I LOSE, TAILS NOBODY WINS)

With the briefs filed, I began preparing the students for oral argument. For the next two weeks, the students attended oral arguments at the Third District Court of Appeal rather than report to my office. I had the students note the names of the three judges on each panel, the type of case being argued (criminal law, contract law, family law), the issues involved in the appeal, and their general impressions of the oral arguments. This proved to be a rewarding exercise for myself and

[20] Interestingly, the State had failed to file a request for oral argument along with its initial brief in both of the two student cases. Counsel for appellant's failure to file a request for oral argument, in a court such as the Third District where oral argument is routinely granted upon request, is generally viewed as a lack of confidence in the positions espoused in the initial brief.

the students. I was both educated and amused by hearing oral arguments described from the perspective of third-year law students. The students benefitted greatly from watching a number of oral arguments before they had to present the oral argument for their cases. Indeed, as I prepared the students for the oral argument in their cases, they frequently mentioned something they had seen in an oral argument which exemplified the point I was trying to make. I tracked the cases which the students had observed and at the beginning of every class, for the remainder of the semester, I discussed with the students any decisions which had been issued in those cases.

Of course, as we began our preparation for the oral argument, I was squarely faced with the problem I had anticipated concerning only one member of each team being able to actually present the oral argument in court. I had told the students about this potential problem in the first class, but the subject obviously needed to be readdressed at this point in the semester. I had quickly come to realize while editing the students' briefs that the issues could not effectively be divided for purposes of oral argument in either case. I therefore had to decide how I would select one person from each of the two teams to present the oral argument in court. Still unable to come up with a satisfactory solution, I told each student to prepare for the oral argument as if they were the student selected to actually present the argument in court. I told the students they would be notified at a future date as to how and when the actual selection would be made. I confess this was not a shining moment in my budding teaching career.

I began the classroom preparation for the oral argument by showing the students two interesting arguments which I had presented to the Third District Court of Appeal a few weeks before.[21] Although it was a somewhat humbling expe-

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[21] The chief clerk of the Third District Court of Appeal, Mary Cay Blanks, was kind enough to provide me with CD-ROM versions of my two oral arguments. I am deeply indebted to Ms. Blanks for all the assistance she gave me during the course of the spring 2005 semester.

rience to watch portions of these oral arguments over and over and critique my performance, I found it to be a great teaching tool. I stopped the playback at various points in the argument and discussed with the students the dynamics involved at that point. It was particularly educational and entertaining to stop the playback just after I was asked a question by the judge and ask the students how they would respond to the question[22] and then show them the answer I had given. We spent a full classroom session on each of my two oral arguments and those were two of the best classes of the semester.

Following these two classes, I conducted mock oral arguments during the classroom sessions. I recorded these arguments on audiotapes and reviewed them with the students individually in my office. For the first mock argument, I told the students to give me a five to seven minute presentation of their case. I told the students I would not interrupt their presentation with questions, as the purpose of this exercise was to test their ability to clearly and concisely present the essence of their case to the court. Each student was present in the classroom to watch the arguments presented by their fellow students. The four arguments were presented one after the other and at the conclusion of all the arguments we discussed the presentations.

In the next classroom sessions, we began full mock oral arguments with my questioning of the students during their presentations. I tried to ask slightly different questions of each team member during these exercises. I began with fairly simple questions and then progressed to more difficult ones over the course of the next several classes. During the students' time in my office following each mock oral argument, I went over the questions with the students and had them work on perfecting their answers to the questions.

One of the more entertaining experiences during these mock oral arguments occurred fairly early in the process. In

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[22] I provided the students with the briefs in each of the two cases before class so they would have the opportunity to familiarize themselves with the issues in the cases.

my weekly review of new decisions, which was a routine part of my work as an appellate defender, I noticed that two decisions had just been issued which directly related to issues in each of the two student cases. During the first mock oral arguments after I read those decisions, I asked each student to address the effect of the decisions on the arguments they had presented in their briefs. None of the students had any idea what I was talking about, and each student recovered from their flustered state with varying degrees of success.

At the end of the mock arguments, I handed out copies of the recent decisions to the students and explained the two main purposes of the exercise. First, I discussed with the students the proper way to respond to an appellate judge when asked to address a case with which they are unfamiliar. Second, I cautioned the students that appellate research does not end with filing the brief. A good appellate lawyer must check at least once a week after the brief is filed to find any new appellate decisions relevant to the issues in their pending appeals.

Approximately three weeks prior to the oral argument date, I began class with a frank discussion concerning the selection of the students to present oral argument to the court. I told the students that I had struggled long and hard with this dilemma and that I had finally decided to make the selection based on my evaluation of the students' performances during mock oral arguments before both a panel of three of my colleagues in the Appellate Division of the Public Defender's Office and the remaining mock arguments in the classroom. I explained to the students that in the final analysis, my overriding obligation was to provide the clients with the best possible representation in their appeals. Although I was not happy about making the process a competition between teammates, this seemed to be the best way to make the selection which would best serve the interests of the clients. The students, although certainly not happy with the prospect of working so hard to prepare for the oral argument and then not actually arguing the case in court, seemed to accept my decision as the best possible solution under the circumstances.

Approximately two weeks before the oral argument date, each student participated in a mock oral argument in my office before three experienced assistant public defenders in the Appellate Division. To make the argument as realistic as possible for the students and to provide some entertainment to my colleagues, I performed the role of the State in the mock arguments. As the appellant, I presented the opening argument and my colleagues showed me no mercy in their questioning. Although somewhat less confrontational when the students presented their arguments, my colleagues questioned the students vigorously. The students were confronted with questions which were more difficult than the questions I had asked in the classroom mock arguments. As it turned out, some of my colleagues' questions were more difficult than the questions the students received in the actual oral arguments. The students acquitted themselves well during the office mock arguments, but they were all somewhat rattled by the experience. I reassured each student afterwards, and spent time with each student going over the best answers to the questions they had faced. At the end of the entire process, they were much more confident of their ability to perform well at the actual oral argument.

However, the burning question remained: Which students would be chosen to argue the cases in court?[23] Following the mock arguments in my office, I advised the students I would make the final decision, after evaluating their performance in both mock oral arguments, in the last class prior to the actual oral argument date. In that class, each student would present their oral argument to me with the other three students out of the room. Each teammate would be given the same questions during the mock oral argument. After both teammates had presented their arguments, I would evaluate their perfor-

[23] Interestingly, when I presented this dilemma to my mock judges when I took them to lunch to thank them for their help, they tried to ease my pain by suggesting that I flip a coin to make the decision. While such a solution was certainly "appealing," in that it would take me off the hook, I felt it would not be fair to either the students or my clients to make the decision in this manner.

mances and decide which student would argue that case in court.

All four students did very well in their arguments. I had no doubt that all four students were capable of making an excellent presentation to the appellate court. However, in each team, one of the two students had clearly performed better than the other, and I selected those two students to present the oral arguments in court. I called all four students back into the classroom to announce the decision, which was met with various reactions which need not be detailed here. Mercifully, the time at which the class ended arrived almost immediately after I announced the decision. The students filed out of the classroom and I experienced my lowest moment of the semester. All four students had worked incredibly hard on both the briefs and the preparation for the oral argument. All four students deserved the opportunity to argue the case in court. There was simply no way for me to give each one that opportunity.

Five days later, the students arrived at the Third District Court of Appeal to present the oral arguments in their cases. The cases were argued back to back and each case was argued before the same three-judge panel. It might have been my imagination, but there seemed to be a palpable feeling of happiness emanating from the bench as the judges watched the bright, eager law students take their place at counsel table and the grizzled old assistant public defender take his seat inconspicuously a short distance behind the students. The bench was very active during both oral arguments, peppering the students with both favorable and unfavorable questions. The students performed beautifully in both cases. I told the students before the arguments that they were on their own and I would not whisper suggestions or pass notes to them as they sat at counsel table and presented their arguments. I must admit that once or twice I was tempted to give the students some help, but I resisted the temptation. Before we knew it, both arguments were over. We walked out of the courthouse together, engaged in a post-argument analysis session on the courthouse steps and that was that.

VII. THE END OF THE BEGINNING

Two days later, we had our final class. As I had done on the courthouse steps, I complimented the two students who argued the cases on their fine performances and I praised all four students for their excellent work over the course of the semester. I confessed to the students that although I had devised an overall plan for the clinic prior to the first class, I had in large part "made it up as I went along" throughout the course of the semester. The students all laughed at this, but they seemed to agree with me that most of my decisions turned out well. I sincerely thanked the students for making my first teaching experience such a rewarding one. I told them I hoped to direct the Appellate Litigation Clinic for many years, but that the four of them set the bar very high for future students and they would always occupy a special place as my first students. I wished them luck on their upcoming exams and in their future legal careers. I advised them that it was difficult to predict when the Third District Court of Appeal would issue the decisions in their cases. Based on my experience, I told them that the decisions could be issued as early as two weeks from the date of the oral argument, or as late as several months later.

On May 4, 2005, eight days after the oral argument, the Third District Court of Appeal issued its opinion in "The Unlawful Detention" case affirming the trial judge's suppression order.[24] I immediately sent news of the decision to the client, the students, the director of the clinical programs at St. Thomas, the dean of the law school, and Public Defender Bennett H. Brummer. One week later, the court issued its decision in "The Warrantless Search" case affirming the trial court's suppression order.[25] I quickly sent out similar notifications.

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[24] State v. Villate, 901 So. 2d 953 (Fla. Dist. Ct. App. 2005).

[25] State v. Iglus, 902 So. 2d 164 (Fla. Dist. Ct. App. 2005) (table).

VIII. THE FUTURE

The next Appellate Litigation Clinic will be an eight-credit course in fall 2005 and spring 2006. Once again, four third-year law students will be enrolled in the clinic. As the clinic will run for the entire school year, the students will have the opportunity to write initial briefs rather than answer briefs. I will devote substantial time to subjects such as assembling the record on appeal, analyzing the record to find potential appellate issues, and deciding which issues to raise in the initial brief. Needless to say, a top priority in the clinic will be giving each student the opportunity to argue their case in the appellate court. I hope to get two appeals through the entire appellate process, including oral arguments. If I am successful in this endeavor, each student will argue one case before the appellate court. Even if only one case reaches the oral argument stage before the end of the year, one teammate will present the opening argument and the other teammate will present the rebuttal.

Finally, I am happy to report that my "identity crisis" concerning the nature of my Appellate Litigation Clinic resolved itself over the course of the spring 2005 semester. Through the various experiences of the clinic in the classroom and in my office, the identity of my particular type of clinic became clear to me. Indeed, I must confess that I believe the model which evolved from my improvised solutions to the many problems I faced during my first teaching experience is a pretty good one, whatever it is called. Come to think about it, is it not true that clinics are supposed to be all about learning from experience?