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Ethical and Aggressive Appellate Advocacy: Confronting Adverse Authority

J. THOMAS SULLIVAN*

...we view this as one of those rare cases in which the result below is so improbable that it reveals a fundamental failure on our part to interpret the Constitution in a way that secures its intended constraint on judicial discretion.

*Crawford v. Washington*¹

I. INTRODUCTION

The problem posed by unfavorable precedent is one that plagues appellate lawyers. Regardless of how reasonable a different result on a given claim would be in light of the facts available in a particular case, the existence of a controlling rule of law that requires rejection of the claim often frustrates counsel's best efforts at representing the client. Were we always able to write on the almost mythical "clean slate," the win/loss records of appellants' counsel would undoubtedly improve, although at the expense of appellees' counsel. Yet well-reasoned arguments and well-argued appeals for justice still prevail at times, and appellate lawyers should be cautious in assuming that precedent will necessarily prove to be unyielding in the face of creative lawyering.

The Supreme Court's decision in *Crawford v. Washington*² demonstrates that appellate courts are susceptible to the need to correct even their own errors, suggesting that appellate lawyers should not despair when confronted by adverse decisions that will, arguably, doom their

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1. *Crawford v. Washington*, 541 U.S. 36, 67 (2004).

2. *Id.*

arguments. *Crawford* is particularly interesting in several respects, not the least of which is that the majority's reversal in thinking did not result in the overruling of a prior decision. Instead, the majority concluded that the rationale for its prior decision in *Ohio v. Roberts* was essentially too broad and permitted constitutionally-erroneous reliance.³

The issue presented in *Crawford* involved the admission of a statement made to police by an accomplice not available for cross-examination at trial.⁴ The defendant's wife, Sylvia, had given a statement to police officers investigating the stabbing of a man who had reportedly attempted to rape Sylvia.⁵ The statement was offered at trial to impeach Crawford's claim of self-defense, even though his wife did not testify.⁶ Crawford objected to admission of the statement⁷ as violative of his Sixth Amendment right of confrontation.⁸

The Washington appellate courts reached different conclusions on admissibility of the out-of-court statement made by Crawford's wife to the police. The court of appeals concluded that the statement did not bear sufficient indicia of reliability to warrant its admission without the accused being afforded an opportunity to cross-examine the declarant.⁹ The state supreme court had reversed the court of appeals, holding that statements given by both Crawford and his wife were sufficiently "interlocking" to demonstrate the reliability of Sylvia's statement, thus rendering it admissible over the Sixth Amendment objection.¹⁰

The *Crawford* Court reviewed the use of the "indicia of reliability" test articulated in *Ohio v. Roberts* by the lower courts for admission of testimonial statements of non-testifying accomplices in arriving at its conclusion that *Roberts* was overly broad in its suggested application of this test to all confrontation issues.¹¹ In *Roberts*, a forgery and receipt of stolen property case, the critical fact was that the testimony offered in rebuttal at trial had been given at a prior proceeding in which the accused's counsel had an opportunity for cross-examination.¹² The wit-

3. *Id.* at 60 (citing *Ohio v. Roberts*, 448 U.S. 56 (1980)).

4. A confession or statement given in response to police interrogation, as well as an *ex parte* affidavit, is testimonial in nature. *Id.* at 52.

5. *Id.* at 38.

6. *Id.* at 40.

7. *Id.*

8. U.S. CONST. amend. VI. The Confrontation Clause provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.*

9. *Crawford*, 541 U.S. at 41. The opinion of the Washington Court of Appeals was not published. *State v. Crawford*, No. 25307-1-II, 2001 WL 850119, at *2 (Wash. Ct. App. July 30, 2001).

10. *State v. Crawford*, 54 P.3d 656, 663-64 (Wash. 2002).

11. *Crawford*, 541 U.S. at 62-65.

12. *Ohio v. Roberts*, 448 U.S. 56, 70-71 (1980). The fact that defense counsel had not

ness, who could not be located for subpoena for trial, had testified that the accused had been staying with her at her parents' home, but that she had neither given him permission to use their credit cards nor given him the forged check on her mother's account that he had in his possession.¹³

The Court's decision in *Roberts* reflected a long-standing approach to admission of hearsay in situations in which prior sworn testimony is offered at trial in the absence of the declarant.¹⁴ But the *Crawford* Court was concerned that the "indicia of reliability" test used to justify admission of prior statements or testimony of unavailable witnesses had been too broadly stated, suggesting that it would always provide a rationale for their admission.¹⁵ The suggested broad application of the *Roberts* "indicia of reliability" test was reinforced by the Court in its later 5-4 decision in *Lee v. Illinois*.¹⁶ There, the majority had rejected admission of an accomplice's confession despite its generally "interlocking" relationship of factual admissions contained in Lee's own statement to the police.¹⁷ The proposition that "interlocking" confessions would provide a constitutionally reasonable basis for admissibility of the non-testifying accomplice's testimony—often particularly valuable in rebutting an accused's own testimony disclaiming prior incrimination¹⁸—had been advanced in *Parker v. Randolph*.¹⁹

Ironically, *Lee* proved dispositive in the Washington Supreme Court. Even though the *Lee* Court had rejected the admissibility argument based primarily on the unreliability of accomplice statements inculcating others,²⁰ the state court relied on the general proposition that "interlocking statements" demonstrate sufficient "indicia of reliability" to justify admission in the absence of cross-examination.²¹ Because the statements of Crawford and Sylvia did not depart on critical facts, as had the statements given to the police by Lee and his accomplice, the Wash-

engaged in a particularly rigorous cross-examination of the witness at the preliminary hearing was essentially characterized as a matter of strategy or tactics. The fact that the defense had an opportunity to cross-examine on the critical issue of consent was sufficient to satisfy the requirements of the Confrontation Clause. *Id.*

13. *Id.* at 58.

14. See, e.g., *California v. Green*, 399 U.S. 149 (1970) (admitting cross-examined preliminary hearing testimony of witness unable to recall facts at trial); *Mattox v. United States*, 156 U.S. 237 (1895) (prior declaration or testimony of deceased witness admissible); *Mancusi v. Stubbs*, 408 U.S. 204 (1972) (prior trial testimony admissible where witness unavailable due to being out of the country).

15. *Crawford*, 541 U.S. at 61-62.

16. *Lee v. Illinois*, 476 U.S. 530 (1986).

17. *Id.* at 538-39.

18. See *Tennessee v. Street*, 471 U.S. 409, 414 (1985).

19. *Parker v. Randolph*, 442 U.S. 62, 79 (1979) (Blackmun, J., concurring in part and concurring in the judgment).

20. *Lee*, 476 U.S. at 539.

21. *State v. Crawford*, 54 P.3d 656, 663 (Wash. 2002).

ington court concluded that *Lee*'s doctrinal position justified admission of Sylvia's statement as an "interlocking confession."²²

Thus, the *Crawford* Court was placed in the somewhat odd position of rejecting prior doctrine without overruling its prior decisions. *Ohio v. Roberts* involved a correct application of the rule governing admission of prior sworn testimony.²³ *Lee v. Illinois* had correctly rejected the proposition that "interlocking confessions" justified admission of an accomplice's statement to police without the accused having a meaningful opportunity for cross-examination.²⁴

The *Crawford* majority observed that a number of courts had applied the "indicia of reliability" test articulated in *Roberts* to uphold the admission of testimonial statements of accomplices who did not testify at trial and were consequently unavailable for cross-examination.²⁵ In reviewing these cases, it concluded: "The legacy of *Roberts* in other courts vindicates the Framers' wisdom in rejecting a general reliability exception. The framework is so unpredictable that it fails to provide meaningful protection from even core confrontation violations."²⁶ Consequently, the *Crawford* Court explicitly rejected the admission of such presumptively unreliable statements—statements made to the police by accomplices—categorically.²⁷

For any appellate lawyer, *Crawford* stands squarely for the proposition that courts do rethink their decisions and the language they have used, and when convinced of the need to do so, overrule defective precedent. While even the very best arguments may fail to induce a court to overrule its prior decisions, cases like *Crawford* remind us that an important part of the development of legal doctrine involves rejection of flawed propositions. The advancement of law is not simply a straight line aimed in one direction; it is, in fact, often something more like a frayed or knotted thread or a series of curves, angles, and sharp turns. Nevertheless, courts strive to avoid departures from the norm, and even the best arguments for overruling precedent will tend toward failure, if

22. *Id.* at 664.

23. *Crawford v. Washington*, 541 U.S. 36, 58 (2003) (observing that "[e]ven our recent cases, in their outcomes, hew closely to the traditional line") (citing *Ohio v. Roberts*, 448 U.S. 56 (1980)) (emphasis added).

24. *Id.* at 58-59. The *Crawford* majority rejected the argument that, by implication, *Lee* authorized admission of a fully interlocking confession in its rejection of the statement admitted against *Lee* based on its divergence from the admissions in the accomplice's statement. While conceding that this inference was possible, Justice Scalia pointed out that it was not an inevitable inference, noting "[i]f *Lee* had meant authoritatively to announce an exception—previously unknown to this Court's jurisprudence—for interlocking confessions, it would not have done so in such an oblique manner." *Id.* at 59.

25. *Id.* at 62-65.

26. *Id.* at 62-63.

27. *Id.* at 61, 68-69.

raised at the wrong time, before the wrong panel, or on the wrong set of facts.

II. THE PREFERENCE FOR PRESERVING PRECEDENT

Appellate courts are justifiably reluctant to overrule prior decisions, as the Texas Court of Criminal Appeals explained in *Paulson v. State*²⁸ in language expressing a commonly held sentiment:

We should not frivolously overrule established precedent. We follow the doctrine of *stare decisis* to promote judicial efficiency and consistency, encourage reliance on judicial decisions, and contribute to the integrity of the judicial process. But if we conclude that one of our previous decisions was poorly reasoned or is unworkable, we do not achieve these goals by continuing to follow it.²⁹

In *Houghland Farms, Inc. v. Johnson*,³⁰ the Idaho Supreme Court offered its rationale for the principle of *stare decisis*. “[T]he rule of *stare decisis* dictates that we follow [precedent], unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice.”³¹ The critical feature of the system based upon precedent is its stability and predictability that permits citizens and attorneys to correctly apprehend the law in understanding its application.

While stability in legal doctrine and procedure is undoubtedly important to the maintenance of a legal system predicated on judicial decisions,³² the ability of the law to serve the public interest is itself dependent upon the willingness of appellate courts to rethink propositions often basic in nature and reject prior judicial expressions when necessary. For example, Justice Harlan commented on the sometimes competing virtues of stability and justice in *Moragne v. States Marine Lines, Inc.*:³³

The confidence of people in their ability to predict the legal consequences of their actions is vitally necessary to facilitate the planning of primary activity and to encourage the settlement of disputes without resort to the courts. However, that confidence is threatened least by the announcement of a new remedial rule to effectuate well-estab-

28. *Paulson v. State*, 28 S.W.3d 570 (Tex. Crim. App. 2000).

29. *Id.* at 571-72 (citation omitted).

30. *Houghland Farms, Inc. v. Johnson*, 803 P.2d 978 (Idaho 1990).

31. *Id.* at 983.

32. The burden is typically placed upon a party arguing that the precedent, which should be overruled, would result in “injustice or great injury.” See *Hill v. State*, 65 S.W.3d 408, 453 (Ark. 2002).

33. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970).

lished primary rules of behavior.³⁴

With that observation, "the Supreme Court overruled a century's worth of precedent which had denied recovery for wrongful death under the general maritime law."³⁵ The Mississippi Supreme Court explained its duty to overrule precedent a bit more dramatically in *Brewer v. Browning*:³⁶

The names of great judges of the past, who have adorned this court, have been brought into honored review, in the suggestion of error, as great names in the judicial history of this state. We revere the memory of these judges, and have great respect and deference for their decisions. Able and eminent as these judges were, they were human and fallible, and, while we would not lightly depart from rules laid down by them, still we must, where they have decided cases which operate to effect injustice or lead to wrong results, apply the corrective as though we had rendered the same decisions. We do not intend to depart lightly from precedents. We expect to consider and adhere to them where they are sound in principle; but *we refuse to crucify justice on the cross of precedent*.³⁷

If every attempt to overrule controlling precedent could justifiably invoke the degree of passion exhibited by the *Brewer* court, the problem of contesting controlling rules of law would be far less difficult for counsel. Most issues, however, offer far less drama in terms of their consequences, and the litigant is sometimes far better positioned if the controlling precedent concerns a matter engendering less passion, as in *Moragne*. A few decades later, the same Mississippi court observed: "Unless mischievous in its effect, and resulting in detriment to the public, *a case will not be overruled although wrongly decided*."³⁸

Effective appellate advocacy requires counsel to approach adverse precedent carefully, but creatively. Not infrequently, appellate lawyers fail to serve the interests of both their clients and the public by simply deferring to precedent, rather than strategically setting about to change the law.

III. THE CONTROLLING ETHICAL RULES

There are surprisingly few ethical rules directed at the conduct of appellate counsel and they may be summarized quickly: counsel should represent the client competently; counsel must disclose adverse authority

34. *Id.* at 403.

35. *Tideway Oil Programs, Inc. v. Serio*, 431 So. 2d 454, 465 (Miss. 1983) (referring to *Moragne*, 398 U.S. at 375).

36. *Brewer v. Browning*, 76 So. 519 (Miss. 1917).

37. *Id.* at 520 (emphasis added).

38. *Childress v. State*, 195 So. 583, 584 (Miss. 1940) (emphasis added).

to the tribunal; and counsel should refrain from asserting frivolous claims or issues. A review of the specific rules should provide assurance to appellate lawyers that good faith advocacy will not result in sanction.

A. *The ethical directive for competent representation*

At the outset, Rule 1.1,³⁹ the catch-all competence rule, directs lawyers to provide "competent representation to a client."⁴⁰ Competence is defined by the rule as possessing the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."⁴¹ This suggests that counsel at a minimum must be sufficiently apprised of controlling case and statutory law in the jurisdiction to advise the client properly concerning the existing state of the law with regard to those issues posed by the client's case. In addition, counsel should also be aware of the likelihood that precedent or authority contrary to the client's position may either be distinguished or overruled. Regrettably, all too often trial counsel makes a strategic or tactical decision that binds appellate counsel, rather than consulting with the attorney who will actually be representing the client on appeal at the outset of litigation. This results in many excellent arguments being forfeited or waived as a result of trial counsel's decisionmaking, or lack thereof.

What Rule 1.1 does suggest is that counsel can aggressively represent the client's interests, even in the face of adverse authority, provided counsel has a good faith basis for going forward. After all, counsel must bear in mind that virtually all changes in case law result either from the impact of legislation or from the willingness of advocates to challenge existing doctrine.

At least in criminal cases, the analog to the requirement for competent representation is suggested by the effective assistance guarantee of the Sixth Amendment.⁴² The guarantee has been applied to representation on the direct appeal as a matter of right,⁴³ but not to discretionary review following disposition of the direct appeal.⁴⁴ The Supreme Court

39. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2003).

40. *Id.*

41. *Id.*

42. U.S. CONST. amend. VI.

43. *E.g.*, *Penson v. Ohio*, 488 U.S. 75, 79-81 (1988).

44. An indigent criminal defendant is not entitled to appointed counsel as a part of the Sixth Amendment guarantee of effective assistance in a petition for discretionary review in a state court or for writ of certiorari in the Supreme Court. *Ross v. Moffitt*, 417 U.S. 600, 610-19 (1974). Nor is a criminal defendant entitled to appointed counsel in a post-conviction action under the Sixth Amendment, *Pennsylvania v. Finley*, 481 U.S. 551, 559 (1987), even in a case in which the death penalty has been imposed. *Murray v. Giarratano*, 492 U.S. 1 (1989). Concluding that the Constitution does not guarantee a right to post-conviction attack on a criminal conviction, the

initially applied the right to effective assistance in representation in a direct appeal for failure to perform rather ministerial functions, such as giving timely notice of appeal.⁴⁵ More recently, in *Smith v. Robbins*,⁴⁶ the Court held that counsel's decision not to raise an issue on direct appeal could constitute ineffectiveness, provided the two-prong standard for ineffectiveness applied in *Strickland v. Washington*⁴⁷ is met. With regard to the latter type of claims, however, the Strickland test is rendered somewhat more difficult than might otherwise be obvious by the Court's deference to counsel's professional judgment in determining what issues should be advanced in the direct appeal.⁴⁸

The interplay of rules governing ineffective assistance of appellate counsel most likely means that a decision by counsel not to challenge existing adverse authority or precedent will probably not be found to be ineffective when counsel has chosen other issues to argue in the direct appeal. *Smith v. Robbins*, however, offers the possibility that a claim of ineffectiveness might potentially prove meritorious if counsel is unaware of recent trends in the law that suggest that the precedent will not withstand attack, or if counsel deliberately chose to argue points having little or no potential for reversal when the client sought to have a controlling principle overruled, and there was simply no strategically sound reason for not doing so.

In the context of civil litigation, the remedy available for counsel's defective performance is a negligence action for legal malpractice.⁴⁹ These claims are difficult to establish, in part because the same deference to counsel's professional judgment that characterizes the Court's interpretation of the effective assistance guarantee in *Jones v. Barnes* appears to generally apply to counsel's performance in civil appeals.⁵⁰

Court has held that no inference of constitutionally ineffective assistance entitling the defendant to federal habeas relief could be drawn from counsel's failure to perform effectively in a state post-conviction proceeding. *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991); see also *Wainwright v. Torna*, 455 U.S. 586 (1982) (holding that counsel's defective performance in state post-conviction litigation did not provide a basis for federal habeas relief).

45. *Evitts v. Lucey*, 469 U.S. 387 (1985).

46. *Smith v. Robbins*, 528 U.S. 259, 285 (2000).

47. *Strickland v. Washington*, 466 U.S. 668 (1984). The *Strickland* test requires the defendant to first demonstrate that counsel performed deficiently and not as a result of an objectively reasonable strategy. *Id.* at 690-91. The second prong requires a showing that but for counsel's defective performance, there was a reasonable probability of a different outcome in the proceeding. *Id.* at 694.

48. In *Jones v. Barnes*, 463 U.S. 745 (1983), the Court held that counsel was not required to argue all colorable claims, even despite the express wishes of the client, because the conduct of the appeal is generally committed to counsel's professional judgment.

49. For a treatment of appellate malpractice, see Steven Wisotsky, *Appellate Malpractice*, 4 J. APP. PRAC. & PROCESS 577 (2002), drawn from Chapter 13 of his treatise, *PROFESSIONAL JUDGMENT ON APPEAL: BRINGING AND OPPOSING APPEALS* (2002).

50. In a civil action, *Randall v. Bantz, Gosch, Cremer, Peterson & Sommers*, 883 F. Supp.

Moreover, recovery is typically foreclosed by a more rigid test than that imposed as the second prong of *Strickland*; the plaintiff is required to show that the appeal would have succeeded “but for” counsel’s errors.⁵¹

While the general approach of Rule 1.1 is designed to ensure competence in representation, in fact, there is not a very strong enforcement mechanism for determining when competence has not been demonstrated, nor prospects for litigants challenging the performance of their counsel on appeal. In addition to the general admonition of Rule 1.1, counsel must bear in mind the two specific rules that specifically bear on the conduct of the appeal.

B. *The “good faith” approach to challenging precedent*

First, Rule 3.1 provides the framework for aggressive appellate advocacy:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a *good faith argument for an extension, modification or reversal of existing law*. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.⁵²

The rule provides an opening for creative lawyering in affording counsel the option of arguing the need for overruling precedent.⁵³ The key is that the argument be made in good faith, which, at a minimum, suggests the need for counsel to formulate a colorable reason why the precedent should be overturned, limited, or distinguished.⁵⁴ A failure to set forth a colorable legal reason for overruling, however, is likely to be considered fatal to the request.

Ethical rules authorize the imposition of sanctions against a party or

449, 450 (D.S.D. 1995), the malpractice claim was rejected where the plaintiff argued that his appellate counsel failed to present issues for the purpose of preserving his option of petitioning for certiorari to the Supreme Court. Because the issues had not been argued in the appellate court, the option of petitioning for certiorari was not available. See Wisotsky, *supra* note 49, at 580 (noting the testimony of a constitutional law expert’s opinion that issues proposed by a lawyer were far more likely to succeed than those proposed by the client).

51. Wisotski, *supra* note 49, at 581-82.

52. MODEL RULES OF PROF’L CONDUCT R. 3.1 (2003) (emphasis added).

53. “The role of an advocate necessarily is to be *partisan* for his or her client” BRENT E. NEWTON, NAT’L INST. FOR TRIAL ADVOCACY, CRIMINAL LITIGATION AND LEGAL ISSUES IN CRIMINAL PROCEDURE 5 (2004), available at <http://www.nita.org/sampleChp/crimlitigation.pdf>.

54. The Supreme Court has advanced its definition for legal “frivolity” in holding that a legal argument is frivolous when it “is squarely foreclosed by statute, rule, or authoritative court decision.” *Barefoot v. Estelle*, 463 U.S. 880, 894 (1983). In this circumstance, the Court has concluded that the holding is not subject to being reconsidered or overruled. A claim is factually frivolous when “lacking any factual basis in the record of the case.” *Id.*

counsel for advancing a frivolous appeal.⁵⁵ For instance, the applicable rule in Arkansas, set forth only in the rules governing civil appeals, provides that “a frivolous appeal or proceeding is one that has no reasonable legal or factual basis.”⁵⁶ Curiously, but perhaps realistically, the “frivolous appeal” language of Rule 11 of the civil appellate rules has no counterpart in the separate rules that govern the conduct of Arkansas criminal appeals.⁵⁷

However, in a State’s appeal attempted by the Arkansas Attorney General, *State v. Warren*,⁵⁸ the state supreme court sanctioned counsel for violation of criminal appeal rule 3(c).⁵⁹ This rule does not define a specific “frivolousness” standard, but defines only the standard applicable for assessing the proper grounds for taking a state’s appeal. Counsel taking the appeal in the case ran afoul of the certification rule because its only attempt at justifying the appeal was expressed in terms of the Attorney General being “‘not happy with the *Ross* decision’” and because it considered the prior decision to have been “‘wrongly decided.’”⁶⁰ Relying on its previously applied standards for imposition of sanctions for taking a frivolous appeal in a civil case in *Stilley v. Hubbs*,⁶¹ the *Warren* court concluded “[w]e will not allow the State to pursue frivolous appeals of criminal matters without recourse when we have held that such actions in a civil case warrant sanctions.”⁶² The court then ordered the State’s appeal dismissed and referred its opinion to the Commission on Professional Conduct,⁶³ as well as identifying the offending

55. For excellent treatments of the problem of frivolous appeals from differing perspectives, see Mark R. Kravitz, *Unpleasant Duties: Imposing Sanctions for Frivolous Appeals*, 4 J. APP. PRAC. & PROCESS 335 (2002) (arguing generally for aggressive appellate court enforcement of standards preventing the filing of frivolous appeals) and Brent E. Newton, *When Reasonable Jurists Could Disagree: The Fifth Circuit’s Misapplication of the Frivolousness Standard*, 3 J. APP. PRAC. & PROCESS 157 (2001) (criticizing the characterization of criminal appeals as frivolous and the increased threat of sanctions by the U.S. Court of Appeals for the Fifth Circuit).

56. ARK. R. APP. P., CIV. R. 11(b) (West 2005). In *Jones v. Jones*, 944 S.W.2d 121 (Ark. 1997), the court invoked the rule and ordered counsel to show cause why sanctions should not be imposed.

57. See *State v. Warren*, 49 S.W.3d 103, 107 (Ark. 2001) (“The Rules of Appellate Procedure—Criminal do not authorize the imposition of sanctions for frivolous appeals in criminal cases.”).

58. *Id.*

59. ARK. R. APP. P., CRIM. R. 3(c) (West 2005), which addresses appeals taken by the state, requires the Office of the Attorney General to certify that a state’s appeal is essential to ensure correct and uniform application of criminal law.

60. *Warren*, 49 S.W.3d at 106. In *State v. Ross*, 39 S.W.3d 789, 790-91 (Ark. 2001), the court had unequivocally held that under the Youthful Offender Act a prior felony conviction could not support a subsequent felon-in-possession charge.

61. *Stilley v. Hubbs*, 40 S.W.3d 209, 213 (Ark. 2001).

62. *Warren*, 49 S.W.3d at 107.

63. *Id.*

Assistant Attorney General by name in its published opinion.⁶⁴

The court's treatment of appellate counsel in *Warren* reflects only part of the picture. Courts themselves often err in their evaluation of frivolousness of claims advanced by counsel on appeal. The classic example is presented by the history of litigation in *McKnight v. General Motors Corp.*,⁶⁵ in which the Seventh Circuit rejected as frivolous a claim that section 101 of the Civil Rights Act of 1991 should be applied retroactively in light of prior circuit authority. The Supreme Court granted certiorari and reversed the frivolousness determination, while the claim itself was rejected on the merits.⁶⁶ Despite the prior holdings of the Seventh Circuit, the Supreme Court concluded that the issue was not frivolous because other courts had resolved the question differently, demonstrating a reasonable basis for asserting the claim as well as preserving the issue until finally resolved by the Court.⁶⁷

Perhaps chastened by the prior disposition in *McKnight*, the Seventh Circuit recently rejected sanctions while finding that an appellant's claims were barred by both existing Supreme Court and circuit precedent in *Brunt v. Service Employees Int'l Union*.⁶⁸ The circuit court observed:

Appellants did attempt to distinguish their case from [controlling authority], and we defer to the district court's finding that Appellants' complaint was not so frivolous that Rule 11 sanctions are warranted.⁶⁹

The credible attempt to distinguish controlling authority was sufficient to establish counsel's good faith in raising the issue and avoiding sanctions. Given the possibility that the reviewing court might have concurred with counsel's argument, or at least offered some intellectual support for challenge to existing Supreme Court precedent, counsel's assertion of the claim and supporting argument were consistent with ethical and aggressive appellate advocacy. Further, in order to preserve the claim for challenge in the Supreme Court in which that Court would be asked to overrule or distinguish its precedent, counsel was required to assert the claim in the intermediate court, a position perhaps lost on intermediate appellate judges.

The treatment of the State's appeal in *Warren* and different approaches to civil and criminal representation in the Model Rules of Professional Conduct emphasize the deference paid to criminal coun-

64. *Id.* at 106.

65. *McKnight v. Gen. Motors Corp.*, 511 U.S. 659 (1994) (per curiam).

66. *Id.* at 659-60.

67. *Id.*

68. *Brunt v. Serv. Employees Int'l Union*, 284 F.3d 715 (7th Cir. 2002).

69. *Id.* at 721.

sel's exercise of strategic decisionmaking which is reflected in a number of ways in the criminal justice system. The right to effective assistance of counsel, ensured by the Sixth Amendment, establishes the extent to which representation in criminal matters is deemed central to the correct operation of the justice system. Attorneys representing civil litigants simply do not enjoy quite the same sense of autonomy in advising their clients, just as appellate lawyers have less autonomy than trial counsel in their conduct of litigation.⁷⁰

C. *The duty to disclose adverse authority*

The model rules impose a duty on counsel to disclose adverse authority to the court not otherwise disclosed by opposing counsel.⁷¹ Rule 3.3(a)(2) specifically directs: "(a) A lawyer shall not knowingly . . . (2) 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"⁷² The language of the rule does not confine the disclosure duty to "precedent," or "binding precedent," or even "persuasive authority."⁷³ Rather, it suggests a broader duty to litigate forthrightly, even when deception or suppression of known authority would arguably help the client.

This suggestion of a broader duty to disclose than one limited to "binding precedent," or prior authority dictating a particular result based on application of a legal rule in cases resting on materially indistinguishable facts, was clearly relied upon by the court in *Rural Water System # 1 v. City of Sioux Center, Iowa*.⁷⁴ In moving for summary judgment at trial, Rural Water System's counsel had failed to disclose the existence of a Sixth Circuit opinion adverse to its position⁷⁵ in the litigation against the City. The court observed:

Although *Scioto Water* is the only published decision of a federal circuit court of appeals either this court or the parties have found that considers directly one of the questions presented here—whether a party that has paid off or bought out its loans from the FmHA can

70. The reason is simple: unlike trial counsel, appellate counsel is restricted by the record created in the trial court and generally will not be permitted to raise new theories or issues not advanced at trial, or error not preserved properly by trial counsel.

71. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2003).

72. *Id.*

73. For an excellent discussion of these differing concepts of "authority" in the context of "no citation" rules and practices implicated by unpublished appellate opinions, see Stephen R. Barnett, *From Anastasoff to Hart to West's Federal Appendix: The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 9-12 (2002).

74. *Rural Water Sys. # 1 v. City of Sioux Ctr., Iowa*, 967 F. Supp. 1483 (N.D. Iowa 1997).

75. *Id.* at 1498 n.2 (citing *Scioto County Reg'l Water Dist. No. 1 v. Scioto Water Inc.*, 103 F.3d 38 (6th Cir. 1996)).

still assert the protections of § 1926(b)—it is not even mentioned in [Rural Water System # 1's (hereinafter RWS # 1)] opening briefs in support of RWS # 1's motions for summary judgment. *This omission is all the more odd, because not only was the decision of the Sixth Circuit Court of Appeals handed down on December 18, 1996, approximately three weeks before the present cross-motions for summary judgment were filed, but counsel for RWS # 1 here was counsel for the defendants-appellees in the Scioto Water case.* Nor can RWS # 1's counsel's omission of the decision in *Scioto Water* be excused on the basis that the City had already brought the decision to this court's attention, because the City's and RWS # 1's cross-motions for summary judgment were filed the same day. RWS # 1's counsel thus had no assurance that the City's counsel would bring the *Scioto Water* decision to the court's attention.⁷⁶

The court found counsel's omission ethically unacceptable, if not strictly warranting sanction, and its condemnation is worth considering:

It is hardly the issue that the rules of professional conduct require only the disclosure of *controlling authority*, see, e.g., C.P.R. DR 7-106(B)(1), which the decision of a court of appeals in another circuit certainly is not. In this court's view, the rules of professional conduct establish the "floor" or "minimum" standards for professional conduct, not the "ceiling"; basic notions of professionalism demand something higher. Although the decision of the Sixth Circuit Court of Appeals is obviously not controlling on this federal district court in the Eighth Circuit, RWS # 1's counsel's omission of the *Scioto Water* decision from RWS # 1's opening briefs smacks of concealment of obviously relevant and strongly persuasive authority simply because it is contrary to RWS # 1's position. RWS # 1's counsel did not hesitate to cite a decision of the Colorado Supreme Court on comparable issues, although that decision is factually distinguishable, probably because that decision appears to support RWS # 1's position. *This selective citation of authorities, when so few decisions are dead on point, is not good faith advocacy, or even legitimate "hard ball." At best, it constitutes failure to confront and distinguish or discredit contrary authority, and, at worst, constitutes an attempt to hide from the court and opposing counsel a decision that is adverse to RWS # 1's position simply because it is adverse.*⁷⁷

Thus, while strict compliance with the controlling rule may be avoided, many courts will not find a deliberate attempt to conceal relevant authority within the scope of "good faith advocacy, or even legitimate 'hard ball.'" ⁷⁸

76. *Id.* (emphasis added).

77. *Id.* (last emphasis added).

78. *Id.*

The Model Rules do not unreasonably constrain counsel needing to address adverse authority, but they do provide a framework for understanding the parameters of counsel's creativity. Even the most reserved appellate attorneys will undoubtedly have to deal with contrary precedent or authority and they should be prepared to do so. In order to effectively assess the options available in representing the client's interests, it is necessary that appellate lawyers think about alternatives for avoiding the application of existing rules which will frustrate those interests.

IV. DEALING WITH UNFAVORABLE, CONTROLLING PRECEDENT

The most difficult problem faced by an appellate counsel often involves the existence of unfavorable precedent within the jurisdiction that is apparently controlling in the factual context. Counsel may have sound reasons for challenging the existing rule or principle and for arguing that controlling precedents should be overruled or distinguished. A number of tactical options in dealing with unfavorable precedent, even within the constraints of the combined requirements of Rules 3.1 and 3.3(a)(2), should be considered when confronting the problem of adverse authority.

A. *Challenging unfavorable precedent*

Quite often, it is simply implausible to suggest that precedent will not control the disposition of the case, or that prior decisions can be distinguished on their facts. This is particularly true when the precedent reflects repeated application of a rule or principle in a number of cases in which facts were sufficiently different as to suggest that the controlling rule could have been avoided, but in which the reviewing courts rejected the factual distinction arguments and continued to apply and extend the existing principle or rule.

When faced with the need to challenge unfavorable precedent directly, counsel should remain aware of the dual requirements for ethical advocacy set forth in Rules 3.1 and 3.3(a)(2). First, counsel should identify the controlling precedent in the opening brief, or in the preservation of error at the trial level, if possible. Second, counsel must be prepared to advance the argument that the court should either not apply or in the alternative overrule the precedent. In doing so, counsel should bear in mind one overriding principle: in a system governed by judicial precedent, evolution of legal doctrine necessarily requires courts to respond to precisely the types of arguments that must be made by an appellate lawyer aggressively representing the client's interest. Rather than approaching the problem of contrary precedent apologetically, counsel should affirmatively address the existing rule or principle in

terms of the common law tradition in which change is the result of good faith challenges to existing rules and principles.

In structuring the approach to be taken in challenging unfavorable precedent, it is important to remember the various contexts in which judicially-made law undergoes change. The posture of an appellate court is not simply the result of common agreement that existing rules or principles are correct. Courts themselves are often reluctant to rely on existing precedent, but find themselves bound by prior decisions, or lacking sufficient grounds for overruling them. Similarly, the views of appellate judges change over time⁷⁹ and changing views are often manifested in changing law.⁸⁰

To ensure that challenges to existing precedent are not treated as frivolous, counsel should be prepared to fashion an appellate argument that fits within the directives of Rule 3.1. Additionally, a good faith basis for arguing that precedent should be overruled is required to avoid a finding that an argument or point is frivolous. At least three different tactical approaches may be taken or used in combination.

1. CHANGING DOCTRINE AS THE NATURAL CONSEQUENCE OF THE COMMON LAW TRADITION

First, counsel should always rely on prior dissenting opinions from the Supreme Court, state supreme court, or lower appellate courts to support the argument for overruling precedent. The history of appellate practice shows that dissents often evolve into majority positions and reliance on dissenting opinions to ask for overruling existing authority provides a reasonable, good faith starting point for the argument.

An example of a good faith challenge to existing precedent that ultimately proved successful may be drawn from the *Roberts/Crawford* litigation. In *State v. Earnest*,⁸¹ a New Mexico murder prosecution, the State attempted to force testimony from an accomplice, Boeglin, who had implicated the defendant in one of four statements he had given to police on the day of the arrest.⁸² Earnest, Boeglin, and a third defendant, Connor, were charged with murder, conspiracy to commit murder, and

79. For example, Justice Blackmun dissented from the plurality which held existing capital punishment schemes unconstitutional in *Furman v. Georgia*, 408 U.S. 238, 405 (1972) (Blackmun, J., dissenting). By the time of his retirement from the Court, his experience in reviewing capital litigation led him to conclude that imposition of the death penalty, in practice, could not be squared with constitutional guarantees of due process. *Callins v. Collins*, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of *certiorari*).

80. For a general discussion of the role of precedent in the decisions of the United States Supreme Court, see Caleb Nelson, *Stare Decisis and Demonstrably Erroneous Precedents*, 87 VA. L. REV. 1 (2001).

81. *State v. Earnest*, 703 P.2d 872 (N.M. 1985).

82. *Id.* at 874.

kidnapping in the murder of Eastman, who was supposedly suspected by the other three men of informing on drug trafficking to police. Eastman had left Boeglin's residence with Boeglin and Connor in his own car. The next morning his body was found on the side of a state highway and Boeglin, Earnest, and Connor were later arrested in possession of the vehicle. Because of the absence of physical evidence linking Earnest to the murder, the prosecution needed Boeglin's testimony in order to obtain a conviction. Boeglin refused to testify despite a grant of immunity and contempt citation. This resulted in a twenty-six year sentence for contempt that was subsequently overturned on appeal.⁸³ The trial court ordered a mistrial as a result of his refusal to testify, purportedly based on Earnest's mistrial motions contesting the court's attempt to force Boeglin to testify.

After rejecting Earnest's double jeopardy claim, the trial court ordered a retrial.⁸⁴ This time, when Boeglin refused to testify, the court declared him unavailable and permitted the State to offer his statement implicating Earnest as a declaration against penal interest. On direct appeal, Earnest relied on *Douglas v. Alabama*⁸⁵ for the proposition that the lack of any opportunity for cross-examination of Boeglin violated his right to confrontation. The State countered that *Ohio v. Roberts* had by implication overruled *Douglas*, supplanting the "indicia of reliability" test for cross-examination as the test for admission under the Confrontation Clause.⁸⁶

The New Mexico Supreme Court concluded that *Douglas*, rather than *Roberts*, controlled on the facts presented because the prior statement admitted in *Roberts* was preliminary hearing testimony where the defendant had had an opportunity to cross-examine the witness,⁸⁷ and it reversed the lower court's decision.⁸⁸ The Attorney General, however, did not accept this disposition. Instead, the State petitioned for review in the Supreme Court again arguing that *Roberts* had effectively abrogated *Douglas*. The case was argued, but not decided. Instead, the Court vacated the state supreme court's judgment reversing Earnest's conviction and remanded for reconsideration⁸⁹ in light of its then-recent deci-

83. *State v. Boeglin*, 686 P.2d 257, 257-58 (N.M. Ct. App. 1984).

84. The state supreme court rejected Earnest's argument that the declaration of mistrial failed to satisfy the "manifest necessity" test justifying retrial over his prior jeopardy claim, concluding that defense counsel's repeated mistrial motions had waived the prior jeopardy bar. *Earnest*, 703 P.2d at 874-75.

85. *Douglas v. Alabama*, 380 U.S. 415, 418-20 (1965).

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

87. *Id.* at 876.

88. *Id.*

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

sion in *Lee v. Illinois*.⁹⁰

Moreover, then-Associate Justice Rehnquist, joined by the Chief Justice, and Justices Powell and O'Connor, concurred in the order remanding Earnest. He observed that *Lee* overruled *Douglas* by implication, adopting the rationale of *Roberts*,⁹¹ and that *Lee* had apparently adopted the "indicia of reliability" test as determinative of even an accomplice's statement to police. Justice Rehnquist concluded that after *Lee*, state courts could admit statements of non-testifying co-defendants, assuming that the prosecution could overcome the "weighty presumption of unreliability attaching to codefendant statements by demonstrating that the particular statement at issue bears sufficient 'indicia of reliability' to satisfy Confrontation Clause concerns."⁹²

On remand, the New Mexico Supreme Court held that Boeglin's statement to police was sufficiently reliable as a statement against his penal interest to justify its admission despite the lack of any opportunity for Earnest to cross-examine Boeglin.⁹³ The persistence of the Attorney General in correctly concluding—at least prior to the Court's recent holding in *Crawford*—that *Roberts* had dramatically reshaped our understanding of the parameters of confrontation under the Sixth Amendment represented reliance on the type of good faith argument for overruling precedent that is a hallmark of creative lawyering.

2. LOOK FOR SUPPORT IN CIRCUIT SPLITS

As a second strategy, counsel should identify splits in circuits or jurisdictions that have previously ruled on the issue raised, and marshal arguments reflecting the contrary view taken in those courts favorable to the client's position. A showing that reasonable jurists disagree on the point or its resolution should meet the requirement for demonstrating that a claim or argument is not frivolous under the standards implicitly recognized in similar contexts.⁹⁴

An example of an argument for overruling precedent based on rea-

90. *Lee v. Illinois*, 476 U.S. 530 (1986).

91. *Earnest*, 477 U.S. at 649 (Rehnquist, J., concurring).

92. *Id.* at 649-50 (Rehnquist, J., concurring).

93. *State v. Earnest*, 744 P.2d 539, 539-40 (N.M. 1987). The Supreme Court thereafter denied certiorari. *Earnest v. New Mexico*, 484 U.S. 924 (1987). Earnest was denied relief in federal habeas corpus, *Earnest v. Dorsey*, 87 F.3d 1123 (10th Cir. 1996), and the Supreme Court again denied Earnest's petition for review by certiorari. *Earnest v. Dorsey*, 519 U.S. 1016 (1996).

94. The standard within the federal appellate system for the granting of a certificate of appealability for review of an adverse determination in a federal habeas action is a showing that the issue is one on which reasonable jurists debate or disagree. *Barefoot v. Estelle*, 463 U.S. 880 (1983). By definition, a colorable claim which meets the standard for the certificate would seemingly also demonstrate a non-frivolous claim. See Newton, *supra* note 55 (discussing frivolousness findings in the Fifth Circuit).

soning applied by other courts or differing conclusions reached on the same issue is demonstrated by the treatment of claims of cumulative error arising from multiple acts of ineffective assistance in criminal cases. Both Arkansas⁹⁵ and the Eighth Circuit refuse to consider claims of cumulative ineffectiveness in counsel's performance.⁹⁶ Arguably, this approach contravenes the clear holding of *Strickland v. Washington*,⁹⁷ in which the Court specifically addressed the question of the Sixth Amendment guarantee of effective assistance of counsel in terms of "showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."⁹⁸ It is clear from the repeated reference to the plural "errors" in the opinion that the Court contemplated cumulative consideration of counsel's performance, as well as individual errors.⁹⁹

But *Strickland's* language is sufficiently vague that lower courts have been inconsistent in their understanding of its appreciation for the cumulation of counsel's errors. In fact, there is a significant split among jurisdictions on the application of cumulative error analysis to ineffective assistance claims. Even jurisdictions recognizing cumulative error analysis are careful to require that the cumulation relates to actual deficiencies that could be termed "errors" on the part of counsel, rather than claims of deficient performance not amounting to errors, as the Tenth Circuit pointed out in *United States v. Rivera*.¹⁰⁰

Some jurisdictions have rejected cumulative error analysis by effectively concluding that in the absence of any single error warranting relief, there can be no cumulation of errors.¹⁰¹ This approach appears to ignore the precise rationale for the doctrine of cumulative error generally, as the *Rivera* Court pointed out:

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

95. See *Parks v. State*, 785 S.W.2d 213, 215 (Ark. 1990). *Parks* cites to *Isom v. State*, 682 S.W.2d 755 (Ark. 1985), which in turn cites *Guy v. State*, 668 S.W.2d 952 (Ark. 1984), and *Henderson v. State*, 663 S.W.2d 734 (Ark. 1984), as supporting the same proposition. *Isom*, 682 S.W.2d at 758. But *Henderson* did not involve a claim of cumulative ineffectiveness and the doctrine of cumulative error in counsel's deficient performance is never discussed, even in *dicta*. See *Henderson*, 663 S.W.2d at 734. Thus, the Arkansas rule is wholly unfounded in the court's own precedents.

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

97. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

98. *Id.*

99. *Id.* at 678, 679, 682, 693, 694, 695, 696.

100. *United States v. Rivera*, 900 F.2d 1462, 1469-72 (10th Cir. 1990).

101. *Brown v. State*, 846 So. 2d 1114, 1126 (Fla. 2003); *McQueen v. Commonwealth*, 721 S.W.2d 694, 701 (Ky. 1986).

to address that possibility.¹⁰²

Ironically, both Arkansas courts¹⁰³ and the Eighth Circuit¹⁰⁴ recognize cumulative error analysis in other contexts.

In contrast to the approach taken by a minority of courts, a substantial number of courts have recognized the applicability of cumulative error analysis in assessing counsel's effectiveness when appropriate situations arise.¹⁰⁵ The significant number of jurisdictions recognizing cumulative error analysis for ineffective assistance claims may afford a good faith basis on which to challenge the Arkansas and Eighth Circuit positions, as well as suggesting the potential "cert-worthiness" for such a claim in a petition to the Supreme Court.

3. RELYING ON PERSUASIVE SECONDARY SOURCES

As a third tactic, counsel should consider citing secondary sources, such as law review commentary, both favorable to the position being advanced and critical to existing precedent. The partial overruling of the Supreme Court's decision in *Swain v. Alabama*¹⁰⁶ by its later holding in *Batson v. Kentucky* demonstrates an example of law review critique of controlling precedent.¹⁰⁷ Both cases stand for the proposition that the prosecution cannot use its peremptory challenges in a racially discriminatory fashion in a criminal trial by removing minority venirepersons from service on the petit jury. The *Swain* holding, however, had required defendants to demonstrate a pattern and practice of discrimination in the use of peremptories by prosecutors so difficult that it could seldom be achieved. The *Batson* Court referred to this burden as "crippling" in formulating a new rule for preservation of the claim of discrim-

102. *Rivera*, 900 F.2d at 1469 (relying on *United States v. Wallace*, 848 F.2d 1464, 1475-76 (9th Cir. 1988); *United States v. Canales*, 744 F.2d 413, 430-31 (5th Cir. 1984)).

103. *See Edwards v. Stills*, 984 S.W.2d 366, 389 (Ark. 1998) (holding counsel failed to preserve cumulative error claim by making specific objection); *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), *habeas corpus denied*, *Noel v. Norris*, 194 F. Supp. 2d 893 (E.D. Ark. 2002).

104. *See 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) (observing that counsel argued claims of prosecutorial misconduct individually and collectively on appeal). The Eighth Circuit has also recognized cumulative error analysis in civil appeals. *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 379 (8th Cir. 1993).

105. *See, e.g., Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991); *Berryman v. Morton*, 100 F.3d 1089, 1101-02 (3d Cir. 1996); *Cooper v. Sowders*, 837 F.2d 284, 286 (6th Cir. 1988); *Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995); *Wade v. Calderon*, 29 F.3d 1312, 1319 (9th Cir. 1994); *Cargle v. Mullin*, 317 F.3d 1196, 1200 (10th Cir. 2003); *Bowers v. State*, 578 A.2d 734, 743-44 (Md. 1990); *Green v. State*, 569 S.E.2d 318, 324-25 (S.C. 2002).

106. *Swain v. Alabama*, 380 U.S. 202 (1965).

107. *Batson v. Kentucky*, 476 U.S. 79 (1986).

inatory use of peremptories.¹⁰⁸ The Court also noted that the *Swain* procedure had been criticized by commentators in law review articles.¹⁰⁹ The existence of significant negative commentary on existing precedent in the nation's law reviews represents an important source of argument supporting the need for change and should not be overlooked by counsel struggling with adverse authority.

A classic example of the impact a law review article may have in supporting an argument for overruling precedent is demonstrated by *Houghland Farms v. Johnson*,¹¹⁰ in which the Idaho Supreme Court revisited the issue of the scope of the state's long-arm jurisdiction statute.¹¹¹ The proper scope of jurisdiction is particularly significant because it limits the authority of trial courts within the state over non-resident defendants, and in an era of increasing interstate commerce, there are strong policy reasons for both expansive and restrictive notions of this jurisdiction. In *Houghland*, the trial court had asserted long-arm jurisdiction over an out-of-state loan broker who had contacted the Idaho plaintiff about refinancing its loan on business interests located in Arizona,¹¹² relying on the prior decision in *Beco Corp. v. Roberts & Sons Constr. Co.*¹¹³ The court overruled its prior decision in *Beco*,¹¹⁴ relying upon the analysis by Professor Lewis criticizing the *Beco* holding¹¹⁵ in an article published in the Idaho Law Review.¹¹⁶

Professor Lewis's article was not merely persuasive; it dominated the court's approach in overruling precedent.¹¹⁷ Moreover, because significant decisions are the subject of articles¹¹⁸ and student-written com-

108. *Id.* at 92-93 & n.17 (noting lower court concern that the burden could not reasonably be met).

109. *Id.* at 90 & n.14.

110. *Houghland Farms, Inc. v. Johnson*, 803 P.2d 978 (Idaho 1990).

111. IDAHO CODE § 5-514(a) (Michie 1990).

112. *Houghland*, 803 P.2d at 979-80.

113. *Beco Corp. v. Roberts & Sons Constr. Co.*, 760 P.2d 1120 (1988).

114. *Houghland*, 803 P.2d at 983-87. Although the court held that the minimum contacts test was demonstrated by the facts concerning the defendant's presence in Idaho, it concluded that fair play and substantial justice considerations did not warrant the exercise of jurisdiction. *Id.* at 984-85.

115. *Houghland*, 803 P.2d at 983.

116. D. Craig Lewis, *The Current Validity of Personal Jurisdiction Doctrine in Idaho*, 25 IDAHO L. REV. 223 (1988-89).

117. *Houghland*, 803 P.2d at 985 (citing Lewis, *supra* note 116, at 268-69).

118. In *Carter v. City of Chattanooga*, 803 F.2d 217 (6th Cir. 1986), the Sixth Circuit considered the application of its prior holding in *Garner v. Memphis Police Dep't*, 710 F.2d 240 (6th Cir. 1983), *aff'd sub nom. Tennessee v. Garner*, 471 U.S. 1 (1985), which had been affirmed by the Supreme Court, to a civil rights claim brought before the circuit court's holding in *Garner*. The plaintiff sought retroactive application of the circuit's decision in *Garner* holding that Tennessee's fleeing felon statute was unconstitutional. *Carter*, 803 F.2d at 219. In assessing the retroactivity argument, the court noted the substantial number of law review articles that had challenged police deadly force policies. *Id.* at 222 & n.2.

ments and casenotes,¹¹⁹ this type of supporting authority is typically readily available for major cases, and often for more minor ones.

B. *Practical considerations in confronting adverse precedent*

Appellate counsel considering a frontal assault on precedent should consider the basic reasons why courts overrule prior decisions, or agree with arguments for exceptions to application of existing precedent. Generally, these may be summarized as follows:

1. CHANGING COMPOSITION OF THE COURT

A change in the composition of the court itself is the most obvious factor that appellate counsel may rely upon in advising the client on the potential success of a challenge to existing precedent. Although a change in court personnel is not a basis for legal argument and in fact, suggesting it may incur the wrath of justices concerned with being viewed as activist in their approach to precedent and *stare decisis*, it is clearly an avenue for counsel's creativity.

The willingness of a "new" majority of an appellate court to reexamine precedent typically reflects the judicial philosophy of key judges for whom precedent is less controlling than other considerations. Most importantly, overruling of prior precedent typically occurs in supreme courts rather than intermediate appellate courts. Judges at the top tier of an appellate system are more susceptible to equitable and justice arguments offered in support of change in the law because that is consistent with the function of a court of last resort in a three-tiered judicial

119. For an interesting exchange regarding the value of student-written law review notes, compare the positions taken by the majority and dissenting judges in *State Farm Mut. Ins. Co. v. Blevins*, 551 N.E.2d 955 (Ohio 1990). The issue before the court concerned whether an arbitrator could award punitive damages on a claim based on an insurance contract. *Id.* at 957. A prior decision of the court in *Hutchinson v. J.C. Penney Cas. Ins. Co.*, 478 N.E.2d 1000 (Ohio 1985), had held that punitive damages could be awarded on the basis of a standard policy provision promising to pay for losses incurred by the insured. The majority in *Blevins* observed that the holding in *Hutchinson* was "controversial" and had been "sharply criticized" in law review commentaries. *Blevins*, 551 N.E.2d at 958 & n.3. The majority's decision to overrule *Hutchinson*, *id.* at 959, itself drew criticism from Justice Sweeney in dissent. *Id.* at 959-62 (Sweeney, J., dissenting). He attacked the majority's reliance on student written law review articles, which he argued included misinterpretations of the term *dictum* and an incorrect assertion that the *Hutchinson* court had not properly cited authority. *Id.* at 961 & n.5 (Sweeney, J., dissenting). The conflict in the majority and dissenting opinions suggests that appellate counsel take care in citing law review materials, particularly when written by law students. But courts continue to rely on student-written materials in support of their positions. See, e.g., *Carter*, 803 F.2d at 223 n.3: "For a comprehensive discussion of the trend of the law in the fleeing felon rule, see Comment, *The Unconstitutional Use of Deadly Force Against Nonviolent Felons*, 18 *Georgia Law Review*, 137 (1983)."

system.¹²⁰

The classic example of a changing court composition influencing an important principle of law is demonstrated by the Supreme Court's treatment of victim impact evidence in capital prosecutions. This evidence is considered essential in the movement for integrating the rights of victims and their families into the criminal justice system. Death penalty defense counsel and capital punishment opponents view the evidence skeptically because it invites imposition of the death penalty based on passion or sympathy present in a particular case and may arbitrarily or unfairly subject some defendants to capital punishment. Nevertheless, the movement for inclusion of such evidence in capital trials has generally been successful.

When initially considered by the Supreme Court in the context of an Eighth Amendment/due process challenge in *Booth v. Maryland*,¹²¹ the Court held that this evidence was fraught with potential for abuse in the imposition of capital sentences. The Court reaffirmed this position two years later in *South Carolina v. Gathers*.¹²² However, just two years later, the Court's membership had changed and so had its view of victim impact evidence. In *Payne v. Tennessee*¹²³ a new majority of the Court overruled *Booth* with Chief Justice Rehnquist justifying the change in constitutional interpretation or policy in terms of the narrow majority in *Booth* and its lack of lengthy tradition as precedent.¹²⁴ *Payne* vividly demonstrates that a change in the composition of an appellate court may undercut a narrow or single vote majority resulting in a shift in our understanding of the meaning of even basic constitutional guarantees.

Arguing for the overruling of existing precedent, Chief Justice Rehnquist's position in *Payne* provides a good faith basis for challenging a rule or principle on the grounds that the prior holding was the result of a narrow majority's view of the issue, or that the holding was

120. Here, an observation made by Dan Schweitzer, *Fundamentals of Preparing a United States Supreme Court Amicus Brief*, 5 J. APP. PRAC. & PROCESS 523 (2003), is illuminating:

... the Supreme Court cares deeply about legal reasoning and logic, policy and practical considerations, and its own precedents. The Court is keenly aware that its decisions are binding across the nation, and that they affect cases and factual situations that are different from the case before it. For this reason, the Court wants to explore the limits of any possible rule it may adopt, as well as examine the jurisprudential and real world consequences. An amicus brief is well suited to assist the Court in that endeavor.

Id. at 537.

121. *Booth v. Maryland*, 482 U.S. 496 (1987).

122. *South Carolina v. Gathers*, 490 U.S. 805 (1989).

123. *Payne v. Tennessee*, 501 U.S. 808 (1991). Justice Souter replaced Justice Powell on the Court during the two year period following *Gathers*.

124. *Id.* at 827-28; see also Scalia, J., concurring, *id.* at 833-34.

incorrect and has not withstood the test of time.¹²⁵ He pointed out that the Court had overruled thirty three decisions in whole or part over the past twenty years, and argued “[s]tare decisis is not an inexorable command; rather it ‘is a principle of policy and not a mechanical formula of adherence to the latest decision.’”¹²⁶

Counsel seeking an argument for overruling prior precedent should consider referencing Chief Justice Rehnquist’s position,¹²⁷ particularly when challenging recent precedent or narrowly decided prior holdings in order to demonstrate a good faith basis for the argument.

Although the changed composition of an appellate court may explain a rejection of precedent, it does not constitute a good faith argument for overruling precedent by counsel. In *Jones v. Jones*,¹²⁸ the Arkansas Supreme Court imposed sanctions for counsel’s assertion that a change in the court’s composition justified a petition for rehearing in protracted litigation in the case.¹²⁹ In her petition, counsel candidly argued:

A. The ruling in the March 7, 1997 *per curiam* order indicating that the emotional needs issue was decided on it [sic] merits, and not on procedural grounds, could not be accurately determined with the current court. The Court erred in proclaiming that the November 22, 1996, mandate (*Jones I*) was decided on its merits, rather than on procedural grounds for three reasons. First, Justice Brown, who was a sitting Justice at the time that the Arkansas Supreme Court reinstated custody of the minor child to Ms. Jones (in *Jones I*) on November 22, 1996, indicated in his concurring opinion that the case was reversed and remanded on procedural grounds, not on its merits. At the time of the original hearing, Chief Justice Jesson, Associate Justice Roaf, and Associate Justice Dudley were sitting on the Court. When the Writ of Prohibition was decided, Chief Justice Jesson, who actually wrote the opinion, and Associate Justices Roaf and Dudley were no longer on the Court. At this time, it would be difficult to

125. *Id.* at 828-30:

Booth and Gathers were decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings of those decisions. They have been questioned by Members of the Court in later decisions and have defied consistent application by the lower courts.

126. *Id.* (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

127. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 965 (1991) (Scalia, J., plurality opinion) (observing that *stare decisis* is less rigid in application when applied to constitutional precedents).

128. *Jones v. Jones*, 947 S.W.2d 6 (Ark. 1997).

129. The history of litigation in *Jones* was extensive. *See Jones v. Jones*, 852 S.W.2d 325 (Ark. Ct. App. 1993); *Jones v. Jones*, 896 S.W.2d 431 (Ark. 1995); *Jones v. Jones*, 898 S.W.2d 23 (Ark. 1995); *Jones v. Jones*, 907 S.W.2d 745 (Ark. Ct. App. 1995); *Jones v. Jones*, 931 S.W.2d 767 (Ark. 1996). This extensive litigation in the appellate courts might have influenced counsel to conclude that changed composition of the supreme court would lead to a different result, of course.

determine whether the November 22, 1996 Court (*Jones I*) reversed the trial court and the Arkansas Court of Appeals on procedural or substantive grounds as only four Justices that comprised the November 22, 1996 (*Jones I*) Court remain on the Supreme Court. Of those four, only three Justices were of the opinion that the case was reversed on substantive grounds. Three Justices do not comprise a majority the (*Jones I*) Court of November 22, 1996. Without the participation of Chief Justice Jesson and Associate Justices Roaf and Dudley, it would be impossible to know the basis for his or her ruling (in *Jones I*) on November 22, 1996.¹³⁰

The court noted counsel's attempt to pre-empt adverse consequences by acknowledging the possibility that her advocacy had "overstepped the line," but nevertheless determined that the failure to predicate the petition for rehearing on a specific factual or legal error in the original opinion constituted an abuse of the rehearing process.¹³¹ Consequently, the court imposed sanctions, awarding costs and attorneys' fees to the prevailing party.¹³²

2. CHANGE REFLECTING GENERAL PUBLIC CONSENSUS

The classic example of a long-term challenge to existing precedent is the work of Thurgood Marshall and the NAACP in its litigation strategy¹³³ to overturn *Plessy v. Ferguson*.¹³⁴ The eventual victory in *Brown v. Board of Education*¹³⁵ was the product of direct challenge to the continuing viability of *Plessy*. Certainly, the historical record reflects substantial social and political support for the Court's 1954 action in *Brown*, but it is not clear legally that there was any greater force to the legal argument which finally prevailed than to that which caused Justice Harlan to dissent in *Plessy*.¹³⁶

There are probably no unresolved issues in American constitutional jurisprudence of the magnitude of *Plessy/Brown*. Developments in

130. *Jones*, 947 S.W.2d at 8.

131. *Id.* Justice Brown, who had disagreed with the majority's characterization that the court's prior holdings had been rendered on the merits, argued instead that the case had been decided on procedural grounds. He concurred specifically in the disposition on rehearing, explaining the lack of a good faith basis for counsel's petition under the supreme court's rules. *Id.* at 9 (Brown, J., concurring) (citing ARK. SUP. CT. R. 2-3(g), which sets forth the recognized grounds for rehearing).

132. *Jones*, 947 S.W.2d at 8.

133. *E.g.*, *Morgan v. Virginia*, 328 U.S. 373 (1946) (holding Virginia law mandating segregation of passengers on interstate motor carriers invalid as burden on interstate commerce).

134. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

135. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

136. *Plessy*, 163 U.S. at 555 (Harlan, J., dissenting). Justice Harlan observed that the doctrine of separate, but equal "will, in time prove to be quite as pernicious as the decision made by this tribunal in the *Dred Scott* case." *Id.* at 559 (Harlan, J., dissenting).

medicine, biology, and digital technology, however, suggest long term litigation battles will be fought pertaining to rights to life, medical treatment, death, and privacy. Nevertheless, even less “significant” issues than legally enforced discrimination based upon race warrant recurring review and relitigation. This is particularly true when the underlying issue involves competing views of fundamental rights or potential conflicts between constitutional principles that may induce courts of last resort to revisit prior decisions. For instance, there will likely be continuing conflict over the interpretation of the limits of the Free Exercise and Establishment Clauses of the First Amendment, thus exemplifying a tension that may never be finally resolved.

Another obvious example lies in the Supreme Court’s reversal of position regarding criminalization of adult homosexual sodomy. In 1986, the Court upheld the authority of states to criminalize consensual adult sodomy in *Bowers v. Hardwick*.¹³⁷ The *Bowers* majority rejected the dissenter’s argument that this conduct had generally been subject to decriminalization over time, reflecting a national consensus that adult homosexual sodomy was protected by federal constitutional guarantees. Less than twenty years later, a majority of the Justices reversed the Court’s position in *Lawrence v. Texas*,¹³⁸ holding that the state’s sodomy law violated the liberty interests protected by the Due Process Clause.¹³⁹

Moreover, the changing legal landscape on major social issues is not necessarily limited to appeals raising federal constitutional issues. Significant questions of state constitutional law may also influence major doctrinal changes by a state court of last resort. For example, even before the Supreme Court’s shift in constitutional policy in *Lawrence*, the Arkansas Supreme Court struck down the state’s sodomy statute in *Jegley v. Picado*,¹⁴⁰ relying on the state’s historical protection of privacy in state law.¹⁴¹ The *Lawrence* Court noted the action taken in *Jegley v. Picado* and other state court decisions rejecting criminalization of consensual homosexual activity in reaching its conclusion.¹⁴²

While conservative critics of the Supreme Court may characterize

137. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

138. *Lawrence v. Texas*, 529 U.S. 558 (2003).

139. U.S. CONST. amend. XIV, § 1.

140. *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002).

141. See Robert L. Brown, *Expanded Rights Through State Law: The United States Supreme Court Shows State Courts the Way*, 4 J. APP. PRAC. & PROCESS 499, 515-17 & n.60 (2002) (explaining state law approach taken to void sodomy statute).

142. *Lawrence*, 529 U.S. at 570-71 (“Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them.”). The court then cited several cases addressing prohibitions on same-sex sodomy. See, e.g., *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct.

Lawrence and other decisions as "activist," the Court's action in this case might be viewed in an entirely different light. *Lawrence* rests, at least in part, on the perception of at least some Justices who must be viewed as conservative—Justice Kennedy—or moderate—Justice O'Connor—that *Bowers v. Hardwick* was no longer constitutionally viable. Had this conclusion been reached simply on a difference in ideological or moral positions of the Court's membership, the "activist" label might be appropriate. The *Lawrence* majority, however, looked to the determinations of state legislatures in concluding that *Bowers* no longer reflected a national consensus¹⁴³ on the proper scope of the liberty interests protected by the Due Process Clause.¹⁴⁴ Clearly, it does not rest on the strict constructionist sentiment that prompted a narrow majority in *Bowers* to hold that criminalization of sodomy was constitutionally permissible because it was contemplated by the drafters of the critical amendments, or by the state legislatures representing the citizens in ratifying those amendments,¹⁴⁵ a proposition questioned by the *Lawrence* majority.¹⁴⁶ In fact, the *Lawrence* majority ultimately concluded that *Bowers* had not been supported by historical precedent, as claimed by the *Bowers* plurality.

As in *Crawford*, the *Lawrence* majority ultimately pronounced *Bowers* as wrongly decided. "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."¹⁴⁷ Undoubtedly, *Lawrence* was the product of rejection by a majority that reconsidered the Court's prior authority in light of both its accuracy at the time of decision in *Bowers*, and general public consensus reflected in the lack of supporting state legislative action for implementation of the restriction on personal liberty authorized by the *Bowers* Court.

The *Lawrence* Court simply corrected a socially unacceptable interpretation of the Constitution in a means less formal than amendment would have required. Overruling *Bowers* was predicated on the lack of

App. 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); see also 1993 Nev. Stat. 236 (repealing NEV. REV. STAT. § 201.193).

143. *Id.* at 570-73. Of additional significance was the lack of enforcement of sodomy laws even in jurisdictions maintaining the prohibition by statute.

144. *Id.* at 571-72 ("In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

145. *Bowers*, 478 U.S. at 192-93. See generally *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. MIAMI L. REV. 521, 525 (1986).

146. *Lawrence*, 539 U.S. at 567-71 (noting that no state "singled out" same sex relations for criminalization until the 1970's).

147. *Id.* at 578.

support for its holding and recognition that the states, by implication, had rejected its holding as a matter of public policy.

The Court's reliance on trends in state legislative action reflecting public policy is even more pronounced in its decision in *Atkins v. Virginia*¹⁴⁸ overruling less than fifteen-year-old precedent, *Penry v. Lynaugh*.¹⁴⁹ In *Penry*, the Court had rejected the argument that the execution of a mentally retarded capital defendant constituted cruel and unusual punishment.¹⁵⁰ The *Atkins* Court, relying in part on *Penry*, expressly noted the importance of state legislative action in assessing whether national policy continued to support contemporaneous interpretation of federal constitutional protections.¹⁵¹ Significantly, the *Atkins* Court noted that state legislatures had affirmatively moved away from authorizing execution of the mentally retarded in the years following its decision in *Penry*.¹⁵²

The Court's actions in *Brown v. Board of Education*, *Lawrence*, and *Atkins* reflect its willingness to reappraise constitutional doctrine in light of changing social policy. In *Brown*, the Court essentially reacted to the failure of Congress and state legislatures to correct a long-term legally indefensible policy. In *Lawrence*, the majority reconsidered the evidence argued to support the precedent and subsequent legislative trends, and concluded that its decision in *Bowers* was simply incorrect. In *Atkins*, the Court reacted to recent and definitive trends in state legislation to informally amend its interpretation of the applicable constitutional provision. It brought its own view in line with national sentiment, as reflected in the action of state legislatures.

Significant social issues will continue to warrant reconsideration over time. As public sentiment or policy shifts on these matters, courts may sometimes view the previously rejected legal arguments with greater interest. Counsel should continue to argue the good faith basis for overruling precedent in light of changing national sentiment, particularly when reflected directly in the actions of state legislatures.

3. INTERPLAY OF JUDICIAL DECISIONS AND LEGISLATIVE ACTION

Because a primary duty of an appellate court is to interpret statutory law, legislative action may prove an important source of argument in addressing unfavorable precedent. Often, this results from the need to

148. *Atkins v. Virginia*, 536 U.S. 304 (2002).

149. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

150. *Id.* at 334-35.

151. *Atkins*, 536 U.S. at 312 ("We have pinpointed that the 'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.") (citing *Penry*, 492 U.S. at 331).

152. *Id.* at 313-17.

interpret legislation in light of existing precedent. An example of such interpretation is the Arkansas courts' treatment of voluntary intoxication as a defensive theory in criminal cases. Under common law principles, voluntary intoxication could serve as a defensive theory that reduces the degree of culpability as it impairs the defendant's intellectual processes.¹⁵³ Typically, the application was important in first degree murder cases that required proof of premeditation or deliberation, or a high degree of criminal intent. Evidence of intoxication served to negate the inference that the defendant was capable of operating with the requisite high degree of intent at the time of the offense because his intoxication compromised his ability to reason and make choices.

When the legislature abolished a statutory provision¹⁵⁴ that apparently barred use of intoxication as a defense in 1977,¹⁵⁵ the courts were required to construe the legislative intent. Initially, the Arkansas Supreme Court concluded that the 1977 enactment had the effect of repealing the earlier prohibition and thus, reinstated the common law recognition of the limited use of intoxication as a defense to criminal intent in *Varnedare v. State*.¹⁵⁶

The state supreme court revisited the issue in *White v. State*¹⁵⁷ when the State, as appellee, responded to the defendant's argument that the trial court incorrectly denied his requested instruction for intoxication as a defensive theory. The court properly rejected the claim because the defendant had already been convicted on the lesser-included offense of second degree murder and under Arkansas common law, intoxication would not have afforded him a defensive theory to this lesser degree of criminal intent.¹⁵⁸ It also straightened out its own view of the legislative intent implicit in the statutory language, holding that the General Assembly did not intend to reinstate the common law defense when it expressly rejected reliance on voluntary intoxication as a defense.¹⁵⁹ The *White* court overruled its prior decision in *Varnedare* and effectively foreclosed reliance on voluntary intoxication as a defen-

153. *Wood v. State*, 34 Ark. 341, 344 (Ark. 1879).

154. ARK. STAT. § 41-115 (Michie 1964) (repealed) ("Drunkenness shall not be an excuse for any crime or misdemeanor, unless such drunkenness be occasioned by the fraud, contrivance or force of some other person, for the purpose of causing the perpetration of the offense . . .") (precluding reliance on voluntary intoxication through the clear language in the statute).

155. ARK. CODE ANN. § 5-2-207 (Michie 2001).

156. *Varnedare v. State*, 573 S.W.2d 57, 59 (Ark. 1978). ("By amending s 41-207 to remove self-induced intoxication as a statutory defense, the legislature, in effect, reinstated any prior Arkansas common law on the subject.").

157. *White v. State*, 717 S.W.2d 784 (Ark. 1986).

158. *Id.* at 787.

159. *Id.* at 787-88.

sive theory in any context in Arkansas trials.¹⁶⁰ Because the Attorney General continued to press the issue of legislative intent, the Arkansas court eventually rendered a decision in *White* properly expressing the General Assembly's position.

In some instances, counsel should consider challenging prior decisions aggressively because the appellate courts have invited legislative action. An example is presented by the history of litigation stemming from the Texas Supreme Court's decision in *Boren v. Boren*.¹⁶¹ There, the court voided a non-holographic will based on defective execution because the witnesses executed a self-proving affidavit to the will, but did not witness the will itself.¹⁶² The problem led to contrary judicial results in other jurisdictions.¹⁶³ The Texas courts, however, held to the *Boren* rule that wills defective in this respect were not properly executed under state probate law and refused to find that substantial compliance with execution formalities warranted its admission to probate.¹⁶⁴

Some Texas decisions¹⁶⁵ and dissenting justices argued the inherent unfairness in the application of a rule of form that effectively negated and frustrated the testator's clear intent.¹⁶⁶ The legislature ultimately responded to the court's "invitation" to correct the situation.¹⁶⁷ In this context, litigants faced with controlling precedent that appellate courts refuse to overrule should continue to assert claims in efforts to induce legislative or administrative action.¹⁶⁸ Unfortunately, for many litigants,

160. See *Standridge v. State*, 951 S.W.2d 299, 302 (Ark. 1997) (holding that intoxication may not form the basis for admission of mental state evidence on issue of culpability as authorized in ARK. CODE ANN. § 5-2-303 (Michie 2001)).

161. *Boren v. Boren*, 402 S.W.2d 728 (Tex. 1966).

162. *Id.* at 729-30.

163. See *In re Estate of Cutsinger*, 445 P.2d 778, 782 (Okla. 1968); *In re Estate of Petty*, 608 P.2d 987, 993 (Kan. 1980); *In re Estate of Charry*, 359 So. 2d 544 (Fla. Dist. Ct. App. 1978). But see *In re Estate of Sample*, 572 P.2d 1232 (Mont. 1977) (following *Boren*).

164. See, e.g., *Wich v. Fleming*, 652 S.W.2d 353, 354 (Tex. 1983) (noting *Boren* rule followed consistently in Texas decisions).

165. See, e.g., *Jones v. Jones*, 630 S.W.2d 645, 648 (Tex. Ct. App. 1980) (noting the court's reluctance to follow *Boren*), *writ ref'd*, 630 S.W.2d 645 (Tex. Ct. App. 1980).

166. *Wich*, 652 S.W.2d at 356 (Robertson, J., dissenting).

167. In *Wich*, 652 S.W.2d at 355, the court noted that "the Legislature [had] amended section 59 of the Probate Code twice since the date of the *Boren* decision, but [had] not modified the [requirements for valid execution of a will to make substantial compliance adequate]." *Id.* The legislature finally corrected the problem created by *Boren* wills in 1991, amending Section 59(b) of the Texas Probate Code to provide that the signature of the testator on a self-proving affidavit could serve as the signature required for the will itself. 1991 Tex. Gen. Laws 3062, 3065 (codified in TEX. PROB. CODE ANN. § 59(b) (Vernon 2003)). The amendment applied retroactively to wills executed prior to the effective date of the Act, but not offered for probate until the death of the testator subsequent to the effective date. *Bank One, Tex., v. Ikard*, 885 S.W.2d 183 (Tex. Ct. App. 1994).

168. For example, in *Hopkins v. Hopkins*, 708 S.W.2d 31, 33 (Tex. Ct. App. 1986), the appellant recognized the controlling authority of *Boren* but expressly preserved her claim for

the laudable public service of fighting against an unjust rule in the appellate courts is simply not economically feasible, or may be contrary to their own interests.¹⁶⁹ Consequently, the reluctance of courts to act results in the continued application of unreasonable rules until the legislature takes corrective action.

4. RECOGNITION OF NATIONAL TRENDS IN THE LAW

An important rationale for overruling precedent is that a jurisdiction's view of an issue is simply out of step with the weight of authority from other jurisdictions, or is contrary to an emerging national trend. A classic example is demonstrated by the Tennessee Supreme Court in *Lollar v. Wal-Mart Stores, Inc.*,¹⁷⁰ in which the court overruled a long-standing rule of state workers compensation law. The issue involved compensation for injuries suffered by employees on the employer's property while coming or going from work.¹⁷¹ The court observed that it had consistently rejected recovery for such injuries in a series of decisions, including eight reported and eleven unreported cases.¹⁷² The court observed that under state law, only employees who suffer injuries as a result of traveling "required routes" that preclude access by members of the general public can recover.¹⁷³

The *Lollar* court then noted that Tennessee was virtually alone among American jurisdictions in applying such a restrictive rule to compensatory recovery for an employee injured on an employer's property while going to or coming from work.¹⁷⁴ It ultimately concluded that its "rule has not proved a workable one," pointing to a difficulty in reconciling application of the rule in many of the cases in which the issue had been raised.¹⁷⁵ It then adopted an approach more consistent with the clear national trend noted by Larson's treatise,¹⁷⁶ holding:

review in the state supreme court for reconsideration of its prior holding. The court of appeals acknowledged the propriety of her action, but held that it was bound to apply "the law as declared by the supreme court."

169. The appellant in *Hopkins* did not press her claim, which sought to have *Boren* overruled, in the Texas Supreme Court because she was able to negotiate a favorable settlement of her claims with other heirs who faced the prospect that the court might overrule its prior decision and deprive them of any recovery under the will.

170. *Lollar v. Wal-Mart Stores, Inc.*, 767 S.W.2d 143 (Tenn. 1989).

171. *Id.* at 143-44.

172. *Id.* at 144 & n.1 (observing in a note its usual prohibition against reference to unreported decisions).

173. *Id.* at 144-48 (summarizing numerous Tennessee decisions).

174. *Id.* at 148 (observing that only Tennessee and Kentucky applied such a narrow construction for recovery and that Kentucky, as seen through *Smith v. Klarer Co.*, 405 S.W.2d 736 (Ky. Ct. App. 1966), actually applied a less restrictive rule).

175. *Id.*

176. ARTHUR LARSON, 1 LARSON'S WORKMEN'S COMPENSATION LAW §15.11 (1985).

[The] rule . . . has failed as a test for determining when *en route* injuries are “in the course of employment.” Faced with the prospect of increased litigation on this issue under *de novo* review, we think the better approach is to frankly admit the inequities that have resulted from Tennessee’s unique minority rule.¹⁷⁷

The court expressly followed the lead of the New Mexico Supreme Court¹⁷⁸ in *Dupper v. Liberty Mutual Ins. Co.*,¹⁷⁹ rejecting a narrow construction of the “coming and going rule” in favor of the broader rule evidenced by the national majority trend:

In aligning ourselves with every other jurisdiction by adoption of the premises rule, we simply recognize that the “course of employment” includes not only the time for which the employee is actually paid but also a reasonable time during which the employee is necessarily on the employer’s premises while passing to or from the place where the work is actually done.¹⁸⁰

Another example of a court conforming local law to a national trend is the treatment of dramshop liability by the Arkansas Supreme Court. In its 1965 decision, *Carr v. Turner*, the court rejected liability for a defendant who furnished alcohol to minors injured as a result of their intoxication.¹⁸¹ The court’s holding persisted through a line of cases until it reconsidered its position in 1997 in *Shannon v. Wilson*.¹⁸² In *Shannon*, the court observed, “[s]ince *Carr*, this Court has been entreated to reevaluate the issue of a seller of alcohol’s liability on numerous occasions. Repeatedly we have held that absent a change in the common-law principle by the legislature, this Court would not depart from the ruling in *Carr* and its progeny.”¹⁸³ The court reminded the legislature that it had suggested the need for corrective action through legislation in the *Carr* opinion itself and noted its prior conclusion that few other jurisdictions had imposed liability in the absence of legislative action.¹⁸⁴ The court then traced the history of appellate litigation on this issue, noting its ‘consistent’ rejection of liability for alcohol providers over the course of thirty years since 1965 when *Carr* was decided.¹⁸⁵

The *Shannon* court then discussed the legislature’s failure to act in light of its own duty to address changing circumstances that warrant

177. *Lollar*, 767 S.W.2d at 150.

178. *Id.*

179. *Dupper v. Liberty Mut. Ins. Co.*, 734 P.2d 743 (N.M. 1987).

180. *Id.* at 746.

181. *Carr v. Turner*, 385 S.W.2d 656, 658 (Ark. 1965).

182. *Shannon v. Wilson*, 947 S.W.2d 349 (Ark. 1997).

183. *Id.* at 351.

184. *Id.*

185. *Id.* at 352.

intervention.¹⁸⁶ Noting the increased public danger posed by intoxication in light of the common use of automobiles, the court observed, "[t]he reality of modern life is evidenced by the fact that most drinking establishments and liquor stores provide patrons parking lots."¹⁸⁷ It concluded, "[t]he rule espoused in *Carr* was judicially created. When a judicially created rule becomes outmoded or unjust in its application, it is appropriate for the judiciary to modify it."¹⁸⁸ In breaking with its own precedent, the Arkansas Supreme Court reviewed a substantial body of case law from other jurisdictions that demonstrated a decisive trend in the law toward recognizing tort liability for providers of intoxicants whose patrons cause or suffer personal injuries as a result of their intoxication.¹⁸⁹ The court also looked to jurisdictions in which legislative action has created liability.¹⁹⁰ The court recognized the weight of this trend in noting:

Most state and federal courts that have considered this issue since the 1960's have reevaluated and rejected as patently unsound the rule that a seller cannot be held liable for furnishing alcoholic beverages to an intoxicated or minor patron who injures a third person based upon the grounds that the sale or service is causally remote from the subsequent injurious conduct of the patron. A substantial majority have decided that the furnishing of alcoholic beverages may be a proximate cause of such injuries and that liability may be imposed upon the vendor in favor of the injured third person.¹⁹¹

Even in dissent, Justice Newbern observed the value of challenging existing precedent in the course of appellate litigation. Although he disagreed with the majority's conclusion about the continuing viability of the *Carr* rationale, he nonetheless prefaced his argument:

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. That is not what the majority is about in this case.¹⁹²

Such "tried and true principles," as reflected in a national trend concerning the admission of expert opinion in medical malpractice, led

186. *Id.* (discussing prior deference to legislature with respect to issue of abolishing governmental immunity from tort actions in *Parish v. Pitts*, 429 S.W.2d 45 (Ark. 1968)).

187. *Id.*

188. *Id.* at 353 (citing decisions from the Oklahoma and Wisconsin courts and Justice William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949)).

189. *Id.* at 353-55.

190. *Id.* at 355-56.

191. *Id.* at 353.

192. *Id.* at 358 (Newbern, J., dissenting) (emphasis added).

the Mississippi Supreme Court to adopt a “national” standard of practice for surgeons. In *Hall v. Hilbun*, it abandoned the jurisdiction’s long-held practice of requiring proof of the “local” standard of care.¹⁹³ The court specifically looked to rules applied in other states in support of its conclusion that the “national” standard reflected a better rule of law.¹⁹⁴ It also noted that its prior reliance on the “locality” rule had itself undergone some liberalization in terms of the expansion of the concept of “locality.”¹⁹⁵ The evolution of the rule afforded counsel a good faith basis for asking for the necessary extension or modification required for the malpractice plaintiff to develop proof of the breach of the standard of care.

Clearly, shifting opinion regarding the correctness of judicially imposed rules or principles can be instrumental in arguing the need for overruling precedent. When apparent, counsel should not hesitate to challenge adverse precedent directly and offer the appropriate policy arguments, particularly when they are supported by a dominant national trend in appellate decisionmaking.¹⁹⁶

5. CONTEMPORARY DEVELOPMENTS IN OTHER BRANCHES OF KNOWLEDGE

New developments in non-legal fields of knowledge are often reflected in changing attitudes toward theories of a claim, a defense, or the admissibility of evidence. The most influential example of a development in science that has been embraced by appellate courts has been the recognition of deoxyribonucleic acid (DNA) technology as a means of identification. The acceptance of DNA, however, does not really indicate a change in appellate court views as a result of changing science. Rather, it demonstrates the acceptance of a new technology not

193. *Hall v. Hilbun*, 466 So. 2d 856, 873 (Miss. 1985). Although subsequent legislative action abrogated the rule that a plaintiff could recover from “one, all or a select group of tortfeasors and collect full damages from those parties sued,” applied in *Hall*, *DePriest v. Barber*, 798 So. 2d 456, 458 at ¶ 7 (Miss. 2001), the rule regarding use of the “national” standard of care in medical negligence actions continues to be viable. See *Ortman v. Cain*, 811 So. 2d 457, 462-63 at ¶ 21 (Miss. Ct. App. 2002); *McCaffrey v. Puckett*, 784 So. 2d 197, 202-03 at ¶¶ 17, 20 (Miss. Ct. App. 2001).

194. *Hall*, 466 So. 2d at 867-69.

195. *Id.* at 866-67. The court cited *King v. Murphy*, 424 So. 2d 547, 550 (Miss. 1982), in which the court had expanded the relevant “locality” to include the entire state and “a reasonable distance adjacent to state boundaries.” *King* also recognized the admissibility of an opinion rendered by an expert from beyond this “locality,” provided they had familiarized themselves with the standard of care within the “locality.” *Id.*

196. *But see Taylor v. State*, 754 So. 2d 598, 609 at ¶ 29 (Miss. Ct. App. 2000) (rebuffing counsel’s reliance on Idaho authority in arguing his position to the Mississippi Court of Appeals, observing that “Mississippi, of course, has ample case law on point regarding the standard employed in reviewing a motion for a new trial”).

previously addressed by the appellate courts. This is not an uncommon occurrence, as many new technologies simply require articulation under relevant standards of admissibility. In other cases, however, appellate courts change their views of relevance based upon newly emerging science. For example, recent developments in the fields of psychiatric medicine, psychology, and behavioral sciences have resulted in the courts' recognition of new ways to look at human behavior. These developments are truly recent and continuing, and therefore courts have been forced to respond to creative efforts by lawyers to integrate new thinking in the mental health and behavioral science fields into their theories for relief or defense. Prior caselaw, which could not have reacted to the previously non-existent degree of scientific knowledge, proves inadequate to address claims and evidence now grounded in reliable scientific theory. As a result, courts continually re-evaluate existing precedent in light of these developments.

An example of how scientific developments are influencing rules of law is in the recognition of relevance and admissibility of expert opinion on human perception in eyewitness identification cases. Traditionally, many courts have held that admitting opinion testimony on the reliability of eyewitness identification would invade the factfinding province of the jury.¹⁹⁷ In *State v. Chapple*,¹⁹⁸ the Arizona Supreme Court reviewed other courts' positions on the admissibility of expert testimony in criminal prosecutions in which identification was the central issue at trial. The court also addressed the scientific developments in the field of psychology relating to human perception.¹⁹⁹ The *Chapple* court considered the framework for admissibility of expert opinion developed by the Ninth Circuit in *United States v. Amaral*, an earlier case that involved exclusion of testimony relating to human perception.²⁰⁰ It then further noted that *Amaral* and other cases had uniformly upheld the exclusion of this type of expert opinion.²⁰¹

Distinguishing the factual context underlying *Amaral* and other rejections of expert opinion on the reliability of eyewitness testimony, the *Chapple* court ultimately held that the evidence presented was admissible and overruled a prior Arizona decision in the process.²⁰² The

197. See *Caldwell v. State*, 594 S.W.2d 24, 28-29 (Ark. Ct. App. 1980); *People v. Johnson*, 112 Cal. Rptr. 834, 836-37 (Cal. Ct. App. 1974); *Jones v. State*, 208 S.E.2d 850, 852-53 (Ga. 1974); *Pankey v. Commonwealth*, 485 S.W.2d 513, 521-22 (Ky. Ct. App. 1972).

198. *State v. Chapple*, 660 P.2d 1208 (Ariz. 1983) (en banc).

199. *Id.* at 1218 (observing that identification was the "one issue" on which the defendant's guilt or innocence hinged).

200. *United States v. Amaral*, 488 F.2d 1148 (9th Cir. 1973).

201. *Chapple*, 660 P.2d at 1218.

202. *Id.* at 1220 (overruling *State v. Valencia*, 575 P.2d 335, 337 (Ariz. Ct. App. 1977)).

court reviewed the proffered testimony of the expert who delineated a series of factors that influence eyewitnesses to err in identifying individuals involved in criminal activity. These factors included: (1) the tendency of witnesses to shocking events to misidentify, rather than identify more accurately; (2) the typical nature of an immediate identification to be more reliable than one in which time has passed—the “forgetting curve”; (3) the process of “unconscious transfer” that occurs when the witness confuses the person identified with another individual, often as a consequence of viewing a photo lineup; (4) the tendency of an eyewitness to incorporate information received after the event into her identification recollection, particularly when feedback from others confirms a particular perception; and (5) the fact that the accuracy of the witness’ identification is likely to vary substantially from the witness’s belief in her own accuracy.²⁰³

Reviewing the proffered expert opinion on each of these points, the *Chapple* court concluded that the expert’s testimony would assist jurors precisely because of common misperceptions about the way in which the human memory works.²⁰⁴ The recognition of admissibility of this type of testimony in appropriate cases has influenced other courts to overrule prior decisions categorically excluding expert testimony relating to human perception. The Georgia Supreme Court did this in *Johnson v. State*,²⁰⁵ yet it also declined to endorse the minority position that exclusion of the testimony results is a *per se* abuse of discretion.²⁰⁶ The Kentucky Supreme Court overruled prior decisions holding expert testimony on human perception inadmissible in *Commonwealth v. Christie*.²⁰⁷ The supreme court elected to follow the “vast majority” of courts that have committed the question to the trial court’s exercise of discretion rather than adopting the alternatives of either admissibility *per se* or exclusion of the evidence.²⁰⁸

The acceptance of expert opinion on human perception by many courts is an example of empirical evidence promoting a change in admissibility. The trend toward admission is supported by the considerable body of research focusing on common inaccuracies in eyewitness identification. The body of scientific evidence supporting this field of

203. *Id.* at 1220-21.

204. *Id.* at 1221.

205. *Johnson v. State*, 526 S.E.2d 549 (Ga. 2000) (overruling *Jones v. State*, 208 S.E.2d 850 (Ga. 1974), and disapproving of *Norris v. State*, 376 S.E.2d 653 (Ga. 1989), and *Cox v. State*, 398 S.E.2d 262 (Ga. Ct. App. 1990), as requiring exclusion of expert testimony on human perception).

206. *Id.* at 552.

207. *Commonwealth v. Christie*, 98 S.W.3d 485 (Ky. 2002).

208. *Id.* at 488.

expertise is extensive.²⁰⁹ Recognition of this well-developed body of information has prompted many courts following *Chapple* to admit expert testimony on the general issue of factors affecting reliability of eyewitness identification.²¹⁰

Nevertheless, a substantial number of courts continue to refuse admission of expert testimony on human perception, as the Kansas Supreme Court did in *State v. Wheaton*.²¹¹ There the court relied upon a cautionary instruction on the potential hazards of eyewitness identification rather than permitting an expert opinion on the factors that may influence the accuracy of an identification in particular circumstances.²¹² The trend toward admissibility, however, has followed more extensive psychological research, as the appellant argued in *Wheaton*.²¹³ This suggests for appellate counsel the need to advise trial attorneys to lay the proper predicate for admission of expert testimony on eyewitness credibility in order to urge changes in the law of admissibility in those remaining jurisdictions that categorically exclude this expertise.

Another example of developments in psychological research influencing admissibility determinations was the recognition of post-traumatic stress disorder (PTSD) by the mental health community approximately twenty-five years ago.²¹⁴ This disorder began to be understood during the Vietnam War when servicemen returned home

209. Perhaps most significantly, the Department of Justice commissioned a national study on the reliability of eyewitness identification, U.S. DEP'T OF JUSTICE, EYEWITNESS EVIDENCE: A GUIDE FOR LAW ENFORCEMENT (1999), available at <http://www.ncjrs.org/pdffiles1/nij/178240.pdf>, which discusses the inherent problems of observation and recollection in eyewitness identification. A second DOJ study, DEP'T OF JUSTICE, CONVICTED BY JURIES, EXONERATED BY SCIENCE: CASE STUDIES IN THE USE OF DNA EVIDENCE TO ESTABLISH INNOCENCE AFTER TRIAL (1996), available at <http://www.ncjrs.org/pdffiles/dnaavid.pdf>, concluded that a significant number of wrongful convictions were based on eyewitness mis-identifications. For a leading academic investigation, see ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1979), and for a more recent work, see R.E. GEISELMAN, EYEWITNESS EXPERT TESTIMONY (1996).

210. See, e.g., *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985); *People v. McDonald*, 690 P.2d 709 (Cal. 1984) (holding exclusion of properly qualified expert testimony on human perception was abuse of discretion). Other courts have held this expert testimony is generally admissible. *United States v. Smithers*, 212 F.3d 306 (6th Cir. 2000); *United States v. Stevens*, 935 F.2d 1380 (3d Cir. 1991); *Jordan v. State*, 928 S.W.2d 550, 556 (Tex. Crim. App. 1996); *State v. Moon*, 726 P.2d 1263 (Wash. Ct. App. 1986). Courts have often relied upon the standards for admissibility of expert testimony articulated in *United States v. Amaral*, 488 F.2d 1148, 1152-53 (9th Cir. 1973), in determining admissibility of human perception testimony.

211. *State v. Wheaton*, 729 P.2d 1183, 1186-88 (Kan. 1986) (discussing and rejecting the *Chapple* rationale).

212. *Id.* at 1185 (citing *State v. Warren*, 635 P.2d 1236 (Kan. 1981)).

213. *Id.* at 1188 (declining to accept the appellant's assertion as correct).

214. This disorder was not recognized by the American Psychiatric Association until 1980. *Dever v. Kan. State Penitentiary*, 788 F. Supp. 496, 498 (D. Kan. 1992). The Veteran's Administration did not recognize the disorder as a treatable disease until 1980 either. *State v. Serrato*, 424 So. 2d 214, 223 (La. 1982).

experiencing problems. These servicemen were often diagnosed as suffering from "Vietnam stress syndrome."²¹⁵ PTSD is characterized by anxiety resulting from exposure to a particularly traumatic event outside the normal realm of human experience. Symptoms include: recollections of the event; recurring dreams of the event; sleeplessness; hyperactivity; startle response; and a dissociative state.²¹⁶

The defensive use of evidence of PTSD has impacted the criminal law in two distinctive, and sometimes contrary, ways. For example, the impairment may be viewed as essentially a form of mental state disorder implicating either the accused's sanity or degree of culpability because it may reflect an inability to appreciate criminality of conduct or ability to conform one's conduct to the requirements of law.²¹⁷ Alternatively, PTSD may also be relevant to a determination that a sane accused acted in self-defense because it influenced her ability to properly appreciate a potential threat to which she has responded.²¹⁸ Some jurisdictions have viewed PTSD as relevant to only one of these inquiries,²¹⁹ while others permit the defensive use of the evidence with respect to either.²²⁰

Changing views on the admissibility of psychological evidence for self-defense claims have allowed the defensive use of Battered Woman's Syndrome, a form of PTSD. Growing acceptance within the community of mental health professionals of syndrome-based defensive theories, including Battered Woman's Syndrome, has caused many appellate courts to allow the admission of evidence relating to the presence of the syndrome or its symptoms in the criminal defendant.

In a leading case on the admissibility of Battered Women's Syndrome evidence, the New Jersey Supreme Court in *State v. Kelly*²²¹ considered admissibility of expert testimony purporting to explain the

215. For a general discussion of this disorder in returning veterans, see *State v. Felde*, 422 So. 2d 370, 376-78 (La. 1982), and the dissenting opinion of Justice Henderson in *Miller v. State*, 338 N.W.2d 673, 678-82 (S.D. 1983) (Henderson, J., dissenting).

216. *Dever*, 788 F. Supp. at 498 (citing *State v. DeMoss*, 770 P.2d 441, 444 (Kan. 1989)).

217. *State v. Coogan*, 453 N.W.2d 186, 190-91 (Wis. Ct. App. 1990) (holding evidence of PTSD admissible in guilt phase of trial if relevant to issue of accused's inability to form criminal intent). But see *State v. Morgan*, 536 N.W.2d 425, 439-40 (Wis. Ct. App. 1995) (holding PTSD not relevant to guilt phase issues if not implicating accused's lack of criminal intent).

218. E.g., *State v. Purcell*, 669 N.E.2d 60, 62-63 (Ohio Ct. App. 1995) (prosecution and defense experts agreed defendant suffered from PTSD, but disagreed on issue of whether perception of threat was influenced by "flashback" resulting in "hyperarousal" response causing overreaction); see also *Commonwealth v. Pitts*, 740 A.2d 726, 733-34 (Pa. Super. Ct. 1999).

219. E.g., *State v. Harris*, 870 S.W.2d 798, 816 (Mo. 1994) (en banc) (concluding that PTSD defense is inconsistent with self-defense under state law).

220. See, e.g., *State v. Nemeth*, 694 N.E.2d 1332, 1335-36 (Ohio 1998) (finding evidence of "battered child syndrome," a PTSD-based defense, is admissible as relevant to both defense of intent and of self-defense).

221. *State v. Kelly*, 478 A.2d 364 (N.J. 1984).

defendant's perception of the threat which prompted her to use force against her husband, the victim. The defendant had suffered long-term abuse by her husband.²²² The court observed that developments in the preceding decade, provided a new and better understanding of the psychological experience of battered victims demonstrated that a battered victim's perception might give rise to a legitimate claim of self-defense.²²³ The court described the research results in support of its conclusion by examining theories underlying the syndrome at length.²²⁴

In *Kelly*, the trial court excluded expert testimony on battered woman syndrome²²⁵ based on the prior holding in *State v. Bess*,²²⁶ where expert testimony on the reasonableness of a defendant's perception of the threat giving rise to his claim of self-defense had been rejected.²²⁷ The court did not overrule *Bess*,²²⁸ instead it distinguished the thrust of the two uses of expert testimony reflected in the differences in expert opinion in the two cases. In *Bess*, the expert had offered the opinion of a psychologist who examined the defendant and concluded that because of his emotional instability and below-average intelligence, he would tend to become confused and overact when confronted by an emotionally exciting experience.²²⁹ The defendant was charged with murdering a much larger individual whom he claimed was attempting to commit a robbery.²³⁰ Killing the larger man was, according to the defendant, done to prevent the robbery and in self-defense.²³¹ The court held that the expert's proffered opinion, that the defendant's response to a threat resulting in a claim of self-defense was reasonable under the circumstances, was inadmissible because it assessed the state of the accused's mind under a subjective standard, rather than an objective standard as required by state law.²³²

The *Kelly* court distinguished *Bess*, holding that expert testimony on the question of reasonableness of the actor's belief in the perceived danger would be admissible, apparently assuming that any actor in the

222. *Id.* at 368-69. The court noted the apparent first attempted defensive use of Battered Woman's Syndrome reported in *Ibn-Tamas v. United States*, 407 A.2d 626, 631-40 (D.C. 1979) (discussing potential viability of expert testimony), *appeal after remand*, 455 A.2d 893 (D.C. 1983) (holding trial court not required to admit expert testimony on facts). *Kelly*, 478 A.2d at 376.

223. *Kelly*, 478 A.2d at 369-72.

224. *Id.* at 370-74.

225. *Id.* at 381.

226. *State v. Bess*, 247 A.2d 669 (N.J. 1968).

227. *Id.* at 672-73.

228. *Kelly*, 478 A.2d at 377.

229. *Bess*, 247 A.2d at 672.

230. *Id.* at 671.

231. *Id.* at 672.

232. *Id.*

same situation would have reasonably reached the same conclusion.²³³ The court thus distinguished between expert opinion that essentially characterized the accused's testimony as "honest" from that which would permit a jury to conclude that any person in the accused's situation could objectively be found to have had a reasonable belief that the perceived threat justified use of force. The *Kelly* court effectively permitted expert opinion that jurors could use to reach a conclusion on the objective reasonableness of the accused's perception that force was justified, as long as the testimony itself related to objective factors. In essence, the *Kelly* court opened the door to far broader admissibility of psychological opinion about the accused's state of mind than had previously been contemplated by the *Bess* opinion without actually overruling the earlier decision.

Admission of expert testimony on the defendant's state of mind at the time of an assault when claiming self-defense has proved to be a rather innovative use of expert opinion at trial. In *State v. Branchal*,²³⁴ the New Mexico court considered its exclusion in a murder prosecution where the circumstances would have ruled out a traditional self-defense instruction because the accused provoked the assault and the threat was not immediate.²³⁵ Branchal had been repeatedly threatened by her husband, who often would become intoxicated and put a fingerless glove on one hand that he claimed permitted him to talk to the "Devil." The deceased was wearing a fingerless glove when his body was examined by the medical examiner.²³⁶ The defense offered the testimony of a psychologist who had examined the defendant and was prepared to offer an

233. *Kelly*, 478 A.2d at 377. The court may have actually drawn its line based on the tenor of the questioning of the two experts, rather than on the experts' findings. It held:

We also find the expert testimony relevant to the reasonableness of defendant's belief that she was in imminent danger of death or serious injury. We do not mean that the expert's testimony could be used to show that it was understandable that a battered woman might believe that her life was in danger when indeed it was not and when a reasonable person would not have so believed, for admission for that purpose would clearly violate the rule set forth in *State v. Bess*. Expert testimony in that direction would be relevant solely to the honesty of defendant's belief, not its objective reasonableness. Rather, our conclusion is that the expert's testimony, if accepted by the jury, would have aided it in determining whether, under the circumstances, a reasonable person would have believed there was imminent danger to her life.

Id. at 377 (citations omitted).

234. *State v. Branchal*, 684 P.2d 1163 (N.M. Ct. App. 1984).

235. *Id.* at 1167. The trial court commented on the record that it did not want to condone retaliation for past domestic violence. The record reflected a lengthy history of violence and threatening acts by the defendant's husband directed at her, her family, and their children. The evidence included the defendant's prior attempt to obtain assistance from police, who advised her that the problem was a family problem that she would have to resolve on her own.

236. *Id.* at 1165.

opinion not only on the reasonableness of her perception of fear, but also on her subjective belief in her right to use deadly force in defense of herself and her family.²³⁷ Unlike the New Jersey court in *Kelly*, however, the *Branchal* court did not draw the fine distinction between admissible opinion on the objective reasonableness of her response and her honesty in invoking the right to use force in self-defense:

Defendant also offered proof through Dr. Salazar, a psychologist, concerning her state of mind when she fired the fatal shot. The psychologist would have testified that she was a religious person and that she took the fingerless glove and the victim's invocation of the devil seriously. He would have explained the predictability of the victim's behavior when drunk, why defendant felt trapped in the kitchen and why she did not leave the victim. He would have testified that she was afraid for her life when she fired the fatal shot.²³⁸

The New Mexico court did not make any reference to Battered Woman's Syndrome and apparently the defense expert had not relied on this diagnosis in his proffered testimony at trial. Yet, it is clear that in this early application of the rationale for admitting expert opinion on the justification for use of deadly force against an abuser, the court was confronted with the problem of reconciling this approach with the traditional self-defense claim issues of immediacy of threat and reasonableness of the response. It gave an expansive answer on this issue, opening the door to reliance on novel expert opinion on issues of mental state.

The theory of "syndrome" evidence in self-defense cases was explained by the South Carolina Supreme Court in *Robinson v. State*.²³⁹ The discussion of the defensive application of the theory arose in the context of an ineffective assistance claim directed against counsel who failed to raise the defense at trial.²⁴⁰ In its discussion, the court accepted the syndrome as accurate,²⁴¹ and concluded that it has value in assisting the jury in analyzing the application of the law of self-defense to the battered victim charged with homicide or assault against her abuser.²⁴² The syndrome theoretically explains or justifies the accused's act of violence in terms of delayed reaction to the terror imposed by the abuser. A significant number of jurisdictions have responded to a general recognition of the Battered Woman Syndrome diagnosis by holding that expert testimony is admissible on the syndrome in support of a claim of self-

237. *Id.* at 1167.

238. *Id.*

239. *Robinson v. State*, 417 S.E.2d 88 (S.C. 1992).

240. *Id.* at 90.

241. *Id.*

242. *Id.* at 90-92.

defense.²⁴³ Although the "science" underlying the theory that battered women, or spouses, or anyone involved in intimate relationships²⁴⁴ behave in particular patterns remains subject to criticism,²⁴⁵ courts have adopted their approaches to the general recognition that self-defense may be treated more broadly than in traditional contexts.

When dealing with newly developing scientific or technical knowledge, counsel intent upon forcing the court to reevaluate prior decisions limiting admissibility should stress the increasing acceptance of the expertise within the relevant field and make the proper offer of proof supporting the change in law sought.

Developments in scientific and technological knowledge will undoubtedly result in a continuing assault on precedents based on information rendered outdated by these advancements. Perhaps cognizant of the long-range potential for litigation of issues relating to advancements in other fields of knowledge and expertise, the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁴⁶ articulates a new framework for evaluation of the science underlying expert opinion. For jurisdictions adopting *Daubert*, or *Daubert*-like²⁴⁷ approaches to admissibility of expert evidence; in light of its reasoning, the prospects for challenge to existing precedents would appear healthy.

243. *E.g.*, *People v. Aris*, 264 Cal. Rptr. 167 (Cal. Ct. App. 1989); *Hawthorne v. State*, 408 So. 2d 801, 806-07 (Fla. Dist. Ct. App. 1982); *Chapman v. State*, 367 S.E.2d 541, 543 (Ga. 1988); *State v. Minnis*, 455 N.E.2d 209, 217-18 (Ill. App. Ct. 1983); *State v. Hundley*, 693 P.2d 475, 477 (Kan. 1985); *Commonwealth v. Craig*, 783 S.W.2d 387, 389 (Ky. 1990); *State v. Anaya*, 438 A.2d 892, 894 (Me. 1981); *State v. Hennum*, 441 N.W.2d 793, 798-99 (Minn. 1989); *State v. Williams*, 787 S.W.2d 308, 310-11 (Mo. Ct. App. 1990); *State v. Kelly*, 478 A.2d 364, 368 (N.J. 1984); *State v. Gallegos*, 719 P.2d 1268, 1274 (N.M. Ct. App. 1986); *State v. Torres*, 488 N.Y.S.2d 358, 363 (N.Y. Sup. Ct. 1985); *State v. Leidholm*, 334 N.W.2d 811, 819 (N.D. 1983); *State v. Koss*, 551 N.E.2d 970, 973 (Ohio 1990); *State v. Moore*, 695 P.2d 985, 987-88 (Or. Ct. App. 1985); *Commonwealth v. Stonehouse*, 555 A.2d 772, 782-83 (Pa. 1989); *State v. Hill*, 339 S.E.2d 121 (S.C. 1986); *State v. Allery*, 682 P.2d 312, 315-16 (Wash. 1984); *State v. Steele*, 359 S.E.2d 558, 564-65 (W. Va. 1987).

244. Expert opinion that a sixteen year old defendant charged with murder of his mother suffered from Battered Child Syndrome was recognized as admissible on issues of his criminal intent and justification of use of force based on his perception of threat in *State v. Nemeth*, 694 N.E.2d 1332, 1334-36 (Ohio 1998).

245. See Erica Beecher-Monas, *Domestic Violence: Competing Conceptions of Equality in the Law of Evidence*, 47 LOY. L. REV. 81, 113-24 (2001). Professor Beecher-Monas offers a scathing critique of the traditional view of Battered Woman's Syndrome, arguing that it cannot be reconciled with standards for admissibility that require expert opinion to be grounded in sound scientific principles. Instead, she argues that courts have accepted syndrome evidence, apparently in sympathetic response to the significant problem of domestic abuse without requiring a showing of scientific authenticity imposed on other subjects of expert opinion.

246. *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). For an overview of *Daubert* and its approach to admissibility, see Erica Beecher-Monas, *The Heuristics of Intellectual Due Process: A Primer for Triers of Science*, 75 N.Y.U. L. REV. 1563 (2000).

247. *E.g.*, *Prater v. State*, 820 S.W.2d 429 (Ark. 1991).

V. CONCLUSION

The development of an effective argument for overruling precedent is often the product of cooperation between trial and appellate counsel, or the appreciation of counsel for the need to assert the argument for overruling in the trial court. The rules of error preservation necessitate asserting grounds for overruling precedent in the trial court; failure to do so will generally doom any argument advanced for the first time in the appeal.²⁴⁸ Generally, even claims of constitutional error may be forfeited by failure to preserve error in timely and appropriate fashion at trial, regardless of whether the claim is based on federal²⁴⁹ or state constitutional grounds.²⁵⁰ Notwithstanding how interesting the appellate argument may be in relying on novel grounds, lack of preservation of the claim at trial will likely result in the appellate court refusing to consider the merits of the claim.²⁵¹

Arguably, of course, a claim requiring overruling of precedent might succeed as a matter of fundamental error, assuming a court would conclude that application of the precedent resulted in denial of fundamental fairness in the proceedings. The requirement that preservation rules be followed with regard to existing precedent that binds a trial court renders objection almost always futile. Because the trial court is bound by existing precedent, one can hardly justify asking that same court to overrule precedent as a threshold for asserting the same argument in the appellate courts actually empowered to reconsider the wisdom of their prior decisions.²⁵² Nevertheless, effective representation requires recognition and respect for existing preservation rules, although appellate counsel may well decide to argue for the overruling of precedent as a matter of fundamental error.

The well-recognized doctrine of “plain error,” as opposed to “fun-

248. *E.g.*, *Yakus v. United States*, 321 U.S. 414, 444 (1944) (holding that a failure to assert error in the trial court constitutes a forfeiture of the claim or right).

249. *See Taylor v. State*, 851 A.2d 551, 557 (Md. 2004) (defendant's failure to assert claim of prior jeopardy waives error).

250. *E.g.*, *Heidelberg v. State*, 144 S.W.3d 535 (Tex. Crim. App. 2004) (defendant's reliance on Fifth Amendment basis for claim at trial waived reliance on comparable state constitutional provision where trial counsel did not include state constitutional basis for argument to trial court).

251. For instance, in *Maso v. State Taxation & Revenue Dep't Motor Vehicle Div.*, 96 P.3d 286, 289 ¶¶ 7-8 (N.M. 2004), the New Mexico Supreme Court declined to consider a novel claim raised as a matter of state constitutional law on direct appeal that had not been preserved at trial regarding failure to include Spanish translation in public document. The court held that the claim must first have been asserted on state constitutional grounds in the trial court. *Id.* *Accord* *State v. Gomez*, 932 P.2d 1, 8 ¶ 23 (N.M. 1997).

252. For an excellent argument for recognizing exceptions to the preservation rules when trial objection would be futile, see Brent E. Newton, *An Argument for Reviving the Actual Futility Exception to the Supreme Court's Procedural Default Doctrine*, 4 J. APP. PRAC. & PROCESS 521 (2002).

damental error,” certainly will not afford appellate counsel grounds for excusing the preservation requirement.²⁵³ By definition, the concept of plain error requires that there be “error”—deviation from application of a legal rule that is both plain and clear.²⁵⁴ The underlying concept of “plain error” is contrary, in theory, to the argument that precedent should be overruled despite lack of objection precisely because the trial court’s adherence to existing precedent will not constitute error.

Assuming preservation of the claim for overruling precedent in the trial court, appellate counsel is positioned to advance the argument on behalf of the client in the appellate courts. The assertion of a properly preserved claim for a change in the law reflects the necessary catalyst for change in law contemplated by the common law system. When appellate counsel makes a good faith claim for overruling, modifying or, in fact, extending existing precedent, her representation is consistent with zealous representation of her client. It is also consistent with both the text and spirit of the Model Rules of Professional Conduct.

Many appellate lawyers equate timidity with deference to the court, and equate such deference with respect. Unfortunately, the lack of passion often displayed in appellate practice may lead reviewing courts to the conclusion that a case or claim is so lacking in legal or equitable merit that the client’s own lawyer has little or no interest in the merits of the appeal. Ethical representation simply does not foreclose aggressive advocacy.

253. The concept of “plain error,” as set forth in Rule 52(b) of the Federal Rules of Criminal Procedure, was examined fully by the Supreme Court in *United States v. Olano*, 507 U.S. 725 (1993).

254. *Id.* at 732-33.