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ON THE VALUE OF PRISON VISITS WITH INCARCERATED CLIENTS REPRESENTED ON APPEAL BY A LAW SCHOOL CRIMINAL DEFENSE CLINIC

*Timothy H. Everett**

I. INTRODUCTION

The need for a professional visit between lawyer and client might seem self-evident on ethical grounds alone; a lawyer who represents a client must first understand the client's goals and must reach an understanding with the client concerning the terms, nature, and scope of representation.¹ However, the matter is not so simple in the appellate setting, particularly where counsel is appointed for an indigent defendant. Indigence for such a client means that he cannot retain counsel of choice and that he lacks any financial power in negotiating the non-financial terms of his representation by appointed counsel. The Supreme Court has made it clear that such a client does not have a constitutional right to control his court-appointed appellate counsel's strategy in selecting the legal issues raised in the client's brief and the issues emphasized at oral argument.² The Supreme Court has also held

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¹ MODEL RULES OF PROF'L CONDUCT R. 1.2, 1.4, 1.5 (2004).

² *Jones v. Barnes*, 463 U.S. 745 (1983). As noted later on, we begin our year long appellate clinic program with several classes on the attorney/client relation-

that there is no constitutional right to discharge appointed counsel and to proceed *pro se* on direct appeal in a criminal case.³ The constitutional message is clear: individuals convicted of crimes do not steer the course of their cases on appeal.

Over the two decades that I have supervised appellate clinic students, I have found no part of the clinic curriculum any more important than taking students to meet face-to-face with appellate clients where the clients live: any one of Connecticut's eighteen correctional institutions. There is no aspect of my clinical supervision each year that is surer of didactic success than going to prison to meet with our appellate clients. Further, there is no more respectful communicative gesture toward an appellate client than an early visit to see him and discuss his appeal at his "place of confinement."⁴ I write to tout the clinical value of such prison visits.

Prison visits provide a strong foundation for the kind of functional and respectful attorney/client relationship that is especially critical, for legal and pedagogical reasons, in conducting the business of an appellate criminal clinic in a law school. Counsel and client introduce themselves to each other and begin their professional relationship in the most appropriate possible setting: the prison at which the client is serving the sentence imposed pursuant to the judgment to be challenged on appeal. Respectful recognition of the client as a particular person surrounded by the reality of prison is a critical part of a law school clinic's representation of the client and the education of its students.

At the prison meeting, counsel and client develop regard for each other as individuals and as players with defined professional roles in the appellate process. Counsel and client can preview the appellate process together in a relatively colloquial fashion. Conversation in which the participants are present in the same place at the same time optimizes the prospects for

ship and the decisional authority given counsel on appeal.

³ *Martinez v. Court of Appeals*, 528 U.S. 152 (2000).

⁴ Because our clinic represents indigent clients, they almost never are able to obtain their release by posting an appeal bond.

achieving and sustaining a communicative "momentum"⁵ between attorney and client during the appeal process. The advantage of spoken language in a conversational mode is that the speaker and hearer can exchange their roles quickly and repeatedly, first one talking, then the other. Each speaker can make, or attempt to make, adjustments in how they are speaking—by changing of level of formality, tone and pitch, by making different lexical and idiomatic choices, etc.—in order to maximize the effectiveness of their communication.⁶

Of course, written communication will also be needed to establish the attorney/client relationship and to inform the client about the appellate process. However, exclusive reliance on written correspondence with an inmate client is problematic. Many individuals in a prison population cannot comfortably and effectively express themselves in writing. Indeed, many inmates seek help in understanding their legal correspondence from cell-mates, "jailhouse lawyers," and even corrections personnel. For these reasons, it is advantageous for correspondents (clients and lawyers alike) to have met each other at least once in person in order to better judge what may need greater or lesser explanation as they correspond with each other about the case.

The benefits of a prison visit are tangible as well as intangible. A solid interpersonal line of communication with an

⁵ WALLACE CHAFE, DISCOURSE, CONSCIOUSNESS, AND TIME: THE FLOW AND DISPLACEMENT OF CONSCIOUS EXPERIENCE IN SPEAKING AND WRITING 127, 135 (1994). The linguist, Wallace Chafe, used the term "momentum" in his description of the devices by which to achieve and sustain a conversational flow in which the speakers focus on a given topic. *Id.* The subject matter of a conversation ("topics" in a "discourse") must initially be "judged interesting" by one of the speakers ("an eliciter" and "a responder"). *Id.* at 135. Once the topic is broached, there are two alternative ways to sustain attention on the topic:

Once a topic has become semiactive, it may be sustained through elicitation or narration. In elicitation, forward movement through the topic is driven by the interaction between two or more interlocutors, one functioning as the eliciter and another as a responder. Self-sustaining topics, those that do not require interaction for their development, typically take the form of narratives.

Id.

⁶ See generally *id.* at chs. 4, 10.

appellate client is, I think, a necessity so that counsel can determine with the client whether there are risks that should be defined and assessed in advance of trying to "win" the appeal.⁷

The question for the appellate lawyer representing an inmate on appeal is whether it is necessary to take the time to visit the client at his or her dwelling place—i.e., must an appellate lawyer visit the client at the prison house? Is there something that compels making a prison visit to meet a client face-to-face if one's appellate work is largely independent of the client's identity? Should the answers to these questions be any different when it is a law school appellate criminal clinic that represents an indigent inmate on appeal?

II. IS IT POSSIBLE TO MAINTAIN AN APPELLATE PRACTICE IN A CLOISTER?

The technical activities of appellate counsel may be accomplished in a cloister. No doubt, it *is possible* for appointed appellate counsel to fulfill one's legal obligations to a client

⁷ An appellate lawyer must make his client aware that a "win" on appeal may sometimes result in more severe punishment upon reconviction after retrial. At one time, it appeared otherwise:

Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

North Carolina v. Pearce, 395 U.S. 711, 725 (1969); accord Blackledge v. Perry, 417 U.S. 21, 28 (1974) ("A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration."). It has become increasingly apparent over the last several decades that neither the Due Process Clause nor the Double Jeopardy Clause provides a basis for lightly assuming that a client will enjoy constitutional protection against increased punishment if reconvicted following a successful appeal. See generally *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003); *Monge v. California*, 524 U.S. 721 (1998); *Alabama v. Smith*, 490 U.S. 794 (1989); *Texas v. McCullough*, 475 U.S. 134 (1986); *Wasman v. United States*, 468 U.S. 559 (1984).

without ever meeting the client face-to-face in prison. Experienced appellate lawyers may prefer not to expend valuable time traveling to prison to talk to a client whose views cannot change what truly matters on appeal—to wit, the array of colorable appellate claims that are preserved in and supported by the cold record.⁸

More than a few appellate lawyers think that an in-person meeting with an incarcerated client is neither mandated by professional ethics nor necessitated by pragmatic considerations relating to the appellate process. In light of the very

⁸ This is not all that “truly matters on appeal.” Lawyers tend to restrict their focus to what will matter to the reviewing court, putatively their own important audience because of its power to reverse the judgment under review. What matters to the court is, in turn, what matters to lawyers in their work. What often does not matter to lawyers is asking whether there is anything more that matters to the appellate client. There is more that matters for most clients. Many clients simply would like their attorneys not to look past them. Many clients have an empirical basis for distrusting appointed lawyers by the time that they have been convicted and sentenced for a crime. As most criminal appeals are legally unsuccessful, appellate lawyers would do well to define success more broadly and to place a value on not becoming the latest legal representative to make critical decisions for the client without explaining them and listening to the client's story. In his article, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, Clark D. Cunningham provides an invaluable tale of a case in which he and his students “translated” a trial client's story into a search and seizure strategy, with the result that “our translations of [client] Johnson's story erased his racial identity.” Clark D. Cunningham, *The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse*, 77 CORNELL L. REV. 1298, 1376 (1992). When the state dismissed the case, “[i]t might have been a great experience for the students, but it certainly was not for Dujon Johnson.” *Id.* at 1329. Johnson made clear that his identity had been sacrificed in the case and that his lawyers had been accessories to the sacrifice. He wrote,

[M]y deepest regret [is] that the judge assumed he knew how I was as an individual, and on this assumption, he judged me on what he believed and not on what was said by me, my counsel, or even on what he saw (other than my race). *To be voiceless was the greatest pain of all.* What struck me most about the judge is that *he seemed so compassionate* [to others in other cases I observed] in the 10 months or so that I came to the courthouse waiting for hearing after hearing to be rescheduled. *I never saw this compassion.* I never received the “I have been there before, I can relate” talks that he frequently gave to those who came before him.

Id. at 1387 (emphasis added).

nature of lawyering at the appellate level, it is not difficult to construct a pragmatic justification for concentrating one's energies on the immanent aspects of appellate practice: studying the record, researching the law, selecting the issues, writing the brief, and presenting oral argument. The manifest necessity in criminal *trial* practice for attorney/client communication and shared decision-making is far from manifest in criminal appellate practice.⁹ Where the trial attorney works in the present tense with live witnesses, the appellate attorney works in the past tense with artifacts from the trial, which is known as the "dead record."

It is not difficult to see why appellate attorneys perceive little need for direct personal contact with appellate clients and why many prefer written contact with clients. The written mode is particularly inviting for the appellate lawyer, who is by definition a literate professional whose bread and butter is effective expression in formal written prose. An obvious advantage of writing is that it is "displaced speech": the speaker need not ever be in the same place at the same time as the person being addressed.¹⁰ Writing is unilateral communica-

⁹ In the trial context, a criminal defendant is an active presence with some decisional authority that he shares with his attorney and some that altogether trumps that of his attorney. The Constitution describes a criminal defense attorney to be the accused's "assistant." *Faretta v. California*, 422 U.S. 806, 818-21 (1975). The Sixth Amendment makes guarantees to a criminal defendant personally, including the right to confront his accusers at trial and to be present at all critical stages of the prosecution. *Id.* at 819-20; *Illinois v. Allen*, 397 U.S. 337, 338 (1970). Certain constitutional decisions may not be delegated to an attorney but may only be made by the accused: e.g., entry of a plea, acceptance of a plea bargain, waiving the right to a jury trial, choosing to testify at trial, and choosing to appeal. ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-5.2 (1993).

¹⁰ Linguists use terms such as "displaced" and "desituated" to describe communication between persons who are not simultaneously present during the sending and receiving of their messages. Charles Hockett writes of displacement in terms of the references made within a communication: "A message is *displaced* to the extent that the key features in its antecedents and consequences are removed from the time and place of transmission." CHARLES F. HOCKETT, A COURSE IN MODERN LINGUISTICS 579 (1958). The difference between messages in writing and spoken messages reflects a second degree of displacement. Chafe writes:

Copresence and interaction together define a property that can be called

tion until such time as the audience writes back.¹¹

The Supreme Court has declared that the roles of trial and appellate counsel in criminal cases differ markedly. A criminal defendant is an active player in his trial case. A trial attorney must work with trial clients in order to ensure that the client makes informed decisions in the exercise of his constitutional rights. The same kind of close working relationship between counsel and client is not required, either constitutionally or otherwise, on appeal.

The Supreme Court views the constitutional role of counsel in the trial and appellate contexts as different because the process of trial and appeal are different for historical, formal, and functional reasons. The very concept of an appeal as of right in criminal cases is not much over a century old.¹² The

situatedness—the closeness language has to the immediate physical and social situation in which it is produced and received. The nature of conversational language and conversational consciousness is dependent on their situatedness. Written language is usually *desituated*, the environment and circumstances of its production and reception having minimal influence on the language and consciousness itself.

WALLACE CHAFE, DISCOURSE, CONSCIOUSNESS, AND TIME: THE FLOW AND DISPLACEMENT OF CONSCIOUS EXPERIENCE IN SPEAKING AND WRITING 44-45 (1994).

¹¹ One cannot presume that an inmate will write back if he wants to do so and that receiving no reply signifies assent to a lawyer's letter. While some inmates are impressively literate and prolific correspondence, many inmates are not. As the federally mandated "prisoner's representative" on an Institutional Review Board at the University of Connecticut Health Center, I am continually reminded that the federal law on human subjects research classifies prisoners as a "vulnerable population." See 45 C.F.R. § 46.301 *et seq.* (2000). ROBERT J. LEVINE, ETHICS AND REGULATION OF CLINICAL RESEARCH 277-95 (2d ed. 1986). Informed Consent Forms must be in "language which is understandable to the subject population," 45 C.F.R. § 46.305(a)(5), which for my IRB means a fifth grade reading level. Because incarceration itself is seen to undermine an inmate's capacity to make a voluntary choice, some otherwise licit biomedical or behavioral research is categorically disallowed in prisons and other, permissible research requires special IRB review that includes a process for obtaining "informed consent" that is uncoerced despite the prison setting. 45 C.F.R. § 46.302; see also Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1046 (1981-82) (concluding that lawyers, like doctors, prefer not to engage their clients in disputes over the propriety of their marching orders and the ultimate authority to give orders).

¹² The Court in *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), pointed out that "the right of appeal itself is of relatively recent origin."

Sixth Amendment provides a formal basis for requiring counsel to help an accused in his defense against the government's criminal prosecution, i.e., his defense at trial, but the Sixth Amendment is not formally applicable to the process of appeal. On appeal, the role of counsel is functionally transformed: now the defense, not the State, is the party initiating the legal action, i.e., the appeal.¹³ An indigent criminal defendant on an appeal "of right" is entitled to an appointed attorney as a matter of fairness,¹⁴ not because the right to appellate counsel ranks as a constitutional "necessity" by the measure used by the Supreme Court in the trial context.¹⁵

Id. at 159. The *Martinez* Court noted that an appeal as of right in criminal cases did not exist at common law and that the trend toward its recognition in federal and state courts only began in the latter part of the Nineteenth Century. *Id.*

¹³ The Supreme Court in *Ross v. Moffitt*, 417 U.S. 600 (1974), wrote that:

[I]t is ordinarily the defendant, rather than the State, who initiates the appellate process, seeking not to fend off the efforts of the State's prosecutor but rather to overturn a finding of guilt made by a judge or jury below. The defendant needs an attorney on appeal not as a shield to protect him against being 'haled into court' by the State and stripped of his presumption of innocence, but rather as a sword to upset the prior determination of guilt.

Id. at 610-11.

¹⁴ *Douglas v. California*, 372 U.S. 353, 355-57 (1963); *Halbert v. Michigan*, 125 S. Ct. 2582, 2593-94 (2005).

¹⁵ The *Gideon* Court declared that for trial purposes, "lawyers in criminal courts are necessities, not luxuries." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). While the nature of the appellate process makes the technical nature of the need for counsel different at trial and appeal, the Supreme Court has recognized that the technical nature of the appellate process is beyond the ken of lay persons:

The need for forceful advocacy does not come to an abrupt halt as the legal proceeding moves from the trial to appellate stage. Both stages of the prosecution, although perhaps involving unique legal skills, require careful advocacy to ensure that rights are not forgone and that substantial legal and factual arguments are not inadvertently passed over. As we stated in *Evitts v. Lucey*:

In bringing an appeal as of right from his conviction, a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful. To prosecute the appeal, a criminal appellant must face an adversary proceeding that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. An unrepresented appel-

Against this legal backdrop it is certainly defensible for appellate lawyers to forgo direct client contact. Seasoned appellate practitioners are ever aware that their work centers around the already established record, not on what a client has to say about matters not reflected in the record. It appears almost wasteful to spend a day going to prison when one might better attend to the appeal by remaining in one's law office with the trial transcripts, near a real or on-line law library, and poised by one's computer, typewriter or quill pen preparing to compose the brief!

III. SHOULD A LAW SCHOOL APPELLATE CLINIC STAY IN ITS CLOISTER OR VISIT ITS CLIENTS IN PRISON?

I confess that I do not agree with those who find it ethically and pragmatically defensible for an appellate attorney not to visit a client in prison. A face-to-face meeting is essential to discuss the terms of the lawyer's representation, the nature of the appeal process and its possible risks and benefits for the client,¹⁶ and simply for the lawyer and client to recognize each other. The point of this paper, however, is not to pick a quarrel with those seasoned appellate criminal lawyers whose professional *modus vivendi* places no premium on actually meeting with incarcerated clients. Instead, the point of this paper is that any such justification is not sustainable in the setting of a law school clinical program. I propose that the law school clinic's educational mission transforms the discourse, removing the "cloister option."

Whether to visit an appellate client in prison is not merely a question that clinical teachers may ask and answer in our role as legal professionals. Rather it is also a question to be asked and answered by us a second time in our role as teachers with a special obligation to our students acting as co-coun-

lant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake.

Penson v. Ohio, 488 U.S. 75, 85 (1988) (internal citations omitted) (quoting *Evitts v. Lucey*, 469 U.S. 387, 396 (1985)).

¹⁶ See *supra* note 7.

sel, an obligation to make the case experience valuable educationally. Further, I would argue that there is a special obligation to an incarcerated client who is represented by students under clinical supervision.¹⁷

Law school appellate criminal defense clinics meld two worlds, professional lawyering and professional education. The lead *dramatis personae* in appellate practice are the lawyers for the defendant and the government and the judges on the reviewing court. When appellate practice is conducted in the law school setting, the lawyers for the defendant have dual identities and an added purpose: while they serve as lawyers for the defendant/appellant, they are also teachers and students. The teacher/student relationship implies a promise to optimize the value of the case for the student educationally, not just to deliver on the clinic's professional promise to optimize the client's odds of legal success.¹⁸

Long-distance client counseling is peculiarly inappropriate in the setting of a law school appellate defense clinic. An in-person visit to meet a client in prison is altogether necessary where the clinic plans to assign law students to compose the client's appellate brief and present oral argument in court. Clinical supervisors and law students need not adopt an efficiency model of professional practice. Unlike private practitioners and public defenders, faculty and students in law school clinics are expected to be generous with their time and effort in every case. A clinic's docket should be small, and a student's case assignments should not be numerous. In a clinic there is no "next case" that is more important than the one at hand. The order of the day is conscious reflection throughout the process, not the production of an appellate brief with the efficiency of a seasoned pro. It must be expected that work production will be deliberate and perhaps even slow in an

¹⁷ The prison visit is all-but-necessary in order to procure truly informed consent from an inmate to representation by a law student on appeal. See *supra* note 11.

¹⁸ There is, of course, a possible conflict of interest in the clinical supervisory role if the supervising attorney allows his or her duty of loyalty to the client to be compromised by the supervisor's educational obligations to students.

appellate criminal defense clinic: a premium is put on collaboration among students and with faculty, frequent consultation and review, and on personal and collective reflection throughout the appellate process. The purpose of a law school clinic is professional *and* educational. It is a multifunctional model for the practice of law, one that centers on the interests of the client whose case is on appeal *and* on the educational value of the process for the students assigned to the case. In sum, I believe that a clinical supervisor should place an ethical, legal, and *educational* premium on the role of trips to prison with students to meet and consult with their appellate clients.

IV. CONFRONTING STUDENTS WITH THE TENSION BETWEEN AN APPELLATE ATTORNEY'S DECISIONAL AUTHORITY AND THE NEED TO ACCORD THE CLIENT "THAT RESPECT FOR THE INDIVIDUAL THAT IS THE LIFEblood OF THE LAW"¹⁹

Our first several classes in the fall semester at the UCONN Criminal Appellate Clinic center on the nature of the appellate process in the American legal system, the function of appellate attorneys in that process, and the client's role in the appellate process. The springboard for our class discussions is *Jones v. Barnes*, where the Supreme Court held that an appellate client does not have a *constitutional right* to direct issue selection, briefing, and strategy at oral argument for his own appeal.²⁰ An appellate attorney is obliged to perform competently in the technical appellate process, but *is not obliged* to be subservient to the client. At our very first clinic classes, we discuss what implications *Jones v. Barnes* has for our Clinic's representation of appellate clients.²¹ Should we tell our cli-

¹⁹ *Illinois v. Allen*, 397 U.S. 337, 350-51 (1970) (Brennan, J., concurring). Justice Brennan coined this phrase in his concurrence, as he stated "shackling and gagging a defendant . . . offends not only judicial dignity and decorum, but also that respect for the individual which is the lifeblood of the law." *Id.*

²⁰ *Jones v. Barnes*, 463 U.S. 745, 751-54 (1983).

²¹ Our appellate clinic primarily handles cases on direct appeal for criminal defendants whose indigence otherwise qualifies them for representation by the Connecticut Office of the Public Defender or by a special public defender. *E.g.*, *State v. Hammond*, 604 A.2d 793 (Conn. 1992) (remand for consideration whether

ents that we have the power to supersede their views on issue selection, briefing, and oral argument? Should we promise to entertain their views on the handling of the appeal but inform them that legally we have the final say? The class discussion invariably moves to sources of authority other than the U.S. Constitution as we search for guidance in defining the attorney/client relationship on appeal. We look at the Rules of Professional Conduct and various independent state law sources (statutes, rules of court, the state constitution and decisional law). It becomes apparent that there is no source that directly mandates the terms of the attorney/client relationship on appeal. Aside from promising to render "effective assistance of counsel," what, then, are the promises that the clinic will make to its appellate clients?

At some point in the first or second class, always, my colleague, Todd Fernow,²² or I will interrupt our own and the students' abstract declarations and try to anchor matters to an actual reality; the clinic's ultimate course of action in any given case may well be more a function of the client's individual identity than it will be a reflection of our general answers to the philosophical issues involved in deciding whether and how to share decisional authority over an appeal with clinic clients. This is the time for some storytelling, best enlivened by our taking turns role-playing as past clients. Tim or Todd becomes the inmate and the classroom becomes a jailhouse visiting room. The class responds in role as attorneys. Four of

jury verdict was against the weight of the evidence where blood grouping and DNA results exculpated the defendant). Our clinic also handles some habeas corpus petitions both in the trial and appellate courts. *E.g.*, *Johnson v. Comm'r*, 786 A.2d 1091 (Conn. 2002) (parole board improperly applied new parole eligibility law retrospectively); *Phillips v. Warden*, 595 A.2d 1356 (Conn. 1991) (ineffective assistance of counsel based on violation of duty of loyalty when lawyer tried case for client following his own conviction of murder).

²² Professor Fernow has taught in the Appellate Clinic at UCONN since 1983. I have taught at UCONN since 1987. We have had other colleagues in the program who have enlivened and enriched it, most notably its founder, Professor Michael R. Sheldon (now a Connecticut Superior Court judge), and several appellate specialists from the Connecticut Public Defender's Office, including Richard Emanuel, Joette Katz (now a Connecticut Supreme Court justice), and the late Jerrold H. Barnett.

the scenarios that we have used follow:

Client One: This inmate asks appellate attorney at first meeting in jail, "Do you think I am guilty? I want an attorney who believes in my innocence." The client presses for an oath of loyalty and is not satisfied with lawyerly tergiversations about the nature of reversible error, the irrelevancy of actual innocence on appeal, the limits of the record, etc.

Client Two: This inmate speaks in disjointed blurbs, doesn't think students look like attorneys . . . too young . . . doesn't want attorneys who are not sure they can win . . . wants the clinic to guarantee victory.

"Are you as good as _____ [name of his attorney on his successful first appeal]? He won but he ain't there for me now. This time I want to get out of jail."

"I mean, this time I get a 'walk' — no more trial, not this time." [Inmate had prevailed on his first appeal, but remedy was new trial, has been reconvicted.]

Added features for spice: Client has I.Q. of 60. He is 40 years old. His sentence is life without possibility of parole. Client appears to hear half of what is said half of the time, reacts to communications affectively not semantically, has no patience for abstract talk, and assesses everything viscerally, not cerebrally.

Client Three: (Inspiration: "Froggy Barnes")²³

²³ Jones, 463 U.S. at 747.

Inmate serving a forty-year sentence for murder is agreeable in manner, but has a punch list of concerns/demands:

Has a lengthy list of issues to include in appellate brief. Wants final say on what issue selection. Was "railroaded" by trial attorney and not permitted to control his defense. Wanted to testify but his attorney stopped him. Won't be pushed around again by a lawyer.

Insists upon seeing brief before it is filed.

Wants copy of transcript (2,000 pages long). Was told by public defender's office that it would charge 10 cents a page. Client penniless. Will the clinic give him a free copy of the transcript?

Client Four: After talking with appellate client and studying trial record, appellate attorney develops conviction that client is probably telling the truth when he insists that he is not factually guilty of the crime of which he was convicted. Client would like attorney to pursue claim of factual innocence in any and every venue available under Connecticut law "like Emanuel did for this dude, Miller."²⁴ Will the clinic do that for him?

²⁴ The inmate is referring to Larry Miller, an inmate whose appellate attorney, Richard Emanuel, came to believe in his innocence during the course of Miller's unsuccessful appeal and then spent over a decade developing evidence that ultimately led to Miller's successful habeas corpus petition based on a "free-standing claim of actual innocence." *Miller v. Comm'r*, 700 A.2d 1108, 1110 (Conn. 1997).

V. PREPARING FOR AND MAKING THE PRISON VISIT TO SEE AN APPELLATE CLIENT

Before visiting an appellate client in prison, clinic attorneys will have access to both public and private information that they should review without delay. Supervisor and students should review any correspondence with the client, the transcripts if available, the documents received from the trial court clerk's file, and the statutory and case law relating to the offenses adjudicated at trial.²⁵ The first meeting with one's client is an interview in which counsel is both an interviewer and interviewee. The client will judge his appellate lawyers adversely if they flunk the client's interview. Doing one's homework, "making book" on the case and on the identity of the client, is critical to ensure that the prison meeting will commence a professional relationship with the client that will be professionally and communicatively successful. As the client also has a dual role as interviewer and interviewee, it is advisable to give the client notice of counsel's intent to visit to discuss the client's appeal. Whether the notice is by letter, by phone, or by leaving a message with the inmate's prison counselor, the notice is a courtesy that is appreciated by most clients as it signals respect for the client and puts the client in a position to come to the meeting prepared to ask questions and to share any information and documents that he believes to be relevant to his case.²⁶

²⁵ It is unnecessary to read a transcript fully before making the visit to prison to meet with one's client. It is advantageous, though, to "make book" on the client's case and on his identity with the materials available before going to prison for a face-to-face meeting. Student attorneys should at least read the transcripts of sentencing (which often include the client's perspective on the trial when accorded the right of allocution) and the probation report received by the court for sentencing purposes (which includes sections on "victim's attitude," the "offender's personal history," his criminal history, the nature of the current convictions, and a report on the probation officer's interview with the client, if he chose to speak). I also recommend reading the summations of counsel to get a provisional sense of the factual themes in the case.

²⁶ For the clinical supervisor, the question arises whether to assign the student to arrange the prison meeting and notify the client or whether the supervisor might better relieve the student of that particular experience. I have followed

In planning for a prison visit, I find that students (and I) have an easier time defining "what" the meeting with the client should entail rather than defining "how" we can expect to accomplish our mission. The harder task is preparing to communicate with a person whose identity, capacities, and own agenda may become apparent only as the prison visit is taking place. With that in mind, here is a list of subjects important to a clinic's agenda for a prison meeting with a new appellate client:

1. *Introductions: Personal and Professional Identification.*

Identify individual attorneys, explain the nature of the appellate clinic program, explain how the clinic was appointed to represent the client on appeal. Explain the purposes of this meeting, including a statement of interest in hearing client's agenda. Establish the scope of the meeting; it is not a time for the lawyer or client to feel he/she must "speak now or forever hold his/her peace." Indicate that there will be opportunity for follow-up communications over the course of appeal if the client decides later that he is comfortable with clinic's representation.

2. *Written retainer agreement forms.*

Even where the clinic has been appointed as appellate counsel already, the clinic should consider use of an attorney/client agreement form that sets forth and limits the terms of the representation. Client and counsel may choose to review the form and sign it by the end of meeting. Sometimes it is wiser to use the meeting to establish

both routes on the theory that everything about the prison context is grist for the mill in the student's professional and educational experience. Sometimes the sheer difficulty of getting word to an inmate and the variable helpfulness of counselors and other prison authorities may impress a student with the reality of incarceration as a removal from society at large. But a premium should be put on actually visiting the client in prison, sooner rather than later, not on exploring the myriad.

a foundation for client's making an informed choice regarding representation and to put off signing the form until a later time.

3. *Appellate Education of Client*: Matters upon which to educate client as effectively as possible (understanding that no one masters the cardinal concepts of appellate work in one sitting).
 - a) What is an appeal?
 - b) What is the appellate record? Can the record be augmented with additional evidence? Why not?
 - c) Who will pay for the trial transcripts? Can the client get a copy of the transcripts? Must he pay the clinic for a copy?
 - d) The concept of preserved error. When, if ever, may claims be made on appeal that trial counsel failed to preserve for review?
 - e) What is reversible error?
 - f) What kinds of claims and remedies can be pursued on appeal? What kinds may not be?
 - g) Will the client be expected to play a role in decision-making on appeal? Will the clinic's lawyers share their decision-making authority with the client? Will the clinic consider the client's input or is he "an extra wheel" in the process?
 - h) What is a brief? Who will write it? Will the client get to see it? Before it is filed? May the client file his own supplemental brief?
 - i) What role will student attorneys play in the client's appeal? How have reviewing courts received the work of student attorneys in the past? What is the role of the supervising attorney? Suppose the student attorney is not up to the task? Suppose the stakes are too high to entrust them to a beginner?
 - j) What other avenues of post-conviction challenge to the conviction or sentence exist? Will the clinic represent or advise the client on other post-conviction options? Must the appeal be decided before pursuing

other post-convictions options?

- k) How long will the appeals process take? What happens if the client loses his first appeal as of right? Will the clinic handle discretionary appeals thereafter in state or federal court?
 - l) How do appeals differ from trials in purpose and procedure? How does the work of an appellate attorney differ from that of a trial attorney? How do these differences impact upon the attorney/client relationship?
4. *Pyrrhic Victory Concerns: Assessing the Risks of Winning.*"

As indicated earlier, a critical aspect of handling criminal appeals competently is issue selection that takes into account the possible adverse consequences of "winning" a given appellate challenge. The *Pearce/Perry* doctrine does not necessarily protect against more severe punishment following an appellate reversal.²⁷ Counsel will want to

²⁷ At one time it was easier to discern whether there was a risk of increased punishment upon reconviction after a successful appeal because the Supreme Court had appeared to require that enhanced sentences be predicated on conduct occurring after the first sentencing. *North Carolina v. Pearce*, 395 U.S. 711, 726 (1969); see also *Blackledge v. Perry*, 417 U.S. 21, 25-27 (1974). In Connecticut, the *Pearce/Perry* doctrine was applied broadly for a while even after the Supreme Court had reduced its amplitude. See *State v. Sutton*, 498 A.2d 65, 74-75 (Conn. 1985). But see *State v. Coleman*, 700 A.2d 14 (Conn. 1997) (increase in sentence from thirty-five years to 110 years following successful withdrawal of guilty plea did not trigger *Pearce* protection). Connecticut's initial broad application of the *Pearce/Perry* doctrine was contrary the Supreme Court's narrowing of constitutional protection against increased punishment upon reconviction after appeal. See *Wasman v. United States*, 468 U.S. 559 (1984) (presumption of vindictiveness overcome where judge relied on intervening conviction on charges that had been pending but were discounted by court at first sentencing); *Texas v. McCullough*, 475 U.S. 134 (1986) (presumption of vindictiveness overcome where judge imposed a fifty year sentence at second trial after presiding over first trial at which the jury imposed a twenty year sentence because of the judge's articulation of objective information supporting an increased sentence); *Alabama v. Smith*, 490 U.S. 794 (1989) (presumption of vindictiveness does not apply to greater sentence imposed after appeal of a guilty plea); *Monge v. California*, 524 U.S. 721 (1998)

communicate the need to discover any factors that might subject the client to increased punishment following reversal of the conviction on appeal. This concern alone justifies going to prison to establish a trusting attorney/client working relationship so that clients will disclose to counsel the kinds of information needed to assess the risks a client faces upon retrial after an appellate reversal.²⁸

VI. PRISON CONVERSATIONS WITH STUDENTS AND CLIENTS

Participation in a professional visit with a client in prison is a valuable part of a student attorney's clinical experience,²⁹

(double jeopardy does not bar a second non-capital sentencing hearing following appellate determination that evidence at first hearing was insufficient to prove "three strikes" liability); *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003) (no double jeopardy bar to imposition of death penalty reconviction where defendant successfully appealed the first trial conviction at which he received a life sentence but was not "acquitted" of the death penalty).

²⁸ Close analysis of the individual case and exploration of the client's precise circumstances are necessary in order to advise an appellate client on whether and how to perfect his appellate rights. Counsel needs to know about "skeletons in the client's closet" that a second sentencing authority could discover and use to enhance punishment. In our appellate clinic, we spend considerable time discussing these issues among ourselves and with our clients. When we learn that a client is at risk of increased punishment after appeal, we have sometimes chosen to pursue only appellate claims of error that do not "wipe the slate clean" and subject the client to a new trial, re-conviction, and a more severe sentence (e.g., insufficiency of evidence, statute of limitations, double jeopardy, speedy trial).

²⁹ By clinical experience, I mean both the student's legal and educational professional experience in handling the case and also the personal dimensions of the experience for the student and client. Law students visiting prisoners may choose only to look for and find "just the facts" they believe that they will need in their work as legal technicians. Those who look for more may see more than they bargained for—a client in prison whose story and whose aspect as a fellow mortal make it hard to keep a professional distance. At a personal level, lawyers may respond to the client and the prison with feelings that run the gamut from shock and revulsion to a sense of identification and poignancy. Most law students I have worked begin by trying to limit themselves to a safely detached professional persona. Understandably, students, at least initially, may hesitate to speak openly about what intrigues, disturbs, revolts, and impresses them about the prison visit and their clients. This is not the place for an extended discussion of the value and limitations of disengaged observation, other than to remark that in the clinical setting, such detachment may deprive students and supervisors of the kind of honesty needed to address the most disturbing and interesting aspects of our experience. See generally RUTH BEHAR, *THE VULNERABLE OBSERVER: ANTHRO-*

whether the student is lead interviewer or not. For most students, the visit is their first to a prison and first to meet a "convicted felon." They make the visit in the garb of a professional lawyer but invariably find the experience transcends merely doing something that affirms their budding status as legal professionals. In the last year, I have asked my Appellate Clinic students to put in writing for me their impressions after visits we have made to see inmates in prison. Their input has been of great value in my supervision of their case work and in my composing this essay on prison visitation. I savor the opportunity that the rides to and from prison provide for speaking with students about their expectations of the visit and about their thoughts and feelings after the visit. Often I learn something invaluable about a student that is important to the case and to me as a clinical supervisor.³⁰

My interest in prison conversations with clients pre-dates my career as a clinical teacher. My own experiences as a criminal clinic student inspired my belief that it is valuable to visit appellate clients in prison and my fascination with the communicative challenge of meeting effectively with a person who is subject to the difficulties of prison life. I offer what follows to open discussion on some of the challenges one faces in communicating with actual inmates in prison.

One summer's day in 1982, after my first year of law school, as part of my summer internship with the criminal clinic in which I now teach, I was sent to visit four inmates

POLOGY THAT BREAKS YOUR HEART chs. 1, 6 (Deb Chasman ed., 1996).

³⁰ Time spent in a car driving to and from a prison visit gives students the chance to express thoughts and feelings about their cases, clients, social justice, their ambitions in the law, and their lives that they might otherwise not express, at least in my presence. Travel itself may be a catalyst to greater expressiveness. It may help that we are away from the law school, keeping one another company as I drive, perhaps stopping at a diner to talk more after the visit. Visiting a client in prison interrupts "business as usual," effectively freeing us to hold conversations less hurried, less guarded, and more revelatory than when we are "in gear" back on campus. Students marvel at many aspects of the prison visit. Perceptions that are merely self-evident in the abstract are altogether different when rooted in actual observations of a prisoner and prison: one student said "it blew my mind" that the inmate we visited was less than twice the student's age but had been in jail for almost as long as "my entire life."

who had corresponded with the clinic. Their letters of inquiry had a common thread: the hope that imprisonment was a reality built on wrongs done to them that might yet be rectified. Each was in an existential boat, capsized and looking to be righted by legal action. The letters assumed that criminal cases, even cases ended long ago, can always be re-opened, then handled differently the second time around so as to accomplish the kind of just results that "went missing" the first time.

Three of the four inmates had been sentenced for sexual assault and one for armed robbery. Only one of the four had stood trial; he had lost his appeal and was serving time for sexual assault. The other three inmates had been convicted by their own pleas of guilty, now regretted. All four were housed in Connecticut's maximum security prison of that era. The purpose of my visits was to gather more information about each inmate's putative "case" and then to report back to a staff attorney at the clinic. The clinic would later advise each inmate on any colorable challenges to his incarceration that might be brought and on the strategic advisability of any such challenges, given the counterintuitive reality that prevailing in a post-conviction action may ultimately harm an inmate's liberty interests more than taking no action at all.

Sent on a fact-finding mission and with some confidence that I would find prison interviews interesting, if not fascinating, I met with all four inmates in the course of a full day at the prison. I listened, regarded each individual, avoided giving advice, made no predictions, and promised only to take what I heard back to my supervisor at the clinic. This mode worked with three inmates; without any special prompting, each was voluble as soon as I made it clear that I was there to be an audience for the story behind his incarceration.

Naturally, the plot of each inmate's story varied: Time, place, and action, the concrete details of the criminal offenses, differed. The *dramatis personae*—prosecutors, defense counsel, judges, witnesses, and family history—differed for each tale. Just as importantly, the tales differed because each inmate had an individual style and manner as narrator of the part in

his life story that had led him to prison. Each had a perception of what landed him in jail, with each reflecting some level of self-examination mixed in with some criticism of the legal and social system. A person telling his life story, or a chapter or two from it, to another person during a prison visit is not worried about being original or having a style that might capture a broader audience's interest. Thankfully, most inmates take their incarceration and their suffering seriously and, thus, are ready to talk. I took notes on their stories. I asked questions sparingly because each was voluble. My presence in the jail to serve as their audience and my identity as a law student affiliated with a criminal clinic were more than enough to carry my side of the dialogue most of the time.³¹ I was a first year law student with the strength that accompanies a beginner; I was not impatient because I did not suffer under the illusion that I knew enough to try to enforce efficiency on my conversations with human beings serving time in prison for serious criminal offenses.

But one of the four inmates could not tell me his own story. He spoke haltingly, seemed unsure why he was in prison, and was unsure quite why he had written the clinic. He appeared to be altogether confused. He stood out in the prison setting because he was not able even to assert that he had been wronged. By contrast, the other three inmates had a strong grip on their own life stories and their putative cases. Their stories were not necessarily tenable, but they were *tellable*, needing only an audience. That, I could be. The fourth inmate's inarticulateness and inner confusion left him without a voice to make himself heard. It left me unable to fulfill my immediate task as an audience, which was to listen to him and give him recognition. I could only try to respect him, but I could not convert what I learned about him into useful legal

³¹ But even a voluble story-teller sometimes needs an audience-editor to probe for more detail or to give a nudge to move the story along. I found that even a neophyte legal interviewer, however patient and tentative, may safely venture an occasional prod to keep the story teller on track. An occasional note of skepticism also seemed to help and did not seem to elicit resentment.

information.

In the course of visiting inmates with my students in an appellate clinic, I have faced a range of intellectual, emotional, and expressive competences in our clinical clients. Some clients are thrilled to be visited and decide quickly that the clinic's services are more than acceptable to them. Some clients appreciate being visited but want to test us further to determine whether we meet their standards for an appellate lawyer.³² Only once has the clinic failed to reach an agreement with a prospective client on appellate representation—that in the case of the inmate who wanted a guarantee of victory that would lead to his immediate release, not retrial.

I cannot here propose a unified field theory for counseling appellate clients. However, I can give a clue on what has been of inestimable value as a guide in trying to communicate with inmates. An inmate who was something of a "Radar O'Reilly"³³ at the maximum security prison once told a student and me, "Just remember one thing. All of us in here has got our self-respects [sic]." I have found that inmates do have a very human need to be recognized and respected. That does not mean that lawyers need remain silent when an inmate is wrong-headed about the law. It does not mean that one is a supplicant. But exhibiting respect for the personhood of appellate clients by making visits to meet them in prison has consistently proven to be the best way of beginning to establish a respectful and effective attorney/client arrangement with our appellate clinic clients.

VII. CONCLUSION

Though it may well be possible to provide "effective assistance of counsel" to an appellate criminal client without visiting the prison house, that does not make it ethical. Neither

³² When visiting one client to discuss an upcoming oral argument before a three judge panel, the client turned to the student on the case and asked, "What are you going to *drill* in their heads?"

³³ I refer to the character played by Gary Burghoff on the classic TV show *MASH*.

does it make it strategically wise not to visit. This article has reviewed some ethical and strategic reasons militating in favor of making it a professional practice to visit incarcerated appellate clients where they live, i.e., in prison, instead of relying exclusively on written correspondence with them. However, the primary focus of the article is on the overriding value of prison visits with clients who are represented on appeal by law school clinics in which law students will engage in issue selection, brief writing, and oral argument on the client's behalf. That a licensed professional appointed to represent a prisoner on appeal may (perhaps) be able to meet his obligations to the client without meeting the client begs the question whether it is legally, ethically, and educationally appropriate for professors and law students in a law school clinic to represent clients without meeting them in person. I believe that making a visit to meet with an client is an invaluable part of a law school appellate clinical curriculum.