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Belmont Criminal Law Journal Symposium 2017: Judicial Panel

Jeffery S. Bivens

Supreme Court of Tennessee - Chief Justice

Joseph A. Woodruff

Tennessee Circuit Court Division I, 21st Judicial District - Judge

Timothy L. Easter

Tennessee Court of Criminal Appeals - Judge

Angelita B. Dalton

Davidson County Criminal Court Division II - Judge

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BELMONT CRIMINAL LAW JOURNAL SYMPOSIUM 2017: JUDICIAL PANEL

Featuring:

CHIEF JUSTICE JEFFREY S. BIVINS,^{*} JUDGE JOSEPH A.
WOODRUFF,^{**} JUDGE TIMOTHY L. EASTER,^{***} AND JUDGE
ANGELITA B. DALTON^{****}

Moderated by Professor Donald Cochran

Welcome. Since we have some young lawyers and young practitioners present today (and those of us who aren't so young can always learn), I want to open up to the panel a general question about advice you might give practitioners in your court. For our appellate court judges, I know you were

^{*} Chief Justice Jeffrey S. Bivins was appointed to the Tennessee Supreme Court in 2014. On September 1, 2016, he was sworn in as chief justice. Prior to his appointment to the Supreme Court, Justice Bivins practiced at Boulton Cummings Connors & Berry, PLC in Nashville, Tennessee, and served as both Assistant Commissioner and General Counsel for the Tennessee Department of Personnel. He has also served as circuit court judge for the 21st Judicial District of Tennessee and on the Board of Judicial Conduct. Justice Bivins served on the Tennessee Criminal Court of Appeals from August 2011 to July 2014.

^{**} Judge Joseph A. Woodruff serves as circuit court judge for Division I in Tennessee's 21st Judicial District. He received his J.D. from the University of Alabama School of Law where he was elected to the Order of the Coif. After law school, Judge Woodruff joined the U.S. Army JAG Corps and later served as partner at Waller Lansden Dortch & Davis in Nashville, Tennessee until 2014. Judge Woodruff is a Fellow of the Tennessee Bar Association, as well as the Nashville Bar Association.

^{***} Judge Timothy L. Easter was appointed to the Tennessee Court of Criminal Appeals in 2014. After receiving his J.D. from the Nashville School of Law in 1989, he served as an Assistant District Attorney General for the 21st Judicial District. He later joined the firm of Rogers & Easter where he remained until 1998. Judge Easter was appointed circuit court judge of the 21st Judicial District in 1998 and was subsequently elected to two, consecutive 8-year terms. Judge Easter currently teaches as an adjunct professor at his alma mater, Lipscomb University.

^{****} Judge Angelita B. Dalton was appointed judge in Division II of Davidson County Criminal Court in 2017 and became the first African American woman to sit on the criminal court bench in Davidson County. Judge Dalton received her J.D. from the University of Toledo College of Law. She worked as staff attorney in the Davidson County District Attorney's Office before serving as Assistant District Attorney General. She was elected to the Davidson County General Sessions Court Division III in 2006, becoming the first African American woman elected to judgeship in Davidson County. In 2010 and in 2017, she was elected to serve as presiding judge of the Davidson County General Sessions Court.

distinguished trial court judges as well, so it can relate to any kind of practice you've seen, things lawyers have done particularly well and have impressed you, or perhaps contrary to that, things that been impressive in a not-particularly-good way. Chief Justice Bivins, I'll open the floor to you if you would like to give us some of your thoughts.

Chief Justice Bivins. I'd be happy to open up, glad to be with you this afternoon. As far as my thoughts on that, I think that there is no substitute for preparation. If you are not prepared when you come in, you are not going to be representing your client well, you're not going to impress the court, and it's just not going to work well. So that's number one. Number two is: be truthful and frank and open with the court, it doesn't matter if it hurts your case. Your reputation is everything, and you begin building your reputation the second you walk in that courtroom. If you lose that reputation it's almost impossible to ever get back, and if you don't think we talk as judges, you're crazy, because we do and we're going to know it and remember. So always, always be truthful, open, and honest. The last thing I'll mention is something I see particularly with young lawyers that's really interesting; don't be afraid to concede a point to the judge. Again, you build credibility. In all likelihood, 95 percent of the time you're there you aren't going to have a strong case on every point, so if you're asked a question by the judge during argument, be ready to concede that point. Most of the time, it's not a point that is going to make you lose. Again, building that credibility and willingness to be reasonable people and willingness to answer questions that are asked and not be wedded to your script are just some basic concepts that I think will make you much better lawyers when you walk in the courtroom.

Moderator. All right, thank you Your Honor. Judge Woodruff?

Judge Woodruff. I completely agree with everything that Justice Bivins said. One of the things that we do in the 21st Judicial District that perhaps began with Judge Easter is after jury trials, we send questionnaires out to the jurors who have heard the cases and we ask them to tell us about their experience. One of the things we ask them about specifically is what they think of the lawyers, and it's really interesting to see the kinds of responses that we get. Frequent comments about lawyers' lack of preparation; if a lawyer wasn't prepared the jury knows it. Lack of organization or being disorganized and scattered; if you're disorganized, the jury is going to know it and they're going to comment on it. Wasting time; spending the jury's valuable time on topics that are really not crucial or germane to the case, if you do it the jury will notice it. Also, your appearance before the jury is important. I've actually had jurors comment on one particular male defense counsel who they said needed a haircut; all of those things jurors notice.

One other thing, in voir dire-this is sort of a pet peeve of mine and I've seen even experienced lawyers do this-whatever you do, don't ask laypeople who are there to be selected to be jurors and who have found themselves in the jury box because of the random draw of their name, don't ask them to give you a legal opinion. When this comes up often is, "Ladies and gentlemen, tell me what reasonable doubt is." That makes the juror feel awkward, the spotlight is on them, they've been singled out in front of all these strangers, they've got this lawyer asking them questions, and the judge is sitting up there. They're being asked this open-ended question about defining a legal concept and it's off-putting to the jurors and it invariably digs a hole the lawyer has a hard time getting out of. I will suggest a much better approach; there's an assistant district attorney in our district that does it this way and she does a beautiful job. She reads the definition of the concept, puts it on the Elmo Projector, shows it up on the screen and talks about how moral certainty is required and she says, "Well, Mr. Guyer, what does moral certainty mean to you?" Perfect question. Why? Because there's no wrong answer. There's no wrong answer for the juror who has all of a sudden been singled out, so they're not uncomfortable and it will reveal something very important about that person as to whether you think they can be fair and impartial.

Moderator. Thank you. Judge Easter?

Judge Easter. I just "ditto" everything these two judges have said, I started writing down responses when you asked the question and Justice Bivins hit on most of them and Woody developed them. The only thing that I would add is a comment about the jury questionnaires and, he mentioned a lawyer who needed to get a haircut. I've had some questionnaires come back and say the judge needs to get a haircut or a shave or something, but that is something you need to know. Jurors are watching you, and Justice Bivins talked about being prepared, that is the number one thing and that relates to what Woody said about your appearance. I say being prepared from head to toe, the head is prepared for your argument, the toe part is the way you look in court. I know we are living in a society where customs are not what they used to be, you used to have people say, you look like a lawyer. I'm still old school, and I think you need to look like a lawyer and I think your clients would expect you to look like a lawyer. That means a number of things. You look like you look today, I was just noticing how professional you all look, you look like you appreciate the fact you have the title of lawyer and that's the toe part.

Head to toe, be prepared head to toe, and finally, something that I would say about where we are in the practice of law today and technology is a tremendous tool. I think trial lawyers fail to use it enough in terms of PowerPoint presentations, like Judge Woodruff mentioned, the DA using the Elmo Projector for putting in front of the jury from the get go the definition

of reasonable doubt. Even in your closing arguments in civil court you see often where video depositions have been cut on the portion of the testimony from the deposition that the lawyer really wants to highlight and it's very effective. You can really use technology, but the only caveat to that is make sure your equipment is working. I know that's not always 100 percent something you can count on, but you lose credibility when you have to say, "Well it worked just a minute ago," and you're sitting there trying to get it to work. For the most part, if you know what you're doing and you've got it working, making sure it works it can be a very effective tool and I think litigators need to use it more. I'm a little surprised you don't see it more. Finally, from the appellate level, when you do appellate briefs make sure your appellate briefs look like something that you would want to present to your law professor here at Belmont. Spell check, grammar, complete sentences, making sure you touch on all of the issues that you want to raise. I've been a little disappointed with some of the appellate briefs that we get in the Court of Criminal Appeals from attorneys.

Moderator. Judge Dalton?

Judge Dalton. I think preparedness is what is key here; that's kind of the common theme in terms of what we're seeking judicially, and as far as advice that I would give young lawyers, I would tell them to know who your audience is. Know who your audience is, whether you're in criminal court or circuit court trying a case in front of a jury, or in general sessions court where I am your trier of fact. I tell the attorneys very often whenever we do the new attorney practicum at the courthouse, one thing I tell them is that you've got to know who the judges are in general sessions court. There are eleven general sessions judges in Davidson County with about thirty-nine different personalities and you need to know all thirty-nine. There are a couple people here today who practice in front of me who would say, "she has about thirty of those," but it's important to know who your audience is and who your judge is because there are going to be certain things that a judge may have expectations of and certain things that juries will expect from you as a lawyer when you present your case.

Very interestingly, this weekend, my husband and I watched the movie *Catch Me if You Can* with Leonardo DiCaprio and Tom Hanks.¹ There was a scene in the movie when Leonardo's character was pretending to be a lawyer. He was in the courtroom, and of course the camera was just focused on him, so you didn't know what else was around him and he was putting on this very elaborate argument. He says, you know, "ladies and gentlemen of the jury," and, "this man is guilty," and the judge says, "what the hell was that?" because there was no jury and the defendant wasn't in the room. I say all of

1. *Catch Me If You Can*, Amblin Entertainment (2002).

that to say you really have to understand and know. Part of being prepared is understanding what boundaries you're working within, knowing what you're arguing, knowing what it is you are expected to do.

Moderator. Thank you, all of you. One of the presentations we heard today was from Dawn Deaner who is the metro public defender, and part of what she talked about was a crisis in indigent defense. Could I ask you to address just the issue of indigent defense in your courtrooms? Is that a problem in Tennessee and, if so, is there a way to deal with that?

Chief Justice Bivins. Absolutely, indigent defense is a problem. I would suggest to you actually trying to change the nomenclature a little bit from "indigent defense" to "indigent representation" because we spend about 35 million dollars per year on indigent representation in Tennessee, but over half of that is not defense work. Over half of that is on the civil side, particularly through termination of parental rights cases and similar types of cases, so it is a problem that strikes across the board in this state. In fact right now, we have an indigent representation task force that's been working for over a year now to try to tackle that problem and is looking to bring to us very comprehensive and major reform. Their report will come in April. That task force is chaired by Dean Bill Koch from the Nashville School of Law, former Justice Bill Koch. They have done a yeoman's job of going around the state listening to people and understanding and trying to develop different approaches in what we can do. We obviously want to be as efficient as possible in taxpayer dollars there, but on the other hand, you can often be pennywise and pound foolish particularly from the standpoint of the criminal defense side because you may end up with post-conviction relief. That is because of ineffective assistance of counsel or other issues that may arise if you don't have good appointed counsel through that process.

This task force is looking at the rates our attorneys are paid; forty dollars per hour out of courtroom, fifty dollars in. That's one of the lowest rates in the entire country right now. Also, there's a cap on those fees, most cases are capped at 1,000 dollars per case. So, it is extremely difficult to get representation, it is extremely difficult for a lawyer to succeed on that type of compensation. It is an ongoing problem throughout our state, in both urban and rural areas, but it is something that we're looking at. It is also something that we as a court are prepared to go advocate strongly for before the legislature next year as far as reforms go. Money is not the only answer, but it *will* take some additional money, better accountability, better training and better efficiency in our system. We are hopefully going to move toward that, but it is definitely a problem.

Moderator. Alright, other thoughts?

Judge Woodruff. One of my colleagues, Judge Deanna Johnson, is on the indigent defense task force and they are doing the yeoman's work. Rates and caps are a problem, but revenue is also a big problem. There are lots of demands on the high tax dollars that are collected every year, and we're seeing that play out right now in the public with priorities that are competing with each other. Building roads and preparing infrastructure and representation of indigent criminal defendants needs to be right up there in terms of priority. Although it's not a totally popular priority, it is important. One of the things that I believe we really need to look at are alternative revenue sources, and from my personal perspective we have a potential revenue source that's going untapped. That additional source is the revenue that professional bail bondsmen earn every year in our state. Not every state allows pretrial release on bond provided by a surety. Kentucky doesn't, but bail bonding is a pretty big business here in our state, and it is untaxed. There are two really simple fixes you could make. You could make the issuance of a surety bond a taxable service, the retail sales tax, that's an easy fix if it is just added as service on the existing retail sales tax, or you could pass a privilege tax. Making the privilege of writing bail bonds a taxable privilege and putting the requirement to emit a tax into an earmarked fund in the treasury on folks who are benefitting from that service and right now. Right now, it's totally untaxed.

Moderator. Alright, other thoughts? Judge Easter?

Judge Easter. The only additional comment that I would add is-and I guess I'm going to throw my colleagues here of the trial court and sessions court under the bus-but when it comes to finding someone indigent, that's the judges call. Quite frankly, I worry that a lot of judges are finding someone indigent without really investigating it like they should. We get these affidavits of indigents from a defendant in a criminal case that are pretty bare bones, and most of them don't ask, they're just "none," every blank is "none," "n/a," and signed. I found that when I got one of those and I had the defendant in front of me, that if I delved into it a little bit and probed about how they spend the income that they do have or how the person was able to make that ten-thousand-dollar bond and now you're asking for the tax payers to pay for your attorney. I found that if the judge making that call will just dig maybe a little bit deeper than that affidavit does you will strike some form of gold. I'm a big believer in partial indigence, too, where someone seems to be able to pay a thousand dollars towards this fee, I find them partially indigent and order that they pay a thousand dollars, a hundred dollars a week, or a hundred dollars a month to get the fee paid. That does a couple things: one, it does somewhat address that million-dollar figure that Chief Justice Bivins talked about, but it gives that participant in the lawsuit "buy in." They now have some wallet interest in the outcome of this case, they've paid some money.

I know I see now General Robert Jones here. He used to be an Assistant Public Defender down in Williamson County, now he's the DA here in Nashville. It is such a thankless job, the public defender job, I know you probably thought about it but and sometimes you get this, the defendants at some point sort of develop an entitlement type of mindset, that, "I'm entitled to this." Certainly, you have Sixth Amendment right to counsel, and you are entitled to that, but how that's paid for, that is a different question. Sometimes you'll see defendants that are never satisfied with the attorney appointment. You give them a Public Defender and they won't work with them. They come in and they want to pick who their lawyer is or they want somebody else. It does not work that way. My main point is that I think the judges need to take the WD-40 off that too easily opened gate, since it's so easy for the assignment of a lawyer. I would encourage judges making the indigence appointments to dig a bit deeper. When somebody's looking at spending time in jail, and an aunt or uncle or granddaddy or somebody can come up with that money for the bond, they can come up with the money for a lawyer. That's just a practical observation.

Judge Dalton. Justice Bivins is correct that we are the gatekeeper of making that determination. I wonder if sometimes it's a matter of resources for us in General Sessions when we have dockets of upwards of 30 or 40 defendants and they're all asking for court-appointed attorneys and expecting those attorneys to prepare for trial the next hour. It's a matter of resources, and not necessarily in a "pass the buck" way because we do have a responsibility and we, as judges, need to be held responsible and accountable for declaring defendants indigent. I am a fan of declaring defendants partially indigent. I am a fan of telling defendants that they need to come back and show me they've been seeking a job. The economy is not as bad as it has recently been. Somebody's hiring. Those are admissions that I try to take but I'm not always very successful. It's a balance of resources for judges. I wish I could require defendants to bring all their bank statements and pay stubs and everything to prove what they're putting in their affidavits instead of just relying on what they're putting in those affidavits when most of it is checked 'not applicable' or 'none' or 'zero' all the way down the line.

Chief Justice Bivins. Let me just add a couple points that those comments have made me think about. First of all, one of the things that the task force is looking at is, "Is there a better way to determine indigency?" For example, we don't have the resources to look behind that affidavit. Is there a way for a third party to make that determination, to look behind that before they ever get into court? Some states do it that way, so we're looking at that as the way to do it. Also, Judge Easter's comments made me think of this from a judge's responsibility standpoint. The law in Tennessee is that the judge is supposed to appoint the Public Defender to represent that defendant, unless there is a conflict. But, what we have sometimes is judges who think, "Well, this is a

young lawyer that I need to help out here,” or, “this is a good thing, so I’m going to appoint this private lawyer here.” First of all, that’s wrong for the judge. Second of all, that costs the taxpayers money. That’s why the Public Defenders are there. Sometimes you’ll hear these defendants say, “Well a Public Defender’s not a real lawyer,” but Public Defenders are some of the best criminal defense lawyers that we have, and judges need to stand up for them both from the standpoint of assuring confidence in the system, but also for the standpoint of changing the culture out there and protect the taxpayers’ money.

Judge Woodruff. If I could add to what the Chief just said, I completely agree. Some of the best criminal defense lawyers that I see come off their two-year rotation on the criminal docket in Williamson County are members of the Public Defender’s Office. They are really, really good. They have good judgment, they know which battles to pick, they know which ills to be willing to die on, and they will really go to bat for their clients. People who get Public Defenders in the 21st Judicial District are not getting a second string, they’re getting the first string, and the quality is extraordinarily high. There are times when it makes sense for continuity of representation to appoint lawyers other than the Public Defenders. It rarely comes up but it does come up sometimes when you have someone who’s before you in circuit court but they’ve had a private attorney appointed in general sessions on related charges. When they’re negotiating a turn-key, comprehensive settlement that’s going to plead the same day as the arraignment, and they’re going to take care of the charges in circuit, plus the charges in sessions, plus VOP warrants – under those circumstances, it just makes sense to go ahead and get those extra dispositions on the same day that you otherwise wouldn’t have. It may be worth the margin of cost to get all of those cases wrapped up. The rules also create an escape hatch when the Public Defender’s workload is such that they cannot ethically meet their requirement of zealous, competent representation. Then, they’ve got the ability to tell the court at arraignment, “Our workload is too much,” and put on the record what their workload is. It really is conflict because they can’t ethically represent the defendants because of the workload. But that comes up rarely. It has come up, but it doesn’t last very long in terms of getting the headcount of their caseload down

Judge Dalton. Our Public Defenders come to our Courts daily with their true conflicts of interest and then a list of workload conflicts of interest. When they are declared a conflict because of workload it really puts us in a bind because then we do have to rely on the private defense bar.

Chief Justice Bivins. That certainly does happen on occasion. I don’t think it’s very frequent. I also want to say, again, that the things we’re having to look at from the task force’s standpoint, is that different Public Defender’s offices are counting cases different ways. We need to have a unified way of

counting cases to compare apples to apples because what you don't want to happen is one Public Defender's office counting one way, coming in and getting relief, and another one that may actually be working harder but is just counting it differently. So, we just need to make sure that we're counting apples to apples.

Judge Woodruff. And Chief you mentioned that a big piece of the budget is for compensation for appointed counsel and TPR cases and child support cases, and Public Defender's aren't available to defend these cases in parental rights or child support or criminal contempt proceedings.

Chief Justice Bivins. That's totally unavailable. That's more than half of the budget.

Moderator. I want to talk about a different subject if we could for just a second. Discovery in criminal cases. Is there a problem here? We read stories about misconduct, Brady violations, has it become a defense strategy or is there a real issue?² Just talk to us from the appellate level and from the trial level, what you see, in terms of prosecutorial or other discovery issues.

Judge Dalton. Well, in General Sessions there are no true, applicable discovery rules. It's very informal. Obviously, there are some things that do apply, but I've not seen or heard of any complaints from the defense bar. For DUI cases, for example, we've actually set up a special DUI docket where the DAs will just give whatever information that they want absent a formal request for discovery. That, in effect, helps the DUI cases go through the system a lot quicker instead of having to wait a lot longer. Obviously, lab results take time but there's other information. There are videos that would be helpful for the defense, and we try to get those done as quickly as possible. In General Sessions I don't think it's as big as a problem as it may be on the trial court level.

Judge Easter. Well, what we see at the Court of Appeals is that we are addressing the violation of the discovery rules that allegedly occurred in the trial courts. Fortunately, that's not too much of a problem. Not that it never occurs, but it's not that big of a problem. Now I want to say this and I hope I have everybody's attention, particularly young lawyers who are litigating. Do not get confused about who you are trying in a case. Whether it's a civil or criminal case, you're not trying the other lawyer. He or she is not your opponent. I see it come up a lot in discovery disputes where the lawyer loses sight in a criminal case; the prosecutor loses sight of the crime and the defendant and goes after the defendant's attorney. This is when the prosecutor starts prosecuting the attorney instead of the defendant. He or she

2. *Brady v. Maryland*, 373 U.S. 83 (1963).

starts trying to make the defense attorney look silly, or plays ‘hide-the-ball’ with the defense attorney. It happens in civil court a lot too, specifically in domestic cases where you’re holding back on something in discovery because you feel like the attorney on the other side has wronged you in some way. That’s not what a trial is all about. The trial is, after all, a search for the truth.

As the Chief said in his opening remarks, if you’ve got something that’s going to eventually come out, that’s going to be your big bruise that you want to hide, show it up front. That happens in the discovery process. You may have a document and you think, “That’s not going to help us,” or you may think, “let’s wait until the very end before we get to trial and spring it on them.” That’s not the way to try a case. More often than not, I saw that happening in situations where it was a lawyer trying the other lawyer and forgetting his or her role in all of this. It’s a search for the truth and how’s the truth ever going to surface if somebody’s playing ‘hide-the-ball’ with discovery? Just keep in mind, it is a search for the truth and you’re not trying the other lawyer and I think that will help smooth over a lot of discovery issues.

Judge Woodruff. Criminal trials are not a search for the truth if you’re a defense counsel. Typically, your job as a defense counsel is to keep the trier of fact from knowing the truth because in order to prove the truth, the State has to rely on evidence that the rules of evidence don’t allow, or that the Constitution prohibits being included because of a violation of constitutional protections. Your job is to make sure that the trier of fact never finds that stuff out. If a trial was a search for truth, there’d be no such thing as Rule 404, and particularly 404(b) of the Rules of Evidence.³ So, if you’re a criminal defense lawyer, your job frequently is to make sure that the only evidence that gets to the jury is what passes through an application of the laws of evidence. That’s ok, because it is an adversarial system. The prosecutor has an additional burden, you’re not there to zealously prosecute the case, you’re there to make sure justice is done. You have an overriding obligation if you’re a prosecutor. In the two years in which I’ve had responsibility of a busy criminal docket, I have had quite a few discovery disputes come before me. Not a single time have I seen any situation where I’ve believed that the State was deliberately guilty of misconduct in connection with evidence that wasn’t available. Frequently, that evidence is not available because the technology that’s used by different law enforcement platforms is different. It’s not unusual particularly in DUI cases, you can have three different law enforcement agencies involved in the investigation; there can be a city police officer, a sheriff’s deputy, and a state

3. Fed. R. Evid. 404.

trooper, and all of them have a video of some kind or don't have video of some kind.

Chief Justice Bivins. Or the equipment doesn't work.

Judge Woodruff. Or the equipment doesn't work! And then the officers thought, "Well, the troopers saved their video I don't have to save mine." Sometimes, defense counsel kind of takes their eye off the ball and they insist on getting the case dismissed so much that they come up with some sort of draconian solution for the failure to produce evidence. Oftentimes, getting a missing evidence instruction for the jury would be a heck of a lot better for their case than a continuance so that the officers can actually find the video of the defendant failing the field sobriety test. Wouldn't you rather have the judge tell the jury, "Well, this video hasn't been produced so you are free to draw from inference because they failed to produce this evidence would have been harmful to the State's position." Think of what you can do as a defense counsel with that instruction! But no, they insist, "Judge, I've got to have a continuance to see what's on that video." Why? If all it's going to do is corroborate the officer's testimony. In my judgement, the majority of discovery problems is because multiplicity of law enforcement agencies that get involved in various cases and different technology platforms. When we add one more to it, body cameras, it just adds another layer of complexity.

Chief Justice Bivins. I tend to concur with that idea, and I have been at all levels. There have been a few issues with discovery, but they have been few and far between. You have to be aware of these issues and be sensitive to it. You must look out for those, but I think as a general rule, I agree with Judge Easter, I saw it much more on the civil side than on the criminal side.

Judge Dalton. Can I add one more thing to that when it comes to discovery? This is directed to those, especially on the prosecution side, when you have an obligation to turn something over. As stated earlier about an attorney's reputation, and I think Professor Johnson talked a little bit about in his presentation before ours, when it comes to discovery, your reputation is on the line. The last thing that you want to do is to be known as that prosecutor who withheld evidence that he knew he was supposed to turn over because that association will stay with you forever. Your reputation and integrity are on the line at that point, definitely for the prosecution and for those that have an obligation, whether in civil or criminal court, to turn information over. One of my former colleagues used to always tell me when I was a brand-new Assistant DA and I was going through our discovery template that we had in the DA's office, I was curious about whether I had to turn certain evidence over. He said, "If you have to ask if you have to turn it over, then turn it over. Submit it. It's done."

Moderator. I would like to talk about sentencing for a minute if we could. Is there an issue here in terms of disparity courtroom to courtroom, or if you would talk about some alternatives perhaps to corrections? Rehabilitative sentences? Is that something you think has promise?

Judge Dalton. I'm a fan of it, and I'm a fan of treatment courts. I think that, as an alternative, when the circumstances are appropriate, I'm a huge fan of treatment courts.

Moderator. What circumstances would make those appropriate to you and what kind of conditions would you put on them?

Judge Dalton. Well, usually, I think one of the most popular treatment courts is the drug courts. We have a drug court in General Sessions, and also Judge Norman's drug court here as well. Drug courts obviously won't accept violent offenders, but someone may qualify based upon certain criteria, based upon the circumstances, the nature of the offense, the record, et cetera. If there is an issue based on substance abuse, and there is a belief and based upon all those circumstances that there is a possibility of rehabilitation, and you can restore justice, I say 'go for it.' I think that the statistics show that there is a success among those who complete the drug treatment court programs in term of written recidivism.

Judge Easter. I noticed on your list of topics you had a potential discussion of restorative justice. I see the problem-solving courts, 'recovery courts' is the term now being broadly used to encompass not only drug courts, but veteran courts, mental health courts, DUI courts. There is a number of these different types of treatment courts that are available, and yes, the numbers are there to support their success. Here's why: one of the reasons I think that these types of courts are so successful, and this is something that I know you're learning at the programs here at Belmont, is the human element involved in the practice of law. So many of the crimes that we see in the criminal courts, at all levels, are drug and alcohol-driven, or some type of addictive behavior. Now, the crime committed might not be a drug crime per se. For example, it may be forgery or burglary, but when you start peeling the criminal activity back and looking at it, they're breaking into your house to steal your VCR. VCRs? We don't even have those anymore. To steal your whatever to support their drug habit, or breaking into your car to get something to support their addiction.

I presided over a drug court for 14 years. The piece of recovery court that makes it work in my mind is the human element where the defendant starts to see the criminal justice system as more of a support system than the enemy. Most defendants see all of us—the judge, prosecutor, and even their own defense attorney—as “the man.” When they start seeing the DA showing a

human side by saying to the offender, “I want to help you and get to the root of the issue,” it helps because these defendants are not all bad people. Many are sick people. They’re sick. It’s just like someone with a kidney problem, but they don’t have the tools, the doctors, or the understanding of how to address or treat their illness. This is what these problem-solving courts can provide at a level that is much more cost effective than \$30,000 a year to lock them up. We spend about \$6,000-\$7,000 per participant in drug court and most of our participants would be at TDOC at the annual cost to taxpayers at \$25,000.

The recidivism rate is the charity in all of this. If you get someone who finally gets it, and they hear a judge telling them, “I’m proud of you; you did a great job,” they’ve never heard that in their lives. They don’t have a family structure or support structure that some of us are blessed to have and they hear that from someone in court who they usually think is that enemy. They get a high-five from the DA and the DA and police officer who arrested them telling them, “We’re proud of you, you’ve been clean and sober for a year; you’ve paid child support.” All these things we know of as responsibilities. That has a tremendous effect on a human being and the way we are all wired. It doesn’t always work, and it’s not a silver bullet by any means, but it’s surprising to me that the recidivism rate that we were seeing out of the 21st Judicial District was about 17-19% of the folks that made it all the way through drug court. On regular probation and parole, that number is closer to 85-90%. Do the math and the cost savings involved in that, not only to taxpayer but the victims out there whose houses are no longer being broken into, it really is a good thing and I’m tickled to see. The drug court is the model that started it all, but I’m tickled to see it now expanding into all of these other areas.

Judge Woodruff. I want you to know that one of the humblest people on this panel is Judge Easter. He is the father of the 21st Judicial District’s drug court and without his vision and his leadership we wouldn’t have one. But we do, and it’s one of the best in the state and that is because of your effort and all the work you’ve put into it. I will agree. We are so fortunate for that. 1 in 5 folks in prisons and jails across the state of Tennessee are mentally ill. You figure somewhere between 18-20% of folks who are mentally ill are in state custody now, but they’re not in the custody of the department of health and mental abuse, they’re in the custody of the department of corrections. We have to figure out a better paradigm because the sheriffs don’t want mentally ill people in their jails. They’re not equipped to deal with them. We need to get them out of the jails and into facilities where they can actually receive the appropriate psychiatric interventions that they need.

Chief Justice Bivins. Couldn’t agree more with everything that’s been said so far. I’m a strong supporter and believer in recovery courts, and mental

health courts seem to be growing even more now. Statistics show that of the male populations in our prisons, they are four times more likely to have mental illness than the greater population of our citizenry. With female inmates, it is eight times more likely than the general public. That just goes to show you a little bit about what's out there. As for sentencing itself in Tennessee, I absolutely think we need to look at it. We have a situation where we haven't had a major comprehensive look at sentencing in over 30 years; 1989 is the last time we did that. We have a situation where release eligibility dates have now become, because of that time frame, all over the board. We have situations where the legislature will come up with a bill that increase release eligibility to 100%. On a big fiscal note, they'll say, "Well, we can't do 100%, we'll budget to do 95%, 90%," and all the way down until release eligibility is based solely upon how much the budget will pay that year. The state prisons are now 90% full in this state. Most of you folks here are too young to remember; our prisons were under federal control for a long time many, many years ago. That's the last thing we want to do. We have a situation now where we have the ACLU, the Beacon Group, which is a very conservative group here in Tennessee, and the Koch brothers all on the same page as far as taking a look at better alternatives for non-violent offenders and perhaps even longer terms for violent offenders, but it needs to be done. Keep your eyes and ears open. We will have a major announcement from our court dealing with sentencing soon.

Moderator. Alright, thank you.