CRIMINAL LAW IN PRACTICE SERIES: APPELLATE PROCEDURE PANEL

Featuring:

ASSISTANT ATTORNEY GENERAL LESLIE PRICE[1*] AND
ASSISTANT PUBLIC DEFENDER JEFF DEVASHER[2**]

Moderated by Professor Jeffrey Omar Usman

Moderator. Mr. DeVasher is going to give us a brief presentation related to some appellate law issues, then we are going to have a question and answer time period. I will ask questions and you will all have an opportunity to ask questions; we will hear some fantastic answers. One of the reasons I am particularly excited is we have the benefit today of having with us two of the most accomplished criminal appeals attorneys in the state of Tennessee. Ms. Price is with the Tennessee Attorney General's Office and Mr. DeVasher with the Nashville Public Defenders Office, so you are getting to hear from both sides of the aisle.

Jeff DeVasher. I appreciate the opportunity to be here with you all today. The life of an appellate lawyer is not very glamorous I am afraid to say. I spend most of my time in my office in front of my computer, reading transcripts and doing legal research. If you think that sounds boring, wait until you hear me talk about it for fifteen minutes. Some trial lawyers are also good appellate lawyers but, in our office, and I know in Leslie's office too, the appellate lawyer is not the same lawyer that panels try. Appellate law really does involve an entirely different skill set than being a trial lawyer. Trial lawyers have to think on their feet, they are often in very

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emotionally-charged environments, and they have to create a record for the appellate court to review. Appellate court lawyers have the luxury of time for legal analysis and writing. They practice in a more analytical and less emotional environment, and their arguments are pretty much bound by what has already been argued in the trial court and what is already in the record. To a large extent, an appellate lawyer's hands are tied when he or she gets a case. As a criminal defense lawyer, we are usually the appellant. We can generally only raise issues on appeal that were first raised and ruled on by the trial court. The appellate courts are not factfinding courts; they base their decisions on the cold record that is created at the trial court level. So, on those rare occasions when we as criminal defense attorneys win an appeal, it is the trial attorney who probably should get most of the credit. On the other hand, on those very frequent occasions when we lose an appeal, the trial attorney, and not me, the appellate attorney, should probably get most of the blame.

I am going to talk about criminal appeals in the Tennessee state courts from the perspective of the defense, which again, is almost always the appellant in criminal appeals. I will also talk about different kinds of appeals in criminal cases, the importance of a Motion for New Trial, the process in general, brief writing, oral argument, and application for permission for appeal to the Tennessee Supreme Court.

First, I want to talk briefly about what I think are a few misconceptions, or myths, about criminal appeals by those who are not familiar with the work we do. Misconception number one is that appellate courts can hear new evidence that was not brought out at trial. That is not true. Appellate courts are not factfinding courts; they only consider evidence that has already been considered by the trial court. Misconception number two is, if the key prosecution witness gave untruthful testimony, the appellate court can fix that. Not true. Juries, not appellate courts, decide issues of witness credibility. On appeal after a jury verdict, the presumption of innocence is replaced by presumption of guilt and any inconsistencies in a witness' testimony are resolved in the manner most favorable to the State. The State gets the benefit of any and all legal inferences. Misconception number three is, appeals by convicted defendants are often won on technicalities. Totally not true.

First, appeals by convicted defendants are rarely won at all. I do not know the statistics in Tennessee, but I would estimate that more than 90% of appeals by convicted defendants are not successful, and that number may be closer to 95%. When defendants win criminal appeals, they do not win on technicalities. This is because there is something called the Harmless Error Rule, Rule 36(b) of the Rules of Appellate Procedure, and that rule says

that relief will only be granted to an appellant if the error by the trial court more likely than not affected the judgment.[3] It is not enough for the appellant to prove that the trial court made a mistake at the trial. The appellant has to prove that that mistake, or combination of mistakes, was so serious, so huge, that the verdict would have been not guilty, but for that mistake or series of mistakes. That is an incredibly difficult standard to meet and that is why criminal appeals are rarely won at all and are certainly not won on technicalities.

Let's talk briefly about the different kinds of appeals there are. First of all, there is no constitutional right to an appeal. The kinds of appeals that can be taken by defense in criminal cases are entirely statutory and rule-created. The classic appeal in criminal cases is when you have a jury trial, a conviction, and then a sentence. The defendant can also appeal only his sentence if there was no plea agreement as to sentence. Probation revocations can be appealed as can the denial of pre-trial diversion or the denial of probation.

Tennessee, unlike most other states, maybe all other states, allows the appeal of a certified question of law. This is a really "quirky animal" that allows a defendant to plead guilty but reserve a legal issue for appeal if that legal issue is dispositive of the whole case. A classic example is a drug case where there is no issue that the defendant was in possession of the drugs, but there is an issue about the legality of the search that led to defendant's arrest and conviction. In that situation, sometimes a defendant will plead guilty to possession of the drugs but will reserve for appeal the issue of whether or not the search that gave rise to that possession was legal. Also, the amount of pre-trial bond or conditions of bond, like drug testing or electronic monitoring, is something that can be appealed.

There is another kind of appeal called an interlocutory appeal. It is an appeal that kind of puts a trial on hold while an appellate court sorts out an issue, otherwise a trial would not be able to go forward. Interlocutory appeals are usually state appeals. The most typical example is again in a drug case where the defense files a motion to suppress and, the trial court grants that motion, and the drugs are suppressed. The State will often take an interlocutory appeal to the Court of Criminal Appeals on that issue because obviously if the State went ahead and had a trial on that issue and the drugs have already been suppressed, they would not get a conviction because there are no drugs. If the defendant were acquitted, which he would be, a double jeopardy would bar any kind retrial, so the State could not

3. "A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." Tenn. R. App. P. 36(b).

appeal after an acquittal. So, this is the kind of relatively rare situation where we see State appeals in the interlocutory appeals context.

What cannot be appealed—guilty pleas cannot be appealed, although in some cases, a trial court's denial of a motion to withdraw a guilty plea is something that can be appealed but that is something that is a very rare instance. Also, a negotiated sentence, pursuant to a plea bargain, is something that cannot be appealed. There are probably two kinds of issues that are raised in criminal appeals: those issues that are litigated prior to trial and issues that arise during trial. The typical appellate issues that arise pre-trial usually begin with a motion that is filed pre-trial by the defense asking the trial court to hold a hearing and rule on the admissibility of evidence. So, in a very real sense, an appeal begins before the trial ever happens because issues that are litigated pre-trial very often become the strongest issues on appeal post-trial.

Jeff DeVasher. Issues that arise during trial really challenge the trial lawyer's ability to think quickly on his or her feet and raise the proper and timely objection because, in order to preserve an issue for appeal that arises during trial, the trial lawyer has to make a contemporaneous objection. The objection has to specifically state the ground for that objection. Also, sometimes the defense lawyer will want a witness to testify about something and the trial court will rule either during trial or prior to trial that that testimony is not admissible. In order for the defense to be able to properly appeal that issue, they have to get that witness's testimony on the record in what is called an offer of proof. So, what happens is the jury will, often in the middle of trial, be excused, the witness will take the stand and the lawyer will ask the witness all the questions that the trial judge ruled that the lawyer could not ask the witness in front of the jury, so that the appellate court knows exactly what this witness's testimony would have been had that witness been allowed to testify at trial.

If the jury returns a verdict of guilty, the trial is over but the appeal has not yet begun. The next step is a sentencing hearing that is usually held within thirty days of the trial. After the defendant has been sentenced, there is one more motion to be filed in the trial court and one more motion to be heard in the trial court. That is the Motion for New Trial and the hearing on the Motion for New Trial. Ironically, I think the single most important document in criminal appeals is not the Notice of Appeal, it is the Motion for New Trial which is a pleading that is filed after sentencing with the trial court, within thirty days of the sentencing hearing. It is basically a list of alleged errors the trial court made, either before or during the trial.

The Motion for New Trial is the most important document in the appellate process for two reasons. First, you generally cannot raise an issue on appeal

unless that issue has been raised in the Motion for New Trial. Second, if you file the Motion for New Trial late, you are in serious trouble because a late filing waives all issues except for sufficiency of the evidence and sentencing. You are almost certainly not going to win an appeal on either of those issues. No extensions are allowed to this thirty-day time frame you have after sentencing to file a Motion for New Trial. So, if you only remember one thing about my presentation today, I hope that it is the importance of a detailed and timely file of a Motion for New Trial.

Next is the appellate process itself. Lots of stuff in the outline touches upon various time limits and the procedural aspects of the process. The notice of appeal kicks off the process. There is a form at the appellate court clerk's office website, a form Notice of Appeal, you file now in the Court of Criminal Appeals. Until July 1 of this year, you filed in the trial court, but now you file in the Court of Criminal Appeals. You have thirty days from the denial of Motion for New Trial to file a Motion of Appeal but unlike the Motion for New Trial, the thirty-day time limit is not jurisdiction, so you can get an extension on that. When you file a Notice of Appeal in the Court of Criminal Appeals, you also file a request for transcript in the trial court. Make sure you get transcripts prepared for every proceeding that is going to be the subject of the issue in the appeal. The court reporter has sixty days to complete and file the transcript and a lot of times, especially in some cases, the court reporter will need additional time. Once a transcript is completed and filed in trial court, the trial court clerk has forty days to prepare the appellate record, which includes a transcript, exhibits, and pleadings. Once that appellate record is filed in the Court of Criminal Appeals, appellant receives a notice that the record has been filed and the lawyer then has thirty days to file the brief.

After you have checked out the appellate record, which includes going through and making sure that it is complete, the next step is to file your brief. In my opinion, briefs are the second most important document in the appellate process, right behind the motion for new trial because they will shape the Court's opinions far more than oral argument. Oral argument lasts twenty to thirty minutes depending on what court you are in, briefs are there forever—the written word survives longer than the spoken word.

Rule 27 of the Tennessee Rules of Appellate Procedures sets out the requirements for the contents of briefs.[4] The three most important parts of the brief are the statement of issues presented, the statement of facts, and argument. Issues presented, again to a large extent, are limited by the issues that were raised in the motion for new trial. Here are a couple of tips I have about your list of issues presented. Ideally, I think issues should be raised in

4. Tenn. R. App. P. 27.

one or two sentences, be specific when you are drafting your issue. Do not say something like, "The trial court erred in denying defense motion to suppress his statement to police." I found that the word "because" works very well in framing an issue. For example, "The trial court erred in denying defense motion to suppress his statement to police because the statement was obtained during custodial interrogation without the benefit of Miranda warning." Also, leave your weakest arguments in the trial court. Do not water down your brief with arguments that are not going to go anywhere unless those are the only arguments you have, which is sometimes the case.

The next important part is the statement of facts. There are two schools of thought on how to draft a statement of facts. One is to just summarize the testimony of each witness in the order they testified at trial. The other way to do it is to sort of write a narrative, a story, and that is usually the way that I try to do it. I think it is the most effective way to communicate with the court. It is a lot more fun to write a story than it is to just summarize the chronological testimony of witnesses.

Here are a few tips on preparing statement of facts. The most important rule is citing the record for every factual proposition you are setting forth. You have to include the bad stuff in the facts, but you minimize the bad stuff. You can minimize the bad stuff in your argument, but you cannot ignore the bad stuff in your facts because it is part of the facts. Do not argue in the statement of facts, tell your client's story but save the argument for later. Do not exaggerate. Your credibility with the court is as valuable as the facts and the law, so do not mischaracterize testimony or be disingenuous about what a witness said because the transcript is going to speak for itself. Do not include testimony that is not relevant to any of your issues on appeal. If there is a witness whose only function at the trial was to admit a bunch of photographs and those photographs are not really relevant to any issue that you are raising, it is not necessary to summarize that witness's testimony. Do not be wordy, do not be repetitive, and use abbreviations when feasible. Just try to be clear and concise.

The last is the argument portion of the brief. This is where you exercise your skills in persuasive legal writing and sound legal reasoning. One tip for the argument portion of the brief is cite legal authority for every legal proposition. If you do not do that, you risk waiver. Use pinpoint cites. Write short sentences and short paragraphs. The Tennessee Court of Criminal Appeals decides about 1,200 cases every year; each judge and law clerk reads hundreds of briefs a year. So, the more concise and clear your brief is the more likely it is to be read and understood. Do not be overly dramatic, and avoid using extreme adjectives and adverbs like "obviously, incredibly,

etc." Limit your legalese. One of my pet peeves is that lawyers think that they need to speak in this sort of secret language that only we lawyers are supposedly smart enough to understand. Use footnotes. I think footnotes are a very valuable tool. Avoid string cites. Cite one or two cases for your proposition, you do not need to cite ten cases for a single propositional law. Do not hesitate to cite unreported cases if they support your position as long as they are not in conflict with reported cases that do not support your position.

Sometimes issues should be divided into sub-issues; that does not make the argument more complicated, it just compartmentalizes the argument in a way that makes it a little easier to understand. For example, if the issue is whether the defendant should have been mirandized, part A of the argument might be that he was in custody while part B of the argument might be that while in custody, his statements were the product of custodial interrogation. Include the standard of review for each issue. That is not just a tip; it is actually required now by Rule 27.[5] Also, address harmless error. It is not enough to say the trial court erred. In order to get relief, you've got to explain why the error should not be deemed harmless. Perhaps the evidence at issue was the single most damaging piece of evidence in the case. Perhaps the case was hotly contested and pretty close. But again, if you convince the appellate court that the trial court made a mistake, you've only won half the battle. You've got to convince them also that the mistake that they made was so serious that your client does get relief.

Be clear about the relief that you're asking and don't hesitate to ask for alternative forms of relief if the issue lends itself to more than one avenue of relief. For example, in a murder case where the client is convicted of second-degree murder and your defense was self-defense, the ideal relief you'd seek is a dismissal on insufficient evidence of second-degree murder. But alternatively, you might want to request on a remand for sentencing on a lesser included defense of voluntary manslaughter which is not as good as a dismissal, but a lot better than a second-degree murder conviction.

General pointers for both statement of the evidence and the argument: stay in the record; use correct grammar and punctuation; proofread carefully; spellcheck; don't rely on spellcheck or grammar tools; use a thesaurus, but don't try to show off your vocabulary—forcing a reader to use a dictionary will not enhance your arguments; and find an example or two of first class briefs and study.

Oral argument—in Tennessee, all you have to do to get oral argument in the Court of Criminal Appeals is to request it on the front page of your brief.

5. Tenn. R. App. P. 27(a)(7)(B).

Should you request oral argument in all cases? My rule is that I request oral argument in any case that I think I have a chance to win. That means I don't request an oral argument in all cases. I have a lot of cases up there, and I think I would lose some credibility if I orally argued every case because not all of my cases are that great. I like to think that when the court sees me that I'll be talking about legitimate issues. The flipside is that if they see a case that I've submitted on brief, they may be tipped off that there are not really any compelling issues in that brief. But they're eventually going to figure that out anyway. Don't argue orally every issue you raise in the brief. Stick to your one or two best issues.

Make a written outline of your presentation. Don't ramble about the facts. Reserve time for rebuttal if you're the appellant. I typically reserve three to five minutes. That gives you a chance to get the last word in. Expect questions from the bench, and be glad if you get questions because that means that you have the attention, and the interest, and the participation of the court. If the court were not interested in your case, they would not be asking you any questions. Answer the question that is asked. Never say, "I'll get to that in a minute, your honor, but first, I want to mention this." Be prepared for questions.

Know your record. Knowing your record is the very best preparation for questions—knowing the facts and knowing the legal issues. Don't be overly dramatic. I've seen lawyers pound the podium in front of the appellate court. Save that stuff for the jury—that does not impress the appellate court. You sort of see them collectively roll their eyes when they see a lawyer who is getting overly dramatic. Don't read. Use your written outline. If the court asks about a topic that has not been briefed, you can ask for permission to file a supplemental brief. It happens every once in a while.

Stay in the record. Occasionally, the court will ask people a question, and you'll know the answer, but the answer won't be in the record. When that happens, I'll go ahead and answer the question and tell the court that the record is silent on that issue. Be interesting. Judges hear six to eight oral arguments a day. That can get tiring, but everyone enjoys a good oral argument. And know when to quit. Someone once said that oral argument to be immortal need not be eternal, so know when to shut up and sit down. I'm headed to that point right now.

That breaks down permission to appeal. After you get the opinion of the Court of Criminal Appeals and you're the appellant, the opinion will very often be adverse to your client. You have ten days to file a petition to rehear in the Court of Criminal Appeals. Those are usually not appropriate unless the court has completely misstated something. You have sixty days to file

an application for permission to appeal to the Tennessee Supreme Court. Unlike the Court of Criminal Appeals, appeal is discretionary in the Tennessee Supreme Court.

They only accept less than 10% of all application for permission to appeal that are filed. There are two kinds of issues that are most likely to get the Supreme Court's attention: an issue where there is a split in authority in the Court of Criminal Appeals and an issue of first impression. So if you can couch your issues in the framework of one of those two arguments, you'll have a lot better chance of having your application for permission to appeal granted. I think when you're writing an application, the aim should be not so much explaining to the Court why the Court of Criminal Appeals was wrong, but rather why the Supreme Court should reach down and take the opportunity in the rare exercise of their discretionary authority to actually get this case. If you're lucky enough to get your permission to appeal granted, you'll then start on the brief schedule and file briefs in the Supreme Court and have oral arguments in the Supreme Court. The things I said about briefs and oral arguments apply equally in the Tennessee Supreme Court. That's all I've got! Thank you for listening.

Leslie Price. I think Jeff did a wonderful job of explaining appellate procedure in Tennessee. This is a great outline for anyone doing appeals to follow. I 100% agree with what he said. I just want to point out a couple of things. He cited to a number of rules. Wherever you practice, whatever type of law you practice, read the rules. Read the local rules. Read the appellate rules because I know at least in our office, we're going to try to get your case dismissed. We are going to try to argue waiver, and you don't want your case to go away on one of these technicalities and procedural issues, and in our office, that's going to be the first thing we raise. In every brief is, "This case should be dismissed because you didn't do something timely. This issue is waived because you didn't do something you were supposed to do." I think reading the rules in your practice of law is so important. Also, as Jeff had discussed, just be focused. That goes to anything in appellate law. In your brief, as Jeff mentioned, don't raise everything that you possibly could. Focus on the issues that are really good because the court, they're going to look at that brief and see one-hundred issues and they're just going to flip through, get bored, and think, "Hmm, none of these are that important." The same thing with argument—focus on those few issues that you think are really important to your case because that will give them a lot more weight before the judges.

Moderator. Let's start the question portion. Could you explain the organization of the Tennessee Attorney General's office in terms of criminal appeals, handling criminal appeals, and what the connection is

between local District Attorney's office and the Attorney General's office in terms of how these cases are handled?

Leslie Price. Absolutely. Our office has gone through some restructuring with our new Attorney General. I'm in the Criminal Appeals Division, which is part of the Criminal Justice Section. The Criminal Justice Section includes three divisions: Criminal Appeals, Federal Habeas Corpus, and Law Enforcement and Special Prosecutions. There are five grand sections in the Attorney General's office with various divisions underneath them. The easiest way to explain what I do is that the local DAs put the bad guys in jail, and I'm going to keep them there. The local DAs handle everything in the trial court for the most part. There are small exceptions, but once the Notice of Appeal is ready to be filed, that's where our office takes over. It actually used to be where the Notice of Appeal was filed in the trial court. That has recently changed where our office does that as well. So, from the Notice of Appeal on, our office handles all the appeals in the Court of Criminal Appeals and in the Tennessee Supreme Court and maybe further if need be.

Moderator. Is there much in the way of communication between the local DA's office and the AG's office in terms of handling these cases? Or when it comes to your office is it basically now the AGs and there's not really a lot of engagement with the DA's office?

Leslie Price. It really depends. It depends on the case and the particular DA's office. There are certain offices that we hear from quite frequently, others we don't. We get a lot of calls regarding interlocutory appeals. I think Jeff discussed that those are appeals that happen during the trial, so we get a lot of calls about those, calls from district attorneys, various questions they have at the trial level. Again, that sort of depends on what is going on in that particular case. We don't get calls about every single case, just what they have a question about that's going on at trial, if there's a potential appeal, those sorts of things.

Moderator. What about on the public defender side? You're talking about the division between the trial attorney that's handling the case, and then essentially, you're the appellate division of the Nashville Public Defender's Office, so how does that intersection work in terms of when you start becoming involved?

Jeff DeVasher. We are typically involved even prior to trial. We get involved with the trial attorney. We don't actually draft the pre-trial motions, but we will do some research, share with them our thoughts on this particular weakness or strength of a given issue, try to give them some direction on what issue should be the focus of any pre-trial motions. Quite

often we'll get calls during trial. Those are sort of frantic calls where something has happened that was not expected, and they'll want to know what they need to do. Typically, my answer will be you need to object or you need to move for a mistrial. Think of any ground you can think of and get it on the record, because if you do not, then we lose the chance to litigate that issue on appeal. We are pretty hands on even before the trial takes place, because an effective appeal starts before the trial and certainly not after. Some lawyers ask more questions and want more input from us than others, but we are there from beginning to the end.

Now once there's a conviction, we have a little more of a role in drafting the Motion for New Trial. The trial attorney will typically do a preliminary draft of the motion. We will talk about the case, discuss whether the wording should be different in the way an issue is presented in the motion for new trial, whether perhaps additional issues should be raised. We do not usually punt issues at this stage. I will tell the trial attorneys if they have any doubt about whether to raise an issue in the motion for new trial, go ahead and throw it in there. I can always kick it out later if it turns out it is not going anywhere, but if you do not put it in there then it is gone forever. Thus, we have a little more input at the motion for new trial stage, and once the motion for new trial is denied then basically the entire file is handed off to us and we pick it up and take care of the whole case from then on.

Moderator. If an issue is not raised, one of the tools of your office is to point that out to the Court of Criminal Appeals, one of the standards is plain error in terms of that concept. How hard is it for a person to win a plain error challenge or for a conviction to get tossed out on the basis of plain error? I wonder if you could explain that concept a little bit for the students.

Leslie Price. It should be pretty difficult for the court to reverse on a plain error basis. Essentially, if the appellant does not do certain things in a timely manner—does not raise the issues Jeff had discussed in the Motion for New Trial, does not object in a timely manner, those sorts of things—our office would argue that the issue is waived. At that point, the only way the court can address the issue is under plain error, and there are five factors under that standard that the court will look at: a clear and unequivocal rule of law was breached, was it tactical, does it affect a substantial right. It is a very high bar for the appellant to overcome when those issues are waived because it is not just, "was there error?"

Moderator. Is it ever worthwhile to try to push an issue on appeal under plain error?

Jeff DeVasher. Occasionally. Not very often, but occasionally. My experience is it usually arises in the context of jury instructions. Sometimes

trial courts get a little careless and will, for example, instruct the jury on a theory of guilt that was not charged in the indictment, and maybe the trial lawyer did not catch that. Usually by the time you get around to the jury instruction portion of the trial, the trial lawyer is so frazzled that it's hard to pay attention to every word that the trial court is reading to the jury in a thirty-minute jury charge. And occasionally, I'll pick something up in the jury instructions, reading the transcript, and its plain error: there's no clear and equivocal rule of law breached, and there's no strategic decision for not objecting to it. But again, those cases are extremely rare.

Moderator. For *Hardy* and others, they're supposed to set forward an argument—present their argument—they're supposed to provide for *Hardy*.[6] When is the trigger for saying, "You haven't adequately briefed this issue. You may have referenced it, but it's been played." Is there a threshold in terms of when you would make that argument as the state? "You've referenced that there's a violation, but you haven't really argued it." What's the point at which you pull the trigger on that?

Leslie Price. If we can argue waiver, we will argue waiver. In addition to things being timely, there are certain things that you have to do. You have to cite to the appropriate authority. You have to cite to the relevant facts. So, if you file a brief and raise an issue, and then you don't point to the record, where that particular issue arose, or you don't cite to any case law, we're going to get you. We're going to argue that that issue is waived. And the Court seems to more and more be agreeing and not delving into an issue when it is not plainly before them.

Moderator. In terms of that shift, and with the Tennessee Court of Criminal Appeals, and the Tennessee Supreme Court, perhaps having gotten closer in regard to the waiver issues, have you seen a pronounced move with regard to the Tennessee Court being more aggressive with their waiver application?

Leslie Price. I believe so. We even had, recently just this past week, a Tennessee Supreme Court case where the court found waiver.[7] A lot of times we used to say, "Oh, it's waived, but notwithstanding such-and-such." Now, they're really holding to the facts, saying, "If it's waived, you have to find these factors under plain error."

Jeff DeVasher. The case Leslie mentions is a case where the trial court allowed the jury to deliberate until very late into the evening and return their verdict at five after one in the morning, and the defense lawyer didn't

6. *United States v. Hardy*, 100 F. App'x 813 (10th Cir. 2004).
7. *State v. Walls,* No. M2014-01972-SC-R11-CD, 2017 LEXIS 719 (Nov. 9, 2017).

properly object to the late hours of jury deliberation.[8] He couldn't say that it wasn't a strategic decision though, because after all, you might think you're going to win this case, so you let them stay out there.[9] So, the issue was waived because he didn't formally and contemporaneously object to the jury deliberating at one o'clock in the morning.[10]

Leslie Price. You should always, as Jeff had mentioned, make an objection if there is a possible objection. Do it at that point in trial and in the motion for retrial, because if you don't oftentimes it's lost.

Moderator. You mentioned that the most important document in terms of appeals is the motion for new trial. How detailed should be in your motion for new trial be, in terms of presenting your argument.

Jeff DeVasher. Well, there's a balance there. You have to be detailed and specific enough that the reader of the motion knows exactly what grounds you're alleging. You don't have to write a big narrative, and you don't necessarily have to cite every conceivable provision of the state and federal constitution that you allege might be violated by this issue. But you do need to be specific about the grounds on which you are basing your legal grounds. Because if you're not specific enough, you risk waiver. Again, if there's any doubt about that, you resolve that doubt in favor of being more specific as opposed to being general.

Moderator. There are certain issues, especially in a capital case, where you know it's going to be going on for an extended period of time. Where you may want to raise an issue as a defendant that you know you're not going to win, you're just looking to preserve the issue, hoping that the law changes at some point from the defendant's perspective. How do you do that and maintain essentially credibility with the court in raising an issue that you're trying to preserve, but you know you're going to lose?

Jeff DeVasher. My experience is that the court knows exactly what we are doing when we are raising those kinds of issues. I won't pretend that the law is on our side when I know the law is not on our side, when the State is going to be able to 'slam-dunk' us with these cases that categorically reject the arguments we are making. So, I took those cases out in our argument. I'll say, "The appellant recognizes that this court and the Tennessee Supreme Court has decided in State v. Smith that 'an issue is contrary to our position.' He nonetheless feels that the court should re-examine this issue." Sometimes in a brief to the Court of Criminal Appeals, I'll drop a little footnote saying, "The appellant recognizes this court is bound by

8. *Id*. at *2
9. *Id*. at *16
10. *Id.*

decisions of the Tennessee Supreme Court." Which kind of leaves the Court of Criminal Appeals a little wiggle-room to say, "Well, we kind of agree with you here, but we're bound by the court upstairs."

Moderator. Some capital briefs that are filed by attorneys that aren't using the approach involving re-examining; sometimes you get the copy and paste sort of aspect where there's not the acknowledgment of the contrary law. Is there a point at which the AG's office takes the approach that an attorney has, maybe, ethically overstepped in terms of preserving these arguments where there's not the acknowledgment of contrary authority? Is there a line out there that's too far on that front?

Leslie Price. I mean, we will certainly point out that that authority has not been cited. Don't be sneaky with the court. The court is going to know that authority is out there. I think, more than anything, the attorney, by not citing that case law, will lose credibility with our office and with the court. So, I don't know that we would necessarily file any sort of ethical complaint; we would certainly point that out. And we don't appreciate it, and I know the court doesn't either.

Moderator. You don't get a lot of splits on the Tennessee Court of Criminal Appeals; they tend to be 3-0 decisions from that court. How important is it to have a split if you have an issue that you're trying to take up with the Tennessee Supreme Court that you want the Tennessee Supreme Court to consider? How valuable do you see that separate opinion being in terms of a case getting to the Supreme Court?

Leslie Price. One of the first things that we point out when we file our Rule 11 application is, as Jeff had mentioned earlier, that you want to point out to the Tennessee Supreme Court that it's a novel issue or that there's a split of authority. So that if you have a split of a single panel, what should happen? We certainly want to point that out that, "The court's not consistent on this, we need your guidance."

Jeff DeVasher. I totally agree. I mean in those situations the Supreme Court, in my opinion, almost has an obligation to settle that area of law that is explicitly unsettled or that which individual judges, or sometimes various panels, of the Court of Criminal Appeals have reached inconsistent results. And if you've got a dissenting opinion, regardless of whether it's for the State or defense, that's good ammunition for why the Supreme Court ought to exercise its discretionary authority and take the case.

Moderator. Most of the cases of the Court of Criminal Appeals are going to go against the defendant. If a defendant is filing a Rule 11 application for

permission to appeal, when does the State need to respond to that Rule 11 application and when do you essentially leave it unaddressed but allow the Supreme Court to consider it without comment from the State? What's the line on responding to that Rule 11 application?

Leslie Price. Typically, in our office, we get so many (and I keep saying Rule 11 applications but that's the rule in Tennessee, application to the Tennessee Supreme Court) it would just be impossible to respond to all of them. So for most of them, our office will simply respond with a letter saying that these issues are adequately addressed in the lower court's opinion and in the State's brief. There's no hard-and-fast rule about when to respond, but typically it would be when the application raises some new issue that wasn't addressed below in our brief or in the opinion or if there's some, maybe new authority or particular issue that we need to clarify. But it's going to be very rare that our office is going to file a formal response to an application.

Jeff DeVasher. They know they don't need to file a response because the Supremes are good at denying the appellants' applications.

Moderator. In terms of mechanisms for Public Defenders' offices, what kind of mechanisms are in place for conversations where, "there's this new issue in regard to sentencing," or, "there's this new issue in regard to search and seizure," issues? When you've got a case going up on appeal, what kind of mechanisms or processes, what's in place? Or is it just informal, in terms of communication with people outside of your office about issues that are arising in case law across Tennessee?

Jeff DeVasher. It's pretty informal. I belong to the Tennessee Association of Criminal Defense Lawyers, and we have a "listserv" where legal issues are discussed. I'm on the Amicus Committee of that same organization. We get involved in cases -- typically not until those cases get to the Tennessee Supreme Court -- where particular issues of public interests or particular legal issues [are involved]. Within the office, I try to read all the opinions of Court of Criminal Appeals and the Supreme Court and keep our lawyers abreast of any new developments or any noteworthy cases. But in large part, it's pretty informal.

Moderator. What about within the AG's office? Attorneys are working on different cases. What mechanisms are in place for that communication within the office, within the teams in the AG's office?

Leslie Price. Our office, our division, we meet every couple of weeks; we just have a staff meeting. During that meeting we discuss recent decisions, not every recent decision, but ones that are important. We discuss issues

that are coming up so that everyone in our division knows what is sort of hot at that moment, what issues they need to be on the lookout for. Also, I know our Deputy's in contact with the District Attorney General's Conference so that if we do have some big issue, we will let them know. In addition, our Deputy speaks each year at the annual Conference, so that's the way we sort of disseminate that information to the District Attorneys.

Moderator. Pursuing a Rule 11 application, any advice in terms of, and you essentially addressed this aspect of you're trying to show that it's a case that the court should take rather than that the Court of Criminal Appeals was wrong, what are the types of things you should emphasize as, "this is the type of case that you want to take, Tennessee Supreme Court," in a Rule 11 application?

Jeff DeVasher. There are four criteria in Rule 11 that aren't exclusive but that are sort of guidelines on which you can frame your arguments. One is the Need to Secure Uniformity of Decision. That's the classic example of panels of the Court of Criminal Appeals differing. Another is to Secure Settlement of an Important Question of Law. You can do that particularly with issues of first impression; they'll fit in that category. There's a category called Need to Secure Settlement of Questions of Public Interest, which is broad enough to include just about anything. And there's an even broader category called a Need for the Supreme Court to Exercise Its Supervisory Authority. So, when you don't have anything else to argue you can argue that the Court really needs to exercise its supervisory authority and consider this issue.

Leslie Price. I was just going to say the same thing, and that's another example where reading the rules, it would sort of tailor your Rule 11 application to fit it into one of those categories. And the Supreme Court is rarely, if ever, going to take a case just because the Court of Criminal Appeals got it wrong. You need something more than that; at least you need to spin it as something more than error-correction.

Moderator. In terms of oral argument before the Tennessee Court of Criminal Appeals, before the Tennessee Supreme Court, and you've both appeared with great regularity before these courts, how important is it to develop an understanding of the judges who are on the bench in front of you, and for those judges to have a positive sense of you as an advocate appearing before the court to be effective as an advocate appearing before Tennessee's appellate courts?

Leslie Price. Honestly, I rarely focus on sort of the personalities or the judges themselves. Occasionally, particularly when I'm in the Court of

Criminal Appeals, you might know certain judges will be more inquisitive about certain issues, but I don't know that I necessarily tailor arguments to the judges. Also, the other thing is, especially on the Supreme Court, you know some of the judges might have come from a civil background so there might be a little more explanation or you might be arguing a little more to those judges. But even more, it's just trying to focus on the issues themselves.

Moderator. What about in terms of your reputation, in terms of how important is that to your effectiveness in presenting to the Court of Appeals?

Leslie Price. My credibility is very important to me, and that is why I want to accurately represent what occurred in the record, accurately represent the law, what we were talking about earlier, recognize bad case law that goes against you, but still argue why you should win. Because we are frequently in these courts, we don't want to get a bad reputation or give some reason for them to question our credibility.

Jeff DeVasher. I totally agree. When we have arguments in the Court of Criminal Appeals, we get notice a few weeks before the argument; we will know what judges are sitting on our panel. There are three judges. So, we will know the judges that are sitting on our panel. I kind of agree with Leslie, it's rare that I'll tailor an argument based on who is on the panel. Some judges will ask more questions than others. Some will virtually never ask a question unless it's just a point of information and they will ask you a factual Audience. You usually have an idea, if you have had much experience in front of them, who is going to ask the most questions before your argument ever starts. And you need to be prepared for that, but I don't know that it necessarily changes the focus of your argument. Unless of course one of the judges on your panel has written a dissenting opinion that totally endorses the argument that you are putting forth that day; you will definitely want to point that out.

Moderator. In terms of oral advocacy, what do you formulate going in? What is it you are going to have in front of you? What is it you're going to have at the podium? And how much of it is just responses to questions that are being asked?

Leslie Price. I have an insanely large outline. Be true to yourself about what works for you. While I have a huge outline with me, I usually have a couple of pages with the key information. But for me, a lot of it is just writing out that outline. I may never look at it, in fact, most of the times I don't look at it during argument. But it's just that preparation; I think preparation for these arguments is key. Just read and read, write it out. But

really you want to focus on certain bullet points, the most important issues that you have during argument. But the outline helps me get prepared.

Jeff DeVasher. I totally agree. I kind of do it the same way Leslie does. I write way too much, but the process of writing helps you focus, helps you remember what you need to be saying. I don't take a big speech in front of me when I do an oral argument, but I try to have something written down that covers pretty much every point that I want to make. And the other reason I do that, I never want to find myself just getting completely stuck and totally blacking out, forgetting what it was that I was about to say and what it was I need to say. So, you need that sort of safety net to keep that sort of worst-case scenario from happening. A couple of times I've almost totally blanked-out, but thankfully both times I've been able to look down and remember again what it was that I was thinking about so I don't totally lose my train of thought.

Leslie Price. I still put my name at the top of my outline and whether I should ask for rebuttal time, and what the standard of review is. You're never going to talk about that, but it is just there if there is some sort of question and you have a blank, you can look down and see it.

Moderator. One of the great temptations for inexperienced attorneys appearing before the Tennessee Court of Criminal Appeals may be to push on sufficiency of the evidence as they're thinking about their client; "My client didn't do it," "the State didn't adequately prove [something]." Why is that a bad idea in terms of pushing on sufficiency of the evidence?

Jeff DeVasher. Well, it's a bad idea for the reasons that I mentioned in the presentation because the appellate court is not the judge of credibility; the jury has already decided those issues. Now when I will talk about sufficiency of the evidence is when I've got another good issue, so that I can give the court some context into knowing this was a really hotly contested case. This was not a case where the evidence was overwhelming. So that this other issue I'm telling you about may very well have affected the outcome of the case. In those kinds of cases, where the proof was highly contested, where the facts are close, you are not going to win the legal argument on sufficiency of the evidence. But by arguing that the evidence was hotly contested and explaining all the manners in which it was hotly contested, you might give the court some extra context in making your argument about why the other issue constitutes a reversible error.

Leslie Price. I would just say on that, a lot of times you do not want to just recite the facts to the court; they should be aware of them. But by that same token, the State, if we have a couple of tricky issues and there are really bad facts-it is a really heinous murder-we are going to throw those facts in at the

beginning, at least just a little bit so they know how terrible it would be to reverse.

Moderator. Do you ever get the case in the AG's office where you're looking at it, this is an error and it's going to be reversed, and when you do get that case how you handle it in the AG's office?

Leslie Price. We do, on occasion, where we do believe it is clear error and just don't have an argument; we will concede that issue in the court. Now that does not mean that the court will accept our concession. There have actually been times in both the Court of Criminal Appeals and the Tennessee Supreme Court that the court has disagreed with our concession. But we do have an internal discussion; we send a memo around and get other thoughts, see if we do have a possible argument. But we would file a concession with the court.

Jeff DeVasher. That's actually one of the defense lawyer's worst nightmares on appeal. I had a case one time where the State had conceded reversible error. And in oral argument I said something like "I won't stand up here too long because the State has conceded reversible error in that case," and the Judge Tipton said, "well Mr. DeVasher, you know we're not bound to that concession." And I gulped a little bit. "Yes, your Honor, yes I do."

Moderator. How did it turn out?

Jeff DeVasher. Well, it's a long story, but the Court of Criminal Appeals actually did not accept the State's concession, held that it was harmless error. I appealed to the Tennessee Supreme Court and it found reversible error. So justice prevails, it just took a while.

Moderator. I have a number of additional questions, but I would like to open it up it up a little bit. What questions do you guys have (the audience)? You have two of the best appellate attorneys in the State of Tennessee here. What do you want to ask them?

Audience. Talking about how the State goes after waiver issues, and how important preserving issues for appeal is, and how important it is at the trial court level to correctly preserve issues, are there any practices by trial attorneys that can kind of hamstring you or that you wish they didn't do in these sorts of practices that you wish were better on the trial level that allowed you the preserve issues for appeal?

Jeff DeVasher. Yeah, and this is going to make it sound like I am second-guessing trial attorneys, and I do not want it to come off that way. Talking

about issues that involve proper closing argument by the prosecutor, some trial lawyers take the position that they do not want to object in the middle of a prosecutor's closing argument. That is sort of a strategic decision. They think that the jury will be put off by them interrupting, and sometimes they will wait until after the arguments and then raise the objections. Sometimes that is too late. It is usually not too late if you give the trial court an opportunity to instruct the jury to disregard that part of the argument, but then you are probably not going to get a mistrial, you are not going to win the issue on appeal. My preference is that even if it might run the risk of annoying the jurors, it is better to stand up, make your objection, and move from this trial in the middle of the prosecutor's closing argument than it is to wait until the argument is over and take your chances.

Leslie Price. And the point of raising a lot of these objections contemporaneously or during the trial is so that the trial court has an opportunity to do something about them.

Audience. One of the things I have seen with local judges is if you make an objection, a judge might just say overruled or sustained without actually hearing what your objection would be. Have you ever experienced that from the record where there's an objection, but you don't really know the grounds? As a trial court attorney, do you run the risk of trying to get the cause and reasoning in front of the jury for the record or do you just take the win and sit down?

Jeff DeVasher. Well, there are a couple of ways that the trial lawyer can respond to that. One is at the next recess, stating for the record the specific grounds for the objection and offering the court an opportunity to state the specific grounds for overruling the objection. Another way to address that is to raise the issue in the motion for new trial, and in the motion for new trial explain why you objected and give the trial court the opportunity to explain why it was overruled. Sometimes, with judges that I know in Davidson County, they are just not very long winded on how they rule on objections, and you are stuck with, "overruled," or, "denied," and move on. Sometimes, they won't even rule; they'll say, "move on," which is really precarious from most lawyers' perspectives and from most judges' perspectives. But ideally you want to state the basis for the objection and want the judge to state their basis for overruling the objection

Leslie Price. Because at least when you state your basis for the objection and the trial court just says, "overruled," at least you've got something on the record and you can assume that the trial court was ruling on that objection. Another place our office will raise an issue is where it is not clear

what the objection is, or the issue on appeal is different than the issue actually raised.

Jeff DeVasher. Yeah, you can't do that. It might be the same general issue, but if you argue something on appeal that is different from the basis for why you should get relief, the State's going to say, "Well the appellant can't assert one theory on trial and another on appeal," and they're exactly right. The law says you cannot do that.

Audience. On relief, are you bound by one form of relief, or could you have two forms of relief? Say, dismissal is optimal, but if not dismissal, can he keep his license at least?

Jeff DeVasher. You have as many avenues as you can think of. Sometimes on the conclusion page of a brief, I will have three or four different alternatives of the case. Ideally, "dismiss the case. If you won't do that, give us a new trial. If you won't do that, reduce the sentence. If you won't do that, lesser conviction." You're not foreclosed from arguing alternative grounds for relief.

Audience. Continuing appellate practice recommendations, when you go into oral arguments, do you have a list in your mind about what you are willing to concede? And how do you deal with an appellate judge bringing up a point that you hadn't really expected would be asked of you?

Leslie Price. There are certain times where you have to concede a small point to win a larger issue and you have to be prepared to do that. That usually doesn't come up for the first time during argument because you already thought that, down the road, that might pose a problem. I recommend just trying really hard not to concede something on the fly. That's hard to answer but it involves just being prepared and recognizing all of the potential problems with your arguments - particularly where you can concede and still win.

Audience. In terms of appeals with regard to sentencing, we're in the post-*Blakely*,[11] post-*Booker*[12] universe in terms of sentencing. How easy is it in the State of Tennessee to appeal a sentencing decision? How easy is it in Tennessee to win an appeal these days with regard to sentencing?

Jeff DeVasher. It is almost impossible. The case came out in 2012 after *Blakely*,[13] called *State v. Bise*,[14] and it set forth a new standard of review for

11. *Blakely v. Washington*, 542 U.S. 296, 305, 124 S.Ct. 2531, 2538 (2004)
12. *United States v. Booker*, 543 U.S. 220, 237, 125 S. Ct. 738, 752, 160 L. Ed. 2d 621 (2005)
13. *Blakely*, 542 U.S. at 305.

sentencing issues on appeal. The standard is "abuse of discretion with a presumption of reasonableness." What that means in practice terms is that, unless the trial court does something illegal in sentencing, the appellant is not going to get any relief. It's really almost that simple. Back in the old days appellate courts loved to tinker with sentences. They would reduce a six-year sentence to four-years; they would reduce a split confinement sentence to full probation. They would modify consecutive sentences to concurrent sentences. That virtually never happens anymore. The trial court almost has to completely blow it at the trial court level and just say something on the record that is just illegal. I can barely think of an example; sentencing someone to a Range 2 sentence when they don't have the required number of convictions to legally make them Range 2. The short answer is that it is almost impossible.

Leslie Price. We have certain ranges of sentences depending on the number of prior convictions so the defendant could have an eight to ten year sentence or twelve to fourteen years, so as long as you're within that range, like Jeff said, and you don't consider anything improper or completely illegal, it is going to be the abuse of discretion standard.

Audience. Looking back to the first brief you ever wrote and the first oral arguments that you participated in, what do you wish you would have known?

Leslie Price. I can speak to the argument because I do remember that. It was a DUI case, and of course, a fairly simple DUI case, and our office does moot courts for attorneys. We have a three-judge panel for moot courts and we practice; they'll ask a bunch of questions. That's pretty typical; you moot court everything when you get started and then use them as needed later on. I had this simple DUI case, and they asked me a billion questions about it. So, I got to court and they didn't ask me a single thing, and I finished my argument in about two minutes. And then repeated it, and repeated it a third time. Because I thought, "Surely I had missed something!" So, I learned, then, that when you're finished, you're finished-you made your point, just stop. Don't keep going. I spoke to my team leader after and asked him how I did, he responded, "Good! The first time."

Jeff DeVasher. Quite honestly, it has been so long, I don't think I can even remember. Surely, I wish I had known how to write better. I think I used to write with more "legalese" than I do now. In terms of oral argument, I probably wouldn't be as nervous as I was then, knowing what I know now.

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14. *State v. Bise*, 380 S.W.3d 682 (Tenn. 2012)

Audience. Could you speak on the relationship you have with the defendant when you're the appellate counsel?

Jeff DeVasher. Almost all of my clients are in custody. They are in custody in various locations across the state, some of which I can get to fairly easily and some of which I can't get to very easily. Fortunately, there's a video conferencing system. I keep in regular contact by mail. I introduce myself and invite them to write back about any questions, concerns or comments that they have about the case. I send them the transcript and keep them updated on any extensions or any delays in the proceedings. I usually have a video conference once or twice during the proceeding, sometimes more. You know, every client is different. Some clients are fully content just letting you do your job, and others want to take a little bit more of an active approach. I try to treat them all as individuals and let them have as much or as little input as they want in the process.

I try to make clear to them on the front end what I try to make clear today, which is that, "We're fighting an uphill battle here, don't get your hopes up too high; however, I'll do the best I can for you." I've found that, except in rare cases when the state is appealing, things aren't going to get any worse for my clients. Things might possibly get a little bit better for them, but it's not going to get any worse for them. They appreciate my candor about that. But the main thing involves just staying in contact. If you ever get any contact from them, it is really important to respond as quickly as possible. The worst thing you can do from my perspective is ignore a client's letter or phone call or communication. If you keep the lines of communication going, my experience is that a client appreciates it.

Audience. Do you have victims that reach out to the Attorney General's office to check on the general status of their case, and how does that interaction work?

Leslie Price. In our division, we have two victim-witness coordinators and they really work as liaisons with the victims' families and the attorneys in our divisions. So, we may see the victims' families at argument and we'll discuss the case with them, but for the most part, it is the liaisons that sort of keep those families apprised of what's going on at the appellate level. We do try to let them know when appeals are filed and what the appellate court has ruled, where the proceedings are, so as much as our office can, we try to keep them informed.

Audience. Is it any more difficult during oral argument if you have the offender's family or the victim's family in the courtroom?

Leslie Price. Really, at least for me, once I start arguing I'm really focused on the argument and the judges. The only time I think about it a little bit is where there are some really bad facts, and we're talking about the "sufficiency of the evidence." It is in the back of my mind that the family is there, so I might be a little bit more careful about how I phrase things.

Jeff DeVasher. The sad truth about most of my clients is that they have little or no family support. Most of the time when I argue cases, families of my clients are not in the courtroom. I always invite them over the phone and tell them when the argument is. I try to explain to them what's going to happen by telling them: "there aren't going to be any witnesses testifying; there will be three judges sitting on the bench, and they are just going to listen to the lawyers' arguments and then ask questions; the lawyers will speak for twenty minutes each, and then we'll sit down. They're not going to decide the case that day, or the next day. It's going to take a while because there's no time limit under which they have to rule." And I always let those families know that their presence is very much an exception to my experience because most of my clients aren't as fortunate as this particular client. Most of my clients don't have other people that are going to come to court for them.

Leslie Price. It is very rare for the appellate courtroom to be very full. It's usually just, for the most part, the appellate attorneys on whatever three, four, five cases that are to be heard.

Audience. Is there any prior experience that you would recommend for somebody that is interested in appellate work? You said earlier that it is super different from the trial court, so is there any prior experience that would be helpful for somebody that is looking into being an appellate attorney?

Jeff DeVasher. I think writing is incredibly important. Writing, like a lot of things, is really something that the more you do it, the better you get at it. The more things you can write, even if you're not writing specifically for appellate work, the more legal writing you can do (for example, writing pretrial motions), it's very helpful. That's what most appellate lawyers' jobs are. Also reading and writing what you read in a way that is concise and clear and makes sense is very useful. The more writing you can do, the better.

Leslie Price. I one-hundred percent agree with that. Any sort of writing you can do helps, particularly if you can intern or clerk somewhere where you can be writing some of those motions. And also, if you can get the opportunity, the Court of Criminal Appeals meets once a month in each division; go watch the arguments and you can try and get a copy of the

briefs so that you can see how they are written and what the court focuses on. I think it's just great to see it in person.

Audience. Mr. DeVasher, you mentioned that one of the differences between appellate and trial practice is the amount of time that you have as an appellate attorney. Could you both speak to your respective caseloads and how you compartmentalize the cases as they come to you if you're balancing a lot at once?

Jeff DeVasher. We try to structure the timing of our notices of appeal so that we're not working on a whole lot of cases at the same time. The nightmare is having three briefs due on the same day in three really big cases. We try to avoid that happening; it makes our administrative system a lot happier and it also makes our caseload really manageable to deal with. Right now, I don't have that many cases because the cases I have are just beasts. There are voluminous records; incredibly time consuming. Right now, I'm handling those kinds of cases and my assistants are handling the cases that are more numerous but less labor-intensive individually. So, it's something that kind of evolves over time. Speaking to trial attorneys, too, with experience. You get a sense of how much work each case is going to entail. Sometimes you can tell just from the transcripts but not always. Sometimes a one-day trial will turn into a case with seven or eight issues, and sometimes a one-week trial may only have one or two issues. But usually, the length of the transcript is a fairly good indicator of how much time it's going to involve and the complexity of the motion for new trial is another tip off. So, we try to stagger the notices of appeal and we try not to get into a position where we have too many things to do all at once, which is not always possible.

Leslie Price. Unfortunately, because we are usually the appellee on most of these cases, we can't plan when they will come in. We have just over twenty attorneys in the Criminal Appeals Division and we represent the state, the entire state, on these appeals. But, the way our division is structured, like the appellate courts themselves, it is divided into three grand divisions: east, west, and middle. I am the team leader for the middle division. So, what will happen is our deputy will essentially split the cases equally among the three teams, putting the arguments for each division on that particular team. Probably most of our cases are just on briefs, they are not orally argued, and those will sort of fill in. So, I might get some east cases or some west cases so then I will take those cases and divide them as equally as I can among the members on my team. So, we do the best we can to even out the workload but sometimes it is a lot and sometimes it is not quite as much.

Audience. You mentioned starting with a relatively straightforward DUI case, as team leader now, what types of cases are you trying to give a new attorney in your office that is just getting started?

Leslie Price. We really want to try to give them the basic cases that won't take them very long, that have usually sufficiency of the evidence, which is almost always raised, sentencing, and sort of those basic issues. We are not going to give them cases that have a two-week long trial. We start with sort of those basic things and build up from there and see how they do on those issues and then gradually add more issues and then at some point, add more oral argument cases.

Audience. Given the volume that comes through your office, how important, or is it important, to have a brief bank to draw from, where you aren't reinventing the wheel on at least things like standard of review or portions of the brief that are going to be the same in other cases on that particular issue, how important is it to have a sort usable brief bank to work from?

Leslie Price. In our office, to be honest, we do not have where you could just go to "sufficiency of the evidence" and you could take that specific language and insert in your brief. Our bank is searchable, so if you had a certain issue you could search and see what others have done. But, what attorneys in our division will typically do, is build their own sort of brief bank with those issues that do come up over and over again so it is consistent with others in the division, but your own work. So, you will have sufficiency, sentencing, and post-conviction issues and all those big issues because it is great to have that language because there are so many issues that arise in every single case.

Jeff DeVasher. We have something similar to that, we have a brief bank full of briefs going back to when the computer age started, and we have filing cabinets full of old briefs even before that. My memories not so shot yet that I can't remember various cases I have worked on in the past, and when you have been around as long as I have, most the issues, you have seen some variation of them somewhere along the line before so I can still rely on my memory for most of them to at least give you the case where I made the argument before.

Audience. Dealing specifically with oral arguments, is there any one thing you might say is the most difficult, and, if there is any sort of recurring issue, is there any advice you would give to anyone wanting to do appellate work? For example, answering questions, rebuttal, something like that?

Leslie Price. My biggest fear in an oral argument is not having an answer. You know sometimes we will have an uphill battle and we will know we have a difficult oral argument. I don't mind so much disagreeing with the Court's questions; my biggest fear is just not having an answer at all. So, for me, it is prepare, prepare, prepare, especially in the Tennessee Supreme Court. I just read as much as I can and read it over and over again. So, that is the best advice I have, just be as prepared as you possibly can.

Jeff DeVasher. I think for me, one of the most challenging things about oral argument, and that I feel like I have never quite mastered is this little trick; not necessarily answering the question that you are asked, but being able to stop your presentation, answer the question, and then segway back seamlessly into your presentation. That is tough for me because sometimes the questions are kind of coming out of left field and you can't say, "Well, I will get to that in a minute," or "that is not really what I am talking about." You have to answer those questions when they are asked but then you have to transition back to where you were because there are things that you really wanted to say that you don't want to get lost or forget to say those things, and that is a challenge for many people.

Leslie Price. That is why outlining, or bullet pointing is so key for me. It is so that when I do get those questions, because I have the same problem of getting caught up in the questions, to just be able to look down and look at those bullet points and go, "ok, let me just talk about that next."

Jeff DeVasher. You do not ever want to say, "Now, what was it I was talking about?"

Audience. In handling those questions, what is your response if you get multiple questions?

Leslie Price. You just do the best you can.

Jeff DeVasher. "One at a time, please."

Leslie Price. Answer them the best you can and in the order in which they are asked, at least that is what I try to do. A lot of times you see that, in the Supreme Court, where they are asking multiple questions, it is almost where they are fighting with each other and sort of using you, the attorney, as a pawn.

Audience. What about with rebuttal? What is your strategy for rebuttal? What are you trying to get across?

Jeff DeVasher. I think the biggest thing about rebuttal is that you do not want to use rebuttal time to repeat what you have already said. There is always the temptation to ask for the whole time and you want to get the last word in, but I ask for five minutes, usually sometimes three, but I hardly ever use all that time. You really just want to respond to one or two things that either the State's lawyer already said that was a little inaccurate or compels a legal related response. You want it to always be something that you haven't said before and something that will leave an impression with the court because, after all, this is your chance to get the last word in.

Leslie Price. And don't raise brand new issues. You certainly want to focus on what the State has argued and maybe make a finer point, but don't bring up an entirely new issue that was not discussed at all.

Jeff DeVasher. What I often do for rebuttal is that sometimes the court will ask the State's lawyer a question that they didn't ask me, and the State's lawyer will respond to that question in a way that is completely different than the way I would have responded to it. So, I will use rebuttal to respond to that question to tell the court how I would respond to the question that they didn't ask me, which they asked the State.

Audience. One thing that you will hear from time to time before the Tennessee Court of Criminal Appeals or the Tennessee Supreme Court for that matter is "I wasn't the trial attorney, so I don't know." Should that ever be stated?

Leslie Price. No.

Audience. Why not? How are judges perceiving that—when you say, "I wasn't the trial attorney, so I don't know what was stated with regard to the testimony on this point."

Leslie Price. The Court expects us, as the State, to have that information and be prepared for oral argument. And certainly, a lot of times we don't know what is outside the record, so we can frame it as, "According to the record on appeal, this is what we know," but I feel like the Court views that as an excuse for not having an answer.

Jeff DeVasher. Yeah, it is either in the record or not. If you say you don't know, it better be because it is not in the record. With me, sometimes I will know the answer to a question when the answer is not in the record and if that is the case, I will tell the Court what the answer is but I will tell them that the record is silent on that issue.

Audience. Another popular statement before the Tennessee Criminal Court of Appeals and Tennessee Supreme Court is, "I was doing research last night and I came across this great case and I want to tell the Court about it." Should we be doing that before the Tennessee Criminal Court of Appeals and Tennessee Supreme Court in terms of somebody talking the Court about the great research they were doing last night?

Leslie Price. Only if it came out last night.

Jeff DeVasher. Or if it came out after the brief.

Audience. How do you handle if something does come out after the brief?

Jeff DeVasher. There is actually a mechanism in the Rules for that. It is called the submission of supplemental authority.[15] You write a letter to the clerk and you enclose copies of the letter and the case for however many members there are on the court there are and you explain in a very brief cover letter that this case was either issued after the briefs were filed or did not come to counsel's attention until after the briefs were filed and that it is relevant to the argument made on pages 23 or 25 of appellant's brief.

Leslie Price. Even though you do not necessarily want to make those kinds of comments to the court, it is very important right before oral argument to do a quick search to make sure that nothing new has come out, no new opinions that are pertinent to your issue, so that is very important. I had a case in the Tennessee Supreme Court where a case, which had actually been argued out of Knoxville, came out late in the afternoon before I had an oral argument first thing in the morning and I just happened to see it. The Court asked me a question exactly about that case and Justice Lee said, "Very timely reading General." So, that was a great moment for me, but you definitely want to make sure that you check your cases before you go into oral argument.

Audience. Any final pieces of advice with regard to writing, with regard to oral argument presentation, with regard to professionalism, any sort of piece of advice you would like to leave the students with who may be interested in practicing in the area of criminal appeals?

Jeff DeVasher. Something I would like to stress is preparation and clarity in writing. Always strive for clarity in your writing. You are not trying to show off your literary gymnastic skills, particularly for the appellant, you want to be clear and concise and let the court to know exactly what the

15. Fed. R. App. P. 28

error is and what you want them to do about it. I think the same thing with oral argument, be clear and concise, don't waste the court's time; keep it simple.

Leslie Price. I absolutely agree with that and I try to remember, particularly whenever I am writing the briefs, that I am writing for the Court, but I am also writing for that law clerk who just got out of law school and who is ultimately going to be writing that opinion. So, I want to be very clear and very concise, so both the Court knows what is going on and anybody that reads my brief will know what is going.

Jeff DeVasher. I will say this, the best compliments I ever get about my briefs, the compliment that I like the most, is when I have a client's family tell me that they understood everything that was written in my brief.