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National Public Defense Symposium: Luncheon Address

Jerry Black

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NATIONAL PUBLIC DEFENSE SYMPOSIUM

ACHIEVING THE PROMISE OF THE SIXTH AMENDMENT: NON-CAPITAL AND CAPITAL DEFENSE SERVICES

REMARKS FROM PROFESSOR JERRY BLACK

LUNCHEON ADDRESS

THURSDAY, MAY 20, 2010

THE UNIVERSITY OF TENNESSEE COLLEGE OF LAW

PENNY WHITE: All right. I hope you're enjoying our lunch, and I will tell you that we regret that Professor David Dow from the Houston Law Center was unable to be with us today, but we're delighted to give you the opportunity to have more interaction with one of the College of Law's brightest stars. And you've heard him throughout the last two days as he's spoken up on some of the topics, and that's Professor Jerry Black.

To many of the UT alumnus, including me, Jerry Black is the College of Law. This is because he's been a part of the UT legal community since I think the early 1900's; I'm not quite sure of the date. He was my clinic supervisor in 1980, and he is Jason Bobo's clinic supervisor in 2010. So that tells you something. For me and hundreds of others who had the benefit of his tutelage, the practice of law is defined by the demanding standards set by Jerry Black.

Recently a student who was with us throughout the last two days—I don't see her right at this moment, but she—in an application for the Summers-Wyatt Scholarship, which she received, she wrote this about Jerry Black, "My law school experience has been filled with the opportunity to work with unbelievable lawyers who have devoted themselves to raising the bar of representation for the criminally accused. It is truly a gift that I have been able to get to know and learn from Jerry Black, TACDL's current president, and someone I have personally heard speak from the heart about his commitment to indigent defense. He is a force to be reckoned with in the UT Legal Clinic for decades and daily as he fights the fight when it comes to upholding *Gideon's*[30] promise. It is almost unreal to me that Professor Black taught my father-in-law at the UT clinic, and it makes me smile to see how things come full circle." And those are the words of Sarah McGee.

In 2002, Jerry Black received the Richard Jacobson

[30] Gideon v. Wainwright, 372 U.S. 335 (1963).

Award for excellence in teaching trial advocacy. That's the highest award in the country given for that endeavor. In 2003, he got the TACDL, Tennessee Association of Criminal Defense Lawyers Award for lifetime contribution. And just two weeks ago, he received the Law & Liberty Award, honoring his contributions to the profession of the Knoxville Bar Association.

I also think it's just worth mentioning that twenty years before the Carnegie Foundation and their Educating Lawyers Report said that we needed to re-think the law school curriculum, Jerry Black and our then dean, Richard Wirtz, had presented a comprehensive curriculum for training future advocates that emphasized teaching practical skills to law students and emphasizing the duties of ethics and professionalism. And Jerry's vision is what gave birth to the Center for Advocacy and Dispute Resolution that I now direct and the curriculum that we have in the Advocacy and Dispute Resolution in the college.

And while he is obviously a great teacher, a phenomenal visionary and all-around wonderful person, which he proved last week when he bought an entire flat—if you're from the country you know what a flat is—a flat of strawberries—and shared them with everyone in law school. He is first and foremost a great lawyer.

I asked Doug Blaze for a funny story about Jerry as a trial lawyer, and I tried cases with Jerry so I had tried to think of some funny stories about Jerry as a trial lawyer. Neither of us could remember any at all. When Doug and I talked about it, we realized that there are no funny stories about Jerry as a trial lawyer because Jerry takes the practice of law seriously. He is committed to his clients. He is committed to justice. But Dean Blaze did tell me that he had nicknamed him long ago, "Most Likely to be Held in Contempt." And we all know that that is indeed a badge of honor.

This year when TACDL came knocking Jerry

Black, a lifelong member, stepped up to the plate and said, "Yes, I will serve as president." And yesterday, when Professor Dow cancelled, and I came knocking and actually beckoned Jerry to come to my office so I could ask him a favor, he agreed to step up to the plate again today. So thank you, Jerry, very, very much. It is all yours.

JERRY BLACK: I thank you for those kind remarks. As a prior speaker that Penny introduced said, "If my father had heard it he would be proud. My mother would have believed it." So I would say to you, it's an honor to be here.

I come to you today as the President of the Tennessee Association of Criminal Defense Lawyers. When I assumed that office in August of 2009, there were three things that I wanted to see the association address. One was the low rate of compensation that court-appointed counsel got in the state, which I think directly affects the quality of representation that we provide to the poor who can't or don't otherwise qualify for the public defender.

Secondly, I wanted to address the way counsel is assigned. This is done by our judiciary, and I don't think that they always have quality representation foremost in their mind. They all too often, I think, appoint their buddies or those who happen to be in court at the time.

And thirdly, I think that it is important that the Association address the case overloads for the public defenders. I don't really believe that the public defender's office, for the most part, can do that for themselves. That's an unfair burden in Tennessee because we have an elected public defender's office and what are you going to say? I can take fewer cases, I can provide higher quality of representation and, by the way, it will cost you more money so vote for me. I don't think that works very well.

I was talking to Libby Sykes earlier, who's the director of the Administrative Office of the Courts, and we

learned within the last month that I believe there are over 3,000 lawyers who are paid by the Administrative Office of the Courts for taking court-appointed work. The Tennessee Association of Criminal Defense Lawyers does not represent the majority of them.

We represent private lawyers that take criminal indigent defense cases, and we represent public defenders. We have 800 members. The AOC says that it pays about 2,400 different lawyers for court appointed work. This leaves about 1,600 lawyers that are taking court appointments that are not TACDL members. In all likelihood they do not belong to the TBA. They may belong to the county bar association. They are getting many court appointments, and I worry about the quality of representation they provide. What quality checks are in place to see that the defendant gets the promised effective assistance of counsel?

As a part of what we did in this state—at a retreat that the Tennessee Association of Criminal Defense Lawyers had in January—we set a modeling of what they started in Nashville, what they have now in Chattanooga, and what we now have in Knoxville. We ought to have roundtables once a month, and we ought to talk about basic criminal procedure issues. And we invite these lawyers to come for free; you don't have to pay a nickel. It's after work. Ours meets at a bar, upstairs. And if you want to have a drink while you learn some basic criminal procedure, come on. And all the young lawyers out there taking court-appointed cases—with the exception of the public defender's office—almost none of them come. None of them come to this.

I began my career somewhere in the 1900's. But I began as a legal services lawyer actually in 1968. I wanted to be a public interest lawyer, and I believed that *Gideon*[31] meant what it said—and as that citizen or person accused

[31] *Id.*

was going to get the effective representation of counsel and that the welfare mother was not. The person being hounded by the loan company was not. And so I wanted to be one of those lawyers that would provide representation to those people.

I came to UT in 1975—contrary to what Penny said—and it was here that I worked with or saw the people in our Criminal Defense Clinic receiving at the time Law Enforcement Assistance Administration money. And we had some really good fat lawyers. And we were sort of the public defender's office for Knox County at that time. But what I saw when I went down to the courthouse with them, was judges who resented appointing lawyers for indigents.

And in fact, if you think about the way we characterize indigency, it seems to me that it's wrong from the word go. When we talk about somebody—and we look at something like poverty guidelines—they may be able to hire the lawyer Mary Ann Green talked about who is going to take the shoplifting case, or the person slightly over the guidelines could hire them. But in a first-degree murder case— where a lawyer in private practice wants a hundred thousand dollars—there are a great number of people who couldn't afford that lawyer. And they may not qualify for the public defender's office. I don't know what they'd do.

I'm reminded of when I started doing this legal services work, there was an article by a woman named Carol Silver talking about our welfare system. And she said, you know, the problem with our welfare system is we have a hundred people who, let's say, need a pair of shoes. And we have ten pairs of shoes. Now, how are we going to divide up those shoes? We can give ten people a pair of shoes and leave ninety out in the cold. We can give twenty people one shoe and leave eighty out in the cold or they could hop or we can divide up the shoes and give a hundred people a piece of a shoe. And that's the way we do our welfare system—or did.

I'm afraid that all too often that's the way we do our criminal defense system. We give a hundred—we overload the public defender's office, we underpay private counsel, and so what we give them instead of the effective assistance of counsel, is a piece of a lawyer. I was serious yesterday when I said I don't believe we take the Sixth Amendment[32] very seriously. I don't doubt that if we do a survey, people are going to say I believe in fairness.

Well, I sort of have two responses. What are they going to say unless they are a prosecutor or a judge? I think you would expect them to believe in fairness. Well, you just have to look at the *Brady*[33] violations. I mean, why is there a prejudice prong for *Brady*?[34] When the prosecution cheats, when they hide evidence, why do I have to show prejudice? When we're talking about ineffective assistance of counsel, why do I have to show prejudice? I didn't get what you promised me, what the Constitution promised me. Why do I have to show prejudice? If we're really talking about fairness, this system has a problem that is not new. This is the forty-seventh year after *Gideon*.[35] And we're here again trying to figure out what to do to provide and make meaningful the promise of *Gideon*.[36] I'm glad we're talking about litigation. It seems like to me that's where we ought to be focusing our efforts, or something radical. Because in trying to get people to do the right thing, it doesn't seem to me works very well.

The 2009 report[37], the crisis in indigent defense—I

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[32] U.S. CONST. amend. VI.
[33] Brady v. Maryland, 373 U.S. 83 (1963).
[34] *Id.*
[35] Gideon v. Wainwright, 372 U.S. 335 (1963).
[36] *Id.*
[37] NAT'L RIGHT TO COUNSEL COMM., THE CONSTITUTION PROJECT, JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), *available at* http://2009transition.org/justicedenied/.

mean—it's not new. And even before then, Francis Allen, author of the report called, *The Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice*,[38] in 1963, before *Gideon*[39] was decided. And what he said was, "It should be understood that governmental obligation to deal effectively with problems of poverty in the administration of criminal justice does not rest or depend upon some hypothetical obligation of government to indulge in acts of public charity." But I think a lot of legislators believe that way. The obligation of government in criminal cases rests on wholly different considerations and reflects principles of much more limited application. The essential point is that the problems of poverty with which this report is concerned, arise in the process initiated by the government for the achievement of a basic government purpose.

It is moreover a process that has one of its consequences as the imposition of severe disabilities on the persons proceeded against. Duties arise from action. The course of conduct, however legitimate, entails the possibility of serious injury to persons. A duty on the actor to avoid the reasonably avoidable injuries is ordinarily recognized. When government chooses to exert its powers in the criminal area, its obligation is surely to be no less than that of taking reasonable measures to eliminate those factors that are irrelevant to the administration of justice.

The essence of the adversary system is challenged. The survival of our system of criminal justice and the values which it advances depend upon our constant searching and creative questioning of official decisions and assertions of authority at all stages of the process. The prior performance of the defense function is thus as vital to

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[38] Poverty and the Administration of Federal Criminal Justice, Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice (1963).
[39] *Id.*

the health of the system as the performance of the prosecuting of adjudicatory functions. It follows that insofar as the financial status of the accused impedes vigorous and proper challenges. It constitutes a threat to the vitality of the adversary system. And that seems like to me what we're about. There is a threat to the vitality of the adversary system.

Over twenty-five years ago we had a trial college here at the law school, and one of the lawyers was a very fine civil trial lawyer. He was talking with the participants about the difficulty of convincing the jury to award damages for pain and suffering. And what he said—and I remember after all these years—is that the easiest thing for somebody else to endure is somebody else's pain. And I think in the criminal context, the easiest thing for us to surrender is somebody else's Constitutional rights. You see it. You hear it. If they came to me, and I had nothing to hide I would do it. And why is that? And I was thinking about this. Why are we willing to—I mean the Sixth Amendment[40] is pretty clear. *Gideon*[41] is pretty clear. Why are we doing that?

I think that the basic premises underlying the Fifth[42] and Sixth Amendment[43] are contrary to human nature. When we talk about a presumption of innocence, I ask my students to think about their experience. My own personal experience—when I drive by and I see the police pull over somebody else—my first response is I wonder what he did. And if that's my first response, that undercuts the presumption of innocence.

And so I tell them there's nothing wrong with that. That is a human experience. My first experience, actually is, I should stop the car and tell the person, "Don't say

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[40] U.S. CONST. amend. VI.
[41] *Gideon*, 372 U.S. at 335.
[42] U.S. CONST. amend. V.
[43] U.S. CONST. amend. VI.

anything, and don't let them search your car." But the reason I say that is because I think they probably did something, and they've probably got something in the car. And I'd really like not to have to say, "Why did you consent to the search?" "Well, I didn't want the officer to get mad at me."

So there's nothing wrong with that, but when we come to talk to a jury, and they give us this little nod, "Yeah, I believe in the presumption of innocence." That's not what they really believe. When they come in the courtroom, and they look at your client, they look at your client like, "I wonder what you did." Similarly, the Fifth Amendment right to silence[44]—you know—is that right? Don't we think that the innocent person would step up and say something if they were truly innocent?

And what's the evidentiary rule in civil cases? It constitutes a tacit admission, right? So that's based on human nature. So I wonder if the legislators and the judges and the prosecutors don't operate on that assumption. Why should we really care about this because the person is probably guilty anyway? And if they are probably guilty, why do we want to put resources into that? Wouldn't a piece of the shoe do just as well?

When Mark Stephens talked to you this morning about the case overload in his office—and when he talked to you about what happened when the state sought to intervene—they did not come into court and try to argue that he could handle that number of cases. They did not try to come into court and argue that he didn't have an ethical obligation to provide effective representation to his clients. What they said is, "It costs too much money." Justice costs too much money, and that's what we're about. Instead of providing a hundred pairs of shoes, we've only got ten. And so you're going to have to make due with what you

[44] U.S. CONST. amend. V.

have. And the judges that decided that case—particularly in the South and in Tennessee—are probably the same judges who put their left hand on the Bible, raised their right hand, and swore to uphold the Constitutions of the State of Tennessee and of the United States of America—the Sixth Amendment.[45] Those are the same judges. Those of whom we're talking about. The attorney general that argued that case did the same. So, I don't really think that we're terribly interested in—well, I suppose—we say we're interested in fairness, but the real issue is what are you willing to do about it.

I want to spend a few minutes talking with you about the Tennessee scheme for appointing counsel. When the public defender's office under—as Norm talked about yesterday—under Rule 13,[46] you have a person that is deemed to be indigent. Rule 13 mandates that the public defender be appointed, unless there's a conflict, or unless the public defender—in a case-by-case basis presumably—can make a clear and convincing showing that he can't provide the constitutionally entitled representation. Otherwise, they've got to take the case.

If they can't take the case, then we send it up to a court-appointed counsel. And as Mark alluded to, this wasn't new. This was created in roughly 1987-1988—our public defender system. Before that, we paid court-appointed counsel $20 for out-of-court work and $30 dollars for in-court work.

Now, the fact that you would pay more for out-of-court work tells you something about our view of out-of-court. It tells you something about our view of what the quality of representation is. I've never talked to a lawyer who didn't say "the work I do out of the office is more important than the work I do in the courtroom, because I have to be ready." But at any rate, the Tennessee Bar

[45] U.S. CONST. amend. VI.
[46] TENN. S. CT. R. 13 (2010).

Association said that this system was deplorable. "Woefully inadequate" were their words.

And as a result, we created the public defender's system. Then the Bar Association, in coalition with other bar groups like the Tennessee Association of Criminal Defense Lawyers and other legal entities like the Capital Case Resource Center, filed a petition with the Tennessee Supreme Court in 1994 seeking to do something about the appointment representation in indigent cases. And the courts did that. The court created a commission to look at this.

This was their charge: They were charged in 1994 with developing and recommending a comprehensive plan for the delivery of legal services of indigent defendants in the state court system. They were charged with collecting information regarding cases in which an indigent defendant was represented by a public defender or a private attorney. They were charged with determining a reasonable caseload for each public defender. They were charged with creating a statement of standards for criminal defense attorneys appointed to represent indigent defendants, including standards for complex and capital cases. They were charged with developing a schedule of reasonable compensation. And they were charged with developing a system to audit claims for compensation.

So what happened? That was sixteen years ago. Why are we here today? Why are you in Tennessee today? Why is Mark Stephens filing this lawsuit that's now bogged down for two or three years in the courts? Well, part of the reason is that the public defenders are part of the problem, as opposed to part of the solution. The public defenders resisted having caseload standards, right? The public defenders resisted having anybody providing any oversight for their cases.

I think as an elected public defender they view their constituency as the elector as opposed to their client.

That's wrong. What did come out of this is that we have raised our princely sum of $20 and $30 to $40 and $50. I suppose that's a 100 percent increase—at least in the out-of-court work.

There was testimony, though, and proof presented that the overhead for the average criminal defense lawyer in 1994 was $46.72, as I recall. So for out-of-court work, you're only losing six dollars and seventy-two cents. Now, I could be cynical—and I quite frankly am—and could suggest to you that there's a method to this madness. You don't have many lawyers, many experienced criminal defense lawyers, clamoring to get on the court-appointed list when you're losing $6.72 for every hour you work.

So the private bar is not there saying, "Wait a minute, you need to be controlling the caseload of the public defenders, so that they only provide—so that they provide effective representation of counsel. You in effect are taking money that we could otherwise have and should have because the Constitution demands that we provide effective assistance of counsel."

And the lawyers that we have, at least in Knoxville, who often take court-appointed work are young inexperienced lawyers for whom $40 an hour is probably the best they can do. There are lawyers who are on the court-appointed list who would rather turn—as the ad says— "a wreck into a check,"[47] than they would to do criminal defense work, but $40 is better than no check for the wreck.

We have filed a petition—the Tennessee Association of Criminal Defense Lawyers—to increase the fees with the Tennessee Supreme Court. I have reservations about that. I'm afraid that we might get something. I think that we have to file the petition because, as it was alluded to this morning, you have to use non-

[47] Ogle, Elrod, & Baril, PLLC, http://www.knoxvilleinjuryquestion.com/.

litigation before you can use litigation.

Now, suppose they get a $20 increase to $60 an hour, which probably doesn't meet overhead now either. Well, that's a 50 percent increase. That looks good doesn't it? Who wouldn't like a 50 percent increase? Well, if $40 is inadequate and $60 is still inadequate, you still don't have lawyers with quality experience providing mentoring and models to the young lawyers coming up. I don't have anything against young lawyers accepting court-appointed work. Everybody's got to get a start somewhere. But we ought to have standards at to what kinds of cases they can handle. And we ought to have standards that require the more complex and difficult cases to be with the appointment and representation by competent, experienced lawyers. Those lawyers in turn provide modeling for the young lawyers. And you could say, "What about the public defender's office?" I heard about the wonderful lawyers that are out there in the public defender's office, who—in Mark's office—who wonder why can't they provide the model. I think the answer is because they're not the gold standard.

Mark requires his lawyers to investigate a case before they accept a plea. And one of the judges told him, "You require your lawyers to do things that the private lawyers don't do, and their cases are handled just fine. So the people that are getting the court-appointed cases are the people that aren't doing the investigation. The court's accepting that, and saying "That's okay, we don't need it." And you're requiring something that some of judges believe the Constitution doesn't require. I don't know where they get that. Well, since they are all former prosecutors—that may be where—but one of them was in your public defender's office before she became a prosecutor, and before she got on the bench. So I don't know. I think they believe, "Well, this person's probably guilty, and so it's okay."

The other thing that we do is that they try to divert as many cases as they can from the system. And we have what we call, I guess, an arraignment court. There are no public defenders in an arraignment court. The people are brought in, they're booked, and then sent to arraignment court. And the first question they're asked is would you like a lawyer, or would you like to see if you can resolve this case today. And most of them would like not to come back, nor would I want to come back. And they say, "I think I'd like to resolve it today." And based on a conversation with the prosecutor—and some brief colloquy with the court—they plead out many, many cases. I don't remember. What, 60 or 70 percent, did you say?

MARK STEPHENS: Seventy percent.

JERRY BLACK: Seventy percent of the cases that come in are diverted, basically, from any court. This rate of compensation hasn't changed in sixteen years—as I said. But that's only part of the problem. I could make out a case that there is a scheme in Tennessee designed to provide minimum representation and designed to hide ineffective assistance of counsel. Because your question ought to be, "Why aren't ineffective assistance of counsel claims filed in these non-capital cases?"

Well, the first thing is, we have a $1,000 cap. Now, given the princely sum of $40 out of court, that would be twenty-five hours. So you're going to spend three days investigating this case—or three eight-hour days. You've got to get the file from the lawyer. You've got to read the file or the transcript of the record, and you've got to get the transcript of the record. You somehow might talk to the client, and then you've got to meet the *Strickland*[48] standard. You've got to provide first a deficient performance, and then, second, you've got to prove

[48] Strickland v. Washington, 466 U.S. 668 (1984).

prejudice.

Well, that wouldn't be so bad, why don't you ask for resources? Why don't you get an investigator? Why don't you get experts? Well,—because as Mary Ann told you—in non-capital cases you don't have any right to resources. You don't have any right to an investigator. They're not going to pay for one. They're not going to pay for an expert. And when you think about it—with the National Academy of Science report—the work in criminal cases is not getting less complex. It's getting more complex. And the science is not getting better, it's getting more suspect.

So without these experts what are you going to do? How are you ever going to meet the prejudice standard? Unless you want to do it out of pocket or, what'd you say? Beg and plead and whatever to get resources? So I could make a case that we're really trying to hide ineffective assistance of counsel.

That's why, obviously, you do not have a Constitutional right to post-conviction counsel. And in Tennessee, not only do you not have a Constitutional right to post-conviction counsel, but there's a statutory right to post-conviction counsel. That lawyer—even though he may be ineffective—can waive a client's rights to a full and fair hearing. I know that because I argued it in the Tennessee Supreme Court in a successor post-conviction petition, *House v. State*.[49] Paul Gregory House was later found by the U.S. Supreme Court to have a viable innocence claim. This was only after they went to federal court and only after they had an evidentiary hearing. His lawyer waived in state court and the evidentiary hearing. And the court said, "That's okay." You only get one bite out of the apple.

My question is in an ineffective assistance claims, how do you ever know you got a bite out of the apple?

[49] House v. State, 911 S.W.2d 705 (Tenn. 1995).

How do you know you got an apple? The courts will tell you—the Tennessee Supreme Court will tell you the only effective way to raise an ineffective assistance claim is on post-conviction relief. You got to have an evidentiary hearing; you got to put on proof. Oh, but by the way, we aren't giving you a good lawyer to do that. And we assume we had a good apple and a bite out of it.

I realize there are real problems with the capital system, and I'm not here to tell you that in Tennessee it's good. I believe it's deplorable. But nonetheless, I do believe it's probably better than the non-capital system. At least there are some quality standards—some standards, I don't know about quality. There are quantity standards as opposed to quality standards. There are at least two lawyers. There are at least resources on post-convictions. And with the post-conviction defender's office, you've probably got a good lawyer. I promise you, you got a good lawyer.

It seems to me, the bottom line is—at least under the Tennessee scheme—we hid ineffective assistance of counsel. I think that what I come away with is several conclusions, and I'll leave it with you. I believe that we should focus on more radical solutions. I think that the suggestion that we litigate ought to be the focus in this. We ought to be talking about how to do it. We ought to be talking about how to file these motions to withdraw.

The other thing that occurred to me—as I listened to the gentlemen from Michigan and the State of Washington—I think you place a real difficult burden on public defenders to step up and say, "I'm ineffective in this case." What if you changed the requirements under *Boykin*,[50] and under, I think, Criminal Procedure Rule 11[51] in Tennessee—to require—as Mary Ann said—this five-page plea agreement? And in that you would have to say,

[50] Boykin v. Alabama, 395 U.S. 238 (1969).
[51] TENN. R. CRIM. P. 11.

"I investigated the case as a part of that. I spoke with the client." And the lawyer has to certify that in every case where there's a plea entered. Then that lawyer is not out there on his own. He just has to—that lawyer or he or she—has to at least be honest. But instead of worrying about the affidavit—just that's part of the plea form. And you can't get a plea unless you do that. It seems like to me that would be an easy solution to simply say, modify *Boykin*[52] and require that as part of the proceedings.

I think that one of the things TACDL needs to work on—but perhaps with the Tennessee Bar Association my problem is they represent the greatest number of lawyers, an overwhelming majority of which, are civil lawyers who, unlike Max Bahner, may not be terribly interested in criminal defense—is that we should work on standards and try to get the court to adopt standards for indigent defense. That's what we ought to be focusing on now. We need those standards, so that you've got something that they can't duck or dodge. The Tennessee Supreme Court basically has said that they don't accept as gospel the revisions for the ABA Guidelines on the provision of counsel in death cases.

If litigation is not the answer, then it seems like to me that we have to force education on the Bar. And I would suggest that we think about dismantling the public defender system and instead go to a straight court-appointed system. And we require all lawyers, every lawyer in the state, to sign up to take court-appointed cases. And that lawyer has to personally do so. He can't pass it off to an associate or a young lawyer. That's his or her case. We could mandate three, six hours of criminal CLE in criminal law and criminal procedures, so they get up to speed.

But what Max Bahner told you is that when he did those cases—what he found and what he learned and how it

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[52] *Boykin*, 395 U.S. at 238.

impacted him—and so now he's a champion for indigent defense. The majority of the lawyers who do not do this and do not have any court experience look the other way. We don't take criminal cases. We don't do that work.

I think that then you have to have some kind of quality control system. I understand that the fear is that these lawyers won't like their clients. Well, what about the people that are doing it now, and they don't have time to meet with their client. Seems like to me that we've got injustice on one hand and injustice on the other and hopefully we can overcome some of that. We will also have a bigger voice in the legislature and in the courts because somebody will want to do something, so that they get the hell out of doing criminal defense work.

But the other thing is you have to have a quality control system, and you have to have experienced lawyers who do criminal defense that are familiar with the requirements, that are familiar with the standards, and who will enforce the standards. And if lawyers don't provide quality representation, the penalty is you're disbarred. Now, if I run the risk of being disbarred because I didn't really want this case but I got it, I'm probably going to provide you a quality representation.

When Mark talked about his ninety-day hiatus, all lawyers in Knoxville were subject to court appointment. The dean of the law school, who I don't believe is licensed in Tennessee, was appointed to a case. The Mayor was appointed to a case. And some really good civil lawyers were appointed to a case. And I remember talking to one of them. First-rate trial lawyer—handles complex medical malpractice cases, handles complex products liability cases, and he's smart enough to figure out criminal defense work too. And he did.

He said, "I'm going down here. I think I'm going to have a preliminary hearing. I'm putting my client on the stand. I believe I can win this attempted first-degree

murder case." By God, he did. And they didn't take it to the criminal court, the grand jury, even though they won the preliminary hearing. It had two effects. One, there were a lot of different things being done by lawyers who weren't familiar with that's how we do business. It wouldn't have been long before we stopped having trial by ambush because these lawyers would have said, "This isn't how we do civil cases. We have discovery. We know what's going to happen before we go to trial. This isn't the right way to have a lawsuit. This isn't the right way to do something." They would do something different.

The other people that didn't like it were the prosecutors. Because they sort of know what we're going to do. But when these guys came in there, they weren't sure what they were going to do. It kind of created chaos in the system; this is probably good for the defense.

And as a result, we got more funding. Not enough, but we got more funding. Because all of a sudden the private bar said, one, "We don't like doing this," and, two, "The prosecution said we don't like the way they're doing this," and, three, "We need to do something to get them back out of here and where they belong. We need to get back to business as usual."

I thank you for your time, and I am honored to be a part of it. I hope we all can continue in the struggle to improve indigent defense. Many of you are my heroes. I admire the work you do. Please keep it up.

PENNY WHITE: I forgot to say about Jerry, golly, that he's been director of our Legal Clinic four times. The man can't say no. Thank you very much, Jerry. It was better than I even expected, and I expected a lot. So thank you very much.