No. 81-300

STATE OF MINNESOTA

IN SUPREME COURT

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In Re

Modification of Canon 3A(7) of the Minnesota Code of Judicial Conduct

WCCO Radio, Inc.; WCCO Television, Inc.; WCCO FM, Inc.; WTCN Television, Inc.; United Television, Inc.-KMSP-TV; KTTC Television, Inc.; Hubbard Broadcasting, Inc.; Northwest Publications, Inc.; Minneapolis Star and Tribune Company; Minnesota Public Radio, Inc.; Twin Cities Public Television, Inc.; Minnesota Broadcasters Associations; Minnesota Newspaper Association; Radio and Television News Directors Association, Minnesota Chapter; and Sigma Delta Chi/Society of Professional Journalists, Minnesota Chapter,

Petitioners.

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TRANSCRIPT OF COMMISSION HEARING ON MODIFICATION OF CANON 3A(7) OF THE MINNESOTA CODE OF JUDICIAL CONDUCT

Transcript of Commission hearing held on Tuesday, October 13, 1981 in Senate Hearing Room Number 15, State Capitol, Saint Paul, Minnesota at 9:30 A.M. before John S. Pillsbury, Jr., Chairman, Sidney E. Kaner and Rosemary M. Ahmann, Commissioners.

SUPREME COURT COMMISSION HEARINGS ON CAMERAS IN THE COURT

October 13, 1981

Pillsbury: Ladies and gentlemen, we might as well begin. We have a witness who has come a long ways and is anxious to get through on time so that he could catch a plane, so I hope he will start. I understand that the first witness will be introduced by Judge Segell.

Segell: Members of the Commission, I might say to the petitioners that we have the best of both worlds this morning. We have a lawyer and a judge from Florida, who went to school in Wisconsin. I am going to formally introduce Judge Sholts later, but because Judge Sholts is well pointed and is a personal friend of Joel Hirschhorn, who is an attorney from Miami, I am going to call upon Judge Sholts to introduce to you Joel Hirschhorn. Judge Sholts.

Sholts: Thanks Judge Segell.

Pillsbury: Judge, we are very happy to have you here.

Sholts: Thank you Commissioner. I have known Joel quite awhile, but I didn't know him well enough to know that he'd give me a three-page personal bibliography of himself. Essentially, Joel is well known in Florida as one of our leading criminal trial lawyers. He was born in Brooklyn, New York on

March 13, 1943 and raised in the Nowalk, Connecticut area. He has an undergraduate degree from the University of Connecticut and that happened in 1964. He graduated, and this is his main claim to fame as far as I am concerned, from the University of Wisconsin Law School in June of 1967. He was admitted to the Wisconsin State Bar on July of 1967 and subsequently admitted to the Florida Bar in November of 1967. He is admitted to practice before the United States Supreme Court, the First, Fourth and Fifth Circuit Courts of Appeal, and I assume now the Eleventh, that isn't on the paper here, the United States Tax Court and various United States district courts in Florida and throughout the nation. He is a member of the Dade County Bar Association since 1967 and he is a member of the American Florida Criminal Defense Lawyers Association. He is chairman emeritus of the First Amendment Lawyers Association since 1977. He is a member of the American Trial Lawyers Association, a member of the Academy of Florida Trial Lawyers, member of the National Association of Criminal Defense Lawyers since 1976, and he is past chairman of the Fair Trial Free Press and Televised Criminal Trials Committee, 1977-1979. He is presently engaged in the practice of law under the firm name of Joel Hirschhorn, P.A. at 742 Northwest Twelfth Avenue, Miami, Dade County, Florida. He limits his practice primarily to criminal trial and appellate matters in both federal and state

court. It is my pleasure to introduce to the Commission, Joel Hirschhorn.

Pillsbury: Mr. Hirschhorn, we are very happy to have you here. We will do your swearing in first.

(MR. HIRSCHHORN SWORN IN).

I don't know whether you wish to make any further statement as to your precise interest in this proceeding or why you are here. We do appreciate your coming.

Hirschhorn: Mr. Chairman and the Commission I appreciate being here. Judge Sholts, I appreciate your introducing me. I want to clear that I don't practice before Judge Sholts, because he is doing civil work now and I am over in criminal court side. I was invited, I believe, because I was counsel for Chandler in Chandler v. Florida, and I have some remarks to make. First, I think it significant that the Minnesota Supreme Court has decided to submit this to Commission type proceedings, as opposed to the star chamber type method the Florida Supreme Court utilized in its first experimental rule. There were no Commission hearings, no testimony or evidence. I think it is significant that the State of Minnesota has elected to pursue it in this manner. I noticed there is a camera here and I presume that these proceedings are being recorded for posterity and televising. If this were a non-law type setting, in order to relax the audience I would generally turn to the camera

and ask the camera man if he would mind moving it over there because this is my better side. While that may sound like a cheap shot, the fact of the matter is there is sufficient hard empirical data and evidence that supports the conclusion that televising a criminal trial over a defendant's objection, over a witness, or a trial juror's objection interferes with the process and interferes with the defendant's right to a fair and impartial trial.

Pillsbury: I might say that these proceedings are being televised and recorded in accordance with the rules of the Supreme Court of this State, which do permit television and cameras. The counsel has applied in courts for that proceeding.

Hirschhorn: I have no problem with it at all. I think that there is nothing wrong with the appellate proceedings being televised because the issue is different. First place, I think we ought to lay to rest what has been laid to rest by Chandler. There is no tug of war between the First and Sixth Amendment in connection with the televised criminal trial issue. The First Amendment has its place in our society of valuable and an important role. The Sixth Amendment, however, is even more charged, because the bottom line is that the defendant, the accused, and I am only speaking in context of criminal cases now, the defendant is the one who stands to win or lose freedom. I don't

understand why the media proponents think it is so important to educate the public, if that is, in fact, a worthwhile goal and an accomplishment of televising criminal trials. Why are they willing to do that at the expense of a defendant's right to a fair and impartial trial? Absent socio-psychological data, we have no way of knowing how many innocent people will be convicted. How many guilty people will be acquitted simply because witnesses are reluctant to testify in the manner they would testify without the presence of cameras in the courtroom. My best argument, now I have tried five cases portions of which have been televised, so of everyone who is in this room now, I presume I am the only one that has had that experience. I will easily conceive that television cameras do not distract in the sense of voice. I mean that television camera is no different than the ones that have been in the trials that I have been involved in, so that is not an issue.

Pillsbury: Excuse me for interrupting once more. There is one difference this morning that I think is worth calling attention to and that is that I presume at the instance of the petitioners, there is also present a sketch artist who is over here, who is sketching in the manner in which I understand is being used in courts where television and media are not permitted. Is that correct? Did I state that correctly?

Hannah: He is sketching as he would in a trial, yes. I think one of his stations is doing this for their own coverage purposes.

Pillsbury: I see, all right. I just thought we should be aware of that.

Hirschhorn: Mr. Chairman, I was not aware of the presence of the sketch artist.

Pillsbury: I was just told before the proceedings commenced, and I thought everybody would like to know about it.

Hirschhorn: I appreciate your proving one of my points, the point that is found in United States v. Columbia Broadcasting System and that is there is something inherently different about being televised as opposed to a sketch artist. Presumably the sketch artist would not have his material out in a position where a witness or a juror could see him. You might see the top of his pad, but he certainly wouldn't be seeing his materials.

Sholts: Mr. Hirschhorn, that citation for the record. The United States v. Columbia Broadcasting System Incorporated is 497 F.2d 102 (5th Cir. 1974).

Hirschhorn: You see it doesn't make any difference whether I am giving a speech or in court, the judge always gets the last word.

Sholts: I just happened to have it handy.

Hirschhorn: As you always do for some reason, Judge. I think if we focus on the purpose of a trial, which is to search for the truth, a trial starts with voir dire and ends with verdicto, both of which mean to speak the truth, one early French and the other, of course, even earlier Latin. The fact of the matter is televising a trial doesn't contribute to that factfinding process in the search for the truth, and let's go back for a moment. I know the State of Minnesota, like every other state in the union, Florida, like every federal court in the country, at the conclusion of a trial charges the jury as follows or something like this and this is the Devitt Blackmore standard charge found in Section 17.02 of Federal Jury Instructions, which have been used widely in federal courts and which were incorporated in my brief in Chandler. The jury is directed at the conclusion of the case to take into consideration the witnesses' demeanor while testifying--his ability to know and remember the facts about which he testifies, his candor or lack of candor, the manner in which he testifies, whether or not his testimony is consistent with the facts and other testimony. What does this have to do with anything? The fact of the matter is simple. Let us assume the following scenario which is a very real scenario certainly for those of us who labor in the criminal area. The witness is on the

stand and he has just pointed to the defendant and he has said that's the man that did it. Now the defendant, through careful and diligent pretrial preparation including discovery, if that's permitted in your state, it is in Florida, has found some inconsistent statements that the witness has made to other parties. On cross-examination the defendant begins to bear down on the witness and the witness begins to squirm because the defense lawyer has touched a tender nerve. The minute you inject the presence of a camera in the court-room the jury has, in the back of its mind, the witness squirming because he is on television for the first time. Is the witness squirming because the defense lawyer has touched a nerve? Has found an inconsistency? My prompt position and that is borne out by socio-psychological studies which are cited in my Chandler brief which Judge Segell has in its entirety, publicity magnifies the personality -- a timid person becomes more timid, an outgoing person becomes more outgoing -- whether it is newspaper publicity and certainly even more so by television publicity. Now the minute the witness' personality, demeanor, changes the jury, which is asked to evaluate the credibility of that witness, is relying on a tortured or at least changed observation of the witness, so that what we have we have the problem exacerbated. The witness is affected in some way and the jury is asked to

deliberate on the witness' credibility and the jury doesn't know that that witness' testimony has been affected by some subtle, subconscious intrusion. I don't think it is necessary to cite the U.S. Supreme Court cases at great length. I think that Chandler deals with them. There is only five or six cases that are cited in the entire Chandler opinion, and I don't think that Chandler was a loss. Since Chandler has come down, Florida Supreme Court has found itself in the position of having to reverse one conviction and remand for a new trial, and at least ten trial judges throughout the State of Florida have excluded cameras from the courtroom because of the guidelines set out in Chandler. You must remember that Chief Justice Burger warned that the states were embarking on a dangerous experiment, but based on a 1923 dissenting opinion they decided that the states have the right to tinker. I suggest that if you examine the questions that were put to me and opposing counsel during oral argument in the United States Supreme Court, a transcript of which I have given to Judge Segell, you will find that many of the questions you are asking yourself were asked by Chief Justice Burger and other members of the court. I suggest that the issue of the absolute constitutional ban will be revisited within the next five years by the United States Supreme Court at great risk to individual states who impose

a rule that says regardless of a defendant's objection, if the press wants to cover it, if the electronic media wants to cover it, they have the right to come in. I have no problem with the rule that says if the defendant objects then the judge has an absolute responsibility to prohibit televising trials. But where a defendant objects, and it is the defendant's liberty at stake, I think that that rule is the appropriate rule, one which will avoid the possibility of reversal in the future. At that time, of course, then it is the judgment for the defendant and his attorney to make. You are going to have a whole plethora of ineffective assistants who privately retain counsel in cases coming up where a lawyer who needs the publicity, or wants the publicity, urges cameras to come into the courtroom where it doesn't oppose it, and then the defendant gets convicted and you will have it come up on lateral relief, but that is a separate issue. Now I agree, of course, that the public has a right to know and, of course, the media has the right to report fairly and responsibly on what occurs in open court. I do not agree that the media has got the right to take the task a judge who exercises his discretion in an effort to protect the constitutional rights of the criminally accused. There is no better example of that than Judge Sholts sitting right here in this courtroom, who was the subject of vicious

and victoriolic media attacks because he did what he thought was right in the context of victory in his murder trial in Florida. The political cartoonists and the editorial writers with the media had a great time at Judge Sholts' expense, and I think he will show you the cartoon and leave it for your consideration, because it is rather significant and underscores my point significantly. Of course judges have a problem, they can't reply. I pointed out to Judge Godfrey, he's going on radio tomorrow with a lawyer, I think petitioners' counsel. Judge Godfrey is bound by different judicial canons than the lawyer is. I can say lots of things as a lawyer that a judge can't say on this issue. For example, in Minnesota judges are elected. The power of the press is obviously well known. The press has the ability to make or break any judge or any elected official just by running a campaign. It is irrelevant that, at this point in time, there have been precious few campaigns or hotly contested campaigns for a judicial office in Minnesota. I can assure you that the minute a judge exercises discretion to preclude electronic media coverage because to do so would in some way impose on the defendant's right to a fair and impartial trial, that judge, no matter how well liked and respected in the State of Minnesota, could be subjected to a series of editorials. The likes of which this state has never seen, questioning

the judge's competence and, of course, railing about how the public has a right to know. Let's talk about that issue. The media says, and I haven't seen the petition that has been presented, but I know my opponents well from all over the country. I don't know this particular counsel, I have just met him today. They say that this is a way to educate the public. That is pure hogwash. Now I tried five cases in Florida, portions of which were televised. By the way, as Chief Justice Burger pointed out in oral argument, in what way did televising two minutes and fifty-five seconds of the best part of a state's case in some way contribute to the overall administration of justice? We will get back to that point, because I think that's an important point. If the media was really concerned about educating the public, than they would pick the kind of trial that the public needs to be educated about. Do you think televising Bundy or Zamora has in any way stopped or prohibited a single murder or prevented a single murder? In Florida, and I like to use this as my best example, Florida, of course, is a haven for retirees -- people who want to come south. People who are 45, 50 years old who want to buy a plot of land and build a retirement home and relax in the sun belt in their later years, in the winters of their life -- and they are entitled to. I tried a case for six weeks in Florida which in-

volved a land fraud. A client of mine was accused of frauding hundreds of thousands of people out of millions and millions, not hundreds, several thousands of people out of millions of dollars in connection with acquiring vacation retirement sites to land that he didn't own. The State witness after witness that had the effect, had the public been shown that trial, of caveat emptor. Fire beware. A warning, what we call snowbirds, northerners, people who live north of Florida, about the slick talking, smooth talking salesman who tries to sell you land five percent down, a hundred dollars a month and when you finally make your last payment, you discover that the land contract is valueless and the land is under water or something like that. Now the media didn't televise that trial. They didn't televise in any of that trial. I guess part of the reason because the defendant was acquitted, but another reason is because they did not want to show six weeks of cross-examination and direct examination of accountants, real estate experts, attorneys, very boring, very dry stuff. Instead media picked the case down the hallway which was a particularly brutal robbery murder because it had everything that the American public's appetite, insatiable appetite, for the sexy and the salacious needs to be fed. They picked that because it will help them improve their ratings. The McDuffy trial. Now let's talk about the overall administration of

justice. How in the world can we hope to educate people about how our system works? How can we possibly hope that the average man or woman will understand the jury trial system when all the media shows is two minutes and fifty-five seconds of the best part of the trial. When the medical examiner is pointing to the picture of the deceased and saying that cut right there was caused by a knife, that hole right there was caused by a bullet, that takes ten seconds. Remember you can only speak and be understood at the rate of about three hundred and forty top words per minute to be truly understood. It is about two hundred eighty words per minute, ask any court reporter. Then the next witness that they televise for ten or fifteen seconds is an immunized police officer who testifies yes he was there when those five defendants brutally kicked, stabbed, stomped and beat to death the deceased, McDuffy, and they showed that. Then they show three or four other ten or fifteen second clips of the entire trial, and then the jury goes out and in less than two hours acquits the defendant. That is shown to the folks back home. How is the public going to understand that when they don't see the two and a half hours of relentless cross-examination, which is very boring in which the small points are made, in which the immunized witness is forced to admit under cross-examination that he was immunized from the commission of six

or eight crimes, and, therefore, he is singing to save his soul and his liberty. The media doesn't show that. They want to see the good part, the pointing part. How are we going to contribute to the overall administration of justice by singling out and shaming a rape victim? How is that going to help the public understand why that defendant was acquitted, because on cross-examination the rape victim reluctantly admitted that she wore contact lenses and she didn't have them on that night? These are some of the things we don't think about. What we get enticed by media? They dangle the bait and, of course, in the back of everyone's mind is we have got to at least give the media a fair chance. The media is not interested in giving the accused a fair chance. They are interested in reporting or making news and not necessarily in balancing news. How do I say that? I say that because there is no canons of ethics that the media is bound to. Lawyers and judges are bound to canon of ethics for a violation of which we stand to lose our robe or our license. The media is bound by no canon of ethics. The only thing they are bound by is the laws of libel and slander and we all know how difficult it is to obtain a successful judgment against someone because of the public figure doctrine. Now let's talk about some of the substanate procedural and strategic considerations and problems that go into

whether or not a trial ought to be televised. The first thing that comes to mind is a pretrial motion for bail that's televised. I noticed in the paper today, in the Minneapolis-St. Paul papers, there is a case involving a fellow by the name of Bradley Vogelpohl, V-O-G-E-L-P-O-H-L, I don't know if I am pronouncing his name right. This fellow has got problems. Forgetting about the truth or falsity of the charges, I don't know whether he did it or not, I don't know whether he is rightly or wrongfully accused, I do know he has asked for a change of venue. Now this man has probably already had a bond hearing at which he has testified at which some of the state's evidence has probably come out and, if the bond hearing was televised, because this is a pretty good case, he is an elected public official charged with first degree murder, that means that the venire is already tainted. You have got to understand, of course, in the context of a criminal case that you are suppose to be picking jurors that have no knowledge,firsthand or otherwise, through media accounts of the facts of the case. So if there has been a bond hearing that has been televised, the venire is tainted. He has asked for a motion for change of venue. He wants to move to twenty five miles away. That was okay in the early nineteenth century, or maybe the early part of the twentieth century when newspapers were local in nature. There weren't national newspapers and

where television, I mean I don't know what the coverage area of this particular television station is, but I suspect that it is probably statewide, so changing the venue from town A to town B twenty-five miles away isn't going to solve the problem. What is the media's response to that? Do they even care about whether the defendant receives a venire that has not been tainted? Who is going to pay for the cost of sequestration of witnesses and jurors, when the witness rule is invoked, the media? Oh no, the taxpayers. So if you have a trial that goes two, three, four, five, six weeks because it's particularly lengthy, sexy, salacious and because it involves somebody who might have a public figure, the taxpayers will bear the burden of witness sequestration and juror sequestration, not the media. The witnesses and the jurors will have to be sequestered because the TV station is going to be picking up thirty, forty-five, fifty seconds a night to show to the folks back home. Now we all know that jurors are suppose to follow a judge's instructions. I don't think there is a trial lawyer here, or a trial judge, that will tell you that they can absolutely guarantee that trial jurors follow every instruction with respect to pretrial publicity. They try, perhaps they try, and I don't fault it. I think that the jury system is an absolutely vital part of our system of criminal justice and I wouldn't

want to try a case anywhere else except under our system. The fact of the matter is, and I am used to being on television, if I am on television or if my friend, Ron Meshbesher, sees some of this on TV tonight, he's going to call me down in Miami and say hey Joel I saw you on TV, you looked pretty good, or maybe he said gee they got the wrong side of your face, or your hair was out of order. Picture a juror who has never been involved in a trial before who is now having a portion or all of the trial televised, and the juror goes home and the juror's spouse says so and so called and said you looked pretty good on TV. The jury doesn't need that additional pressure to distract him or her from the job at hand. The reason we have a jury is because there's a difference between ambition and conscience. I suggest that what we have here is media ambition and no conscience about what is going to happen to the rights of the accused or a witness. Can you imagine the media tells you that televising a trial, I don't want the trial judges here to snicker, please if you can avoid, can you imagine the media has the audacity to tell you that televising trials is going to help to produce more witnesses? Imagine this scenario. Can you imagine a trial lawyer after his second day of trial, they are already working on the second or third witness, he gets a phone call at home Mr. Trial Lawyer I saw a part

of the trial on TV a few minutes ago and I remember I was at that very hotel where the murder occurred. So now, of course, the lawyer has got a responsibility to his client to report to the trial judge that there is a new witness. So he goes up to the trial judge and says Judge Segell, I move for a continuance of the trial because a new witness has come forward as a result of televising the trial. I don't know Judge Segell, I just met him today, but I would bet that consistent with his responsibility and the Speedy Trial Act and fairness that he would look at me and says what are you nuts lawyer? The time to do your homework is before trial, not in trial. Do you have six or twelve men jurors now? We have got twelve good or thirteen good people sitting here, we have got witnesses on here, you want me to recess the trial for three days while you check down this lunatic lead. That will never happen. I mean that just will never happen. Now then the question is, and there is no question that media has the right to run the courtroom in the sense that the Ohio example, where the media wanted to televise a trial. The defendant objected, the trial judge excluded it, the media took an appeal to the Ohio Supreme Court. The Ohio Supreme Court entered a writ of prohibition against the trial judge, prohibiting the trial judge from going forward with the trial until the merits of

the media claim were litigated. The bottom line to all that was the defendant sat in jail well in excess of Ohio's Speedy Trial Act, while third party litigants. He wasn't even a party to the litigation in the Ohio Supreme Court. (INAUDIBLE) whether they had the right to televise the trial or not. I don't think that the media can take much heart in Chandler. Oh yes, the non-legal media reporting with great glee an important victory after Chandler was decided, but the lawyers who read the opinion knew that the United States Supreme Court was issuing a very severe warning to the states to be ever conscience of a defendant's right to a fair and impartial trial. I think that perhaps this may well cover the range of ideas that I have on the subject and some of my experiences. It might be more fruitful for me to spend some of my time, as much or as little as you wish, answering any questions provided the questions are put by members of the Commission and not media because every time they interview me on this subject, they have a nasty habit of debating me and trying to make the news instead of reporting it.

Pillsbury: The media doesn't ask any questions in this proceeding, but counsel for the petitioners do and the members of the Commission and Judge Segell who is appearing here as an interested party has accepted the leadership unofficially of those who are opposed to the media in the courtroom.

Hirschhorn: Mr. Chairman, I forgot one very minor point. It's not a minor, it's a major point. With all the money that media is spending on trying to resolve this issue legally, I challenge the media to allocate some of their resources to socio-psychological studies that will prove or disprove, perhaps by analogy, not directly, the propositions that we are talking about with respect to publicity and witness and juror reaction. It is interesting. It would be a very simple thing to get an impartial socio-psychological objective study, not the hodge podge, helter skelter, haphazard recollection that was done in the Wisconsin and Florida experiments with which I am totally familiar. You have got one of the greatest universities in the United States here. I say that even though I hope Wisconsin beats them this year, but the point is that you have got all the resources you need right here in this state to do your study. The media won't spend a penny on that, because I suspect they know the result will not be favorable.

Pillsbury: Before I turn the questioning over to the counsel for the petitioners, do you have anything you would like to ask, Judge Segell?

Segell: Not at this time.

Pillsbury: Mr. Hannah.

Hannah: Thank you. Mr. Hirschhorn, I am sorry. The reason

I prepared these articles was that I know your time was limited and I wasn't sure of your testimony and there were some questions I wanted to clear up on some of the arguments that you set forth. (END OF TAPE).

Hirschhorn: This belies any claim of broad legal support for the alteration of the experimental canon and raises a spector of both commercial self-interest and the utilization of at least undue and subtle pressures by media on the elective floor of the Supreme Court justices. Quote, unquote. I wrote it.

Hannah: Thank you. Mr. Hirschhorn, you have no evidence of any undue or subtle pressure by the media on the elected Minnesota Supreme Court justices, do you?

Hirschhorn: I don't know anything about Minnesota at all other then I love the weather here.

Hannah: You have no evidence of undue or subtle pressure by the media on this Commission, do you?

Hirschhorn: I have absolutely no evidence whatsoever of that, but I think that that's not the only point I made in my article. I mean you have done a good job.

Hannah: I appreciate it. Thank you counsel.

Hirschhorn: The article is a little longer.

Hannah: We do have one or two more things.

Pillsbury: Can you push that a little over to the left? The light seems to be a little better on the left side. No the other way. See what I mean there. There, I think that comes out a little better, thank you.

Hannah: I did find this quote in the article. I believe the quote states what will an insecure trial judge do in an election year with a well financed opponent when the defendant's motion to suppress his confession should be granted because of a clear violation of Miranda. Now for the Commissioners a clear violation of Miranda counsel would be, could you give them an example? We have some people who aren't lawyers.

Hirschhorn: Where the defendant exercises his right to remain silent after being arrested, asks for a lawyer and, for some reason or other, the police manage to extract a confession out of him despite the exercise of his right.

Hannah: In a normal circumstance, if his Miranda rights are violated,

Hirschhorn: The confession should be suppressed.

Hannah: In other words, it won't be used in court and evidence gained as a result of that violation won't be used in court.

Hirschhorn: It ought not be.

Hannah: Now I have up here a canon.

Hirschhorn: I am familiar with the canon.

Hannah: All right. In fact I believe you mentioned that the lawyers have our code of professional conduct and judges have their code of judicial conduct, but the press, the media, has no appropriate code of ethics. The code states a judge should perform the duties of his office impartially and diligently. A judge should be faithful to the law and maintain professional competence in it, should be unswayed by partisan interests, public clamor, or fear of criticism. Now presumably if a judge violated the provisions of Canon 3, he would lose his job. He would lose his robe. Is it your testimony that there are circumstances you can see in your mind if cameras are in the court where a judge would so act and jeopardize his job and not follow the law?

Hirschhorn: You asked the exact question that the point I was making is why a trial judge should never go on a public forum with a lawyer. A trial judge can't answer that question as candidly as I will. Point one is obviously you are not familiar with Sheppard v. Maxwell because in there the United States Supreme Court pointed out that the Roman-like circus atmosphere was created by a judge who was running for re-election and a district attorney who was running for election, that's the basis for that

quote for that observation.

Hannah: Could that be the exception that proves this rule. Are we looking at judges across the country who are going to act that way because of the presence of cameras in the court?

Hirschhorn: Counsel, if you read the Wisconsin experiment carefully, you will discover that a Wisconsin trial judge said oh no cameras in the courtroom didn't bother me at all. Oh yes I did spend more time selecting my tie in the morning. Okay. Now my response to that was I cannot believe that. The litigants would have been better off if he had spent more time reading the trial briefs instead of worrying about what his tie looked like. I also point out to you, sir, now I am just quoting the Wisconsin study it is not something that I made up, it is not something the media made up, it's what the Wisconsin Supreme Court did. I also point out to you that no matter how diligent, no matter how earnestly, no matter how faithfully our judges attempt to comply with the letter of the law, the fact of the matter is we have yet to meet a judge who is not a human being. Everyone is subject to the same pressures. Many judges, and I am not, and I say this candidly, will pass the buck to the appellate court in those kind of years when you have got a trial judge with a well financed opponent and you have got a particularly terrible crime who will say

well maybe there is a question here. I will let the appellate court decide it rather than take the heat. Under our system of justice, it is the defendant who gets the benefit of the doubt, not the state. So I can't point to a single instance, I can only tell you that human nature hasn't changed in several thousands of years and I don't think putting a camera in the courtroom is going to change it any bit.

Hannah: Except that, presumably, now they will be violating that code of judicial conduct with a camera in the court, whereas in Minnesota at this point no judges are doing that because we don't have cameras, although we do have full media coverage (INAUDIBLE).

Hirschhorn: I suppose what you are saying is that Minnesota trial judges never get reversed by federal courts on habeas corpus.

Hannah: Perhaps they do, sir, but if you read your quotation, this judge,that you are discussing in your hypothetical, intentionally violated that code and his understanding of the law in doing what he did. All I have to do is ask Judge Segell if he believes his brothers and sisters on the bench are going to be doing that.

Hirschhorn: You can't ask a judge that question. I mean you will probably somewhere along the line, especially if you are on the radio tomorrow, because you are not

bound by the same code that the judge is. You can ask me and I will tell you yes. It has happened and will continue to happen and as long as we have elected state trial judges, it will always happen. Perhaps not in the numbers that I think of, but certainly more in the numbers that you think of. If it happens one time, just one time, during the Minnesota televised trial rule, it has happened one time too often.

Hannah: Counsel, I don't have that view of our courts.

Hirschhorn: You don't try criminal cases.

Hannah: I believe this quotation is the second full paragraph in the article. "The First Amendment guarantees the right of a free and unfetted press. It does not permit or authorize unlimited media access. Gannett. The Sixth Amendment, on the other hand, makes it clear that the accused is entitled to a public trial. These two important constitutional rights are on a direct collision course, mainly because of commercial television's need to satisfy the American public's virtually insatiable appetite for the salacious, regardless of the cost to the individual, the criminal justice system or society." It is true now, after Richmond Newspapers, that the media has a constitutional right to access to trial courts, not cameras, just the media at this point based on Richmond.

Hirschhorn: I'm not disagreeing.

Hannah: Isn't it also true that Chandler, based on the record presented to it, said that the mere presence of a camera in a courtroom has not been proved to be violative of a defendant's right to due process of law.

Hirschhorn: Absolutely.

Hannah: Now you are a member of, in fact, very active in the First Amendment Lawyers Associaion, isn't that right?

Hirschhorn: I was one of its founders.

Hannah: I have reviewed some of your work and I noticed that you have argued forcefully and eloquently for broad First Amendment protections for distributors of allegedly pornographic movies. Yet you argue here for a very limited First Amendment protection for the media in a case in which the Supreme Court says they have a constitutional right for access, isn't that inconsistent?

Hirschhorn: My friends call it my personal schizophrenia. The fact of the matter is they are not inconsistent because in Chandler and in Richmond, Richmond, of course, was a closure case, Chandler was not, we didn't seek to exclude all the media from the Chandler trial. We only sought to exclude cyclops over there. The fact of the matter is that they

are not inconsistent and the United States Supreme Court has said that in a clash between the First and Sixth Amendment right the individual right must be paramount. I read Chandler that way. I think everyone who reads Chandler reads it that way. It is just, as you correctly pointed out on the record presented to the United States Supreme Court, there was insufficient evidence, and the reason is because, unlike what's going on here, in Florida the experimental rule was mandatory. You were not permitted to challenge the rule. You had no right to put any evidence in. Now, in light of Chandler, you can put on evidence that shows why or how electronic media coverage is different and will adversely affect your client's right to a fair and impartial trial, so on that point we agree.

Hannah: It certainly would have been possible for you though wouldn't it in Chandler to have made a record for appeal if you had the evidence.

Hirschhorn: No, that's my point. If you read the appellate briefs, you will understand. The experimental rule, and you can ask Judge Sholts because he was a judge faced with that position, did not permit any challenges. You just did not have that rule. It was a mandatory rule. The judge had absolutely no discretion. Judge after judge said counsel you could show me forty-two witnesses who said the defendant can't get a fair and impartial trial.

Your quarrel is not with me, it is with the Florida Supreme Court which just said it is mandatory, and, in fact, we challenged it in the Florida Supreme Court on a certified question procedure, and it was dismissed on the grounds that it was not dispositive of the case.

Hannah: We spoke to Judge Cowart yesterday by telephone and he indicated, at least in Dade County, the judges believed that it was their right simply to administer justice to be able to hold those hearings and to make determinations which the media could then appeal, if they wanted. In fact, the Florida Supreme Court at the beginning.

Hirschhorn: You misunderstood Judge Cowart. I know him very well and I know him from the Bundy trial, because Bundy's lawyers asked me to come in and litigate it in front of Judge Cowart and I refused to do it for other reasons. The fact of the matter is that,if that's the way you understood Judge Cowart, I will pay for the long distance telephone call back to Judge Cowart because he will tell you that prior to or during the experimental year from July 5, 1977 until June 30, 1978 no evidentiary hearings were permitted.

Hannah: We do have a difference of opinion. I want to get back to your arguments about broad First Amendment rights. It is true generally in obscenity cases, isn't it, that one of the major arguments that the

proponents for the distributors of these materials make is that the issue for the court is not whether the court agrees or likes or appreciates the content of classics like Valley of the Nymphs, but here today

Hirschhorn: And P.V. Levine.

Hannah: Here today you have attacked the media for the lack of substance it has in its news reports. You have told us, in your opinion, the media has no conscience. In your opinion the materials that we see on television have no educational basis. Aren't those positions inconsistent?

Hirschhorn: No, not necessarily. By the way I said little educational basis. I mean that's the carrot that is thrown in front of the rabbit. That it's highly educational and that's the guys under which the rule will get snuck into the trial courts, but, in fact, when push comes to shove, they will show one five minute documentary on traffic court where ninety-five percent of all the people who are involved in the justice system have their first and sometimes only brush with the law. Then after that five minute documentary, then they are going to show the salacious rapes and murders. You are not talking with the same issue, because you see the obscenity cases that I have defended, by the way I haven't handled one in the past four years, I just don't do that work anymore for other

reasons. My practice has changed, but the obscenity cases the issue is different. That was whether or not the state had a right to censor it. But, as we know from State of Minnesota ex rel. Near or Near v. State of Minnesota, I forget the exact cite, which has become a very important case in First Amendment jurisprudence, the state does not have the right to censor newspapers. Nobody has the right to censor newspapers, not even the justice department --Pentagon Papers case and all the other cases. Only the media has the right to control what is published, and only the media's own view of what is in good taste is what marries it to responsible reporting. Now I don't mean to suggest that all media people are irresponsible. All I am saying is there is no professional code of ethics. The code of ethics that you have is a voluntary code. I don't know if there is any reporters here, but I will bet you if you ask them if they could within the next ten minutes locate a copy of their voluntary code of professional ethics, they couldn't do it. If you asked any lawyer in this courtroom, he would be able to find it in a minute. If you asked any judge, of course the books are right there, but at least we know where to go for it, and presumably we are married to it.

Hannah: That's true, but if it is an election year the judge won't pay attention to the code anyway.

Hirschhorn: I didn't necessarily say that.

Hannah: Let me ask you this. I would like you to look at the last sentence of that paragraph.

Hirschhorn: Which paragraph?

Hannah: The paragraph that's now up on the board, your article, not our notes. "These two important constitutional rights are on a direct collision course, mainly because of commercial television's need to satisfy the American public's virtually insatiable appetite for the salacious." Now frankly I have been trying to put this together in my own mind, but the only picture that I can draw hooking up the news media and the American public's virtually insatiable appetite for the salacious is some picture of the Roman forum jammed to the top with screaming

Hirschhorn: I will help you.

Hannah: Now wait. Screaming people all lustfully looking down at the bottom of that place and at the bottom is a giant television screen and they are looking at Walter Cronkite. Sir, the word salacious is defined at the bottom. Now if you are telling me that the TV stations who provide the kind of coverage that they have at least to this community are doing nothing more than pandering to the insatiable appetite of the American public for the salacious,

I have to disagree with you.

Hirschhorn: You are entitled to and maybe they haven't done it yet. I don't have a copy with me. I saw at 6:30 this morning the front page of the St. Paul Times. What's the name of the newspapers?

Segell: Pioneer Press.

Hirschhorn: I'm sorry.

Segell: Pioneer Press.

Hirschhorn: St. Paul Pioneer Press. On the front page was a story of an attempted rape involving a 10 year old. Now that was a very newsworthy story for the front page of a newspaper located in a major metropolitan area in the United States. It overwhelmed all other news that happened last night. I rest my case.

Hannah: No you don't because that article was on the front page of the Metropolitan Section which is second section of the paper.

Hirschhorn: Front page.

Hannah: And, I presume, although I won't do this anymore, I'm sorry, but after many days of listening to this I finally have to do it. If I were living in the block that was mentioned in that article and had a 10 year old child, I might be happy that someone had been picked up.

Hirschhorn: I am happy. If the fella did it, I'm happy that he got picked up too. You seem to think that I equate defending people charged with crimes with the fact that I am in favor of a lawless society. That's not the issue. You said you'd be happy that he was picked up, but being happy that an accused was picked up does not equate to that statement, and the fact of the matter is that the only way television stations make money is by the dollar sign attributed to their commercial time. I don't know how much a minute of World Series time costs, and I don't know how much a minute of advertising time costs here, but the fact of the matter is the two are married to television ratings. If the news is more, whatever station this is, if this particular television station has a wider viewing audience, it can charge more for its television time, and they are not going to get a wider audience by showing the cross-examination of an accountant who testifies about the footnotes in a financial statement in connection with a security fraud case. They are going to get it by showing the pretty hot case.

Hannah: In any event it's your opinion based on that statement. I mean you really think, don't you, that the American public has a virtually insatiable appetite for the salacious. You believe that.

Hirschhorn: I do. You don't think so, huh?

Hannah: I don't think so and I hope not. If it does, I don't why we are spending all of our time doing this frankly, and it is too bad.

Hirschhorn: If they didn't, there sure is a lot of adult sexually oriented materials floating around.

Hannah: True. Valley of the Nymphs, they are in numbers. Let's move onto Chandler very briefly. I think you said during your testimony, and I have read your brief, many of the arguments you made today were made to the Supreme Court of Florida. Now I have no reason to believe that the Justices on the Supreme Court of Florida are any less interested in the right to a fair trial or defendant's rights, constitutional rights to due process, than you or I. You made those arguments and you lost and you made the same arguments to the Supreme Court of the United States, and again, in my view, the Justices of the Supreme Court of the United States certainly care as much as we do about the rights of individual defendants. You were not able to persuade them that the presence of a camera and all of the dangers and risks that you have outlined this morning cause that man to have an unfair trial. Isn't that what happened in that case?

Hirschhorn: That doesn't mean that I am wrong though. It doesn't mean that the opponents of cameras in the courtroom

are wrong. All it means is what you said, I was unable to persuade them, perhaps because of the political climate and anyone who thinks the United States Supreme Court isn't a political institution, does not fully understand it. If you do not think that the Florida Supreme Court Justices were under tremendous pressure then you have to go back and read the newspaper morgues which will tell you three justices -- two justices resigned and one justice promised he would never have another drink again, and then like the Chestshire cat in Lewis Carroll's story Alice in Wonderland, suddenly the experimental rule reappeared and was approved on a mandatory basis. You are aware of the fact now, I presume this Commission is aware of the fact, that when the rule was first opposed, it was limited to one circuit and they could not get a single litigant to agree. So then rather to abandon the rule, they expanded it to two circuits and they couldn't get a single litigant to agree. So rather then abandon the rule they expanded it to how many did we wind up with?

Sholts: Four.

Hirschhorn: Four circuits and they still couldn't get two lawyers and a defendant and a trial judge couldn't get everybody to agree. It seems to me that there was an awful lot of opposition to the rule so the smart thing to do was instead of leaping would be

to crawl. But for some reason, unknown to me, the Florida Supreme Court decided to take the jump.

Hannah: You know I am personally becoming a little concerned. I have been hearing so much about all the horrible things that are going to happen because of the possibility of having cameras in the courts that I expect some scientific body to come out any day now and say that (INAUDIBLE)to television cameras are going to cause cancer. We have got two or three days of hearings and that's probably about all the exposure we are going to be able to stand.

Hirschhorn: Your clients have plenty of money to undertake those studies.

Hannah: There is a point here that I probably should tell you for your own information and that is that the petitioners are funding the expenses for the Commission in this case, although that is

Hirschhorn: Irrelevant. That's irrelevant.

Hannah: We happen to think that these proceedings are very relevant.

Hirschhorn: No, of course, they are, but who is funding it is irrelevant. In fact, I would be prouder if the taxpayers were funding these rather than having the media that's asked for it to fund it. Because you are not going to fund the juror sequestration, the taxpayers will and instead of spending the money

on expenses here, you should be funding a little study done at the University of Minnesota on socio-psychiatric information that would be helpful to this Commission. You are not paying my way. I wouldn't let this Commission pay my way. I am here on my own esteem.

Hannah: You are aware that the University, that the Journalism School at least, in Wisconsin

Hirschhorn: Oh yes, that was a very fine study by Mr. Hoyt.

Hannah: And the Journalism School here at the University of Minnesota.

Hirschhorn: Oh yes, Mr. Netterberg.

Hannah: We have at least been trying. We seem to be

Hirschhorn: Schools of Journalism are media advocates. I can see Schools of Socio-Psychological studies or the School of Social Science is being asked by the media to conduct these studies.

Hannah: I haven't seen law schools trying to fund studies that indicate that witnesses will be crushed under unbearable pressure and the jurors will become totally responsive to the whims of the public opinion and the judges will really (INAUDIBLE)ignore their oath but perhaps one of those studies will be coming up in the future.

Hirschhorn: You are right, but there is a very simple reason why.

Law schools haven't petitioned the Minnesota Supreme Court to change the rule, the media has.

Hannah: I have nothing else.

Pillsbury: Do either of the Commissioners?

Kaner: I have a question Mr. Hirschhorn. As I understand it, you represented Chandler both at the trial level and through the appellate process.

Hirschhorn: Yes.

Kaner: Now the real significance of Chandler, why don't you just tell us in general what you think Chandler really holds so far as our guidance is concerned?

Hirschhorn: There are nine places in Chandler that I think you can. There is eight places in Chandler that focus on the issue. First place, Chandler really is a bone to trial lawyers, because I suspect there will be a plethora of post-conviction collateral attacks on televised trials. Chandler, and the easiest way to tell you what I think Chandler says is by reading five sentences from Chandler. Now I am reading from the slip opinion which has become my Bible. I read it, I unread it. It is like Justice Douglas' copy of the Bill of Rights. I live with it. I think about it. I keep telling myself I won. My eight year old son said I lost eight zip. And Chandler, of course, is found in 101 S.Ct. 802. "If it could be demonstrated that the mere presence of photographic

and recording equipment and the knowledge that the event would be broadcast invariably and uniformly affected the conduct of participants so as to impair fundamental fairness, our task would be simple; prohibition of broadcast coverage of trials would be required." So it has to be demonstrated, not by Commission hearings. I have given you my subjective opinion and while you may accept it or reject it, it cannot be a substitute for empirical data. Two, and this is footnote 11 in Chandler, "At the moment, however, there is no unimpeachable" and that's the operative word "there is no unimpeachable empirical support for the thesis that the presence of the electronic media, ipso facto, interfers with trial proceedings." Now let me stop. We submitted in support of our brief and appellant's brief six or seven socio-psychological studies that were not done of trials because you can't have a mock trial. You can't take twelve people off the street and have a trial that doesn't exist and then test them because that's defrauding the jurors, so we could only argue by analogy and empirical studies. The empirical studies are cited in a long footnote to my brief which Judge Segell has. The only empirical studies that were submitted to the United States Supreme Court were by me. I mean there were fifty-four opponents, fifty-four people in opposition to me, and not a single one submitted an empirical study. So that when the U.S. Supreme Court says there is no

unimpeachable empirical data, what they were saying is there is empirical data, but it is impeachable because it doesn't directly relate and is by analogy. The next I think sentence "Inherent in electronic coverage of a trial is the risk that the very awareness by the accused of the coverage and the contemplated broadcast may adversely affect the conduct of the participants and the fairness of the trial, yet leads no evidence of how the conduct or the trial's fairness was affected." Okay, so there was no evidence in the record. They are saying there is a risk, but we have to show it. "Experiments such as the one presented here may well increase the number of appeals by adding a new basis for claims to reverse, but this is a risk Florida has chosen to take after preliminary experimentation." I mean that's a warning by the United States Supreme Court that they are invited, if they are wrong, if they are on the wrong path and if it can eventually be shown, they are inviting reversal if the issue has been preserved on appeal. "Even the amici supporting Florida's position," there were seventeen State's attorneys general, there were forty-one media representatives that supported Florida's position,"even the amici supporting Florida's own position concede that further experimentation is necessary to evaluate the potential psychological prejudice associated with broadcast coverage of trials. Further developments and more data are required before

this issue can be finally resolved." And that is footnote 12 from Chandler and that's what it is all about and that is what the media proponents should be doing -- empirical experiments, objective experiments, not funding subjective observations by me or Judge Sholts or anyone else. And then finally, and this is why I know down deep I feel that perhaps something has been accomplished. "To say that appellants have not demonstrated that broadcast coverage is inherently a denial of due process is not to say that the appellants were in fact accorded all of the protections of due process in their trial." So the United States Supreme Court has said there may well be a due process violation here. We are not saying there wasn't, seek another remedy, which is an invitation to a federal habeas corpus or a collateral attack on the conviction. "Dangers lurk in this, as in most,experiments, but unless we were to conclude that television coverage under all conditions is prohibited by the Constitution, the states must be free to experiment." Another direct quote. That is what the United States Supreme Court is saying. That this is a dangerous experiment, but under the separation, under the two state and federal comity -- c-o-m-i-t-y, in case there's a transcription -- the states must be free to experiment. But I don't think that the Minnesota Supreme Court ought to experiment if the risk is that an innocent person will be convicted, or a guilty person acquitted,

because a juror was reluctant to vote one way or the other because he or she was being televised. Or a witness was reluctant to come forward and testify or change his or her testimony because of the presence of a television camera.

Kaner: Would you say that Chandler holds that the United States Supreme Court recognizes the risk in this procedure, but that in that particular case and on that particular record you were unable to prove that the trial was, in fact, unfair because of television coverage? Is that what you are saying?

Hirschhorn: Absolutely.

Kaner: And you are further saying that you couldn't have protected your record further because of the procedures unavailable to you in the Florida courts? Is that right?

Hirschhorn: Yes, sir at the time.

Kaner: That's not fair. What could you have done to have persuaded the Supreme Court that, in fact, your client did not get a fair trial?

Hirschhorn: Now I could have called a psychiatrist who would have testified that the State's main witness was likely to change his testimony because of, now this is hypothetical, it is not fair for me to discuss the actual facts of that case because there is collateral relief going on. There will be another attack on

their convictions, not by me, but now there are several psychiatrists who have already testified in Florida and Florida cases that the presence of television (END OF TAPE).
and all the other elements or might give the witness an opportunity to "ham it up", that's the kind of showing you have to make.

Kaner: You say that that was unavailable to you at the time of Chandler.

Hirschhorn: Then it was unavailable at the time of the experimental

Kaner: How could it become available later?

Hirschhorn: In light of Chandler and in light after the experimental rule, the Florida Supreme Court modified and made permanent a new rule which gave a very vague border, or very vague guideline to the trial judges. I am sure Judge Sholts will address that because he has to deal with it in applying the rule. After the experimental rule, they changed the rule slightly to give a defendant the right to make some type of showing, and Chandler v. Florida has laid out specific warnings to the state that a defendant must be given the right to show why his trial is likely to be adversely affected. That is now available, it was not available before.

Kaner: Nothing further.

Pillsbury: Can I just pursue Commissioner Kaner's point a little

further? We, of course, do not have to recommend to the Supreme Court either that the media should have unrestricted access to the courts or that they should have no access at all. We can pick something in between and I want to just ask you again. You seem to indicate that the access, giving the media access to trial courts,might have been all right if there had been a procedure for you, or as representative of the defendant, to test or to place before the court the right in that particular case. In other words, I am wondering whether you are not really totally against the media in the court, but merely would like to have some right for the defendant to appeal it on some basis.

Hirschhorn: Mr. Chairman, you are right. I take the position that, like any other right, a defendant should have the opportunity to waive or invoke that right. I am not opposed to a rule that says as follows: Media has the right to come in and televise any or all of a portion of a trial. However in a criminal case where the defendant objects, the trial judge must exclude electronic press coverage. If a trial participant, such as a jury or a witness, objects, then the trial judge must balance the media's right under the First Amendment against the trial juror's or the trial witness' objection -- engage in a balancing test. So that I would make it an absolute rule where the defendant objected and a

balancing test where a witness or a trial participant objected.

Pillsbury: You do not think there is adequate protection for the defendant if he has the right to request the court to rule on it and there is an appeal from the ruling of the court.

Hirschhorn: No I do not and I will tell you why. I don't know how crowded your court calendars are here and this might be a better question for you to address to Judge Sholts.

Segell: We have a 60 day trial rule.

Hirschhorn: Well, then you have answered my question. Without knowing anything else, your trial judges are already pushed to the limit to crank cases out and get defendants in and out and through the system. I don't mean this disrespectfully. I can appreciate. You have got to understand what goes on. You have got to go down to criminal court and see the massive humanity and suffering and see the pressures that trial judges work under and now they have got a guy that's in jail for 59 days and his trial is suppose start or he is liable to be discharged or whatever the sanctions are, and the media wants to televise his trial. So now the judge has to call time out, two minute warning and we have a mini-trial on whether or not the media should be permitted to televise his trial over the defendant's objection.

Our system is just not built or designed for that unless the taxpayers want to bear the burden of the additional delay, the additional waste and the additional effort. Why should a trial judge, who is concentrating on the substantive charge, on the rules of evidence, on the rules of procedure, and who is worried about at the end of the case that the jury instructions be correctly given, why should he now have to in the middle of this trial have a mini-trial on an issue that does not deal with guilt or innocence?

Pillsbury: Thank you very much. On a little different point, some of the evidence that has been presented to us is,in part the study in Wisconsin,has indicated that there could be a positive benefit from the media in that the jurors are more alert and that they pay better attention, more conscience and, if the same thing is true with respect to the counsel, the judge and so forth, there is sometimes a feeling when hearing the opposition. We had another attorney yesterday who represented very much the same point of view you did, two of them as a matter of fact that lead the status quo -- don't change things, there is more danger of them being changed for the worst than for the better. Would you like to comment on that point?

Hirschhorn: Yes. First place I want to dispel the validity of the Hoyt study in two paragraphs. The Hoyt study is the

Wisconsin study. Please understand and I don't know the makeup of this Commission whether you are lawyers, trial lawyers, judges, trial judges or not. Please understand that a person who witnesses a crime or an automobile accident does not know in advance that he or she is going to witness a crime or an automobile accident and will six months or a year later be asked to testify about it. In the Hoyt study,which was the study that Professor Hoyt did, he took three groups and they studied a film. It was a two minute film or a five minute film or a ten minute film. Now I don't have my study in front of me, so whatever it was of a German Post Office.

Pillsbury: There was also a committee report on a study of the experimental

Hirschhorn: I am familiar with it.

Pillsbury: I was referring also to that.

Hirschhorn: Okay and I can dispel all that too. I will come back to that with an observation met by a Wisconsin state appointed psychiatrist. But the point is that in that Wisconsin study the witnesses, the students, who are hardly your average jurors, knew in advance that they were going to be tested about what they saw, so, of course, they would be more alert. It isn't as if they came upon an extemporaneous, excuse me, or a contemporaneous event and then that would have made the study valid. But no, they put the cart

before the horse and the School of Journalism praised this and the Attorney General, who I have debated in Wisconsin at the Wisconsin Bar in March this past year, Wisconsin Bar meeting, pointed to that setting and said it was a wonderful study. It missed the boat by a long shot. In the State of Wisconsin experiment they attached reports of six televised trials, they were your run of the mill case. One was a Reverend paddling a kid in Madison, Wisconsin, that's your average case, the media televised that. An arson-murder in a small town in northern Wisconsin, that's your average crime. I forget what the other four were, but it was very interesting. The state appointed psychiatrist who was asked to evaluate one of the cases was asked his opinion of cameras in the courtroom. Now he is a state appointed psychiatrist. He has got no ax to grind. In fact he held that defendant was competent. He said in his study that he thought telvision cameras adversely affected a juror's ability to concentrate, and it certainly affected his ability to testify. Now that is found two-thirds into the study in a little line that you could hardly see. So I don't think that those haphazard subjective observations that are in the Wisconsin experimental study offer any validity and ought not to be utilized by you, because even the amici in opposition to Chandler concede that they are a far stretch from objective

studies. We test the intelligence of monkeys better than we tested the experiment in Florida. I know if my son's I.Q. test depended on this experiment, I would really worry about the validity of the experiment. This is the only experiment where human lives are at stake and there was no effort to test it at the same time. A year after they started sending out flyers to jurors. In essence they are saying to the juror hey listen would you have voted differently if the trial hadn't been televised. Well, what juror is going to say that. No juror is ever going to say that, not after they did their solemn duty.

Pillsbury: Commissioner Ahmann, have you got a question?

Ahmann: Mr. Chairman, I'm the lay person on this committee. Perhaps I take a little different approach to this. I am interested in the discussion on experiment and I detected in Dr. Hoyt's testimony here yesterday the feeling that what could be a reasonable experiment in the courtroom and, in fact, what is unimpeachable empirical evidence. What could be unimpeachable? Isn't it true that it would be very difficult to put to the test in a scientific manner the courtroom proceedings and that, in fact, no matter how much empirical evidence we have that's all we will have when we finish? That, in fact, we cannot test this question scientifically.

Hirschhorn: You're right. To do so would be to make a mockery of the trial because everyone would have to commit a crime to participate in the trial.

Ahmann: Let me ask you this question, however. You did in your testimony ask or suggest some kind of a study. What would be convincing evidence to the court that, in fact, on one side or the other. The issue that would convince you or the opponents or those of us or perhaps on either side of this issue which would prove one way or the other, since we cannot put it to a scientific test since we are only left with other kinds of investigative questions?

Hirschhorn: I think that objective socio-psychological and psychiatric analyses by analogy of witnesses, individuals, and individuals in structured settings that closely similate a courtroom setting which could then be interpreted by objective experts would be helpful to the Commission. I don't know if you understood what I met when I said everyone involved in a mock trial would have to commit a crime. Someone would have to raise his hand and swear to tell the truth because the jury would have to see the witness swearing to tell the truth about a non-existing event. By the way this was tried and that's what was tried in 1959 to find out what goes on in jury deliberations. It was the famous American Bar Association Chicago jury rigging project

and it was concluded that it was unethical, and now it is against the law to listen jury deliberations. That's just by way of To get back to your primary question, there are fields of discipline that are not connected with journalism or partisans that could help this Commission, that this Commission doesn't have the money for. Dr. Hoyt knows that because he has been in touch with a professor at the University of Michigan, whose name escapes me at this moment, who is attempting to put together a project that would be a control group and questions people who don't know what they are being tested about that could be used for commissions such as this. But it has not been done yet, it's too expensive.

Ahmann: He did mention to us that the American Bar Association had embarked on the question of further pursuing this issue, and I was just interested in your own view, in your opinion, what you thought might be helpful to advance the question.

Hirschhorn: I don't think that psychiatric testimony is the answer. I have had three or four psychiatrists and I have their testimony who have testified to my point, a sworn testimony under oath, namely that that one's personality is affected by the publicity and the pressures to which he or she is subjected. That kind of proves my point about jurors having to reflect upon what and how a witness says what-

ever he or she says in determining whether or not the witness is credible.

Pillsbury: Have you any further questions?

Kaner: I have just one other question, Mr. Hirschhorn. You indicated at one point previously that you thought there might be some intermediate suggestion that we could make to the Supreme Court about consent. Now we have had all kinds of evidence here already in these hearings that wherever consent was required, they never had any coverage.

Hirschhorn: I wonder why.

Kaner: So you would advocate that we attempt to come out with any kind of solution such as that.

Hirschhorn: Colorado has that rule and it has worked. Colorado has a consent rule and they have had it since 1956.

Hannah: 1956.

Hirschhorn: '56 and it's worked.

Kaner: How has it worked?

Hirschhorn: Because sometimes defendants consent to the televising of their trials where the defendants think that televising the trials will be helpful to them. The best example is my friend Bud Morley who is a First Amendment lawyer from Denver, Colorado who consents regularly to the televising of his clients' trials when they are arrested for topless and

bottomless dancing because it gives a lot of publicity to the particular company that they work for and that helps business. Where is that thing about salacious? So there is a consent provision and it has worked. It has not worked as well as media would like it to work, which is why they won't recommend it because media knows that the careful, cautious defense lawyer who is interested in protecting his client's rights is not going to consent if he has just a hunch, the smallest hunch, that the televising of the trial will in some way affect his client's rights.

Segell: I would like to ask a question. To follow that up Mr. Hirschhorn, Florida is the only state in the Union in which there is a non-consent rule about cameras, isn't that correct?

Hirschhorn: No, I think

Segell: Non-consent.

Hirschhorn: California has changed to a non-consent state recently.

Segell: Did they.

Hirschhorn: I know that.

Segell: But one of the reasons for the non-consent rule in Florida was because of the undue and subtle pressure of the media on the elected Florida Supreme Court, isn't that a fair statement?

Hirschhorn: I believe that and I believe that most members of the Bar believe that and I think that, although I urge and hope no one on this Commission will ask Judge Sholts that, I believe most trial judges believe that.

Segell: That's because apparently politics as far as the bench is concerned both on the Supreme Court and on the trial court is quite prevalent. You have a lot of contested elections, a lot of judges sit in fear of an election, isn't that a fair statement?

Hirschhorn: Yes.

Segell: It happens both on the Supreme Court and in major metropolitan areas.

Hirschhorn: Now since the experimental rule in Florida, Florida at the Supreme Court level has gone to the Missouri plan, where appellate judges run against their own record. But state trial judges still run, although it's non-partisan, it's still run against an opponent.

Segell: You still have serious contested elections there, do you not?

Hirschhorn: Absolutely.

Segell: There are one or two other points I would like to make. Since the permanent rule has been adopted, hasn't there been considerable litigation as a

result of having cameras in your courts?

Hirschhorn: In Florida?

Segell: Yes.

Hirschhorn: Yes.

Segell: Not only on the trial court level, but cases that have gone to the appellate court, that is the intermediate appellate court, and to the Supreme Court. Your case is an example. It went all the way to the United States Supreme Court.

Hirschhorn: Surely.

Segell: And it's based on a rule regarding cameras

Hirschhorn: There is at least thirty or forty death penalty cases awaiting federal habeas corpus attacks in which the objection to televising portions of their trial were raised and preserved and denied by the Florida Supreme Court, which are now going to be subject to collateral attack in federal habeas corpus proceedings.

Segell: They have generated that in the federal court.

Hirschhorn: Some of them have been filed, not all of them. I know that they are waiting. (INAUDIBLE)

Segell: As a result of having cameras in your courts, you have put an additional burden, not only on your state court judges, but on your federal court

judges as well.

Hirschhorn: I believe that to be true.

Segell: Would you like to comment on any additional burdens that you have observed on trial court judges in cases that you have handled?

Hirschhorn: In connection with the cameras.

Segell: With cameras being there.

Hirschhorn: Frankly, there have been very few. I think Judge Sholts could answer that question better because I haven't had any problems. There was only one time a camera man was changing a lens during a witness' testimony. I have not observed any.

Segell: Did you have any in camera hearings in any of your cases?

Hirschhorn: No, mine were not of that nature.

Segell: Was that because the rule didn't permit that kind of a hearing for the most part?

Hirschhorn: No, the cases that I were involved in there was no need to case for an in camera hearing in any of those cases. Judge Sholts, I think, can address that better.

Segell: That's all.

Hirschhorn: Thank you. By the way Judge Godfrey handed me what

is a document entitled State Legislative Clearing-house, which, of course, is put out by the legal department of the National Association of Broadcasters so we don't know how accurate it is, in which according to this in California as of August 1. No, they couldn't have sent this to you recently, because I know it is inaccurate. The judge must consent of consent rules removed following Chandler decision coverage in all courts. I think someone said

Beckmann: California very recently has been changed that made it a non-consent rule.

Hannah: Iowa has no consent requirements. Wisconsin has no consent requirements.

Segell: Mr. Chairman, I wonder if I might supply as an exhibit in this case the brief that Mr.Hirschhorn wrote in Chandler together with the studies that he gave to the Supreme Court?

Pillsbury: Okay, fine. We accept it as an exhibit. Will you mark it as exhibit number?

Segell: I don't have it, but I will

Hirschhorn: The media has it, they can give it to you.

Hannah: Yes, we do. We will also probably append a little piece of paper on the front that says remember, he lost.

Pillsbury: Have you any further questions counsel?

Hannah: No.

Pillsbury: No further questions. Thank you very much. You are helpful to come up here and we appreciate it very much.

Hirschhorn: I want to thank you. It is a great privilege to be here in your state. Thank you.

Pillsbury: I would like to suggest that unless our next witness has a very tight time schedule for an airplane, why don't we have a recess now for five minutes?
(RECESS)
Are you going to make an introduction?

Segell: Yes. I just would like to make a brief introduction. Members of the Commission, Judge Sholts.

Pillsbury: I believe everybody is here so the proceedings will reconvene.

Segell: Judge Sholts is a native of Appleton, Wisconsin. Was raised there and he attended the University of Wisconsin, graduate from the University in 1954. He's a graduate of NYU law school in 1957. In 1960 he went to Florida and there worked as a prosecutor, defense counsel and in private practice. Has had considerable experience in the trial courts and has been on the bench for about ten years there as a circuit court judge. He was a chief judge of his circuit in 1975 to 1977. It is my pleasure to present to you, Judge Thomas E. Sholts.

Sholts: Thank you.

Pillsbury: We are very happy to have you come here, Judge Sholts.

Sholts: Thank you, Mr. Pillsbury.

Pillsbury: We will have you sworn in first.

Sholts: This is unusual.

Pillsbury: I know it is.

(JUDGE SHOLTS SWORN IN).

Sholts: Members of the Commission, Judge Segell, Mr. Hannah and the Judiciary and members of the media. I am here at the request of District Judge Hy Segell to speak to you about my experience in trial proceedings where the electronic media, primarily the television camera, was present. Before continuing I wish to make it clear that I am not here to criticize the Florida Supreme Court for its opinions on this sensitive subject. As a Florida trial judge, I am oathed and duty bound to follow Florida Supreme Court and United States Supreme Court precedent where applicable, and I will continue to do so to the best of my ability. I am here to discuss my experiences and to express my personal views relative to the subject matter of this Commission study. Perhaps a bit of Florida judicial history will explain why the Florida Supreme Court reached the point which allows the electronic media's presence in Florida's courtrooms. Judicial Canon 3A(7) which was formerly known as Canon 35

originated from a 1932 American Bar Association resolution which suggested a complete ban to prevent breaches of judicial decorum on radio broadcasting and the taking of still photographs of judicial proceedings. Its complete history, if you are interested, is attached as an appendix to Justice Harlan's concurring opinion in Estes v. Texas cited at 381 U.S. 532 (S.Ct. 1965). The Canon's adoption was related to excessive and spectacular media coverage of the Lindberg kidnapping trial in the State v. Hauptmann, 18 A. 809 (N.J.1935) cert. denied in the United States Supreme Court at 296 U.S. 649 (1935) decision. Canon 35 was formerly adopted by the American Bar Association House of Delegates in 1937 and amended in 1952 to ban the televising of court proceedings. Obviously in '35 we didn't have television such as we had in 1952. Incidentally, the broadcasting and taping and televising of trials is still prohibited in the federal court system and Justice Burger's views on that are well known. I think that when Richard Salod who was then the president of CBS News asked for permission to televise the appellate argument in the Bakke decision, he said something like over my dead body. I would also point out that the Court didn't even permit the televising of the ceremonial robing of Justice O'Connor, so I think his views on that are well known and he is a man from these parts. Rule 3.110, Florida Rules of Criminal Procedure in Florida, formally ban

broadcasting, photographing, televising and taping of judicial criminal proceedings. Florida experimental rule which was the rule that Mr. Hirschhorn eluded to, 3A(7), was taken from ABA Canon 35 and temporarily superceded Rule 3.110. On January 24, 1975 the Post Newsweek Stations of Florida, Inc. filed a petition in the Florida Supreme Court for a modification of Rule 3A(7) to permit the use of radio broadcasting equipment and television cameras in Florida judicial proceedings. By Order entered January 28, 1976 the Florida Supreme Court permitted television coverage on a restricted basis of one criminal trial and one civil trial in the Second Circuit. We have nineteen circuits in Florida. The consent of jurors, witnesses and parties was required and any news camera film was to be filed with the Florida Supreme Court and could not, without prior approval, be shown for public broadcast. On April 12, 1976 the Order was expanded to include still photography cameras. The Second Judicial Circuit was expanded, due to difficulty which was eluded to previously, in obtaining agreement of all involved parties to include the Ninth Judicial Circuit. On December 21, 1976 a supplemental Order granted similar authorization to the Fourth and Eighth Judicial Circuits for the same reason -- they couldn't get anybody to agree to it, which says something for not perhaps having it. Having no success in obtaining all

parties consent, the Florida Supreme Court decided to bite the bullet and make an involuntary experimental program which they felt was essential to a reasoned decision and, in effect, the court did away with the consent portion of their former Orders by stating "Consequently in order to gain the experience which we deem essential to a proper final determination of this cause, it is the decision of this Court to invoke a pilot program with a duration of one year from July 1, 1977 during which the electronic media, including still photography, may televise and photograph at their discretion judicial proceedings, civil, criminal and appellate, in all courts of the State of Florida subject only to the proper adoption of standards with respect to types of equipment, lighting and noise levels, camera placement and audio pickup, and to the reasonable Orders and direction of the presiding judge in any such proceeding." The starting date was subsequently change from July 1, 1977 to July 5, 1977 at 12:01 A.M. ending at 11:59 P.M, June 30, 1978. A motion to extend the pilot program for an additional year was denied by the Supreme Court on May 11, 1978. The Florida Bar's Board of Governors on the same day by resolution -- 21 in favor and 8 against -- instructed its council to oppose any effort to continue the experimental pilot program. On June 14, 1977 the Florida Supreme Court in Post Newsweek Stations Inc. established the standards and criteria for use of cameras and electronic recording

devices in our courtrooms. Operation of the cameras were subject to strict standards and the media had no right of appeal from restrictive trial Court Orders during this pilot program. The standards related to equipment and personnel, sound and light criteria, location of equipment and personnel, movement during proceedings, courtroom light sources, conferences of counsel, impermissible use of media material, appellate review and evaluation of the program. The Florida Supreme Court also limited the number of camera and audio system operators in trial proceedings to one camera person operating not more than one television camera, one photographer operating not more than two still cameras and one audio system for radio broadcast. The Court also designated brands and models of cameras for courtroom use. The chief judge of each circuit was given responsibility to designate appropriate courtroom areas for the placement of equipment. During the experimental year, Florida's experimental rule did not proceed unchallenged. Some of this was eluded to you, but I think I have some of the facts that might fill in some of the questions that you all had. One criminal defendant sought a federal court injunction of the experimental rule. Two criminal defendants requested the Florida Supreme Court ban the cameras in trial proceedings. One witness in a criminal case requested the Florida Supreme Court prohibit televising her testimony and an attempt was made to bar televising

the testimony of a 16 year old rape victim. I have the citations here, but I won't bore you with them now. They are in a report that I made to the Florida Supreme Court, which I will submit to you as an exhibit in this matter. Two of the appeals concern the Herman case. That's the case that I tried. It was the second fully televised trial in Florida, and I will elude to that a little more farther on down my presentation. These two appeals arose because the widow in that case of the deceased victim objected to having her testimony televised on her claimed right to privacy under authority of the Ninth and Fourteenth Amendments to the United States Constitution in Article I, Section 1 of the Florida Constitution, 1968. I think that's important for you to note because it wasn't the defendant, on this occasion, that objected, it was the widow. (END OF TAPE).

Which many of you probably saw portions of here in Minnesota, because I think the national broadcasting networks picked it up, or portions of it. That case was a murder case which received national attention because of the defendant's claimed defense of television intoxication. I presided over the second fully televised trial which was the State of Florida v. Mark A. Herman. In that case the defendant was charged with first degree murder. Pillsbury, you having had some contact with Palm Beach may have had some independent knowledge of the facts of that

case. The man was a well known Palm Beach person who was gunned down in his home in the early evening in the presence of his wife and children by shotgun blasts that occurred through the front door and side window of the alcove on his home. The Herman trial was televised gavel-to-gavel by WPBT Channel 2, the public broadcasting system in our area. The proceedings were extensively reported in most major newspapers published in southeast Florida, usually accompanied by still camera courtroom photographs. There was no separate radio broadcasting system installed, although a facility for audio pickup was made available by Channel 2. At 9 A.M. on Monday, February 6, 1978 the trial began. Pooling arrangements for media personnel were made in advance of the trial. I appointed Bob Horey, our court administrator of the Fifteenth Judicial Circuit which comprises Palm Beach County, to serve as liaison between the media and the court. The media personnel did not attempt, fortunately, to bypass the court's liaison officer and the media personnel fairly well cooperated with the court in carrying out any suggestions and requests that the court made. One portable television camera was used throughout the trial. The camera was operated by personnel of WPBT, Channel 2 and only one camera person manned the camera at any given time and substitution of camera operators was done during recesses so as not to disrupt the proceedings. In line with

a Supreme Court directive, I requested all microphones, including the directional microphone located on the camera, be turned off when panning counsel tables and side bar conferences. A room immediately adjacent to the courtroom was reserved for personnel and equipment for video and audio tape reproduction. That was done in an effort to keep the halls immediately outside the courtroom from being unduly congested with media personnel and not to overly disturb any other courts in the courthouse that were in active session. The courtroom was not remodeled to accommodate the television equipment, but additional microphones, necessary cable equipment, a television camera and required videotape reproduction equipment were installed over the weekend before the trial. I met with the media representatives on Sunday afternoon, February 5, 1978, the day before the trial began, to finally inspect and approve the installation and equipment. These are all duties that, frankly, I don't believe a trial judge ought to have to cope with. In a first degree murder prosecution where you have got a man's life at stake with a death penalty involved, as we do in Florida, these are all, in my view, kind of irrelevant to the real job at hand. A television camera was mounted on a fixed tripod base located directly to the rear of the jury box. The camera and the cables were relatively unobtrusive, but because of the configuration of the court-

room and the location of the existing benches, counsel tables and seating arrangements, the camera was located, in my view, much too close to the jury box. The television and audio equipment caused no significant distractions. Let me say this about that. I think that any objection to the televising of trials based on the equipment present in the courtroom, I am talking about the cold equipment -- the camera -- really has little or no validity any more. The equipment has been developed and is now sophisticated enough so it is relatively small and unobtrusive and I think the presence per se of the equipment has little affect in fairness to the media. Existing courtroom light was sufficient without increasing the light intensity and the courtroom's air conditioning equipment caused some interference with the audio portion of the televised signal. This problem was somewhat remedied by adding, at the request of Channel 2, two microphones, one located at the bench and the other at the witness stand. I didn't really like to do that because I mean when you start adding microphones and doing things of that nature to permit the camera's presence so that it will be better presented to the public, I mean are we setting up a stage for a playhouse 90 production or are we trying a major criminal trial? We don't really run the system for the benefit of the media, we run it for the benefit of the public. That's

kind of an ancillary thing, but my feeling about that was we were doing things to suit the media as opposed to doing things to suit the prosecution and the defendant and employ fair justice in the cause. On several occasions before and after normal court hours, and again this is more work on behalf of the court. I don't mind working. I hope all of you understand that, but I would rather be working, in my view, on something that is relevant to the proceedings. The court held informal conferences with Tom Donaldson, who was the producer/director of WPBT, concerning such matters as the length of a given day's session and particularly with respect to the two Saturday sessions which were televised live, rather than videotape re-broadcast. The Herman trial was the first trial to my knowledge in Florida where we showed,in the language of the media, showed, which is an expression that I don't prefer to use in these circumstances, live. In other words, we were on camera live, rather than videotaping and showing it at night during hours say from 8 until 2 o'clock in the morning, when the whole day's production was shown. To do that, it was necessary to install additional equipment -- a microwave transmitter on the courthouse roof. Arrangements were made well in advance to satisfactorily complete the work and Channel 2 personnel and the building maintenance staff of the Palm Beach County courthouse cooperated well in installing and setting up the

necessary additional equipment. As far as the day sessions are concerned and working Saturdays was concerned, I wanted to do that primarily because it was a major case and primarily because I wanted it over as soon as possible due to the presence of the cameras in there. I didn't want anymore interference with the possible fair justice in the case than was necessary, so we worked two full Saturdays and we worked longer sessions during the day than we normally would have worked, which could conceivably have been tiring to the juries and altered our normal course of doing things in the court system for the benefit of the media. The court permitted one photographer utilizing two still cameras with not more than two lenses per camera to take still photographs. These still cameras primarily conformed to specifications set forth by the Florida Supreme Court. In July of 1977 the chief judge of our circuit generally approved the Leica M2, Nikon F2 and Leica M42 cameras which were ultimately used at the trial. A special seat was indicated for the still camera photographer who was not permitted to move about the courtroom. The news media agreed between themselves as to which still photographer would take pictures on any given day. During the first three days of the trial, the court noticed some movement by the still camera photographer from one side of the aisle to the other when taking

pictures. As soon as the matter was brought to the photographer's attention, the movement stopped and there was no further problem. In comparison and being fair I would say that the clicking of the still photographer's camera's shutter was more disruptive than the co-presence of the television camera mechanically speaking. Although the court imposed no restriction on the number of still camera shots permitted, it now seems more reasonable to me to minimize this distraction by setting a limit on the number of the still camera shots that could be taken of each witness. Because if you are in a court proceeding with a motion running in a first degree murder trial and the prosecutor is about to say and where were you on the night of so and so and you hear click, click, the camera shutter doesn't sound like much when you are out taking a picture of a bird in your backyard, but when you are in a courtroom it takes on a much larger significance. The front row of the public benches were reserved for media personnel, which included representatives from the local newspapers, radio and television stations and employees of the public broadcasting system. The court requested many personnel to refrain from interviewing, taking photographs or conducting any activity in the hallway immediately outside the court-room because of the possible interference with the free flow of spectators, parties, attorneys, witnesses

and jurors to the courtroom. During the first week of the trial and contrary to the court's directive, a local television station, not Channel 2 or not Public TV, but a commercial channel, took many camera television shots in the hall immediately outside the courtroom. Interestingly enough, the court received a formal complaint about this activity from other media personnel. They were telling on each other. This is that big cooperation that they always get between, and then, if you believe that, I will buy you the Brooklyn Bridge next week. They can't agree to much of anything unless they are forced to agree to it, and this is because they want the right to report. I don't fault them for that, but reaching agreement is difficult because they always want to get the beat, get the news, etc. Interestingly enough, I received a formal complaint from the other media personnel and I rectified the problem by speaking with the offenders and it took care of itself. As far as the trial itself was concerned, there were no histrionics and no thespians. I think that the lawyers behaved themselves, although they wore, one wore conservative blue and the defense counsel wore checkered trousers and a red jacket sometimes. I don't know whether that was significant to the television's presence or not, but I feel that the danger of acting for the cameras will exist and does exist. The attorneys, the witnesses, and all interested parties were

properly behaved in my view at the trial. One witness refused to testify for fear of her safety partially contributed to by the television's presence. I rejected her plea on that position and held her in contempt. Her name was Wanda Poller also known as Wicked Wanda, if that's of any significance. She refused to testify. An illusion was made earlier whether or not the experimental rule was discretionary or not and I believe someone said that they called Judge Cowart and Cowart thought that it was. Hirschhorn thought that it wasn't. I think it wasn't. Interestingly enough, it was referred, and that's the reason I really held her in contempt, because I thought I had no discretion but to permit her image to be televised under the rule. That very fact was eluded to in Justice Somberg's opinion in Petition of Post Newsweek Stations of Florida, Inc. changes in code of judicial conduct, 370 S.2d 764. It looked like it wasn't discretionary to me and frankly I think a lot of other judges thought it wasn't discretionary. Perhaps Judge Cowart did think it was discretionary, but here's what Justice Somberg had to say about it and I am telling on myself here because he doesn't agree with me and he's a Supreme Court Justice. This is at page 24, Mr. Hannah, of the opinion, if you want to cross me on it later, you are welcome to do so. I am using your precedent to make my presentation here. In State v. Herman

case number 771236, Fifteenth Judicial Circuit of the State of Florida two problems occurred concerning the coverage of certain types of witnesses. The widow of the deceased murder victim sought to prohibit electronic media coverage of her appearance as a witness. The presiding judge overruled her claimed right to privacy under the Ninth and Fourteenth Amendment to the United States Constitution, Article I, Section 1, Florida Constitution. I have already eluded to that. Both this Court and the Federal District Court for the Southern District of Florida refused to intervene. During the same trial, Judge Sholts denied the objection to electronic media coverage interposed by an inmate of the Florida correction system who had been called as a witness by the state. Spurred by the fear of reprisals from fellow inmates if she testified, the prisoner refused to take the stand, and as a result, was held in contempt. It is not clear that in either instance the presiding judge precede that discretion reposed in him to grant the objection by the witness. Now remember that language because we are going to come to that sometime later, when I had another situation arrive involving another prisoner in the state prison system who refused to testify. Remember that as how it applies to Wicked Wanda Poller. In the Herman case, the defendant objected to televising the trial on due process grounds. That was Mark Herman the defendant. The court, myself, overruled his objections

because of the Supreme Court's ruling temporarily suspending Florida Criminal Rule Procedure 3.110. The state originally took no position either for or against televising the trial, although subsequent to the verdict the prosecutor stated an objection on security grounds because of possible retribution against several prison inmate witnesses who testified for the state and who might not otherwise have been identified to fellow inmates except for their exposure on television. Because of excessive pre-trial publicity and Channel 2's decision to televise this trial, I decided to sequester the jury. Something I don't think I'd ever done before, or perhaps once. No I had never done it before my recollection is. That's a very expensive proceeding. It means that you are going to lock up a jury -- I think we had twelve jurors and two alternates -- for a period of a little over three and a half weeks. Put them in a hotel room at night as soon as they are done in court, transport them back and forth, deprive them of reading a newspaper or watching television and doing all the other things that are necessary which is extremely expensive, to say nothing of the affect it might have on the jurors. The defendant requested, in addition to that, that the court sequester the witnesses. I think we had something like fifty witnesses and some of them would have been a person just standing on a street corner who happened to see a speeding car go by. What the defendant wanted

me to do was sequester the witnesses, as well as the jurors. I denied this request because there were approximately fifty witnesses and it was unreasonable and economically unfeasible to grant the defendant's request, but it gives the defendant another right to complain where the witness rule is invoked. Now I did invoke the witness rule which means that each witness was specifically directed not to watch television proceedings, not to listen to radio news broadcasts, nor read any newspaper -- headlines or accounts relating to the trial. Human nature being what it is, this thing was on every night from 7:30 at night until 2:00 in the morning. You might tell someone not to watch it,and if they are on a jury in a normal case, if there is a squib on it for five minutes, or three minutes, or even ten minutes, they are not going to watch it. But if it is the cause celebra and it's going on and everybody in town is talking about it, I wonder about that. The reason you invoke the witness rule is to prohibit one witness from hearing the testimony of another so they can't get their stories in agreement and fool the court or fool the jury or somebody about their credibility. We are talking about a first degree murder prosecution here. When you are sitting where I am sitting, and you have got to make an ultimate decision perhaps to sentence someone to the death, to the electric chair, you want to make sure and know in your mind and heart

that whatever you are doing is correct and gives due process of law and follows the law. This makes it difficult. Now we had a lot of inmate witnesses in this proceeding. They were housed at the Palm Beach County jail. What we did there was not permit them, because they were in a jail situation, to listen to any radio or television broadcast, nor read any newspaper accounts of the trial. This procedure was arranged and agreed to by the parties and enforced by court order. Because of the defendant's motion to change venue which was generated, in part at least, by the excessive pretrial publicity and contributed to by Channel 2's decision to fully televise this trial, the court had to follow a pre-qualifying voir dire procedure by examining each juror individually away from the remainder of the jury panel and outside the presence of the television camera. Although I had to permit newspaper reporters and the still camera photographer to be present because it is an open proceeding, we didn't close it to the media, but we were trying to close, at least this portion of it, to the television camera. Four general areas had to be discussed with each juror. First, pretrial media publicity. This was a Sheppard v. Maxwell situation with very excessive pretrial publicity. Most of which dealt with the defendant's extensive prior criminal record, which was not admissible at the trial, but dealt with everyday by the media -- in the newspapers, on television and on the radio. Secondly,

we had to discuss juror attitudes towards television and other media coverage of the trial. You wouldn't want somebody sitting on that jury who thought it was great to be on the panel because they would be on TV every night for three and a half weeks and wanted the grandstanding show. On the other hand, you wouldn't want someone on there who absolutely prohibited had a feeling about not being televised whatsoever. In the process of doing that, what are we doing? We are windling out members of the society, a juror of the defendant's peers, who might otherwise be perfectly acceptable jurors, but because of the media's presence, they aren't acceptable jurors for one reason or the other, is that right? I just ask you rhetorically. Thirdly, we had to ask them about jury sequestration and tell them that the trial is going to last at least three or three and a half weeks. How do they feel about being locked up in a hotel room for three and a half weeks? Are they going to take that out against the defendant? Are they going to be in favor of the state by saying well on the other hand I have got to do this, this guy did it, I am really going to stick it to him. Put it in laymen's terms, I don't know. Wouldn't have these problems to a great extent if the television camera wasn't present in these courtrooms. The fourth thing we had to ask them about were their views on capital punishment. We have to do that whether the television camera is

present or not. Now the pre-qualification process -- the voir dire process -- was lengthy, but, in my view, absolutely necessary. I was afraid that the answers of the individual jurors, if we did it with all the panel present and we got their individual views, might prejudice the entire panel, so we had to do it individually. We interviewed a panel of 83 jurors. Of the 83 jurors we interviewed, and we had to take that many because of the problems I am telling you about here. We just couldn't keep sending down for more. We had to select them and have them wait outside and I did the individual voir dire in my chambers. 35 of these jurors were excused for cause. 48 were pre-qualified after which the voir dire examination moved from chambers to the courtroom and then we went into the normal voir dire that you would normally have. The pre-qualifying procedure lasted four complete working days. We had to ask each juror question after question -- the same question over and over again -- on the four categories. It was almost as though we were sitting through 20 consecutive showings of an army training film on dental hygiene. I mean that's how tough it was. Of the 35 jurors that were discharged, 14 were excused because of pre-conceived opinions formed by pretrial publicity and the others were excused because of attitudes about capital punishment or for hardship reasons. The great majority of jurors interviewed during voir dire stated they preferred not to have the trial

televised, but that they would nevertheless be able to render a fair and impartial verdict. Do you presume that they are telling you the truth? They are under oath, but perhaps they may have some fear deep down in their inner heart of saying something different, I don't know. It is a question that really shouldn't even be presented. It is totally irrelevant to the factfinding process and the truth finding process of this trial only if you thought the idea of televising the trial and taking still photographs in the courtroom was good. By the end of the trial, the sitting jurors apparently changed their views about the media's presence in the courtroom. Are you writing that down, Mr. Hannah?

Hannah: I think I heard this before from somebody else.

Sholts: The court with agreement of the parties, and I was interested in finding out, requested that each trial juror voluntarily complete a jury survey form which was provided by the Department of Communication of the Florida Technological University, which was currently making a study of the impact of the media in courtroom proceedings. I also asked interested courtroom personnel to fill out the same forms. I am talking about the clerk and the bailiff and deputies who had been in and out of the courtroom. A synopsis of the information received as well as a sample of the survey form is attached in my report, which I made to the Florida Supreme Court, and which I am

going to offer to you as an exhibit in this cause later on. A jury of twelve persons and two alternates were selected on Friday, February 10, 1978 and instructed to go home, pack their belongings and return to court on Saturday morning. Humorously speaking, we had some interesting thing happen. They showed up with exercise bicycles, barbells, majong games, it was unbelievable. We had to rent a bus to take them. Initially, I told them all to come to the courtroom on Saturday and they brought all this equipment. We had to get a bus and take them from there to the hotel room to get them all settled in with all their luggage and their exercise equipment, and their games and cards and books. The jury was sworn on Saturday morning, February 11, 1978, and the testimony began. Meanwhile, we had to make arrangements to lodge them at a motel. We had to instruct the management to remove all the television and radio sets from the jurors. These are all things that I am having to supervise. I wouldn't mind doing it, if it were necessary, but in my view it is not necessary to the truth and fact-finding process. In fact, it throws road blocks into it. Sequestration, as I pointed out, was necessary to protect the record by making it impossible for jurors to watch proffers of evidence, which would not otherwise be admissible and they wouldn't watch or hear other related matters not normally seen by the jury. In this trial, members of the Commission,

we had a large amount of proffer, we really did. There were a lot of evidentiary questions that had to be settled before the court determined which evidence and testimony the jury could and could not hear. I would not have sequestered this jury, except for the presence of the media in the courtroom. I am talking about the television camera. The media was always present in Florida's courtroom. I am talking about the print media and the newspaper medium. The expense of sequestration borne by the taxpayers of Palm Beach County, not by the media as was eluded to earlier, I think, by Mr. Hirschhorn, amounted to approximately $11,500, including hotel rooms, meals, overtime for around the clock bailiffs and jury transportation. The verdict was rendered Feburary 22, 1978. During the trial and directly related to the widespread public interest caused by the television coverage, I received two bomb threats on my direct phone line to my office. Additionally, courthouse personnel in other offices received four other bomb threats telephoned to other departments in the courthouse. Now let me tell you the significance of that. I would be sitting on the bench and I would get a phone call and my secretary comes in and hands me a message in the middle of the day there's a bomb due to go off at 11:00 or something. Now what do I do members of the panel? Do I take a chance and

assume it's a hoax? If it isn't, 75 people are killed and who would be criticized for that? Would the media be criticized for that? You know where the fault would lie. Or do I stop the proceedings, clear the courtroom and order the courtroom searched and secured. Meanwhile, we can't tell the jury what's going on, because if you do that, you are going to frighten the devil out of them and they may take it out against the defendant or the state or say look I want out of this case. After two weeks of trial or something, you'd have a mistrial situation and all that expense involved. Fortunately, I guessed right. We searched the courtroom every night and every morning and I took a chance on one or two of these things and we waited. Fortunately, there was no bomb, but it was a terrible problem. I sat there wondering whether I was going to be flying through the roof in ten minutes, or whether the thing was going to be all right until the next morning when we started all over again. Additionally, we kept getting anonymous leads from people calling up on the telephone and telling us that the butler did it, or the neighbor next door did it, or some friend did it. Now everyone of these leads had to be investigated by the State's Attorney's office and we had to tell defense counsel and we had to have a conference about that. We were doing that at 6:30 and 7:00 in the morning, or after court closed in the evening. They had to be followed up to some extent.

We had to keep these leads and these bomb threats from public knowledge for security reasons, and the truth is if you put out a situation that you have got a bomb threat, I mean four other nuts might call you up and say hey there is another bomb, and you know one leads to the other. So it was a terrible problem. Totally unnecessary. Now the defendant was convicted of first degree murder and sentenced to a life term without possibility of parole for twenty-five years. He objected to the televising of the cameras. The Fourth District Court of Appeal denied his appeal on that ground and all others. The conviction and sentence was affirmed on appeal. Now since the Herman trial, the television media in Florida has fully televised three other trials that I know of -- the McDuffy case, the State v. Theodore Bundy and the State v. Jones. To my knowledge no civil trial, underline that, in Florida has ever been fully televised. McDuffy and Bundy were notorious murder cases. Jones was a notorious grand larceny case against the defendant who was the black superintendent of the Dade County, Miami school system charged with an elaborate scheme to steal public funds for the purpose of purchasing gold bathroom fixtures for use in his vacation home. I point this out for the purpose of showing to you how sincere the media really is when it claims it wants to take still photographs, tape and broadcast testimony and televise trials because it wishes to

educate the public about the legal system, the courts and how the courts operate. I personally doubt the intellectual integrity of the media's position in this regard. What the media really sees at the expense of the litigants is to entertain the public with the real life tragedy of crime and its aftermath. There was an editorial written by

(END OF TAPE)

Mr. Herb Site. No aid to the public. This is heresy. This is one of their own kind writing this. True,in the Herman trial airing, many people saw for the first time how a murder case is actually conducted. This one had some of the elements of the more lurid, TV dramatizations viewers have been fed in the past, but it could hardly be considered a fair sample of the day-to-day operation of our courts of justice. Perhaps 90% of our normal court proceedings are deadly dull. No rating hungry TV station or network would dare make them daily fare for their viewers. It is logical to assume that even if the court camera ban is permanently removed, TV coverage would be offered only on the most sensational trials and that would provide more Roman circuses than education. It sounds as though I wrote that. I believe that he is correct and this is a media person writing it. I truly believe that when a defendant's problems become entertainment for the public, the trial takes on a different form than an orderly search for the truth. The trial court searches for the truth, the appellate court searches

for error. The chief function of our judicial trial machinery is to ascertain the truth and the use of television does not materially contribute to this objective. Its use amounts to interjection of irrelevant factors into court proceedings. Trials are open to the public, if the public really wants to attend. Permitting the media to televise trials and to take still camera photographs during court-room proceedings creates unnecessary problems at the risk of great possible prejudice and it isn't worth it. If education is the true aim of the television camera's presence, then why not fully televise a civil trial which might have some educational benefit? For example, I tried a medical malpractice case where the widow of a deceased senior citizen, who had been a 30 year, two pack a day smoker of cigarettes, filed a malpractice action against a general practitioner, a radiologist and a chest surgeon alleging negligent failure to timely detect the lung cancer which eventually killed her husband. Trial witnesses included several top experts -- well versed in the dangers of smoking, the importance of regular medical checkups and treatment and the necessity of appropriate medical treatment for senior citizens. All matters of great public interest to our large body of retired persons in south Florida. Everybody wants to come to Florida after they retire, yet no television coverage of this trial occurred. Perhaps the subject matter was too dull to satisfy

the ratings. Since the Herman trial, I have had some other experiences in dealing with the television's presence in the courtroom. I presided over a first degree murder trial, the State v. Arthur Sekal, in which the defendant was a prisoner in the state prison system and accused of murdering another prisoner in a most horrible manner. Someone, the defendant was ultimately found not guilty, so I use the term someone, had concocted a mixture of gasoline, lighter fluid and honey and poured it on the victim at night while he was asleep in his dormitory bunk and lit a match and threw it on the man and immolated him. Now what more horrible state of facts can you get than that? The homicide occurred at night, in a prison dormitory, which housed approximately 120 inmates -- a mixture of blacks and whites. Most of the eye witnesses were inmates due to the fact that they were all prisoners in the dormitory. The defendant was white, the victim was black, which raised the obvious question of racial prejudice. Two of the white witnesses told the prosecutor they would refuse to testify if their images were televised because they feared reprisal of great bodily harm or, at worse, death, and what more proof could you have than the fact that somebody in that dormitory had killed the victim in the manner I described to you. They feared reprisal because of the prison code of silence, and if you try these cases and you're familiar with the prison code of silence, it exists. I can tell

you that from my own experience in this case, if no other. The prosecutor filed a motion to exclude television coverage of these two witnesses while they were testifying, not to exclude the television from covering the entire trial, but only to turn the cameras off while these two witnesses were testifying because they feared for their lives or worse. In Florida news media have a special preference entitling them to notice and a hearing before any trial court may enjoin or limit publication of proceedings. That comes to us from a case called Miami Herald v. McIntosh, 340 S.2d 904. The facts of that case were that the judge issued a pre-trial gag order there. It was a First Amendment situation, but that ruling has been now applied to the closure of television proceedings in Florida. The trial may not be closed, but you just make an attempt to bar the televising of trials and, as far as the television media is concerned, that is a closure, although the trial is not closed. There's a difference. In effect, this means that any time any party moves to close a trial or to exclude news coverage, which I have explained to you. The Appellate court and the Supreme Court of Florida in two cases I have cited which I will also submit to you as exhibits in this matter, when anybody moves to do that, then all ongoing proceedings between the state and the defendant, if it is a criminal case, must stop even if the jury is chosen in the middle of the trial until

the media is notified and a hearing is held. That means you have got to put the jury in the jury room, if it's going to take an hour, or you got to send them home, if it is going to take a day and a half or whatever. Stop the proceedings. In the case I am describing to you the Sakal case, I held the required hearing about six weeks before the scheduled trial date. The state offered affidavits from the two witnesses rather than having them appear personally to tell me under oath that they feared for their life because of the prison code and testifying, and if others in the prison system knew it, and the black and the white situation, etc. The reason the state did it that way was it was a Catch 22, if you are going to ban them at the trial, are you going to not permit them to televise the pretrial evidentiary hearing they are entitled to? Good question. The DCA never answered it, and neither did the Florida Supreme Court. It's a Catch 22. Anyway, I ruled,in order to protect the witnesses, that the electronic media could not televise the two witnesses while they testified. I refer you now back to Wicked Wanda. Now I am using my discretion. We will see what happened when I used my discretion. The media appealed my ruling to the Fourth District Court of Appeal, which is our intermediary Court of Appeal. In Florida we have a trial court and then an intermediary Court of Appeal and then a Supreme Court. Guess what they did, they

entered a stay in the proceedings which effectively continued the trial. Now who caused the continuance? I suppose it could arguably be said that I caused it because I goofed in the ruling ultimately, but in reality it was the third party practice that caused the continuance. Now when did the continuance take effect, the stay order? I held the hearing enough in advance to hopefully obviate it, but the DCA didn't get around to hearing it until after the trial was scheduled actually, so what happened was that the stay was granted on the Friday prior to the Monday the trial was set to begin. The Fourth District Court of Appeals reversed me, stating that the determination I made could not be made upon affidavits presented and further stated that the court had not permitted a full evidentiary hearing. I think it was the Fourth District's opinion that the media had the right to cross-examine these people on whether their fear was real or not. Now these people can't protect themselves, these jail prisoners. I mean,you, if you are threatened with death or great bodily harm or fear, can take some measure to protect yourself, but when you are cooped up in a prison with the kind of people that they were cooped up with and the fact that someone had already been murdered in this terrible manner, it seemed to me that their fear was pretty real. If I had to make a choice between witnesses testifying so that the jury hears the truth of the matters in-

volved, or the television's presence, you know how I am going to have to rule. It is more important to me to have the jury hear the testimony and receive the facts, frankly speaking. I believe that any trial judge worth his or her salt will agree to that when it comes right down to the nitty gritty, the bottom line. The net result caused a four month delay in the trial of the case. The problem was finally resolved when the two witnesses decided to testify irrespective of whether or not their testimony was televised. The defendant was found not guilty. After the trial, I asked the prosecutor, a young man named Paul Morrow, to relate the problems he encountered as a result of the media's demands in the case. He told me the following. It is his sincere belief that the actions taken by in the presence of the photography equipment clearly created an intolerable situation which adversely affected the fair trial and its cause. He said as follows: A number of critical witnesses related they wanted to cooperate and prevent the abuses in the prison system, but would not do so even, if held in contempt of court, if it meant their faces being photographed by camera or television. Several witnesses cited several reasons for this fear of photos or televising the trial. Prison is a closed system upon which most inmates watch TV broadcasts and read newspapers which contain photos of persons testifying. There is a prison code against testifying by a fellow

prison inmate witness. Violation of that code means severe retribution --serious bodily harm or death. Not being well educated and lacking in social skills and knowing the TV camera or other cameras are present taking photographs makes a lot of these witnesses nervous and upset to the point that they were not able, in his view, to amply relate their testimony. As far as the delay in the trial was concerned, he said the following. After both the state and the defense prepared their respective cases, the third party media petition caused a stay of four months. This stay was issued on a Friday at 3:30 when the trial was to begin the following Monday morning. This is his language now. It took me many days to set up the paperwork to have numerous witnesses transferred from various state institutions to West Palm Beach City jail facilities. The various prisons became quite upset at the constant shuffle, and some witnesses said this caused them problems. Special arrangements had to be made to separate a number of the witnesses from each other for security reasons, which caused bad feelings between me, the city jail officials, sheriff's office transportation units and the prisoners. Witnesses threatened to not testify if these delays continued, since the constant shuffle meant staying in worse facilities and having hassles from fellow inmates, losing privileges and having hassles from institutional authorities. Witnesses told me such delays were causing them to lose

interest and memories were diminishing as time went on. I was often told that if the case wasn't going to trial soon, they just wouldn't testify anymore. It was just causing them too much trouble and placing them in physical harm and fear. This is additionally what he said. I found the entire process of having to fight the press corps to be nerve wracking and diverted my attention from my substantive case preparation. The attention given to the media problem created further anxiety in several witnesses. The amount of publicity created a potential venue situation. I personally found it a severe impediment in getting psyched up and mentally prepared after the appeals. I noted that anxiety and nervousness on the part of several witnesses when the camera is clicked and the TV camera turned on them. I personally was not comfortable and sometimes was distracted when the cameras and TV made noises, left the courtroom noisily, or followed me around the courtroom. The cost to the taxpayers for the delay was enormous. The Sakal case, members of the Commission, demonstrates a serious practical problem caused by the television cameras' presence in our courtrooms. Florida has adopted procedure of notifying the media whenever any litigant moves to limit its presence in the courtroom. This procedure requires stopping the ongoing litigation unless and until reasonable notice is given the media and an evidentiary hearing held. This

procedure originated from an attempt to entirely close trials to the media's presence, but has since then adopted to the electronic media's presence as well. I am not in favor of closed trials in any respect. It is obvious that the necessity of holding evidentiary hearings regarding the electronic media's presence, a presence which is irrelevant to the truth and factfinding process, has, and may very well cause, prejudicial delays in Florida judicial proceedings. After the Herman trial, the media requested, asked me about my opinion regarding cameras in the courtroom. Now they want my First Amendment view which they are so careful to protect at all times. When I expressed my First Amendment view indicating I did not favor the televising of trials, the media's response was publication of a cartoon, which I am now also going to offer to you as an exhibit in the cause. May I approach the bench?

Pillsbury: We are very informal.

Sholts: When I looked over my papers last night, the characture appeared in the Post Times. The head mast sheet is there to show you which day it appeared. The cartoon involving prime time below was my secretary has a marvelous sense of humor and she surreptitiously added that on there for humor purposes. That wasn't a part of the publication, but it is another comment on the situation. The cartoon, although humorous

in my view, was in bad taste, and demonstrates the extent to which the media will go on criticizing someone who does not agree with its opinion when expressing his First Amendment rights. I am opposed to televising criminal trials for the following reasons, if not others that I might already have mentioned to you, the potential impact of television on jurors, in my view, can be significant. As soon as the public knows that a case will be fully televised, it becomes a cause celebre. The entire community, including prospective jurors who aren't as yet chosen but who are out there running around looking at all the publicity and listening to it on television, become interested in all the morbid details about the matter. As happened in the Herman case, the trial immediately assumes an immensely important status. The accused is highly publicized along with the gorey details of the offense. Realisticly, as I have hopefully shown to you here, it is only the notorious trial which will be fully broadcast. The conscious or unconscious affect this may have on any given juror's judgment is questionable, but experience indicated, in my mind, that it is not only possible, but probable that it will have a direct bearing on a juror's vote. Where pretrial publicity creates intense public feeling, aggravated by the televising of a trial, the televised jurors cannot help but feel the pressures of knowing that friends, neighbors and the public are watching. I believe jurors may very well

be distracted by the presence of a television camera because jurors are aware of the fact of the telecasting and to some extent most people are self-conscious when being televised. The quality of the testimony in criminal trials may be impaired. The impact upon a witness who knows that he or she is being viewed on the television camera by a vast audience is simply incalculable -- some may be demoralized and frightened, some cocky and given to overstatement, some memories may falter, accuracy of testimony may be severely undermined and embarassment may impede the search for the truth, as may be a natural tendency for overdramatization. Invocation of the witness rule is frustrated, unless the witnesses are sequestered, which normally is impossible, unreasonable and economically impossible, they are able to view broadcasts of the day's trial proceeding, notwithstanding an admonition not to do so. They convene and hear the testimony of the proceedings and other witnesses and so shape their testimony as to make its impact crucial. Also the mere fact that the trial is televised may render witnesses reluctant to appear and testify, thereby impeding the trial. Additional responsibilities are placed on the trial judge. He or she has the responsibility of maintaining the integrity of the trial, protecting the due process rights of the participants and making sure that the accused receives a fair trial. When television and

still camera photographers come into the courtroom the judge must also supervise that presence and spend a great deal of time on unwarranted ancillary matters. The impact of courtroom television on defendant is extremely important. Inevitable close-ups of his or her gestures and expressions may overcome personal sensibilities, dignity and the ability to concentrate. Sometimes that could be the difference between life and death. A defendant, however bad he may have been, is entitled to his or her day in court -- that's the American system whether you like it or not -- which should not become a television sound stage or a movie set or a playhouse 90 production. The television camera is a powerful weapon. Its coverage from a technological and fiscal necessity is selective -- that is it is edited. Total television coverage of all trials all the time is technically possible, but economically impossible. Editing is, therefore, essential and inevitable. The editing is the perogative of the media and it should always be the perogative of the media. It shouldn't be the perogative of the court, but that's the way it is. Editing is difficult without making value judgments. No mechanics presently exist for media portrayal of the media judgments of the judicial system independent of the value system of the media. The power to portray certain trials or certain portions, while not portraying other trials or other portions, is

the power to distort the facts. Unintentionally or otherwise, there is the potential of destroying a defendant and his or her case in the eyes of the public. As previously mentioned, the camera invariably focuses upon the unpopular or the infamous accused. Obviously public sentiment can affect trial participants and the real unknown, and that's what we are talking about here. We are talking about the same issue, I suppose, as to whether or not the death penalty does or doesn't deter murder. I don't know that you will ever prove it one way or the other to be honest about it. The real unknown is the possibility of prejudice to criminal defendants in such instances. Because of excessive pretrial publicity and the media's presence in the courtroom, the voir dire process takes much longer than necessary, which unreasonably prolongs the trial. We had an interesting thing happen also in the Herman case. An important state's witness, a man named Jerrod DeNono, was granted a change of venue in his subsequent trial for murder and he was tried for first degree murder based upon excessive pretrial publicity attributable to the television exposure he had in the Herman case and the televising of the Herman trial. That case had to be tried in Miami which was costly to the taxpayers. We had another interesting variation on the theme. In the Zamora case, Zamora had a co-defendant who wasn't tried with Ronnie Zamora when he was tried, but because Zamora had received

all that coverage, he asked for and received permission for his counsel to voir dire the grand jury before it decided to indict the co-defendant on murder charges to make sure that the grand jury had no pre-conceived opinion. That's the first time that I know of in the history of the State of Florida and probably anyplace else where a defendant through counsel asked for permission and received the court's permission to voir dire grand jurors before they found probable cause in a criminal case in which they were considering the indictment of a co-defendant who had been tried and fully televised. Very interesting question. Totally unnecessary, except for or but for the presence of the television media in the courtroom. Gavel-to-gavel television coverage is expensive. As I previously noted, it cost the taxpayers of Palm Beach County in the Herman case about $11,500. The presence of the media in the courtroom unnecessarily, in my view, gives every defendant another ground for reversal. Should there be a conviction, which adds additional burdens to an already clogged and overworked appellate court system? We have had some other fallouts. I know I am taking a little time. I hope you will bear with me here, but I came a long way and I do want to express my views. McDuffy was a case I previously eluded to which was moved from Miami due to all the pretrial publicity, and it was fully televised. It was held in Tampa. It involved four or five Miami

Dade County police officers who allegedly had arrested a black defendant. At the time they arrested him, they allegedly beat him to death. It was a very ugly case. Certain portions of the trial, I think, were shown in Miami. I am not sure that it was fully televised in Miami, but the point was that there were some illusions made, and I have no grounds, I mean this is one of those things that you are never going to prove one way or the other. Immediately after the trial, it was an ugly case, there was a very significant riot in the Liberty City section of Miami in which sixteen or seventeen people were killed and millions of dollars of property were burned. The police officers were white and the defendant was black. The rioting occurred in the Liberty City section. Part of that problem was attributed to the televising of those portions of the trial which were seen in Dade County. I don't know whether that's correct or not, but the point is it would not have existed and those remarks could not have been made unless the television camera was present and televising that trial and portions of it were shown. We have another interesting situation in Atlanta in the Williams matter, which intrigues me because the media wants to educate the public so they are in there for the purpose of helping the public learn about the court system. Normally it is the trial participants who object to the televising process. Strangely enough, certain portions of the public in the Williams case are now

objecting to the televising of the Williams trial in Atlanta because it would have a detrimental effect on Atlanta's black children. I picked up a clipping from the Miami Herald which was dated Wednesday, September 23, 1981 talking about that situation. It is an article which is entitled Frightened Atlanta Fights Televised Trial. Certain pscyhologists and psychiatrists are quoted in there as saying "After three months of calm and no murder, said Dr. Henry Braddock, a psychologist who works closely with Atlanta schoolchildren, the emotional healing process is just now beginning to bear fruit. Televising the trial now could psychologically snatch the stitches out of the wounds that are healing. People here are deathly afraid of it and so are the mental health professionals, said Braddock. Lawyers for the Atlanta Press Club citing Florida as an example claim that no ill effects have been reported among viewers of televised trials in other states. They said the intense public interest in the case demands that it be televised. But this case can't be compared to any other, said Sondra Sims, director of the child development center at Spellman College, the real victims here are the city's children and you can't believe how emotional this case is in the black community. You have to remember, she said, that a child often interprets things he sees differently from adults and what a child sees often has more impact than what he hears. Televising this trial would

just dredge up all the old tensions and anxieties back up again, but would the mere reporting of the trial, even if cameras be banned, do the same thing. Rhetorical question answered, perhaps, she says, but television cameras would make it even worse." That statement was made by Dr. Anna Harbin Grant,a Moorehouse College sociologist, who has given the State Supreme Court a report critical of cameras in the courtroom. "Young impressionable children, she said, tend to see television as a creditable and believable source of information reflecting the world as it is. Unfortunately, Grant said, the relentless imagery of murder mayhem and negative role modeling provided so often by the television cameras is suggestive to children. There is also a danger that TV could dramatize a shocking murder and make it into entertainment, she said. Several mothers," Now this is not the public, now we are getting to the mothers of the murdered children, let's see how they feel about this. They have some rights in my view. "Several mothers of the murdered children have signed a petition against televising the trial. They complain that it would make their private grief too public and would hamper the readjustment of their other children who are just now getting over the trauma, said Camile Bell, mother of nine year old, Josef Bell." Dr. Lloyd Backus, a well known Emery University Professor of Psychiatry, agreed. "A public trial is salutary in the sense that it could bring a public

closure to the crisis and give a sense of restoring order, but if televised there is a danger of children being drawn into...." That you permit the electronic media into Minnesota's courtrooms, I would recommend that you require or ask the Supreme Court of Minnesota to require the consent of the State or the defendant before obtaining that consent. I will tell you one or two other short things. I don't think it makes a difference in the world whether you televise appellate proceedings or not, because the appellate judges are professionals and the record is already made. I don't think it makes a difference whether or not the camera per se is present. I am talking about the equipment, because it has been refined and sophisticated to the point so I don't think it makes a difference, perhaps the clicking of the camera shutter might or might not. So those arguments really are not valid in my view. But for the reasons that I have indicated to you, I hope that you will take that into consideration. Thank you.

(END OF TAPE)

Pillsbury: Thank you Judge. Ladies and gentlemen, the Commission would like to continue and finish with this witness unless other people have serious objections. It is a little past noon, but this is the last witness and so we would like to continue. It might be for the convenience of the witnesses. Any objection to that? I also gather that you intended to introduce this evidence.

Sholts: Yes. Let me hand you those other.

Pillsbury: Is there any objection to him putting them into evidence? We will mark them then.

Sholts: At this time, Mr. Chairman, I would like to offer this report that I made to the Florida Supreme Court in the Herman trial in triplicate and also the two cases that intervene in the appellate trial which was the Palm Beach Newspapers, Inc., Petitioner v. The State of Florida, at 378 S.2d 862 and the Supreme Court opinion on the same case which is recorded at 395 S.2d 544.

Pillsbury: Any objection to these being received? They will all be received in the record. Have you any questions you would like to ask Judge Segell before we give the petitioners' attorneys a chance.

Segell: I wanted to raise one point with Judge Sholts. In the last few years, Judge Sholts, isn't it fair to state that we have become much more concerned with the right of privacy as far as individuals is concerned?

Sholts: I don't know. In what context are you?

Segell: There are privacy acts that have been passed and we have become, I think, a little bit more concerned with the rights that people have to privacy whether it is in the courtroom or in other settings.

Sholts: All of these questions, of course, have to be measured against First Amendment rights, and the right to report and it is difficult, unless it's a one-on-one situation, to make valued judgments about that, but I would say yes. In more recent years there has been an increasing thought about protecting a person's privacy. We may get a different about that now that we have a different Supreme Court makeup. I don't know what's going to happen, but I think that you are essentially correct about that.

Segell: We are beginning to view that as a property right under the Fourteenth Amendment.

Sholts: Yes.

Segell: That's all.

Pillsbury: Counsel, have you some questions?

Hannah: Yes. Judge did you give the Commissioners a copy of the two Palm Beach Newspaper decisions?

Sholts: Yes.

Hannah: Do you have a copy of those decisions for your use? We have some extras. Here you are. Judge you anticipated my examination somewhat.

Sholts: That's what I get paid to do counsel.

Hannah: We have a chronology here and I think some of my

educated guesses may be wrong. The McIntosh case was a 1976 decision and I think you described it as a case which is now being construed to require notice and the opportunity of a hearing even in a situation where one witness' testimony might be excluded from coverage.

Sholts: Yes, that's correct. Incidentally, let me tell you what we have had to do in reference to that. In order to give the media notice, we have adopted a procedure. We have a press room downstairs and we have a local rule where we post a notice. We don't know who to notify. First we thought we would have to go through all the yellow pages and try and notice all the TV stations and the newspapers and radio stations so that everybody would have notice to come in. It's kind of a catch-all situation. Now we post a notice on the press room door downstairs trying to give reasonable notice and we make an effort to call. I would make an effort personally to have my secretary call like the Herald and the Post and the Times and people like that who might have an interest in it.

Hannah: Could you also use a press coordinator if one had been designated in your district?

Sholts: We don't have a press coordinator.

Hannah: If you did that would.

Sholts: Why should the taxpayers pay for a press coordinator?

Hannah: No, someone from the press who is designated as the person to whom all those communications should go.

Sholts: I suppose that might be possible.

Hannah: Okay. Moving down, March 29, 1979 that was the decision of the Supreme Court which made coverage in courtrooms permanent, is that right?

Sholts: No I think that decision came later. That decision I think came April 12. That was the 377 S.2d 764 one.

Hannah: I don't know where I got March 29.

Sholts: I could be wrong about that.

Hannah: No, I think you are right now that I think of it.

Sholts: I think that the opinion in the Post Newsweek Stations for changing code of judicial conduct was rendered April 12.

Hannah: You are right. There is a case next to it called the State of W.T. Grant Company v. General Lewis, and that one was decided on March 29, 1979.

Sholts: I survived that cross-examination.

Hannah: I will be referring to the W.T. Grant case periodically as well.

Sholts: I am not familiar with the W.T. Grant case. That sounds like a five-and-dime situation to me.

Hannah: It was per curium one mere paragraph.

Sholts: Okay.

Hannah: Now the hearing that you held, the discussion about whether or not these witnesses were going to be allowed to testify before a camera occurred in late November of 1979, or was it earlier than that?

Sholts: I don't know exactly the dates.

Hannah: After I put that down I checked again and to the best that I can tell from my file it looks like late October or early November.

Sholts: I held it early enough, frankly, counsel. I knew this problem existed, you understand. I held it as soon as I knew the state's position so that the media, frankly, would have a chance under the existing law to appeal. It was the district court that didn't rule at all until after the original trial date was set, and they notified us on Friday prior to the Monday's start of the trial that the stay was in effect.

Hannah: I think that date was December 20 was the day of their ruling.

Sholts: Yeah.

Hannah: As I read it from the opinions, the appellate opinions, they state that at the time that media counsel was

present in your courtroom or your chambers, you had two affidavits from these prisoners. You refused to show the affidavits to the media lawyer, and that there was a prison official who was at or near the courtroom and that you did not allow him to testify, although he was present, and that, again these are just from those decisions.

Sholts: Yeah, I will tell you what really happened, but go ahead.

Hannah: Okay. Obviously I am at a disadvantage, I wasn't there.

Sholts: I won't take advantage of you and I will tell you the way it was.

Hannah: In any event, you made no findings based on an evidentiary hearing to support your order of closure At that point the media appealed, and the District Court of Appeals said on December 20, 1979 your right Judge Sholts was wrong. He should have made a record which could have supported an order to exclude coverage. My question is this, and you anticipated it again in your own testimony, you are being tarred here to some extent because of a potential delay. We listened to a long series of statements from the prosecutor about what that delay might have meant to his case. It seems to me that had you allowed the prison official to testify, taken steps to protect the identity of the people in the

affidavits, but placed that evidence into the record, had a hearing and evidence, and then issued your opinion, it is possible the media may have said fine, we aren't going to show those people. Isn't that possible?

Sholts: I don't know what the media would have done. I can't speak for the media. I can speak for myself and I will tell you what happened, if you are interested in knowing. It is true that I ordered the affidavits filed with the clerk so they became a part of the record. It is something obviously that the Court of Appeals and the Supreme Court had a chance to review, so there was no hiding the affidavits from obvious scrutiny later on. It is true that I think Officer Pim was in the courtroom who was a prison inspector, but you know whose request the Officer Pim was there at, whose request he came to the courtroom as a result of -- the state's request. The media never called him. They never even offered to call him. If the media had said to me during the hearing, we want to call Inspector Pim, I would have permitted it. With all due respect to the Court of Appeals, they thought for some reason in reading the record, that Pim was there at the media's response. Nobody offered any testimony. Nobody offered to have any testimony about it, so I think in that sense that your assumptions are erroneous. There was no proffer made, my recollection was that there was no proffer made to offer any evidence whatsoever on behalf of the media at the hearing. There

was no testimony taken. I did consider the affidavits and I filed them with the clerk. Now the reason that I did that, and in retrospect, I made a mistake in not permitting the affidavits to be seen by media counsel. Okay. If I had it to do over again, I would do otherwise. Also I assume in view of the holding of the Supreme Court that I would give the media a chance to present whatever testimony or evidence they wished to present. I am not sure under these circumstances whether I would permit the televising of the witnesses, if they came there live. That's a question that wasn't answered, interestingly enough. I think the Supreme Court artfully decided not to solve that problem at this stage. The reason that I didn't permit the affidavits to be shown was to protect the witnesses.

Hannah: You could have done that though simply by refusing to devulge their names and identifying the circumstances and the affidavits.

Sholts: The affidavit is the affidavit and it has got to have their name on it and be sworn to tell the truth before it is an affidavit, it would seem to me. It would affect the viability or the validity of the affidavit if you didn't know who was making the affidavit, what good would it do?

Hannah: We may be talking to Judge Segell about that when

he brings his affidavits from some jurors he has talked to, but under the circumstances given the question that publicity might be dangerous, I presume that as long as the media was aware of the circumstances that was supporting your decision, that the names at that point wouldn't have been important. It would have been the question of whether or not they really did fear for their safety, and you, sir, during your testimony, I believe, argued a strong case for them, but as I understand it that case may have been argued, but at the time it was argued it was really argued in your head, and the media hadn't seen it and couldn't respond to it. Then the only choice was to either say from now on.

Sholts: I expressed that view at the hearing to the media's lawyer.

Hannah: What view?

Sholts: My view that these witnesses were in danger of getting killed or maimed or something terrible happening to them. In view of the fact situation, I also told the media that these prison witnesses were not able to protect themselves, such as you or I would. If somebody makes a death threat against you or me, we can, you know, protect our environment, but they are thrown in a dormitory with, you know, killers and murderers and rapists and two or three time losers, and they can't, because of the fence around them, they can't run off and hide.

Hannah: The standard that is now up on the screen is one that was discussed in at least one of the opinions regarding your activities. It is the Supreme Court standard in the April 12 opinion. The presiding judge may exclude electronic media coverage of a particular participant only upon a finding that such coverage will have a substantial effect upon the particular individual which would be qualitatively different from the effect on members of the public in general, and such effect will be qualitatively different from coverage by other types of media. Now you could have done that in October or November of 1979, and there wouldn't have been an appeal perhaps. We won't know that since you didn't make that finding and you didn't, at least on the record, that could be reviewed by any other parties.

Sholts: I thought I made that finding in the record, by finding they were prisoners and unable to protect themselves and thrown in with an environment of thieves, murderers, crooks and what have you and the facts of the alleged crime and the racial situation and all the rest of it. Apparently I didn't say it in ABC language so that somebody could interpret it as meaning that, but I thought it was fairly clear.

Hannah: Or in a manner that had evidence that could be rebutted by the media if they desire to do so.

Sholts: You mentioned also the affidavit situation in the DCA. I point out to the Commission that the DCA was

reversed on that question in the Supreme Court. The Supreme Court rule that I should have produced the affidavits, but they said that if I had produced the affidavits the affidavits would have been sufficient rather than require the live testimony of the witness. I point that out for the record.

Hannah: That's right. If you had done that, it is possible that the media, as I said, would not have gone any further and you would have excluded the testimony.

Sholts: It's possible, but let me tell you the human nature that we are dealing with here. They might not even want to cover a trial or know about a trial, but the minute somebody files a motion to exclude them, boy they are in there on all fours hollering about their First Amendment. It is still a privilege. It's not a right yet, and they will want to cover it if their attention is called to it. It peaks their intellectual curiosity, I suppose, for lack of a better description. If you tell them that there is somebody saying that they can't come, they will want to come. That's the nature of their situation, counsel. I don't know what they would or would not have done. I mean that's conjecture.

Hannah: I can't argue with you about that. You may be right and you may be wrong. The point is we sat and listened to a great deal of testimony about the expense and the adverse impact this delay had upon

this case. Judge Segell has been telling us about it for the past two weeks. The only point I make, Judge, is that the process was sent in motion by your failure to have an evidentiary hearing which, on appeal, was determined to be the appropriate manner of acting. So that I don't think that we can lay that delay at the doorstep of the media in that case.

Sholts: Let me read to you what the Supreme Court of Florida said at 395 S.2d 544, page 549, which is the Supreme Court opinion. It says we also reiterate, however, that it remains essential for trial judges to err on the side of fair trial rights for both the state and the defense. The electronic media's presence in Florida's courtrooms is desirable, but is not indispensable. That difference should always affect, but never control a trial judge in his approach to the exercise of his discretion in excluding electronic media coverage of a prisoner witness, or for that matter any witness.

Hannah: I have no quarrel with that. In fact, I really don't have a quarrel with anything except that we are being branded here at these hearings before these Commissioners with some wrongful act because of our attitude in this case. I am simply pointing out that all we did was assert a right which the District Court of Appeals and the Supreme Court of Florida ultimately said was ours. The delay was unfortunate. I don't know that we began the process, and thus, can't be completely tarred

by the effects of the delay. That's my only point.

Sholts: My point, counsel, is that we now have a third party practice in criminal cases, which has developed along the lines I have indicated to you, which cause, I think the problem multiplies now because there is more television coverage of at least portions of these criminal trials. We have to delay the ongoing proceeding between the state and the defendant until we get all these side ancillary issues satisfied. We didn't have that prior to April of 1979 when the Florida Supreme Court permitted the television coverage in. If you look at the history of jurisprudence, we didn't have that many cases involving the presence of the press media. In other words, the problem has been exacerbated because of the television coverage as opposed to press media. I think the McIntosh case is the first First Amendment right case that we had, I believe. I could be wrong about that in Florida on that issue. Of course, Gannett speaks about closure and speaks about notice, so we have a Supreme Court opinion, but that's closure. You see this wasn't, in my view, a real closure situation. I think there is a distinction. It was closure as far as the televising of two witnesses are concerned, but it wasn't closure as far as the print media was concerned or the press media at all. It wasn't closure as far as the television coverage was concerned, except

as to these two witnesses, you see.

Hannah: There was a later finding though that there would be no reporting of the witnesses' names. You also said that at the hearing. I think that was picked up in the DCA opinion and that there could be no sketches.

Sholts: No, I didn't make any formal ruling about prohibiting sketches. I knew about the CBS case. I mentioned that in the discussion with counsel. Absolutely not. I think the CBS case is absolutely correct. If you look at the footnote, now you are tarring me with a brush, let me read it to you. Of course, we don't have the, it says the judge apparently also ruled that sketch artists would be excluded from the courtroom, although the record is not clear that a formal ruling was made. So they are telling me on one hand that I made a formal ruling and telling me, on the other hand, that I didn't. I can tell you, I was there sir, I did not make that ruling. That isn't what they are saying here. Then it went on to say there was plainly no basis for an exclusion of sketch artists in this case citing U.S. v. Columbia Broadcasting Systems, Inc., 497 F.2d 102. They obviously allow sketch artists in Federal proceedings which still has the ban on televising and taking photographs of criminal and civil matters in the federal court system. I did not make that ruling in that case. We eluded to it in the discussion with

counsel.

Hannah: Okay. Let's talk about Herman. Your report, and I saw it a long time ago and have not reviewed it, generally stated that you thought that the media coverage of the Herman case worked better than you were expecting prior to the trial.

Sholts: Yeah and why did I say that? Because I am a fair person. I expected a heck of a lot worse counsel. Every time I appear, you see when you tell it like it is then someone picks that up and holds it against you. I wanted to be fair about that. What I was saying there essentially was that it worked out a lot better than I thought it was going to work out. I was pleasantly surprised about that, and I did that in fairness to the Supreme Court which, you know, that's part of what I do for a living.

Hannah: There was no real evidence during the course of that case that the defendant was being denied a fair trial.

Sholts: I am not sure. What do you mean real evidence?

Hannah: In your opinion the defendant did receive a fair trial.

Sholts: If I say no, then he is going to file a 3.850 attack on a judgment and we will be back in court. I think essentially he got a fair trial, despite all the problems, but it wasn't easy. The Court of Appeals

has indicated that he got a fair trial.

Hannah: I believe you said that the question of whether or not his trial rights were somehow violated by the presence of the camera was at least brought up to the District Court of Appeals.

Sholts: Yes.

Hannah: They determined from the record that they were not.

Sholts: That's correct.

Hannah: My figure may not be exactly correct, Judge, and I am hoping that you know these figures. After the experimentation in Florida, there was a survey of trial judges, was there not?

Sholts: I am not sure about that. Was it eluded to in the opinion?

Hannah: I think it was. I was going to ask you if you knew of your knowledge. I understood it was approximately 70% of the trial judges saying that they now supported the presence of cameras, 30% saying no.

Sholts: I don't know, but I doubt that that is correct. I don't have any way of knowing one way or the other.

Hannah: At least some of the objections that you have raised today were certainly brought to the attention of the Florida Supreme Court during the time of its experimentation.

Sholts: I brought it to their attention. They voted 7-0 against my position.

Hannah: At this point you have no reason to believe that the Florida Supreme Court is any less interested in the administration of justice than you are, do you?

Sholts: Certainly not.

Hannah: We have a difference of opinion here that we are arguing about.

Sholts: Yes.

Hannah: We did hear from Judge Cowart yesterday who testified that in Dade County there was not a serious burden placed, at least in his court, from the presence of the camera. He told us that eighty-five judges during the course of his term there as a chief had four hearings on exclusions of witnesses and only one appeal. Would you find that to be fairly standard in terms of the experience around Florida?

Sholts: I really don't know. I know I have had one occasion and they appealed me. I have discussed it with you. I think that's the only case that windled its way to the Supreme Court. There have been other occasions. I think Joel told me of four or five occasions in Dade County where rulings were made, but I don't know really what happened to them, whether they were appealed or not. I don't have any knowledge of that.

Hannah: You mentioned a bomb threat in one of the cases.

Sholts: Several bomb threats.

Hannah: That case was intensely publicized by all media, wasn't it?

Sholts: Yes.

Hannah: We obviously can't ascribe the fact of a bomb threat to the presence of cameras in that courtroom with any sense of making a factual statement, can we?

Sholts: Wrong. I disagree with that to some extent. This case was on every night. In other words, we do a whole day's testimony, like five, six hours or four to five, six hours of testimony, and at night it would come on at 7 o'clock at night and would run until two or three in the morning. It was very intense.

Hannah: It was also intensely reported in the newspapers, wasn't it?

Sholts: Sure.

Hannah: There were other commercial stations that didn't run it from gavel-to-gavel who might have taken pieces of that coverage for their news stories, isn't that right?

Sholts: You mean other commercial television stations?

Hannah: That's right.

Sholts: Portions of the time were shown at the six o'clock news and the eleven o'clock news, and perhaps in the morning. I was busy in the morning, I don't know what they showed in the morning.

Hannah: So that in terms of one person probably making bomb threats, we really don't know where he got the idea or if he got it watching gavel-to-gavel or reading it in the newspaper, do we?

Sholts: I don't know that you can say absolutely that you know one way or the other, but I think logic would cause you to conclude that it was caused, the bomb threats came during the television coverage time. We didn't get any prior to the television coverage time. They came during the time the trial was being televised. Now would that cause you logically to conclude?

Hannah: It was also the time that the other media were reporting on the trial.

Sholts: Sure, but the intensity of the coverage was far greater in the ongoing gavel-to-gavel coverage by television than it was in the ongoing press coverage.

Hannah: I wish Mr. Hirschhorn were here because I believe he testified today rather strongly that it would be essentially a cold day in hell for anyone to be able to believe the argument that somehow televising of a trial would bring a witness out who knew something about what was going on in the trial, and

then you came and sat down and said we had so many phone calls with people with leads that we were following them all over the place.

Sholts: We got those calls. That happened.

Hannah: He may have to delete that sentence out of his.

Sholts: Another thing that happened that I just thought of that upset me a little was that when the media people were talking about the coverage, they were saying things like gee we beat Laverne and Shirley in the ratings last night and things like that. For a trial judge to hear that kind of business with this kind of significant trial going on, really is very, very upsetting.

Hannah: You also talked about a lengthy voir dire. That, again, there was intense pretrial publicity. That voir dire would have been lengthy even without the presence of cameras in that courtroom, wouldn't it Judge?

Sholts: It would have been lengthy. How lengthy, I could not say for sure, but it would have been lengthy.

Hannah: Now let's talk for just a moment about discretion of education. All I want to ask you is, I have heard some numbers bandied about it and I don't know if there were any studies, but one study that I read said that one hundred thousand people saw large portions of that trial.

Sholts: Including a now retired Minnesota Supreme Court jurist who was down there on vacation and who called me and asked to see the proceedings. One good thing that came out of it, I had a marvelous opportunity to meet and make a friend of Walter Rogosheske. I invited him to the courtroom and he viewed the proceedings one day. He still is my friend and out of all that I appreciate that.

Hannah: Out of those hundred thousand people, I would suspect that there were a considerable number of people who had never been in a courtroom before, wouldn't you think that was true?

Sholts: Probably.

Hannah: They saw that system, that system that you met at that point were operating, in a very, very (END OF TAPE).

Sholts: Just murder and rape trials.

Hannah: You mentioned a case about the politician who allegedly was using public monies to outfit a vacation home, that's certainly something that would be of interest to people who may either be voting for him or somebody else in that spot at sometime.

Sholts: It's a criminal case, counsel. That's the point I am making. It makes for a very interesting listening.

Hannah: It's also pretty important, isn't it?

Sholts: Sure every serious trial is important.

Hannah: Every crime is important to large portions of the community.

Sholts: Yes, due process of law is important.

Hannah: I am doing this, and I don't know if I will be successful, but the McDuffy case. Now I know you were testifying in a backhanded way perhaps a little on McDuffy.

Sholts: I had nothing to do with McDuffy, so if you are going to ask me facts and figures, I can't answer those questions. I am telling you what the comments were about it.

Hannah: You are aware that there was no televising of the McDuffy proceeding in the Miami area.

Sholts: No, I am not aware of that.

Hannah: Then I can perhaps go to my source and say that reporting in Miami was done as if there were no cameras in the courtroom. The report of the jury verdict was by radio and television bulletin and a riot thereafter ensued.

Sholts: If you say so, I will take your word for it. I respect your integrity.

Hannah: We have been challenged for a lot of reasons, but I did not want to add

Sholts: I just pointed that out for the sake of the comment. I don't know whether that's true or not. It is one of those things that I don't know that you'd ever be able to establish. That is was it the McDuffy case per se that caused the rioting? Under any circumstances, rioting is not justified. McDuffy was moved though to Tampa because the judge tried to get, I think, tried to get a panel there and couldn't and there was a change of venue granted to try the matter in Tampa due to all the publicity.

Hannah: I have one more point. I have been thinking of something in the last few days and I finally had a chance to see somebody else say it. There is a concern being stated generally about the fact that witnesses who are going to be put on television may be fearful of things that might occur to them because their face was put on TV at the six or ten o'clock news. I would like to ask you, this is in the Palm Beach Newspapers case, your case takes that to its extreme. Not only are these witnesses afraid, but they are also in a place in society where violence is pretty prevalent.

Sholts: You know we had another instance arise in that case that your remarks reminded me about. There was a lot of homosexual allegations between prisoners in this prison case, the Sakal case. One of the sad things that happened there was and I had to let this testimony in because it involved the credibility

between the witnesses and that dichotomy between the blacks and the whites. It was just an awful thing to have to do, but you had to permit it. One of the younger white witnesses who had subsequently gotten out of prison between the time the stay was granted and the trial was held was living in Fort Pierce or a neighboring town about sixty or seventy miles, Vero Beach, or somewhere. Of course, he was subpoenaed and had to come. They started cross-examining him about his relationship to the defendant and they started asking him about the homosexuality. He broke down and started to cry almost. He said I am not this way. I am not a homosexual. I had to do it. They were going to hurt me if I didn't do it. It was a very difficult situation. Now, in honesty, I don't know whether his testimony was televised. He was not one of the original witnesses who refused to testify and the camera may or may not have been on at that point. There was no motion made to prohibit the televising of his testimony, but I was saying to myself as I sat there on the bench having to tell this man that he had to go ahead and tell what happened. He was now going straight so to speak, and out working and people might hear about it through the television. It was very difficult to do, but it had to be done under the circumstances.

Hannah: Judge Letz discusses that whole question of witness

safety or the concern for witness safety.

Sholts: He wrote the dissenting. Incidentally, you didn't point out, but that decision, I think, was a 2 to 1 decision in the Florida DCA, so it wasn't unanimous. Judge Letz, in essence, tended to agree with me to some extent as I recall.

Hannah: That's right, except that he says at the end but for Post Newsweek I would reverse and permit photography under the facts. I think that was his dissent. He said that one of the reasons for his statement is the accused in this case before us is already being charged with the gastly torching death of a fellow prisoner inside the jail. Surely a classic demonstration of justified terror of him. This very defendant will be sitting in the courtroom observing his betrayal with his own eyes and his own ears. In a criminal case when a witness comes before the court, if I were that witness, I would be a lot more concerned about what the defendant was going to think about me than some yahu on the six o'clock news. Essentially, if in this case, the man is then acquitted.

Sholts: Here's another interesting thing, which the record doesn't reflect. The defendant had completed his prison term by the time we held the trial, so that when he was acquitted he was freed from custody. He wasn't going back to the same system where the

witnesses, who were testifying against them, were incarcerated. So I think that militates against your thoughts about when he goes back to the prison he is going to do something bad to the witnesses who testified against him. You weren't there, but that's essentially what happened.

Hannah: I think Judge Letz also talked about that. He said, however, the word can easily be spread from one jail to another and other solicited to extract (INAUDIBLE). I am not trying to say that that would or would not happen, Judge, it's just that it seems to me that argument is a little overplaced. I think Judge Letz adequately describes the fallacy.

Sholts: The point is that in view of the facts of that case and the horrible situation that existed there, I felt it was appropriate to protect the physical and integrity of those witnesses under those circumstances.

Segell: Mr. Pillsbury, excuse me, but if Mr. Hannah is going to go on and on and on, this man has been standing up there for a couple hours.

Sholts: I don't mind. It's all right.

Segell: It seems to me

Pillsbury: I gather that you are almost through with him.

Hannah: I am finished, yes.

Sholts: I don't mind.

Segell: Hopefully.

Pillsbury: Have you any further?

Kaner: Nothing further.

Pillsbury: I just want to ask one question. During some of the testimony that we have taken here, it has been eluded to the fact that these trials in courts are public. The media, even under our rules, can be present in the person of reporters with notes, of sketch artists, we have one here today, and so forth. The kind of an implication, if not precisely stated, that some people are free to come and listen to a portion of a trial and walk out, again they come and go. In a sense when you put it on the television media, you are really enlarging the courtroom to include the total public. Therefore, it is just increasing, making available to more people, what already a small group can have and perhaps are limited by the physical size of the court. So that some of the problems that you, if you take that reasoning to its ultimate conclusion, some of the concerns that you have would be present even without the television media being present. I would just like to have if you want to comment on that for a minute.

Sholts: I think there's a qualitative difference between the presence of a television camera and the presence of the print media and the possible dilatory effect

or the bad effect on trial participants. It is true that the trials are always open. They should be open to the public. I mean that's what the Constitution requires and that's what due process requires. I am certainly not in favor, under any circumstances, except where necessary and there are where trials can be closed. Gannett talks about that and security measures and national security measures, but those are narrowly construed exceptions to the general rule. I suppose in the sense that more people will watch it if it is on television is true. I really think that the other end of the spectrum is really more important. I think honestly and sincerely that any time that you have a direct collision between Sixth Amendment and the First Amendment, you should avoid that collision if possible. I mean I think that's what you must try to do. That's what the law requires, but anytime you have a head-on collision between the Sixth Amendment and the First Amendment, the irresistible force is going to meet the immovable object and any trial judge that is worth his or her salt will opt for the Sixth Amendment under those circumstances.

Pillsbury: Any further questions? Well thank you.

Sholts: Thank you. I apppreciate

Pillsbury: We have, as Judge Segell indicated, perhaps imposed upon you to stand up there for quite awhile, but

we do appreciate your coming and your patience.

Sholts: Thank you Mr. Pillsbury.

Pillsbury: Thank you.

Hannah: Thank you Judge.

Pillsbury: The proceeding is adjourned then until 9:30 on Tuesday morning, October 20, at this place right here.

Segell: Mr. Pillsbury, I have been trying to get the tapes to these proceedings for some days now and I keep getting repeated excuses about them. I just think I am going to have to invoke your good offices to get them for me.

Hannah: Judge, if you want me to give them back, I will go and take them in the store where they are sitting now and I will bring them back. I don't lie to you, sir. I simply tell you that I have not been able to get them because the place is full.

Segell: The place is what?

Hannah: We are on a list of people.

Pillsbury: I am not familiar with the mechanics or where they are or what's going on.

Hannah: I did this as a

Pillsbury: I do think the method of recording these proceedings

and making the record was suggested by the petitioners.

Hannah: We have made a record. The Judge wants a copy.

Pillsbury: Yes, that's right.

Hannah: I offered to give him a copy, but apparently I haven't done it quickly enough so I will return them to Ms. Regan and you can talk to her about it.

Segell: This is, I think, the second week.

Pillsbury: What I am saying is that, I think, I don't know whether you have conveyed special pressure to bear. I don't know who is doing this. I know nothing about it, but I do think that the proceeding is important. It has a very tight time schedule and if you could use your best offices. The emphasis of the fact that the Chairman of the Commission tells you that the monkey is on your back to move rapidly. Please do what you can. I don't know what I can do beyond that.

Segell: Thank you.

Hannah: All right.

Pillsbury: Is that satisfactory?

(END OF OCTOBER 13, 1981 HEARING).