

# **CROSS EXAMINATION**

***A Short Story, by H. Berkeley Rourke, July 2021***

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## **Cross Examination**

Rick Gentile walked into the Circle K at a little before seven p.m. on a Wednesday. His intent was to frighten the clerk into giving him enough money to eat. Rick lived on the streets, one of the homeless. He lost his apartment and few belongings in a rent forfeiture. The clerk, an older woman, working because social security did not cover her debts, saw him enter. Four other customers milled about in the store. Rick walked to the counter, pulled out a .45 pistol and said, "Get the money out, now. Do it now."

Norma, the clerk, said, "I can't open the safe. It was closed at five and can't be opened until tomorrow morning."

Rick said, his face turning red, "Get the money out now, dammit."

Norma opened the cash register and began to scoop out the bills. She glanced under the counter where she had a small pistol hidden. Rick saw her, tried to look over the counter and could not, started waving the gun, shouting, "Get the money out now."

The gun fired. He did not intend for that to happen. A red spot appeared on the blouse Norma wore. She slumped against the back counter and slid toward the floor. She clutched the money. Rick lost it, thought *she will identify me*, reached over the counter, and pointed the gun at her. She put her hand up to stop him firing. He fired the gun again. The bullet passed through her hand and her open mouth, hitting her brain stem and ending her life in an instant. Rick grabbed a few bills and ran. The cameras in the store showed Rick, facial recognition software in the Police Department computers identified him, and he was arrested the day after the robbery/murder. The grinding legal machine took over Rick's life.

In Arizona, a defendant convicted of first-degree murder is sentenced by the jury to one of several possibilities, including death. A defendant convicted of second-degree murder is sentenced by the judge. A

sentence for second-degree murder can range from an aggravated sentence of 22 years in prison, to a mitigated sentence of 11 years in prison. The case of Rick Gentile sat in a sentencing hearing. Defense Counsel completed his direct examination of a psychologist, James Hart.

In response to the judge's invitation for him to begin cross-examination the prosecutor stood, looked at the witness for a moment, then said to the judge, "Your honor, the lunch hour is almost upon us. Would it be agreeable to adjourn until this afternoon?"

The defense lawyer raised no objection to the prosecutor's request. The judge asked, "Defense, any objection."

"No, your honor."

The prosecutor would spend a lot of time with this witness. The court understood. Judge Jenkins responded, "Since there is no objection, we stand adjourned until 1:30 this afternoon." The judge rose, the bailiff announced, "All rise," and the courtroom emptied. The defendant, still in custody, went with the deputies to have lunch at the jail. They prepped him by attaching his handcuffs to a belt around his waist, then putting ankle restraints on him

which also tied to the belt on his waist. They seemed to enjoy “perp walking” him in that restraint system.

The prosecutor took his protégé to lunch. No discussion of the case seemed necessary to the protégé, Susan Collins. She asked one question. “Why not start this morning before lunch?”

The prosecutor, Bill Jones, answered, “Two things. I want the witness to stew a little about what I may ask him. I have seen this guy testify before. He is glib, sure of himself, haughty toward the prosecution, but vulnerable because he is also cocky. The second thing is simple, I was hungry.” Susan laughed. They ordered lunch.

“Do you have a plan?”

“Yes. It’s what I term the small things package.”

“What does that mean?”

“You’ll see this afternoon. Suffice it to say there are always a lot of small things that add up to a murder, and in this case, it was the same. Sometimes those small things tell us a lot more than the defendant would like.”

“But we have already found him guilty. Why belabor the cross of this psychologist?”

“He tried to justify a minimum sentence, Susan. There is a lot of difference between the defendant serving eleven years or twenty-two years. My intention is to maximize the sentence as much as possible. I would bet the judge will not give the full twenty-two years. He never gives the maximum sentence available. If I do nothing, he might give the guy eleven years. Do you remember seeing the autopsy pictures?”

“Yes. They were gruesome.”

“Do you think that crime should receive a stringent or an easy sentence?”

“I want the guy to go to prison for the rest of his life.”

“All right then. Sit back when we return to the courtroom, and watch, and learn. It cannot hurt for your future in trying cases.” Susan’s tenure with the County Attorney’s Office began after her graduation from the University of Arizona College of Law about two months earlier. She felt privileged to work with an experienced prosecutor on a murder case. Many new lawyers, like Susan, toiled in Justice Courts, or worked on juvenile cases for long years before being allowed into the felony setting.

The Chief Deputy Criminal Attorney for the office asked Jones to allow her this

opportunity. Her family and the County Attorney had a deep and abiding friendship. Susan rode a fast train toward stardom in the office. She did not try the case, but she handled many parts of it, gathering and creating evidence boards with pictures, and much more, all under the guidance and with the help of the prosecutor.

Jones said to her, after they ordered lunch, "While we are waiting for our lunch to get here why don't we do a quick review of the evidence." Susan launched into the body of proof prepared for a trial which never occurred. She detailed everything in her methodical way, including the plea of the defendant to second-degree murder. They discussed using exhibits to buttress the argument for a sentence of 22 years in prison. The court admitted all their exhibits even though no trial occurred. Jones wanted them available for the sentencing hearing.

The defendant pled guilty to a charge of murder in the second degree. He shot a Circle K clerk, by accident he said, then being scared the woman could accuse him, he shot the clerk again to make sure. He told the judge, when he made his confession in court, called allocution, that the two shots came one right after the other. Witnesses

described the shooting to the police investigating as spaced out. One witness said, "There was a shot, then what seemed like a long time later, another shot."

The Chief, Bill Jones' boss, suggested the charge be offered, saying, "Offer them second. We will see what they respond and go from there. It will avoid a trial. The County Attorney does not think this is a first-degree case." Jones felt the subtext of the order from the Chief had political overtones. He did not argue. Jones' experiences told him a jury might well convict for second-degree in this shooting.

He intended, if a trial occurred, to show the pictures of the body, a first wound to the middle of the body, and the second wound through the hand raised up to stop it, then into the mouth and brain. The wound in the center mass would have dealt death to the clerk. The second shot, in Jones' mind, came with intent. It allowed him to argue first degree.

Regardless of the evidence, and in concert with the orders he received from the Chief, Jones offered the second-degree charge. The defense wanted manslaughter. They argued with him, refused the second-degree charge. Jones said no. Two days later,

the defense caved on the second-degree charge but wanted a sentencing hearing in which they could present so called “mitigating evidence.” Jones refused and told them, “Get ready. We will go on the charge of first-degree murder and seek the death penalty.”

The next day the Chief came to Jones and said, “Give them the hearing. It is a second-degree case. The shooting was inadvertent.”

“You think so? What about the fact he loaded the gun with eight rounds? Does that strike you as the defendant being prepared to have a war? Do you think that might constitute premeditation? What about the second shot going through the hand put up to protect? What about the witness testimony he spaced the shots out?”

While listening, the Chief put his head down, shook it when Jones finished, and said, “Just do it. I admire your preparation, Bill. You know how these things go. That is what the CA wants. The Public Defender called him about this case, and he talked to me. You know the deal. Shit rolls downhill every time.”

Jones agreed to the hearing. He did not like making the decision. It happened. The

sentencing hearing took two days to the point of his cross-examination of the psychologist hired by the defendant's lawyers to "mitigate" his sentence. Nothing which had gone before gave Jones pause about the sentence being long, except for the testimony of the psychologist.

The psychologist testified in the hearing, before cross, that the defendant suffered from schizophrenia, with overtones of bi-polar disorder. He told the judge that someone molested the defendant as a child; that he suffered from bullying in school and responded to every slight of life with violence as a teen. The psych's portrayal of his client took the morning to say the defendant was a good man at heart, who happened to suffer from mental illness, and should receive the mitigated sentence.

A pre-sentence report prepared by the County Probation office suggested fifteen to twenty years as a punishment. The psych testified the suggested sentence was harsh and disagreed with the findings of the probation officer who prepared the report. Now it was time for Jones to rise to the challenge of what would be the punishment.

"All rise. The Superior Court of this County is now in session, the honorable

James Jenkins presiding. Be seated.” The Judge asked the prosecutor, “Are you ready to proceed Mr. Jones.”

“Yes, your honor.”

The judge said to the witness, “Mr. Hart, you are still under oath. Proceed counsel.”

“My name is Bill Jones, Mr. Hart.” The defense lawyer referred to Hart as doctor in the earlier testimony. Jones avoided the title doctor, using the surname. “Do you understand my position here, sir?”

“Yes, you are the prosecutor.”

“Does that make me your enemy, Mr. Hart?”

“No sir. I am here as an expert witness, not an enemy of the state.”

“in this case your client is the defendant, true?”

“Yes, but . . .”

Jones interrupted, saying, “Thank you Mr. Hart. You answered my question.”

This short colloquy created a moment of drama when the defense lawyer jumped up and said, “Let him answer, your honor.”

The judge, tiring of the hearing already, said, “I am assuming that was an objection, albeit improperly stated. No, your objection is overruled. Proceed Mr. Jones.”

“Let us be clear Mr. Hart. How many times have you testified as an expert witness in a case such as this?”

“Many. More than I can remember.”

“How many times have you ever testified as an expert witness for the prosecution in a case like this?”

“Never.” Both lawyers, standing, awaiting anything from the judge, saw a short-lived smile from him. Jones went on.

“Thank you, Mr. Hart. As an expert witness you are being paid to render your opinion, true?”

“Yes, sir, but I resent . . .”

Jones interrupted and said, “You answered my question.”

Once more a moment of drama occurred. The defense lawyer jumped up and yelled, “Why not let him speak, your honor.”

“Is that an objection?”

“Yes, your honor.”

“No, overruled. He has answered. Proceed Mr. Jones.”

“Before I forget, you are not a medical doctor, are you sir?”

“No, sir, I am a Psychologist.”

“What degree do you hold?”

“A Bachelor’s degree with an emphasis in Psychology, and a master’s degree in Psychology from Arizona State University.”

“How long have you been a practicing psychologist?”

“Ten years.”

“Now, Mr. Hart, let us get some of the mundane things out of the way. How many times did you visit with the defendant?”

“Once.”

“Where did the visit take place?”

“In the jail.”

“How long did you visit with him?”

“For an hour.”

“In that hour you arrived at a diagnosis of schizophrenia with bi-polar disorder. True?”

“Yes.”

“Tell the judge, Mr. Hart, why is it that many psychologists describe psychology as the most inexact of all sciences?”

“I don’t agree with that statement. It can be quite exact, in fact.” The sarcasm and disdain of the witness’ response showed. His pride in the profession he practiced came clear in an arrogant fashion. Hart attacked.

“In concert with your visiting the defendant, did you use the DSM?” Jones knew the judge had encountered the DSM in

other cases, thus he used the initials rather than Diagnostic and Statistical Manual.

Hart answered, "Yes. I did."

"Mr. Hart are you aware that the DSM, whatever version you use, also states psychology is an inexact science?"

"Yes, but I disagree with the writers."

"Mr. Hart, let me ask you this, do you consider yourself to be more capable, better educated, more experienced than the writers of the DSM?"

"No, of course not."

"It is the recognized source of factors used for psychological diagnosis, that is true, is it not?"

"Yes."

"Do you know what the writers of the DSM decided was the basis for the inexact nature of your science, sir?"

"Yes."

"Tell the judge what that is."

"Self-reporting."

"From what sources did you receive the information you evaluated in order to label the defendant as a schizo and a bi-polar patient?"

"The defendant."

"None besides the defendant?"

"No."

The rapid-fire series of questions, and responses pleased Jones. Later the defense lawyer said to the court reporter, can you print a copy of Mr. Jones' cross exam of Hart for me. It is a fine example for my young attorneys to study."

Jones, paused, allowing the court to take in the last minutes of questions and answers. He began anew, asking, "Mr. Hart your diagnosis does not preclude the notion that the defendant planned this entire scenario, including the crime, does it?"

"If you are asking whether patients suffering from schizophrenia can make plans, the answer is yes they can. So can bipolar patients, but if they do so in manic phase the plan may be a little imperfect."

"As I said, your diagnosis does not preclude this all being planned by the defendant. True?"

"Yes, if you must have it your way, it is true."

For Jones this came as a major concession on the part of the witness. The judge knew the defendant could plan the entire thing, including the hearing. Now Jones must give credence to that notion. He paused again, looking at notes, making a short comment to Susan, who he waved to

the table to sit with him. "Time for small things."

"One last set of questions, Mr. Hart. How would you evaluate the statement that big things come from many smaller things?"

"It can be true."

"Or said another way, from smaller ideas come large notions."

"Yes, that also could be true."

"I am showing you an exhibit to this case, Mr. Hart. It is a pistol. Do you recognize it?"

"I have never seen this gun before. No, I do not recognize it."

"If I tell you, it is the gun your client used to shoot the victim in this case you would not disagree, would you?"

"No."

"Good. Now the next envelope contains a magazine. Do you know what a magazine is Mr. Hart?"

"Yes, I am a gun owner myself."

"Good, then I don't have to tell you the magazine is what holds the ammunition for the gun. In the same envelope as the magazine there are a number of cartridges, some fired and some not fired. Do you see them?"

“Yes. How many are in the envelope sir?”

“There are eight.”

“This pistol I have showed you is a .45 automatic. Do you know what the words full load mean, regarding a .45 automatic, Mr. Hart?”

“No, I guess not.”

“Based on the items I have showed you so far, Mr. Hart, can you guess?”

“My guess is eight bullets.”

“Yes, Mr. Hart, eight bullets. Seven in the magazine and one in the chamber.”

“All right, but what is the point?”

“If you were going to war, would you want a weapon with a full load, or a weapon with less than a full load, Mr. Hart?”

Hart stared at Jones but did not respond. “No answer? Okay, Mr. Hart, let us take a look at this exhibit, and it is a picture. Have you seen this picture before?”

“Yes.”

“Tell the judge about that please.”

“I reviewed all the evidence.”

“For what purpose?”

“To determine, as best I could, what happened.”

“So, did you see the cartridge cases in this photo Mr. Hart?”

“No.”

“Let me point them out for you.” Jones showed Hart where to look. “Do you see them now?”

“Yes.”

“Mr. Hart one task the police officers perform at crime scenes is to pick up cartridges, check them for fingerprints, and store them away for a trial. If I tell you these two empty cartridge cases in this envelope came from the crime scene created by your client, after he shot the clerk, Mrs. Belt, you would not argue with that, would you, sir?”

“No.”

“Just so the judge understands what type of hallucinations does the defendant have? Olfactory, or Auditory, or both?”

“Both.”

“Did you see him having those types of hallucinations?”

“By his reporting he was having an olfactory hallucination at the time I visited him.”

“So, Mr. Psychologist, what type of hallucination did the defendant suffer from when he shot Mrs. Belt twice, once through the heart, and once through the mouth?”

“Objection, argumentative,” yelled the defense lawyer.

The judge, smiling, without laughing out loud, responded, "Yes, it was, a little. Sustained."

"Never mind sir, and your honor, I am done with this witness."

The defense lawyer, a Public Defender's Office member, argued for a minimum sentence of eleven years. His argument included reference to the prosecutor never dealing with the molestation, which should mitigate the sentence. He went on for an hour before giving up the floor.

Jones approached the podium and said, when invited by the judge to argue the sentence, "Your honor, you have heard all the positions taken by both the defense and the state. You also have the recommendation of the probation department in hand. I am satisfied that you have heard enough to know the defendant planned a robbery and if needed, a murder in this case. Enough said. I leave it to you."

Again, the defendant argued, almost screaming about the prosecutor's statement, but doing nothing in his argument to deal with the small things notion the state planted in the judge's head.

Now, Mr., Mrs., Ms., Miss, Sir, Madam, or any other epithet you choose, it is your turn to make a choice. You are now the judge. You have heard the confession of the defendant, the arguments and evidence produced in the hearing on sentencing. The law is in front of you. It requires a minimum sentence of eleven years and a maximum sentence of twenty-two years. Address the court and the defendant in this fashion.

“The defendant will rise. Having heard all matters in this case, and being advised the case is ripe for sentencing, and with no further hearings necessary, or appropriate, I sentence you to a term of \_\_\_\_\_ years in the Arizona State Penitentiary. You have credit for time served in the County Jail. Probation will determine the amount of credit. Is there anything further?”

Both sides told the court nothing further, and the defendant left, perp walked out of the courtroom by the deputies. What was your sentence?