Ruth Bader Ginsburg Inn of Court – November 2017
Appellate Advocacy Do's and Don'ts

I. Clarity

A. Draft your brief as if your audience was composed of well-educated laypeople rather than lawyers. Doing so will make the brief much clearer.

B. Do not assume that the judges are familiar with a particular area of law. If your case involves an area of law that a generalist would not know, include some background about the relevant law in your brief. Consider citing to well-known treatises for this background.

C. If you cannot avoid using technical jargon or acronyms in your brief, be sure to define them.

D. If you truly want oral argument, be sure that your brief explains in detail why oral argument is needed for your case. Boilerplate language is not helpful here.

E. Complete your appellate brief at least seven days before its filing deadline. Set your brief down for a couple of days and then re-read it. You will likely discover areas in need of improvement that you would not have found if you had not taken a break from working on your brief. Also, ask someone unfamiliar with your case to read your brief and provide input as to what could be clarified.

F. At oral argument, begin by letting the judges know what issues you intend to address and in what order. Then, when you are about to begin actually addressing one of those issues, let the judges know which issue are about to begin addressing.

G. At oral argument, (a) do not speak too quickly; (b) do not speak too quietly; (c) do not gesticulate too much; (d) do not be theatrical; and (e) do not be self-righteous or indignant.

II. Brevity

A. At oral argument, be prepared for a judge to ask: (a) what is the most critical fact in your case; (b) what is the most important opinion you rely upon; and (c) what is the rule of law you would like the court to adopt.

B. It is extremely easy to waive error in federal court, much more so than in state court. Having a lawyer focused on error preservation in the trial court is invaluable.

C. In appellate briefing and at oral argument, do not say "I think," "I believe," or "it seems to me." The judges do not want your opinion. They want you to tell them what the law requires.

D. Unnecessarily criticizing the trial court judge is offensive to the appellate judges.

E. You can never be too prepared for oral argument. Know the record.

F. If asked to concede an obvious matter at oral argument, do so.

G. At oral argument, do not say "with all due respect." Judges perceive that as telling them you think that they are idiots.

H. At oral argument, be sure to directly address any question posed to you.

III. Honesty

A. If the disposition of one of your issues is governed by a particular fact or by a controlling opinion, you should try to include that fact or opinion in the issue presented section of your brief.

B. When deciding which arguments to make on appeal, be certain not to make any weak arguments. If there is a weakness in your case, acknowledge it and explain why you should nevertheless win. Lack of candor is the single worst mistake that you can make in appellate advocacy. If you fail to acknowledge important facts or legal authority, the judges will certainly talk to their colleagues about you and may even admonish you publicly when they issue their opinion.

C. If you indicate in your brief that something is in the record, be sure that it really is.

D. If, after filing your brief or making your oral argument, you realize that you have made a mistake (in citing to the record or the law), you should file a letter correcting your mistake. This will go a long way toward restoring your credibility with the judges.

November Team

2017

Introduction

Thompson v. Oklahoma, 487 U.S. 815 (1988)
Facts and Background

- The parties: William Wayne Thompson – Petitioner & Defendant; State of Oklahoma – Respondent
- The victim: Charles Keene, the ex-husband of Thompson's sister, Vicki, was brutally murdered on January 23, 1983.
- Apparently provoked by Keene's physical abuse of Vicki, Thompson—who was 15 years old at the time—told his girlfriend on January 22, 1983, that he and his friends were going to kill Keene.
- A few hours later, on January 23, Malcolm "Possum" Brown, Thompson's neighbor, heard a gunshot outside his house and someone knocking on his door. He then heard someone yell, "Possum, open the door, let me in. They're going to kill me."
- After calling the authorities, Brown looked outside his door and saw five men on his porch. Three of the men were attacking a kneeling man, while the other man, who was carrying a gun, looked on. When Brown returned to the telephone to answer a call from the police, the men departed with the victim.

Facts and Background – Continued

- In the ensuing days, Thompson admitted to several people, including his girlfriend and his mother, that he and the others had killed Charles Keene. On February 18, 1983, almost a month after the murder, Oklahoma officials discovered Keene's body in a nearby river. The medical evidence revealed that Keene had been beaten, shot twice, and that his throat, chest, and abdomen had been cut.
- After Thompson was charged with Keene's murder, the state prosecutor sought to have him tried as an adult, even though Thompson was considered a "child" under Oklahoma law.
- There were 2 provisions relating to trying a minor. One, under Oklahoma Law, a youth of 16 or 17 charged with murder would automatically stand trial as an adult unless he asks for and is granted certification as a child. Two, an offender younger than 16, however, would remain within the jurisdiction of juvenile authorities unless the court certifies that he be tried "as if he were an adult."

Facts and Background – Continued

- The court used the latter provision. In granting the prosecutor's request, the trial court noted "that there [were] virtually no reasonable prospects for rehabilitation of [Thompson] within the juvenile system and that [he] should be held accountable for his acts as if he were an adult and should be certified to stand trial as an adult."
- Subsequently, a Grady County jury found Thompson guilty of first-degree murder, and Thompson was sentenced to death. All three of his accomplices, met the same fate.
- The trial was conducted under the shadow of major evidentiary questions.
- Under the defense's strenuous objections, the prosecutor introduced photographs of the corpse as it was pulled, rotted and covered with mud, from the Washita River.

Facts and Background – Continued

- Thompson did not take the stand in his own defense because his lawyer, Ed McConnell of Oklahoma City, feared that the boy's prior statements to the police about Keene would be too damaging. Thompson had told police after the murder but before the body was found that he would kill Keene if he had the chance.
- Thompson also did not let McConnell introduce evidence that Keene had tried to have sex with Thompson. He was ashamed of it and it was a collateral issue per his lawyer. Thompson had been raped by an older cousin but this also failed to reach the jury.
- Keene had beaten both Thompson and his sister and introduced Thompson to paint-sniffing.

Facts and Background – Continued

- On the night of the murder, per Thompson's lawyer, both Thompson and Keene were high on drugs and alcohol.
- At the penalty phase of the trial, the judge instructed the jurors that they must consider the mitigating evidence but failed to tell them that under *Eddings,* youth is a mitigating factor of "great weight."
- Oklahoma law permits a defendant to introduce any evidence in mitigation, but it does not list any mitigating factors. It lists aggravating factors including a murder committed "in a heinous, atrocious or cruel fashion." It was on this aggravating factor that the jury found Thompson guilty and sentenced him to death.

Professor Tepker

Appellate Advocacy Do's and Don'ts

Joi Miskel

Appellate Advocacy
Do's and Don'ts

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- Brevity
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THOMPSON V. OKLAHOMA

487 U.S. 815 (1988)

Facts and proceedings below:

Petitioner was 15 years old, when he committed a brutal murder.

The boy was a "child" as a matter of Oklahoma law, but the District Attorney filed a statutory petition seeking to have him tried as an adult, which the trial court granted. He was then convicted and sentenced to death, and the Court of Criminal Appeals of Oklahoma affirmed.

Issue: Whether the "cruel and unusual punishment" prohibition of the Eighth Amendment, made applicable to the States by the Fourteenth Amendment, prohibits the execution of a person who was under 16 years of age at the time of his or her offense.

Plurality opinion (Stevens, J.)

1. Execution of persons for crimes committed under age 16 is inconsistent with the "evolving standards of decency that mark the progress of a maturing society."
    a. Eight states have expressly considered the question of a minimum age for imposition of the death penalty. All required that the defendant have attained at least the age of 16 at the time of the capital offense.
    b. Respected professional organizations, other nations that share the Anglo-American heritage, and the leading members of the Western European Community agree that such executions offend basic standards of decency.
    c. Juries rarely condemn young capital offenders to death.
    d. No execution of a child for crimes committed before age 16 has taken place since 1948.
    e. Among thousands of murder cases, only 5 of the 1,393 persons sentenced to death for willful homicide during the years 1982 through 1986 were less than 16 at the time of the offense.
    f. The unambiguous conclusion: imposition of the death penalty on a 15-year-old offender is now generally abhorrent to the conscience of the community.
2. Less culpablility
    a. The juvenile has less culpability, because inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct.

b. He or she is much more apt to be motivated by mere emotion or peer pressure than is an adult.

3. Executions for juvenile crime does not measurably contribute to the essential purposes underlying the penalty.
    a. Given lesser culpability, as well as the teenager's capacity for growth and society's fiduciary obligations to its children, executions do not serve retributive purposes.
    b. It is fanciful to believe that a 15-year-old would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century.

Concurring opinion (O'Connor, J.):

1. A national consensus forbidding the execution of any person for a crime committed before the age of 16 very likely does exist.
2. Still, such a conclusion should not be adopted as a matter of constitutional law without better evidence than is before the Court.
3. The fact that the 18 legislatures that have expressly considered the question have set the minimum age for capital punishment at 16 or above, coupled with the fact that 14 other States have rejected capital punishment completely, suggests the existence of a consensus.
4. However, the Federal Government and 19 States have authorized capital punishment without setting any minimum age, and have also provided for some 15-year-olds to be prosecuted as adults.
5. The death sentence in this cases must be set aside on a narrow ground: Execution of a boy for a crime committed before age 16 should not be allowed in the absence of an explicit legislative decision that specifies a minimum age.

The dissenting opinion (Scalia, J.): There is no plausible basis for a conclusion that there is a national consensus against execution of persons committing a crime under age 16.