

Tuesday 10th

July, 2001.

Avery Demetrie Kirby, Appellant,
against Record No. 0076-00-3
Circuit Court Nos. CR99-994, CR99-995 and
CR99-1176
Commonwealth of Virginia, Appellee.

Upon a Rehearing En Banc

Before Chief Judge Fitzpatrick, Judges Benton, Willis, Elder, Bray,
Annunziata, Bumgardner, Frank, Humphreys, Clements and Agee

S. Jane Chittom, Appellate Defender (Public
Defender Commission, on briefs), for
appellant.

Virginia B. Theisen, Assistant Attorney
General (Mark L. Earley, Attorney General,
on brief), for appellee.

By unpublished opinion dated December 5, 2000, a divided
panel of this Court affirmed the judgment of the trial court. We
stayed the mandate of that decision and granted rehearing en banc.

Upon rehearing en banc, it is ordered that the stay of the
December 5, 2000 mandate is lifted, and the judgment of the trial
court is affirmed for the reasons set forth in the majority panel
opinion.

Judges Benton and Elder dissent for the reasons set forth
in the panel dissent.

The Commonwealth shall recover of the appellant an additional fee of \$200 for services rendered by the Public Defender on the rehearing portion of this appeal, in addition to counsel's costs and necessary direct out-of-pocket expenses. This amount shall be added to the costs due the Commonwealth in the December 5, 2000 mandate.

This order shall be certified to the trial court.

A Copy,

Teste:

Cynthia L. McCoy, Clerk

By:

Deputy Clerk