

# Appellate Brief Writing: Developing Themes And Creating A Persuasive Theory of the Defense:

How to transform the cold appellate record –which tells the story of how a terrible crime was committed, the perpetrator apprehended, tried, and sentenced – into a story about how a grave injustice occurred necessitating reversal of the conviction.

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## I. Developing Themes To Create A Persuasive Defense Theory

- What was the legal error that deprived your client of a fair trial?
- What is the moral center of your case?
- Where does the story begin?
- Are there facts that are helpful to your client that were ignored by the court in its rulings, or seemingly ignored by the jury as evidenced by its verdict?
- Can the legal errors be tied to each other?

## II. Writing the Statement of Facts

- What are the necessary facts? Identify them and include them –good and bad. Irrelevant facts need not be included in the brief.
  - How can you neutralize the bad facts without losing credibility with the court?
- The facts should tell a story, and should read as an integrated whole – a witness by witness summary of testimony is NOT effective
- You need not tell the facts in the same order in which the facts came out at trial so long as the facts accurately set out what occurred at trial (or in the plea proceeding).
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## III Appellate Counsel Must Be Cognizant of the Harmless Error Rule

- Not all errors lead to reversal; appellate counsel must show that the error impacted on the verdict.
- There is a different harmless error test for constitutional and non-constitutional error.
- For an error of constitutional dimension, the test is whether there is no reasonable possibility that the error might have contributed to the defendant's conviction; the prosecution has the burden of showing that the error is harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18 (1967).

- For non-constitutional error, the test is whether “there is a significant probability, rather than only a rational possibility, in the particular case that the jury would have acquitted the defendant had it not been for the error or errors which occurred.” *People v. Crimmins*, 36 N.Y.2d 230, 242 (1975).

#### IV. Appellate Counsel Must Also Determine If the Issue Is Preserved for Appellate Review.

- Although the Appellate Division may review an issue that has not been preserved in the interest of justice, N.Y. Crim. Proc. Law §470.15, the Court of Appeals has jurisdiction to review issues of law that are properly preserved for appellate review. Appellate counsel should therefore strive to include issues that are preserved for appellate review.

#### V. Writing An Effective Legal Argument

- The argument should stand alone in that it integrates the facts with the legal analysis – but this does NOT mean that the facts are repeated verbatim from the Statement of Facts.
- The case law analysis should be specific to your facts and your legal argument; it is helpful to include parenthetical explanations for the reason you are citing a case, and it is always helpful to include a pin cite.

YOU KNOW YOU HAVE CHANGED THE THEORY OF THE CASE WHEN THE APPELLATE COURT ADOPTS YOUR ARGUMENT:

#### **PEOPLE V. WRIGHT**

ISSUE: WHETHER COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO THE PROSECUTOR'S MISREPRESENTATION OF THE DNA EVIDENCE IN SUMMATION.

“We are presented in this appeal with a confluence of prosecutorial misconduct committed during closing argument, and a series of critical lapses by defense counsel when faced with the prosecutor's obvious transgressions from the leeway generally afforded attorneys during summation.”

*People v. Wright*, 25 N.Y.3d 769 (2015)

Here is how the Appellate Division saw the issue:

“Defendant failed to preserve for our review his contention that he was denied a fair trial based on prosecutorial misconduct on summation . . . and we decline to exercise our power to review that contention as a matter of discretion in the interest of justice. . . Finally, contrary to defendant's contention, we conclude that the evidence, the law and the circumstances of this case, viewed in totality and as of the time of the representation, establish that he received meaningful representation.

*People v. Wright*, 115 A.D.3d 1257 (4<sup>th</sup> Dep’t 2014) (internal citations omitted)

### **PEOPLE V. JIMENEZ**

ISSUE: WHETHER THE POLICE WERE REQUIRED TO OBTAIN A WARRANT AFTER ARRESTING THE DEFENDANT FOR CRIMINAL TRESPASS IN ORDER TO SEARCH HER POCKETBOOK IN A CASE WHERE NEITHER POLICE OFFICER TESTIFIED HE FEARED FOR HIS SAFETY.

“The protections embodied in article I, section 12 of the New York State Constitution serve to shield citizens from warrantless intrusions on their privacy interests, including their personal effects. In the context of warrantless searches of closed containers incident to arrest, the People bear the burden of demonstrating the presence of exigent circumstances in order to invoke this exception to the warrant requirement. Because the People failed to meet that burden in this case as a matter of law, defendant's motion to suppress should have been granted.”

*People v. Jimenez*, 22 N.Y.3d 717 (2014)

Quite different from the Appellate Division’s analysis:

“The police lawfully searched defendant's shoulder bag as incident to a lawful arrest. . . . The bag was large enough to contain a weapon and was within defendant's grabbable area at the time of her arrest for criminal trespass in connection with the police investigation of a burglary. Moreover, the police did not have exclusive control of the bag. The surrounding circumstances here support a reasonable belief in the existence of an exigency justifying a search of the bag, even though the officers did not explicitly testify at the suppression hearing that they feared for their safety.”

*People v. Jimenez*, 98 A.D.3d 886 (1st Dep’t 2012) (internal citations omitted)

And strikingly similar to the introductory argument from the appellant’s Court of Appeals brief:

“All warrantless searches presumptively are unreasonable per se,” and, thus, “[w]here a warrant has not been obtained, it is the People who have the burden of overcoming” this

presumption of unreasonableness. *People v. Hodge*, 44 N.Y.2d 553, 557 (1978); see *Arizona v. Gant*, 556 U.S. 332, 338 (2009); *People v. Calhoun*, 49 N.Y.2d 398, 402 (1980). This allocation of burden applies full force when the warrant exemption that the People seek to invoke is the search-incident-to-arrest exception. *Chimel v. California*, 395 U.S. 752, 762 (1969) . . . Under our State Constitution, to justify a warrantless search of a closed container incident to an arrest, the People must show more than that the arrest was supported by probable cause, that the search occurred around the time of the arrest and that the container was in the defendant's "grabbable area." *People v. Gokey*, 60 N.Y.2d 309, 311-12 (1983); *People v. Smith*, 59 N.Y.2d 454, 458 (1983).

## **PEOPLE V. GUILFORD**

ISSUE: AFTER INTERROGATING THE JAMES GULFORD FOR 49½ HOURS, DID AN 8-HOUR BREAK IN THE INTERROGATION DURING WHICH TIME GUILFORD WAS PROVIDED WITH AN ATTORNEY, CONSTITUTE SUFFICIENT ATTENUATION TO DISSIPATE THE TAIN OF THE COERCIVE 49½ HOUR INTERROGATION?

“Defendant appeals from an order of the Appellate Division affirming a judgment convicting him of murder in the second degree. The uncontested circumstance at the root of this appeal is that, before confessing to a detective that he had killed his former paramour, Ms. Nugent, defendant was subjected to a custodial interrogation lasting 49½ hours. It is not now suggested that this evidently uniquely lengthy interrogation was proper, or that the trial court erred when it granted defendant's pretrial suppression motion to the extent of deeming inadmissible the statements made in its course on the ground, among others, that they had been "involuntar[y] ... in the 'traditional due process sense'." The question posed is rather whether the exclusionary consequence of this marathon interrogation was correctly limited by the trial court to the statements made during the interrogation itself, or whether defendant's suppression motion should have been granted to the further extent of suppressing his subsequent inculpatory statements.”

*People v. Guilford*, 21 N.Y.3d 205 (2013)

The Appellate Division focused on the facts of the crime, and the likely (certain?) guilt of the defendant:

“Defendant appeals from a judgment convicting him upon a jury verdict of murder in the second degree . . . based on the charge that he killed the victim on or around February 6, 2007. The victim was the ex-girlfriend of defendant who lived with him in Syracuse and was the mother of his children. Within days after the victim's disappearance, defendant took the children to Georgia to stay with his mother.”

*People v. Guilford*, 96 A.D.3d 1375 (2012).

Here is how the issue was framed in the Court of Appeals brief:

By the night of March 22, 2007, Syracuse police had been interrogating James Guilford in the “blue room” of the Criminal Investigation Division (CID) for almost 48 hours (A 30-33). The blue room—named for its blue carpeting—was a windowless, 10 x 10 foot interrogation room on the third floor of CID that contained 3 chairs, a table, a two-way mirror, and no clock (A 30). Since about 11:00 PM on March 20th, Mr. Guilford, alone and without counsel, had been continuously questioned by 9 shifts of rotating teams of detectives (A 30-34). He would not leave the blue room until 1:30 AM on March 23rd, about 50 hours after the marathon interrogation began (A 34). The detectives deprived Mr. Guilford of sleep during those 50 hours, and he had but one sandwich to eat (A 30-34, 40).

Syracuse police suspected Mr. Guilford of being responsible for the death of Sharon Nugent, who disappeared on February 6, 2007 (A 21-22). Nugent was Mr. Guilford’s ex-girlfriend and the mother of his three children (A 21). Sergeant Donald Hilton ordered 8 detectives to continuously interrogate Mr. Guilford in teams of two, in the hope of extracting a confession (A 33, 38). For almost two straight days, the teams had been taking turns questioning him, attempting to get him to crack (A 30-34, 38-39). Rory Gilhooley, one of the 8 detectives, testified that the teams of two would pass Mr. Guilford over to another team once they grew tired (A 259-260). The detectives would go home and sleep in between their interrogation shifts (A 286). Mr. Guilford, however, did not sleep, and was kept under constant surveillance (A 40). When he tried to sleep, the detectives took away the chair he was sitting on and forced him to stand (A 39). As the hours ticked by, Mr. Guilford became increasingly desperate for the ordeal to end (A 39).

## **PEOPLE V. HANDY**

**ISSUE: DID THE TRIAL COURT ERR WHEN IT REFUSED TO PROVIDE AN ADVERSE INTEREST CHARGE FOR THE PROSECUTION’S FAILURE TO PRESERVE A VIDEO THAT CAPTURED THE ASSAULT FOR WHICH DAYSHAWN HANDY STOOD TRIAL?**

“We hold that when a defendant in a criminal case, acting with due diligence, demands evidence that is reasonably likely to be of material importance, and that evidence has been destroyed by the State, the defendant is entitled to an adverse inference charge.”

*People v. Handy*, 20 N.Y.3d 663 (2013)

The Appellate Division did not see it that way:

“On appeal from a judgment convicting him following a jury trial of assault in the second degree . . . defendant contends that County Court erred in denying his request for an adverse inference charge concerning the failure of the People to preserve an alleged videotape of the assault. Contrary to defendant's contention, an adverse inference charge was not warranted inasmuch as defendant failed to establish that the alleged videotape was discoverable evidence that the People were required to preserve.”

*People v. Handy*, 83 A.D.3d 1454 (4th Dep’t 2011)

Here is how appellate counsel framed the issue in the Court of Appeals brief:

The outcome of this case turned primarily on whether Mr. Handy possessed the required “intent” to cause physical injury. Intent, of course, be “may be inferred from conduct as well as the surrounding circumstances” (People v Steinberg, 79 NY2d 673, 682 [1992]; see also People v Smith, 79 NY2d 309, 315 [1992]), and jurors in this case were so charged (R 506). A video recording of the alleged assault, or the circumstances surrounding the conduct that resulted in the injury to Deputy Schliff’s thumb, would have been critical to the outcome of the case.

#### V. Writing An Effective Reply Brief

- Reply only to the issues raised by the opposing party.
- There is NO NEED to include a Statement of Facts in the reply brief.
- Do NOT EVER, UNDER ANY CIRCUMSTANCES, paste in your argument from the opening brief. The arguments set out in the reply brief should be responsive to the arguments set out by the opposition.
- While it is not necessary to distinguish every single case cited by the opposition (particularly cases that are cited for non-contested broad legal issues), you should strive to distinguish the cases that the opposition relies upon that are specific to your legal issue.

**RESOURCES:** New York State Office of Indigent Legal Services: [www.ils.ny.gov](http://www.ils.ny.gov)

To join the listserv for attorneys representing indigent criminal defendants, or the listserv for attorneys representing parents in Family Court, send an email to: [pavery@ils.ny.gov](mailto:pavery@ils.ny.gov)  
Please indicate which list you would like to join, through which assigned counsel plans you accept cases, and certify that you do not engage in the prosecution of criminal cases

New York State Defenders Association: [www.nysda.org](http://www.nysda.org)

New York Court of Appeals Court Pass (access to briefs filed in the Court of Appeals):  
<https://www.nycourts.gov/ctapps/courtpass/>

Center for Appellate Litigation: [www.appellate-litigation.org](http://www.appellate-litigation.org)

Easton Thompson Kasperek Shiffrin: Legal Resource link contains substantive articles of use to the criminal practitioner, as well as a link to the New York Criminal Defense law blog:  
[www.etksdefense.com](http://www.etksdefense.com)