LINES, SHAPES AND ATTITUDE: The Structure and Language of Effective Appellate Advocacy

By

Leighton M. Jackson

ABSTRACT

Appellate advocacy is not an adversarial proceeding but a cooperative enterprise with the appellate court to produce a judgment that is well-reasoned and coherent and a decision that is spot on. This presentation extols the virtues of the categorical syllogism as the vehicle for producing arguments that are clear, uncluttered and easy to follow and a conclusion that is convincing to the point of seeming inevitable, unavoidable and automatic. Using an actual case that the writer has argued, the paper discusses the mechanical process of constructing the syllogism, highlights the keys to unimpeachable premises and suggests that the cooperative enterprise of appellate advocacy is not complete until every counter argument is dismissed and the court is made to feel that its decision advances justice or the objectives of the law. The highpoint of success is when the court adopts appellate counsel's argument as its judgment.

Prelude

Consider the following example:

ARGUMENT

POINT I

Under New York law, an accused's right to counsel is triggered and indelibly attaches after counsel communicates to the police that she represents the accused. Once represented, an identification parade cannot be conducted by police without affording counsel a reasonable opportunity to be present.

The detective testified that accused's counsel communicated to him at the time of the accused's arrest that she represents the accused and gave the detective her name. The detective said he did not notify counsel of the line-up identification procedure he subsequently conducted.

The accused's right to counsel was therefore violated and the hearing court's decision denying defendant's motion to suppress the identification evidence should be reversed.

POINT II

In cases involving a violation of constitutional due process and right to counsel, in order to affirm the conviction of the accused, the Court must find that the error is harmless beyond reasonable doubt.

The sole eyewitness to the possession of weapons charge for which the defendant was convicted was unable to make an in-court identification of the defendant. No other evidence linked the defendant to the weapon that was recovered. As such the prosecution's case placed heavy reliance on the pre-trial lineup identification testimony.

Therefore, the error is not harmless beyond reasonable doubt and the conviction should be reversed.

The Court's Judgment

Supreme Court, Appellate Division, Second Department, New York.
The PEOPLE, etc., respondent,
v.
LaJay SUMPTER, appellant.
(Cite as: 48 A.D.3d 596, 852 N.Y.S.2d 216)
Feb. 13, 2008.

****216** Leighton M. Jackson, New York, N.Y., for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Seth M. Lieberman, and Maria Park of counsel), for respondent.

DAVID S. RITTER, J.P., FRED T. SANTUCCI, JOSEPH COVELLO, and EDWARD D. CARNI, JJ.

***597** Appeal by the defendant from a judgment of the Supreme Court, Kings County (Reichbach, J.), rendered November 7, 2005, convicting him of criminal possession of a weapon in the third degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Starkey, J.), of that branch of the defendant's omnibus motion which was to suppress lineup identification testimony.

ORDERED that the judgment is reversed, on the law, that branch of the defendant's omnibus motion which was to suppress lineup identification testimony is granted, and a new trial is ordered.

[T]he hearing court erred in denying that branch of the defendant's omnibus motion which was to suppress lineup identification testimony. The defendant's right to counsel was violated when police officers conducted a lineup without first apprising the defendant's attorney and affording her a reasonable opportunity to participate (*see* *People v. LaClere*, 76 N.Y.2d 670, 563 N.Y.S.2d 30, 564 N.E.2d 640). Further, because the evidence of the defendant's guilt without the erroneously admitted testimony was not overwhelming, the error cannot be deemed harmless, and a new trial is required (*see* *People v. Crimmins*, 36 N.Y.2d 230, 367 N.Y.S.2d 213, 326 N.E.2d 787).

Introduction

Lines, shapes and attitude. These are the characteristics which a dance choreographer wishes his audience to see and experience. Appellate advocacy is like the dance – lines, shapes and attitude. This paper addresses the angst of the appellate advocate whose life is one of the proverbial Monday morning cricketer who could tell you which stroke the batsman should have played. Appellate counsel would have done a better job than trial counsel. He is now faced with the towering presumption that the court below did the right thing, came to the correct decision, and reversal is a long shot. Appellate counsel is faced, not with a jury, or with just one, but faces at least three judges, who believe they are knowledgeable, who are sceptical to the point of bad faith, waiting for you to trip up and who are impatiently busy with their loads of judgments to write.

The role of an effective syllogism is to play to this audience and create the roadmap for the journey of reshaping the law and the facts into a form that is capable of converting these most sceptical decision makers to the appellate advocate's point of view.

A note of caution: This paper does not purport to show how to revive those cases that are dead on arrival when they reach appellate counsel's hands. It is about those cases that can be won and is certainly about how not to lose a case that you should win. Remember as lawyers we are not free to make any argument at all just to win. Our ethical responsibility requires us to make only those submissions that are grounded in fact and capable of being supported by a reasoned view of the law.

This presentation covers the categorical syllogism as the most effective forensic methodology for organising appellate argument through its ability to gain the attention of the Court through its mathematical simplicity and clarity. It paper takes you through:

- The nature of appellate advocate's audience – how appellate judges think, what do appellate judges want from you.
- The method for successfully assembling the categorical syllogism in appellate advocacy.
- The keys to constructing unimpeachable premises – the Achilles heel of the syllogism.

- The use of policy analysis as a basis for countering prejudicial judicial beliefs and attitudes.
- The use of counter-analysis as a means of gaining and maintain credibility with the Court.

The Skills of the Appellate Advocate

At the outset, one must debunk a couple of myths about appellate advocacy. The first is that appellate advocacy does not depend on skills of argument that are clever and elegant but statements that are logical, coherent and solidly grounded. The second is related to first. Successful appellate advocacy is not an adversarial battle with either opposing counsel or the Court; it is a cooperative venture with the court in arriving at a decision that is learned, lucid, logical and spot-on. It is the hope that at the end of the presentation there will be a confidence of a roadmap to appellate advocacy without the angst and pain.

While law office practice and trial advocacy may come naturally to many, appellate advocacy is a disposition bestowed only on a few. The skill set of the appellate advocate is functionally related to the appellate advocate's audience. The appellate advocate's audience disdains the tedium of the law office practice's concern with fastidious perfectionism and scorns tricks of irrelevance and emotionalism that the fact-based environment of trial demands.

> "The trial advocate is not limited to reasoned argument and may speak of many things, including irrelevant, somewhat irrational or shamelessly emotional matters…. But don't carry these ploys upstairs to the appellate court. Check this baggage after you finish your closing summation. You are still a salesperson when you appear before a multi-judge court, but it's a different audience, requiring different rhetorical skills. The oral tradition gives way to a mixture of writing and speaking…. The lawyer is still a salesperson, but the lawyer carries a different sample case. The law is argued principally, and the tools of argument, the rhetoric, if you please, must be adjusted accordingly. Too many lawyers fail to make this adjustment. Indeed, too many lawyers do not even realize that an adjustment has to be made."[i]
>
> - Ruggero Aldisert *Winning on Appeal* (National Institute for Trial Advocacy 1996) pp. 5-6

The skills required of the appellate advocate are also affected by the way he moves across the appellate stage. Other disciplines think from the known to uncover the unknown or even in some – the arts – leave the end ambiguous. Appellate advocates first have to establish certainty out of a field of chaotic facts through the presumptive application of rule or rules of law. He then seeks to recreate uncertainty and chaos for the purpose of reordering it to suit his client's

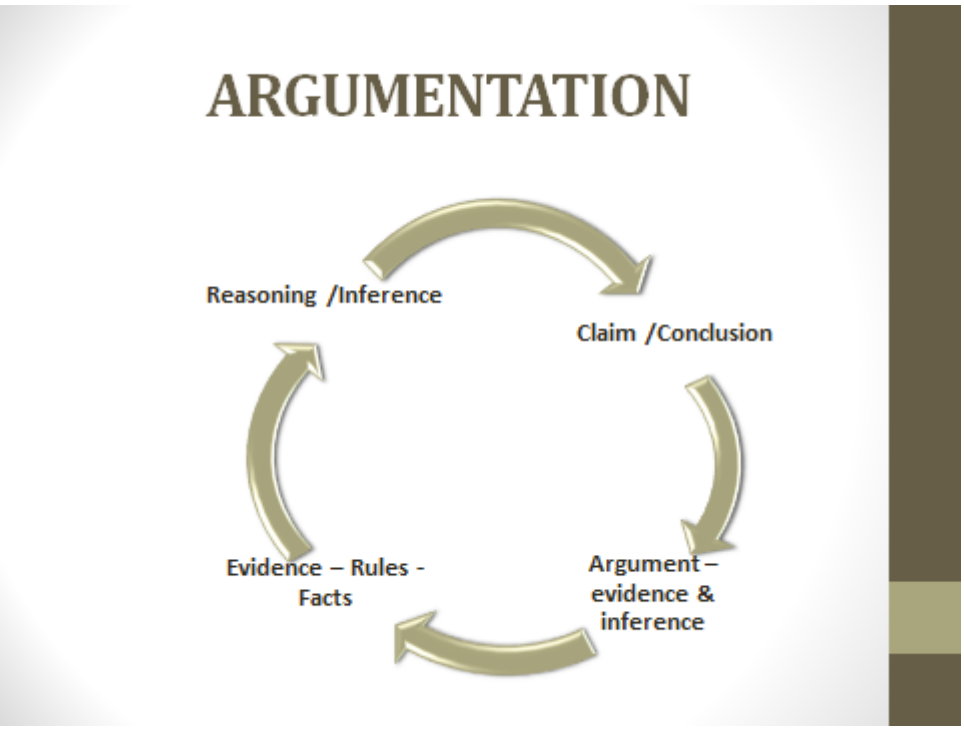
ends.While scientists, for example, proceeds from a question to prove a conclusion that is unknown, the lawyer begins and ends with the conclusion.

The appellate advocate's singular purpose is to persuade - to persuade the court to accept his conclusion.

> "The conclusion… is not just the major thing; it's the only thing. It's the only game in town."
>
> "Unlike an opinion of the court, the law review article or a professional treatise, a[n appellate advocate] sells only [her] conclusion. Remember, the [appellate advocate]is a persuader. [She] is selling something, and that something is the conclusion."
>
> - R Aldisert p. 19

How does the advocate persuade the court?

The advocate persuades the court by proving her conclusion by explaining the law and the facts in ways that convince the court that her conclusion is right. Therefore what the Court first needs from you as an appellate advocate is your conclusion. Your conclusion is your claim. You claim flows from the rule of law. The rule flows from the facts. This process unfolds as follows: State your conclusion to the court. Then comes the rule which supports that conclusion. This is accompanied by proof that that the rule exists and that you have stated it accurately. The Court then needs to see an application of the rule to the facts that resolves the claim. This leads right back to the conclusion. What we are talking about is a logical relationship. Logical, because each pre-empts the next in a natural order. Each is clear and unambiguous.



Unlike trial advocacy, appellate advocacy is not an adversarial and antagonistic warfare-, with your opponent, where each argument is a skirmish in which points are added up and the one with most points declared the winner. Appellate advocacy, to repeat, is a cooperative enterprise with the Court.

> "The obvious audience is the judge or judges before whom [the appellate advocate] appears. Judges are not a generic and homogeneous lot. They have unique political inclinations and judicial philosophies. What they have in common, however, is a busy schedule and a craving for submissions that are clear, orderly and efficient, submissions that summarise the facts, identify the issues, and analyse the issues **with the sort of detached rationality that they themselves, the judges, will be inclined to import into their judgments**."
>
> - J Raymond, *Writing for the Court* 21

Write it!

The tradition of British appellate advocacy is to rely entirely on oral argument. The American tradition is the written brief. "Oral argument before an American appellate court is a fleeting moment." Modern advocacy has witnessed a movement away from 'skeleton argument' and oral advocacy over a period of days and even weeks to appellate briefs that fully lays out counsel's argument. The transitional stage is the so-called 'written submission' which is an

optional course usually done at the end of oral argument. Accepting that appellate advocacy is a cooperative intellectual endeavor, compelling reasons exist for written as opposed to oral argumentation.

Guidelines for Effective Written Advocacy

1. We think to write and write to think. "Writing is often a means of discovering what we think. It is not unusual for judges and lawyers to discover the case as they write." You must develop the ability to plan, choose, and order arguments and even more to state your case without interruption leaving the oral argument for filling in the gaps.
2. What you write is what is first seen by the court and has a greater impact on preconceived attitudes and beliefs.
3. The written submission is what the court uses to prepare itself for oral argument – the questions that it may have regarding the soundness of your argument, which you can defend or clarify.
4. The written brief is what the court has when it is ready to write the judgment.

The Purpose of Oral Advocacy

Oral Argument should be part of the cooperative endeavour, helping the court to:

1. **Clarify and isolate the issues** – judicial restraint means that judges need help to narrow the case down to only the issue(s) they must decide – a conclusion they can only come to after reading the briefs.
2. **Clarify the record –** on appeal, the facts found at first instance are usually accepted and applied to the law as articulated. The court must be sure that parties are agreed regarding what facts were found.
3. **Clarify the practical impact of the decision** – this is often not stated in the brief but judges need to know what the practical effect of their decision is.
4. **Internal advocacy** – to rally arguments in favour of an individual judge's predisposition.

The Categorical Syllogism

All appellate arguments should be organised in the form of syllogisms. The categorical syllogism provides the most convenient form by which to plan, organise and test legal argument.

> "The power of syllogistic argument leads to the only significant rule about crafting legal arguments: *every good legal argument is cast in the form of a syllogism."*

– J. Gardner *Legal Argument: Structure and Language of Effective Advocacy* p. 8

> "Leaving aside emotional appeals, persuasion is possible only because all human beings are born with a capacity for logical thought. It is something we all have in common. The most rigorous form of logic, and hence the most persuasive, is the syllogism."
>
> - Antonio Scalia & Bryan Garner *making your Case: The Art of Persuading Judges* (Thompson/West 2008) p.41

> "Every legal analysis can be distilled to the same simple structure, a variation of the classic categorical syllogism. In logic classes, this form of reasoning is typically illustrated by an example like this:
>
> Major Premise: All humans are mortal.
>
> Minor Premise: Socrates is human.
>
> Conclusion: Socrates is mortal.
>
> …It may be.. merely a 'veneer' of logic, creating an illusion of inevitability, even though the applicable law may be uncertain and the facts, merely guesses based on circumstantial evidence. But there is no better system."
>
> - James C Raymond *Writing for the Court* (Carswell 2010) pp. 22-23

From what I have said, the syllogism is best suited because appellate advocacy deals with logical relationships and a syllogism is a statement of logical relationship.

> "A conclusion cannot stand on its own direct account, but only on account of something else which stands as 'witness, evidence, voucher or warrant.' We have to see an objective connection leading from that which we know to that which we don't know…. The ability to study law depends upon the power of seeing logical connections in the cases, of recognising similarities and dissimilarities."
>
> - R Aldisert *Logic for Lawyers: A Guide to Clear Legal Thinking p.* 25

The Structure of a Syllogism

The syllogism has three related parts.

1. The major premise
2. The minor premise
3. The conclusion

<u>The Major Premise</u>

The classical definition is that the major premise is a broad statement of general applicability. In forensic terms, the major premise is a distilled statement of the law which is

intended to apply to the facts. In order for it to bear a logical relationship and partake of the characteristics which we stated it has to pass certain tests:

1. It must be general applies to all men at all times.
2. It must be in the nature of a rule. A rule partakes of the nature: If *x* then *y*. A factual predicate that leads to a consequence.
3. It must admit of no exception.

Examples

- All men are mortal
- The removal of a benefit to which one is not lawfully entitled cannot constitute discrimination or inequality of treatment.
- Under the Education Act 1996, a teacher may only administer reasonable corporal punishment.
- Under New York law, an accused's right to counsel is triggered and indelibly attaches once his counsel communicates to the police that he represents the accused, thereby prohibiting the conduct of a lineup without affording counsel a reasonable opportunity to be present..

The Minor Premise

The minor premise, classically stated is a narrower statement of **particular** applicability, **related** in some way to the major premise through **similarity of terms** which contains a factual proposition that **invites** the application of the major premise. In forensic terms, the major premise is the rule of law and the minor premise is the particular statement of fact that must be related to the rule of law.

Examples

1. All men are mortal

   Socrates is a man.

2. The removal of a benefit to which one is not lawfully entitled cannot constitute discrimination or inequality of treatment.

The Teaching Services Commission mistakenly confirmed the appellant's appointment to a date earlier than his date of first appointment, thereby conferring a benefit in terms of salary to which he was not lawfully entitled.

3. Under the Education Act 1996, a teacher may only administer reasonable corporal punishment.

   On October 10, 2006, defendant repeatedly struck plaintiff with a leather belt causing plaintiff to sustain injuries so serious that he spent three days in the hospital.

4. Under New York law, an accused's right to counsel is triggered and indelibly attaches, once his counsel communicates to the police that he represents the accused, thereby prohibiting the conduct of a lineup without affording counsel a reasonable opportunity to be present..

   The detective testified that accused's counsel communicated to him at the time of the accused's arrest that she represents the accused and gave the detective her name and told him not to question her client. The detective said he did not notify counsel of the line-up identification procedure he subsequently conducted.

   In every instance cited above, the statement of the minor premise is:

   1. Specific and concrete,
   2. Narrower in focus than the major premise,
   3. Contains no abstract principles,
   4. Constitute a factual assertion, not an opinion, and
   5. Is true.

Each and every one of these five criteria is essential to the logical relationship which establishes the soundness of the syllogism.

The Conclusion

The conclusion therefore follows logically from the relationship of the premises. When the premises are formulated correctly and with precision, intuition alone furnishes the conclusion. The conclusion is:

- Inevitable,
- Unavoidable,and
- Automatic.

The logic is -

- Clear,
- Uncluttered, and
- Easy to follow.

These are the very standard of assistance that the Court wants from the appellate advocate.

Examples

1. All men are mortal

   Socrates is a man.

   Socrates is mortal.

2. The removal of a benefit to which one is not lawfully entitled cannot constitute discrimination or inequality of treatment.

   The Teaching Services Commission mistakenly confirmed the appellant's appointment to a date earlier than his date of first appointment, thereby conferring a benefit in terms of salary to which he was not lawfully entitled.

   The removal of the benefit conferred on the appellant in the form of the salary which was unlawfully paid to him did not constitute discrimination or inequality of treatment.

3. Under the Education Act 1996, a teacher may only administer reasonable corporal punishment.

   On October 10, 2006, defendant repeatedly struck plaintiff with a leather belt causing plaintiff to sustain injuries so serious that he spent three days in the hospital.

   This constitutes an assault way beyond what the Education Act allows for which the plaintiff is entitled to damages.

4. Under New York law, an accused's right to counsel is triggered and indelibly attaches, once his counsel communicates to the police that he represents the accused, thereby prohibiting the conduct of a lineup without affording counsel a reasonable opportunity to be present..

   The detective testified that accused's counsel communicated to him at the time of the accused's arrest that she represents the accused and gave the detective her name and told

him not to question her client. The detective said he did not notify counsel of the line-up identification procedure he subsequently conducted.

The accused's right to counsel was therefore violated and the hearing court's decision denying defendant's motion to suppress the identification evidence should be reversed.

The argument in each instance has f**orce** and **compulsion** because the logical and mathematical foundations of the syllogism make it an awesomely powerful tool of persuasion. If your premises are accepted then the court must accept your conclusion. The syllogism avoids "so what?" The writing is simple and it is easily adoptable in the judgment of the Court.

> Remember that the judge is every bit as despondent as the advocate when confronted with the chaotic thicket of law and facts in any given case. Indeed, the judge wants nothing more than to be led out of this jungle by a confident, reliable guide….
>
> Syllogistic argument provides the requisite appearance of certainty. It makes the outcome of a case seem as certain and as mechanical as the output of a mathematical equation, and it achieves this effect not by employing actual mathematical operations, but, paradoxically, by exploiting human intuition.
>
> - James Gardener *Legal Argument: The Structure and Language of Effective Advocacy* (LexisNexis 1993) p. 4

Stating Your Grounds of Appeal

Use the syllogism to begin the process of persuasion by stating your questions to be decided in the nature of a syllogism.

Question Presented

1. A document is inadmissible when offered for its truth if it does not fall within an exception to the hearsay rule, or if it contains an opinion that the declarant would be unqualified to give in court. Over counsel's objection, the trial court admitted two reports prepared by the police officer which stated that the car driven by the respondent who has sued our client, slid off the road because of wet road conditions. Were the reports admissible?

Constructing your Syllogism

The construction of the syllogism is the construction of your case on appeal. The syllogism necessarily begins with the conclusion that you want the Court to come to and this is where preparing your case also begins. It is therefore a perfect instrument for constructing your

argument and testing it. Your conclusion is your claim. It is the answer that will resolve the claim in your favour. The premises are what you need to establish your entitlement to your claim or conclusion. Your conclusion must be clearly defined, firmly committed (no waffling) and clearly differentiated from your opponent's propositions. It is the position that you must take if you are to prevail in the appeal.

The next step is to construct the premises that you need to get you that conclusion. It means therefore that the premises must yield the conclusion. There must be a logical relationship. The terms of the premises must match and more than everything else, the premises of a syllogism must not merely be true but self-evidently true.

The Key to Constructing Unimpeachable Premises

The deductive categorical syllogism is dependent on premises with which there is and can be no disagreement. This can only happen if they are self-evidently true. Self-evidently true means they requires no further explanation or justification. Classically stated, it is an accepted statement referring to the whole of a class – that is, **categorical**. The premises must be categorical. This cannot be over-emphasised. Categorical means: "unambiguously explicit and direct" – unconditional, unqualified, unequivocal, absolute, explicit, definite, direct, without reservations. This is important because the test of the soundness of your argument is whether you can state premises that are SELF-EVIDENTLY TRUE and which lead intuitively to the conclusion.

<u>What if Your Premise is not Self-Evidently True?</u>

If you have not done so, you must ask yourself "Why is it not self-evidently true?" The reason you will find is that the statement requires further explanation or justification. In other words, your research or reflection is not complete. You have to say more, in the terminology of Professor Gardener, you have to give your premise 'grounding' until it meets the standard that is until it is incapable of any further explanation or justification.

How much explanation or justification you need and how many authorities you cite depends on:

- The context,

- The level of scepticism of the reader,
- The level of knowledge and familiarity, and
- The importance of the point,

Grounding your premise speaks to the **truth** of the syllogism. To unlock that truth you must have enough information that will satisfy the court in the context of the case. In some cases establishing the truth of your premise is not difficult. In others it may be. You will know that you have met the standard because the premise requires no further explanation. Often times you will have to link through other syllogisms to get you to a grounded premise which leads you to the conclusion you want the court to accept.

With respect to the law, which is the major premise, the task is to establish with the required certainty, assurance by proof, with explanation that the rule exists and that you have stated it accurately. In other words, your characterization of the law must create the impression that the judge has no choice - someone with more authority said so or several different authorities said so.

Counter analysis

Establishing and maintaining your credibility with the court is essential to appellate advocacy. Trial attorneys can sometimes get away with offending the judge when the jury is the decision maker. The argumentation of the appellate advocate requires much more than the logical clarity of the syllogism. It requires the support of your credibility.

> "Without credibility you may possibly gain the judge's attention, but you will never maintain it. Unless you maintain it, you will never get the judge to accept your conclusion."
>
> - Ruggero Aldisert, *Winning on Appeal* (National Institute for Trial Advocacy 1996) p. 22

The use of counter-analysis is critical to supporting your argumentation. Getting astride your own argument is not sufficient. Counter-argument establishes your credibility with the court because it consists of you taking time out to address for the court, as part of the cooperative enterprise, and not as a matter of adversarial jostling**,** the law and facts that are contrary to or challenge your conclusion. These are points that the opposing counsel made, may make **or**

should have made. "Constantly ask yourself what *you* would argue if you were on the other side**.**"

> "Don't delude yourself. Try to discern the real argument that an intelligent opponent would make, and don't replace it with a straw man that you can easily dispatch."
>
> Scalia & Garner at p.11

It also addresses questions that the judge would ask. Unless this is covered the judge's skepticism will not be overcome.

The further key to counter-analysis is to not to overstate your case and to be scrupulously accurate in stating the opposing or contradicting point of view.

> "Scrupulous accuracy consists not merely in never making a statement you know to be incorrect (that is mere honesty), but also never making a statement you are not *certain* is correct. So err, if you must, on the side of understatement, and flee hyperbole....
>
> Inaccuracies can result from either deliberate misstatement or carelessness. Either way, the advocate suffers a grave loss of credibility from which it's difficult to recover."
>
> - Scalia & Garner at pp.13-14

Honesty = Trust = Confidence = Persuasion

Clarity in Stating the Rule

Especially where the rule is complex, formulate it using tests, steps, or factors. In addition, apply rule-based reasoning which breaks down the rule down into its component elements.

<u>Example</u>

> Under section 102 of the Criminal Code, a person is guilty of burglary if he or she (1) breaks and (2) enters (3) the dwelling (4) of another (5) in the nighttime (6) with the intent to commit a felony therein.

Rule-based reasoning prevents you from missing issues or counter-arguments as you can methodically scour the record to discover (1) whether each and every element has been satisfied to the standard of proof, and (2) to analyse the adequacy of the trial court's charge to the jury, in a criminal case. Indeed, in the case of *Evon Smith v R* the argument that ultimately won in the Privy Council was not raised either at trial or in the Court of Appeal. If appellate counsel had

used rule-based reasoning, then counsel would have discovered that the murder was not committed in the course and furtherance of a felony or burglary, the basis upon which the Privy Council reversed. The rules-based reasoning formula is therefore the key to constructing unimpeachable premises and sound arguments

Policy Analysis

There is no doubt that judges like all human beings have predisposed attitudes and beliefs. This is because law serves competing values and in many cases the court is often asked to weigh, evaluate and choose between these competing values. Indeed, some hold the view that the process for the most part is a decision first as to where the justice and fairness lies in the case and then there is a search for authorities or argument to support the conclusion previously reached. The indeterminacy of common law and even statutory rules give the court this leeway and it is unavoidable. Appellate counsel cannot ignore attitude but must address it in argument. Counsel must not only satisfy the court that the law and logic warrants the conclusion for which counsel argues, he must also ensure that the justice and fairness gap through which a decision in his favour may escape is closed. Lord Denning famously confessed:

> "My root belief is that the proper role of a judge is to do justice between the parties before him. If there is any rule of law [that] impairs the doing of justice, then it is the province of the judge to do all he legitimately can do to avoid that rule – or even to change it – so as to do justice in the instant case before him. He need not wait for the legislature to intervene; because that can never be of any help I the instant case."
>
> - Lord Denning, *The Family Story* (* 1984) at p. 174

The following quotation comes from someone who would never cast himself in the activist shoe of Lord Denning, none other than the conservative Justice Antonio Scalia of the Supreme Court of the United States, who advises that:

> "It is therefore important to your case to demonstrate, if possible, not only that your client does prevail under applicable law but also that this result is reasonable. So you must explain why it is that what might seem unjust is in fact fair and equitable – in this very case, if possible – and if not there, then in the vast majority of cases to which the rule you are urging will apply. You will need to give the court a reason you should win that the judge could explain in a sentence or two to a nonlawyer friend".
>
> - Scalia & Garner pp. 27-28

In the famous constitutional law case of *Thornhill v AG* (1974) 27 WIR 281,286 Georges J (as he then was) heralded the ability of the judge to do justice because of the uniqueness of common law adjudication. He remarked:

> "The strength of the common law as I understand it is its capacity for growth. Its concept may seem to develop only too slowly but when the challenge of changing social conditions has to be met and an appropriate factual situation is present to the court a sensible answer can often be produced which can be shown to have been foreshadowed in the dicta of the judges of the past."

Professor Thomas Huhn states that "Every rule serves a purpose, and whenever you attempt to interpret a rule of law it is necessary to identify the purpose of the rule." (*The Five Types of Legal Arguments* (Carolina Academic Press 2002) p. 133. He advocates that appellate counsel must also attack policy arguments of his opponent. Huhn goes on to lay out a pattern for challenging such an argument which also may be used to formulate one's policy argument supporting one's conclusion. This process is comprised of five crucial questions:

1. Is the factual prediction accurate?
2. Is the asserted policy one of the purposes of the law?
3. Is the asserted policy sufficiently strong?
4. How likely is it that the decision in this case will serve this policy?
5. Are there other, competing policies that are also at stake?

These provide an excellent checklist for influencing the beliefs and attitude of a judge to rule in your favour. But a note of caution, appellate advocates are not trial lawyers and the shameless appeal to emotion will not get you nothing but disdain. It is the explanation of the law and facts in clear, logical and uncluttered ways that convince the court that your conclusion is right that wins cases.

Conclusion

An appeal case is not only made up of straight logical **lines**, which the categorical syllogism provides a guiding light. It also has many **shapes** in the form of opposing weaknesses in every case that the appellate counsel has to navigate on his way to success and with which he has to deal by using counter-analysis. There is also **attitude**, the competing values that underlie the law. Taking command of the lines, shapes and attitudes is the language and structure of

effective appellate advocacy. In that way the judge may be guided to dance to the tune of the advocate's drum.

[i] Ruggero Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* (Revised 1st edn, National Institute of Trial Advocacy, 1996)

Appendix I

To be argued by
Leighton M. Jackson

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

----------X

THE PEOPLE OF THE STATE OF NEW YORK,

Plaintiffs-Respondent,

Kings County Ind. No. 6660/03
Docket No. 2005-11058

-against-

LAJAY SUMPTER,

Defendant-Appellant.

----------X

BRIEF FOR DEFENDANT-APPELLANT

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PRELIMINARY STATEMENT

This is an appeal from a judgment of the Supreme Court, Kings County (Reichbach, J. at trial and sentence, Starkey J. at hearing), rendered November 7, 2005, convicting the defendant of the crime of criminal possession of a weapon in the third degree and sentencing him to an indeterminate term of 14 years to life.

A timely notice of appeal was filed and on May 2, 2006, this Court granted defendant poor person relief and assigned Leighton M. Jackson to perfect the defendant's appeal.

The defendant is incarcerated pursuant to his sentence of conviction and no stay has been sought pending appeal.

QUESTIONS PRESENTED

POINT I

> Under New York law, a defendant's right to counsel is triggered and indelibly attaches, prohibiting the conduct of a lineup without affording counsel a reasonable opportunity to be present, when counsel enters the case by communicating to the police that she represents the defendant. The detective testified that defendant's counsel communicated to him at the time of defendant's arrest that she represents the defendant and gave him her name. But the detective said he did not notify defendant's counsel of the subsequently conducted lineup identification procedure. Was defendant's right to counsel violated, mandating the suppression of the lineup identification evidence?

POINT II

> As a constitutional violation of due process and right to counsel, in order to affirm the court must find that the error is harmless beyond reasonable doubt. The sole eyewitness to the possession of weapons charge for which the defendant was convicted was unable to make an in-court identification of the defendant, and no other evidence linked the defendant to the weapon that was recovered, leading the prosecution to place overwhelming reliance on the pretrial lineup identification testimony. Is the erroneous admission of the constitutionally infirm pre-trial line-up identification harmless beyond reasonable doubt?

POINT III

> Where, other than the erroneously admitted evidence, there is no evidence in the record tending to connect the defendant with the commission of the crime for which he was convicted, all the available proof was produced at trial, and a new trial would serve no useful purpose the indictment will be dismissed. The sole eyewitness to defendant's possession of the .38 revolver could not make an in-court identification of defendant as the person she observed tossing the gun, rendering an independent source hearing redundant, and no other evidence links the defendant to the charge for which he was convicted, should the court upon the reversal of the conviction dismiss the indictment?

STATEMENT OF THE CASE

On September 15, 2003, as Mr. LaJay Sumpter and his attorney, Ms. Roslyn Morrison, left the DV Part of Brooklyn Criminal Court, they were accosted by Detective Steven Swantek of the 81st Precinct. He placed Mr. Sumpter under arrest for a shooting incident which allegedly occurred on Marcus Garvey Boulevard in the vicinity of Pulaski and Hart Streets a week previously. After the detective told Ms. Morrison what the matter was about, she told the detective that she represents Mr. Sumpter in the matter and instructed the detective not to question him her client. The detective took Ms. Morrison's name and transported Mr. Sumpter to the 81st Precinct.

As soon as he arrived at the Precinct, Detective Swantek immediately contacted Jahmeek Hudson and asked him to come to the precinct to view a lineup. Hudson had told the police that it was Mr. Sumpter who shot him. The detective then went personally to the home of another potential witness, Ms. Buruska Meronta, told her that he wanted her to view a lineup and drove her to Precinct. Ms. Meronta had previously picked out Mr. Sumpter from a photo-array, as the person she saw throw a gun in the parking lot next to her house on Hart Street.

Finally, Det. Swantek went to the nearby homeless shelter and selected fillers for the lineup in which he placed Mr. Sumpter. Both Mr. Hudson and Ms. Meronta picked out Mr. Sumpter from the lineup. In spite of Det. Swantek's awareness of Mr. Sumpter's representation by counsel, he neither notified nor attempted to notify her, thereby giving her the opportunity to be present.

At trial, Jahmeek Hudson, the virtual complainant, revealed that he was in prison serving five years for robbery and admitted that he has never had a job but was a gun-toting drug dealer who sold crack cocaine outside his residence at 153 Marcus Garvey Boulevard. He said that Mr. Sumpter was his enemy with whom he has been involved in a shootout on two prior occasions. Previous to being shot on September 8, 2003, he had not recently seen or had any contact with Mr. Sumpter. He told different police officers at the scene and at Kings County Hospital to which he was taken by EMS, that he did not see who shot him because his back was turned and the persons crept up on him and he just ran. He maintained the same version of events when he was questioned by Detective Swantek at the hospital. However, he said Swantek told him that he was wanted for a robbery and that there were detectives on their way to arrest him. It was Swantek who suggested that it was a person by the name of Little Jay or Baby Jay who shot him and that if he did not confirm this he would be arrested for the robbery.

Hudson said that he was afraid of being arrested for the robbery, which he claimed was committed by his friends and not by him, so he told the detective that it was LaJay who shot him in order to avoid being arrested. However, in contradiction to the testimony of Officers Boyette and Berger, who both testified that they heard three shots, and the gun which was recovered, which had three spent shells and was a .38 revolver, Hudson said that the shooter fired six shots from a .32 caliber revolver.

Hudson said he then quickly left the hospital against medical advice to avoid being arrested. He said that after he cooperated with police in naming Mr. Sumpter as the person who shot him, he did not hear anymore about the robbery case Det. Swantek told him that he was wanted for and was never arrested for it.

Detective Swantek, the detective in charge of the investigation, said that he arrived at the scene of the shooting and spoke to Police Officers Boyette and Berger. He went to 228 Hart Street and observed a handgun in a fenced parking lot. He spoke to Berkuska Morenta. Another detective told him that it was Baby Jay who shot Hudson. He therefore went to Kings County Hospital to speak with Hudson and in spite of Hudson's repeated statements that he did not see who shot him, he suggested that it was Baby Jay and admitted that he threatened Hudson with arrest for the robbery in order for him to change his story. It was at this time that Hudson told him the name LaJay.

Once he got the name LaJay, he went back to the Precinct to ascertain who LaJay was and found out from the "shooting chart" in the Precinct that a LaJay Sumpter was once shot in the Roosevelt Houses, the same housing project in which Hudson was shot. He then prepared a photo-array which included a mug shot of Mr. Sumpter and went to Ms. Morenta's house where he said she identified Mr. Sumpter.[1] He ascertained that Mr. Sumpter was due to appear in the Brooklyn Criminal Court of September 15, so he went and arrested him placed him in a lineup without notifying his attorney.

The entire case was based on the credibility of the identification of Mr. Sumpter as the person who shot Hudson and Ms. Morenta, who claimed she saw a man run past her and toss something in the parking lot close to where she was standing. However, her testimony was weakened by several prior inconsistent statements and by cross examination as to the matter of seconds which she had to view this person she had never seen before, her lack

[1] Consistent with the settled law in New York State, the evidence of the identification was not admitted into evidence and formed no part of the People proof in the case.

of motive to pay attention and her failure to observe obvious features in the defendant's face such as his scars which were plainly visible in the arrest photos and from her seat in the witness stand. Moreover, she was unable to make an in-court identification of the defendant as the person who she saw toss the gun.

The prosecution spent the significant portion of its summation urging the jury to convict on the basis of the lineup identification by Ms. Morenta and her lack of motive, as distinct from the outrageous conduct of Detective Swantek and the repeated lies and bad reputation of the complainant, Jahmeek Hudson.

In its Jury Charge, the judge told the jury that identification was the main issue in the case and that apart from the testimony of Hudson and Ms. Moronta, "there is no other evidence whatsoever which identifies the defendant as the perpetrator of the crime." It gave an extended identification charge.

The jury returned a verdict of not guilty of all charges, with the exception of possession of the gun which was recovered from the parking lot. He was sentenced as a persistent violent felony offender to 14 years to life.

Mr. Sumpter appeals.

ARGUMENTS

POINT I

DEFENDANT'S RIGHT TO COUNSEL INDELIBLY ATTACHED WHEN COUNSEL ENTERED THE CASE BY COMMUNICATING TO DET. SWANTEK THAT SHE REPRESENTS THE DEFENDANT, GAVE THE OFFICER HER NAME, AND INSTRUCTED THE OFFICER NOT TO INTERROGATE HER CLIENT. THE SUBSEQUENT LINEUP IDENTIFICATIONS CONDUCTED BY THE OFFICER, WITHOUT NOTIFICATION TO DEFENDANT'S COUNSEL, VIOLATED DEFENDANT'S CONSTITUTIONAL RIGHT TO COUNSEL, AND ITS ADMISSION AT TRIAL WAS REVERSIBLE ERROR.

Evidence of the lineup in this case was inadmissible because it was conducted after defendant's counsel's announced entry into the case, triggering the defendant's right to counsel which became indelibly attached at the time of his arrest. Detective Swantek admitted at the suppression hearing, that defendant's counsel in the unrelated criminal case told him that she represents the defendant and instructed him not to question to her client. Detective Swantek's awareness of this fact is evidenced by his testimony that he scrupulously obeyed her instructions not to question the defendant and that he made a notation of the defendant's counsel's name. In conducting the lineup in these circumstances, without some notice or other legally justified excusal of counsel's presence, Detective Swantek

violated defendant's right to counsel mandating suppression of all evidence of the lineup.

A. ***The right to counsel attached when counsel unequivocally communicated her entry into the matter.***

The New York Court of Appeals has long settled the constitutional law of this State that, even before the commencement of formal proceedings, the right to counsel at an investigatory lineup will attach when counsel has actually entered the matter under investigation. "The indelible right to counsel arises from the provision of the State Constitution that guarantees due process of law, the right to effective assistance of counsel and the privilege against compulsory self-incrimination. The right is 'indelible' because once it 'attaches', interrogation is prohibited unless the right is waived in the presence of counsel" (*People v Grice*, 100 NY2d 318, 320-321 [2003]; *see*, *People v Mitchell*, 2 NY3d 272, 274-275 [2004]; *People v. Wilson*, 89 N.Y.2d 754 [1997]; *People v. LaClere*, 76 N.Y.2d 670 [1990]).

Here, defense counsel actually entered the matter by unequivocally communicating to Detective Swantek that she represents the defendant in the case for which the detective was arresting the defendant.

In *Grice*, the Court of Appeals affirmed that "'entry' is premised on the actual appearance or communication by an attorney" (*supra* at 322). It confirmed its decision in *People v Arthur*, 22 NY2d 325 [1968], that the right to counsel is not dependent upon "such 'mechanical' and 'arbitrary' requirements' as a formal retainer but rather 'once the police know or have been apprised of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant, the accused's right to counsel attaches' (22 N.Y. 2d at 329)" (*People v Grice*, *supra* at 322). Detective Swantek confirmed his awareness of this effect of counsel's communication to him, that right to counsel had been triggered, by his confession that he wrote down defendant counsel's name and obeyed defendant's counsel's instructions not to question her client.

Q. Was this a female lawyer, or a male lawyer?

A. If I may look and get the exact name for you, I will get it. I believe it was a female.

Q. If you could, please.

A. Roslyn Morrison.

Q. So you wrote this down. So you knew Miss Morrison was his attorney?

A. She said she was representing him.

Q. And when she told you not to question him, did you take that as a directive, or a suggestion that you should comply by it because it was his attorney?

A. Once I hear that, I do not question regarding the case.

(H.26-27)

Since the right to counsel attached unequivocally and indelibly at the time of Mr. Sumpter's arrest at the Brooklyn Criminal Court, no interrogation could take place without waiver by him in the presence of his counsel and no lineup could take place without notifying his counsel and affording her the opportunity to be present.

B. The lineup procedure conducted without notice to counsel is constitutionally infirm.

The essential requirements and the duty of law enforcement officials are as simple as they are beyond cavil. Counsel is entitled to be present at the line-up and law enforcement must notify counsel. "[I]f a suspect already has counsel, his attorney may not be excluded from the lineup proceedings" (*People v Wilson*, 89 N.Y.2d, at 758). "Once the right to counsel has been triggered, the police may not proceed with the lineup without at least apprising the defendant's lawyer of the situation and affording the lawyer a reasonable opportunity to appear" (*People v Mitchell*, 2 NY3d 272, 274-275 (2004)). "When at any stage... to the knowledge of law enforcement agencies, already has counsel, his right or access to counsel may not be denied." (*People v Blake*, 35 NY2d 331, 338 [1974]). "[I]f a suspect already has counsel, his attorney may not be excluded from the lineup proceedings" (*People v. Hawkins*, 55 N.Y.2d 474, 487). "Once activated, however, the right incorporates a requirement that defense counsel be notified of an impending investigatory lineup, if possible, and that counsel be afforded a reasonable opportunity to attend" (*People v LaClere*, *supra* at 672-673).

Here, the undisputed testimony of Detective Swantek is that he did not notify or attempt to notify defense counsel.

Q. When you decided to put together a lineup, did you make – now that you had her name, she already told you not to question him, was acting as his attorney, and you were accepting it as though she was his attorney – did you then give her a call and say, we have a lineup being put together, or two lineups, would you like to attend?

A. She wasn't asked to come to the lineup.

(H.26-27)

C. No specific request by Counsel to be notified is required.

Contrary to the People's submission to the Hearing Court, the indispensable requirement of notification of defense counsel is not dependent either on a specific request made by defense counsel at the time of her entry into the case or a request made by the defendant for his attorney to be present. The "critical feature "of the requirement of notification is the police's awareness of the defendant's representation by counsel (*LaClere,* 76 N.Y.2d at 673-74, *supra*). As Chief Judge Kaye recently had occasion to remind us, "[a] specific request that the lineup not proceed until counsel is so notified need not be made"(*People v Mitchell*, 2 NY3d 272, 274-275 (2004)).

Thus, even if the patently incredible testimony of Det. Swantek that the defense counsel's only instruction was to question her client is accepted, defendant's indelible right to counsel was still violated. *People v LeClere* is directly on point. It supports the proposition that the "critical feature" is the awareness of the police that the defendant has counsel (*LaClere,* 76 N.Y.2d at 673-74, *supra*) and even the limited admonition not to question the defendant is enough to cover the right not to be put in a lineup without the attorney being given an opportunity to appear. The actual words used by the attorney do not matter. "Defense counsel surely should not be held to an additional recitation of a precious litany of utterances" (*LaClere*, *id*. at 674).

In *LaClere*, defendant was identified at an investigatory lineup, conducted in the absence of his counsel, and he was eventually convicted of attempted murder after a jury trial at which lineup identification evidence was admitted. He had been arrested following a court appearance with counsel on an unrelated matter. The attorney promptly asked the presiding judge to advise the arresting officers that he also represented defendant on the matter for which he was then being arrested, and only that the police should not take any statements from his client unless counsel was present. The judge complied. The police then removed defendant to a precinct where a lineup was conducted later that day. Counsel was not notified about the lineup.

The hearing court denied the motion to suppress, concluding that the police were not obliged to inform defense counsel of the investigatory lineup, citing *People v. Hawkins*, 55 N.Y.2d 474, and, therefore, that defendant's right to counsel in that respect had not been violated. The Appellate Division affirmed by a majority,[2]adverting to the Court of Appeals' decisions in *People v. Coates*, 74 N.Y.2d 244; *People v. Hawkins* (supra), and *People v. Blake*, 35 N.Y.2d 331.

[2] 157 AD2d 473. The dissenting Justice in that court, who granted leave to appeal to our Court, urged that the police should not have proceeded with the lineup without notifying defense counsel inasmuch as the arresting officers were informed in court by the Judge that defendant was represented on the instant charge

The Court of Appeal reversed the judgment of the Appellate Division and suppressed the lineup evidence, holding that "counsel's announced entry into the case and explicit solicitation of formal judicial admonitory relief attached the defendant's right to counsel. In conducting the lineup in these circumstances, without some notice or other legally recognized excusal of counsel's presence, the police took the risk that the adduced evidence would not be allowed."

It rejected the Appellate Division's narrow reading of *People v. Coates*, 74 N.Y.2d 244, *supra*, as establishing a *sine qua non* requirement that the defendant verbalize the desire for the attorney's presence at a lineup, even where the police is aware that the defendant is represented by counsel. The Court was emphatic. It said: "Our answer is in the negative because such an evidentiary acquisition should not be countenanced in these circumstances."

> The People's argument that under Coates the defendant had to personally utter a request for his counsel's presence at the lineup is too restrictive and mechanistic and conflicts with governing underlying principles. The formal point of counsel's entry into the case, the representational activity, and the solicitation of judicial intervention are equal to, if not greater than, the defendant's personal request in Coates, which sprung and attached the entitlement to counsel at the investigatory lineup.

In accord is *People v Wilson,* 89 NY2d 754 (1997), the Court of Appeals unanimously rejected the opinion of the two dissenting justices of the Appellate Division who reasoned that defendant's right to counsel had not indelibly attach "upon the unilateral pronouncement of continued representation made by the defendant's assigned representative in the context of an unrelated and dismissed matter"[3], that defendant did not invoke his right to counsel at the lineup; and a need for a relationship between the Brooklyn and Queens charges. The Court of Appeal affirmed the order granting a new trial, agreeing with the majority Appellate Division, and reaffirmed its holding that "once defendant actually was represented by counsel, the alleged waiver of his right to counsel without his attorney present was ineffective (*see, People v. Settles*, 46 N.Y.2d 154)." The Court clarified its decision in *LeClere* that the foundation of the rule was the attachment of attorney-client privilege and not, for example, the judicial admonition sought and obtained by the attorney in *LaClere* that he represented the defendant and that the police should not take any statements from his client.

D. There was no legally justified excusal for failing to notify counsel

[3] 219 AD2d, at 170

Clearly, therefore, the defendant's constitutional right to counsel was violated and the all evidence resulting therefrom was inadmissible, rendering the court's failure to suppress the lineup evidence error. The People have not come forward with any legally recognised excusal, nor did they claim any exigent circumstances to merit conducting the lineup in counsel's absence. Rather, the police cannot be excused from the simple requirement of notifying counsel because, under the facts of this case, delay in conducting the investigatory lineup would not have significantly inconvenienced the witnesses or undermined the substantial advantages of a prompt identification confrontation.

E. The Supreme Court Erred in Failing to Suppress the Lineup Identification

The right to defendant's counsel's presence at the investigatory lineups certainly was compromised and denied. Prompt notification to counsel by the detective or someone deputized by him was eminently feasible and a reasonable accommodation and satisfaction of the defendant's judicially jealously guarded constitutional right. The incident occurred a week before the defendant was arrested. Indeed, the detective stated that he arrested and spoke to defense counsel at the Brooklyn Criminal Court 3:05 p.m. and went directly to the precinct to conduct the lineup (H. 12-13). The two witnesses, who viewed the lineups, Jahmeek Hudson and Beruska Meronta, were readily available to the police. Jahmeek came to the Precinct on his own while Beruska was picked up by the detective himself from her home. The arrangements were made via a telephone call (H.27). In a similar way, defendant's counsel could have been contacted. Indeed, far from providing evidence of exigency, the record provides the inference of a deliberate attempt to exclude defense counsel from the lineup proceedings, in violation of defendant's constitutional rights.

Accordingly, the hearing court's decision denying defendant's motion to suppress the identification evidence should be reversed and defendant's motion to suppress the lineup evidence granted.

POINT II

THE ADMISSION OF THE LINEUP EVIDENCE WAS THE REASON FOR THE DEFENDANT'S CONVICTION SINCE THE SOLE EYEWITNESS WAS UNABLE TO MAKE AN IN-COURT IDENTIFICATION OF THE DEFENDANT, AND NO OTHER EVIDENCE LINKED THE DEFENDANT TO POSSESSION OF THE WEAPON FOR WHICH HE WAS CONVICTED. THEREFORE THE ERROR WAS NOT HARMLESS.

"The indelible right to counsel arises from the provisions of the State Constitution that guarantees due

process of law, the right to effective assistance of counsel and the privilege against compulsory self-incrimination (*see* N.Y. Const. art. I, §6; *People v Bing*, 76 N.Y. 2d 331, 338-339 [1990])" (*People v Grice*, 100 NY2d 318.322 [2003]). As a constitutional violation in order to affirm, the court must find that the error is harmless beyond reasonable doubt (*People v Crimmins*, 36 NY2d 230, 241 (1975); cf. *People v King* 259 AD2d 763 [2d Dept, 1999]; *People v Cross*, 216 AD2d 407) . The violation of a defendant's right to counsel based on the failure to notify counsel of a lineup and affording counsel the opportunity to attend has been repeatedly held to be a constitutional violation which requires the suppression of the evidence of the lineup and the reversal of conviction unless the error is harmless beyond reasonable doubt (*see, People v Coates*, 74 NY2d 244; *People v. Wilson*, 89 N.Y.2d 754 [1997]; *People v. LaClere*, 76 N.Y.2d 670 [1990]).

Here, the witness Moronta gave sole identification evidence that linked the defendant to the charge for which he was convicted. All the other charges depended on the identification testimony of the complainant Hudson. The jury totally discredited those charges and found the defendant not guilty. Indeed, the criminal possession of a weapon in the second degree which would require some evidence of connection with the shooting of Hudson was also dismissed by the jury. In finding the defendant guilty only of criminal possession of a weapon in the third degree, the jury isolated the testimony of Moronta from the rest of the case.

However, Moronta could not make an in-court identification of the defendant and therefore her only identifying evidence came from the lineup. Without the lineup evidence, there would not even be a prima facie case as no other evidence linked the defendant to the gun that was recovered.. The defendant was not arrested until one week after the recovery of the gun and there was no testimony that he was in anywhere near the vicinity.

Thus, it cannot be said beyond a reasonable doubt that the error, which was of constitutional dimension, did not contribute to the conviction of defendant. On the contrary, "the identification testimony of the People's witnesses comprised the critical proof against [defendant], the failure to exclude evidence of the pretrial lineup identifications ... cannot be deemed harmless error (see, *People v. Jackson*, 74 N.Y.2d 787, 545 N.Y.S.2d 95, 543 N.E.2d 738 [decided herewith]; *People v. Dodt*, 61 N.Y.2d 408, 417, 474 N.Y.S.2d 441, 462 N.E.2d 1159)" (*People v Coates*, 74 NY2d 244 [1989]).

Accordingly, the judgment should be reversed and the conviction set aside.

POINT III

OTHER THAN THE ERRONEOUSLY ADMITTED EVIDENCE, NO EVIDENCE CONNECTED THE DEFENDANT WITH THE COMMISSION OF THE CRIME FOR WHICH HE WAS CONVICTED. ALL THE AVAILABLE PROOF WAS PRODUCED AT TRIAL, AND THE SOLE EYEWITNESS TO DEFENDANT'S POSSESSION OF THE WEAPON COULD NOT MAKE AN IN-COURT IDENTIFICATION RENDERING AN INDEPENDENT SOURCE HEARING REDUNDANT. A NEW TRIAL WOULD SERVE NO USEFUL PURPOSE AND THE INDICTMENT SHOULD BE DISMISSED.

Normally, where the court finds erroneously admitted evidence was not harmless, it remits the case for retrial on the surviving counts of the indictment, to be preceded by an independent source hearing to see whether the impugned identification procedure tainted the in-court identification of the defendant. But in this case an independent source hearing serves no useful purpose since the witness Moronta could not make an in-court identification of the defendant.

Moreover, the only count on which defendant was convicted was the criminal possession of a weapon in the third degree count which was based entirely on the lineup identification testimony of the witness Moronta. Moronta did not make any admissible identification of defendant, apart from the testimony regarding the lineup. Thus, her failure to make an in-court identification of defendant destroyed any link between the person she testified she observed running past her and the defendant who appeared in court two years later. Her memory could certainly not improve with the further passage of years.

The People presented all the available evidence. None of the other witnesses could link defendant to the gun that was recovered and exhibited. The testimony of Jahmeek Hudson was entirely discredited, and there is no physical evidence that linked the defendant to the gun, a retrial would be futile and the case should be dismissed.

Where a new trial would serve no useful purpose the appeals court on reversal will dismiss the indictment (*People v Flynn*, 79 NY2d 879 [1992]; *People v Ni*, 293 AD2d 552 [2d Dept, 2002]; *People v Barnes*; 24 AD2d 940 [1st Dept, 1970]; *People v Cright*, 47 AD2d 906 [2d Dept, 1975]; *People v Baldiseno*, 266 A.D. 909 [4th Dept, 1943]). (see People v. Rossi, 80 N.Y.2d 952, 954, 590 N.Y.S.2d 872, 605 N.E.2d 359; People v. Folk, 284 A.D.2d

476, 477, 727 N.Y.S.2d 131; cf. People v. Perkins, 189 A.D.2d 830, 833, 592 N.Y.S.2d 752).

In *People v. Hargroves,* 296 A.D.2d 581 [2d Dept, 2002], this Court arrived at a similar conclusion. In that case, as in this one, without the lineup testimony the Court held that: "Under the particular circumstances of this case, including the fact that at the trial the complainant was unable to identify either the defendant or any of the codefendants as his assailants, we are constrained to dismiss the indictment."

Analogously, in *People v. Pries,* 206 A.D.2d 873 [4th Dept, 1994], the Appellate Division, having concluded that the show-up procedure in that case was unduly suggestive, and that there were no independent basis for the in-court identifications, it granted the motion to suppress and dismissed the indictment.

Herein, there is no basis upon which an independent source hearing can be held as there is no in-court identification upon which it may be bottomed. Therefore, a similar result is compelled and accordingly, the indictment should be dismissed.

CONCLUSION

FOR THE REASONS STATED ABOVE, THE JUDGMENT OF CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully Submitted,

Leighton M. Jackson
Attorney for Defendant-Appellant

Appendix II

48 A.D.3d 596, 852 N.Y.S.2d 216, 2008 N.Y. Slip Op. 01376
(Cite as: 48 A.D.3d 596, 852 N.Y.S.2d 216)

C

Supreme Court, Appellate Division, Second Department, New York.
The PEOPLE, etc., respondent,
v.
LaJay SUMPTER, appellant.

Feb. 13, 2008.

Background: Following denial by hearing court, Starkey, J., of defendant's omnibus motion to suppress lineup identification testimony, defendant was convicted in the Supreme Court, Kings County, Reichbach, J., of criminal possession of a weapon in the third degree. Defendant appealed.

Holding: The Supreme Court, Appellate Division, held that defendant's right to counsel was violated when police officers conducted a lineup without first apprising the defendant's attorney and affording her a reasonable opportunity to participate.

Reversed, new trial ordered.

West Headnotes

Criminal Law 110 1726

110 Criminal Law
110XXXI Counsel
110XXXI(B) Right of Defendant to Counsel
110XXXI(B)2 Stage of Proceedings as Affecting Right
110k1723 Identification
110k1726 k. Lineup or Showup. Most Cited Cases
(Formerly 110k641.3(10))

Defendant's right to counsel was violated when police officers conducted a lineup without first apprising the defendant's attorney and affording her a reasonable opportunity to participate, warranting new trial. U.S.C.A. Const.Amend. 6.

****216** Leighton M. Jackson, New York, N.Y., for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove, Seth M. Lieberman, and Maria Park of counsel), for respondent.

DAVID S. RITTER, J.P., FRED T. SANTUCCI, JOSEPH COVELLO, and EDWARD D. CARNI, JJ.

***597** Appeal by the defendant from a judgment of the Supreme Court, Kings County (Reichbach, J.), rendered November 7, 2005, convicting him of criminal possession of a weapon in the third degree, upon a jury verdict, and imposing sentence. The appeal brings up for review the denial, after a hearing (Starkey, J.), of that branch of the defendant's omnibus motion which was to suppress lineup identification testimony.

ORDERED that the judgment is reversed, on the law, that branch of the defendant's omnibus motion which was to suppress lineup identification testimony is granted, and a new trial is ordered.

The defendant's contention that the evidence was legally insufficient is unpreserved for appellate review as it was not raised before the trial court (*see* CPL 470.05[2]; *People v. Gray*, 86 N.Y.2d 10, 19, 629 N.Y.S.2d 173, 652 N.E.2d 919). In any event, viewing the evidence in the light most favorable to the prosecution (*see People v. Contes*, 60 N.Y.2d 620, 467 N.Y.S.2d 349, 454 N.E.2d 932), we find that it was legally sufficient. Resolution of issues of

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credibility is primarily a matter to be determined by the jury, which saw and heard the witnesses, and its determination should be accorded great deference on appeal (*see* *People v. Romero*, 7 N.Y.3d 633, 644–645, 826 N.Y.S.2d 163, 859 N.E.2d 902; ****217***People v. Mateo*, 2 N.Y.3d 383, 410, 779 N.Y.S.2d 399, 811 N.E.2d 1053, *cert. denied* 542 U.S. 946, 124 S.Ct. 2929, 159 L.Ed.2d 828). Upon the exercise of our factual review power (*see* CPL 470.15 [5]), we are satisfied that the verdict of guilt was not against the weight of the evidence (*see* *People v. Romero*, 7 N.Y.3d at 644–645, 826 N.Y.S.2d 163, 859 N.E.2d 902).

However, the hearing court erred in denying that branch of the defendant's omnibus motion which was to suppress lineup identification testimony. The defendant's right to counsel was violated when police officers conducted a lineup without first apprising the defendant's attorney and affording her a reasonable opportunity to participate (*see* *People v. LaClere*, 76 N.Y.2d 670, 563 N.Y.S.2d 30, 564 N.E.2d 640). Further, because the evidence of the defendant's guilt without the erroneously admitted testimony was not overwhelming, the error cannot be deemed harmless, and a new trial is required (*see* *People v. Crimmins*, 36 N.Y.2d 230, 367 N.Y.S.2d 213, 326 N.E.2d 787). However, contrary to the defendant's contention, dismissal of the indictment is not warranted (*see* *People v. Wolters*, 41 A.D.3d 518, 838 N.Y.S.2d 117; *but see* *People v. Hargroves*, 296 A.D.2d 581, 745 N.Y.S.2d 579).

The defendant's remaining contentions need not be addressed ***598** in light of the foregoing determination.

N.Y.A.D. 2 Dept.,2008.
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