HANDBOOK ON BRIEFS AND ORAL ARGUMENTS

by
THE HON. ROBERT E. DAVISON
and
DAVID P. BERGSCHNEIDER

STATE APPELLATE DEFENDER OFFICES

Administrative Office
400 West Monroe - Suite 202
Post Office Box 5240
Springfield, Illinois 62705-5240
Phone: (217) 782-7203
Fax: (217) 782-5385

First District Office
203 N. LaSalle, 24th Floor
Chicago, Illinois 60601
Phone: (312) 814-5472
Fax: (312) 814-1447

Second District Office
2010 Larkin Avenue
Elgin, Illinois 60123
Phone: (847) 695-8822
Fax: (847) 695-8959

Third District Office
1100 Columbus Street
Ottawa, Illinois 61350
Phone: (815) 434-5531
Fax: (815) 434-2920

Fourth District Office
400 West Monroe - Suite 303
Post Office Box 5240
Springfield, Illinois 62705-5240
Phone: (217) 782-3654
Fax: (217) 524-2472

Fifth District Office
117 N. Tenth Street - Suite 300
Mount Vernon, Illinois 62864
Phone: (618) 244-3466
Fax: (618) 244-8471

Supreme Court Unit
400 West Monroe - Suite 303
Post Office Box 5240
Springfield, Illinois 62705-5240
Phone: (217) 782-1989
Fax: (217) 782-3918

Post Conviction Unit
20 N. Clark Street, Suite 2800
Chicago, Illinois 60602
Phone: (312) 814-5100
Fax: (312) 814-5951

Death Penalty Trial Assistance
20 N. Clark Street, Suite 2800
Chicago, IL 60602
Phone: (312) 793-2056
Fax: (312) 793-2278

Death Penalty Trial Assistance
400 West Monroe - Suite 303
Post Office Box 5240
Springfield, IL 62705-5240
Phone: (217) 557-6400
Fax: (217) 557-6412

Death Penalty Trial Assistance
300 West Main - Suite 500
Belleville, Il 62222
Phone: (618) 236-8680
Fax: (618) 236-8681

INTRODUCTION

The first edition of this Handbook was written in the early 1970's by Kenneth L. Gillis, who is now a Circuit Court Judge in Cook County. The Handbook was later expanded by Robert E. Davison, former First Assistant Appellate Defender and Circuit Court Judge in Christian County. Although the Handbook has been updated on several occasions, the contributions of Judges Gillis and Davison remain an essential part.

The lawyers who use this Handbook are encouraged to offer suggestions for improving future editions.

David P. Bergschneider
Legal Director
Office of the State Appellate Defender
400 West Monroe, Suite 202
Springfield, IL 62705

March, 2007

TABLE OF CONTENTS

I.

REVIEWING COURTS IN ILLINOIS

A. STRUCTURE

1. Supreme Court

The Supreme Court of Illinois has seven justices, each of whom is elected from his or her respective judicial district for a term of ten years. The State is divided into five judicial districts. Three Supreme Court Justices are elected from the First Judicial District (Cook County) and one from each of the other four districts. The Justices select one of their number to serve as Chief Justice for a three-year term.

The concurrence of four Justices is required for a decision. The Supreme Court holds five terms each year (January, March, May, September and November) in the Supreme Court Building, Springfield, Illinois. The Clerk of the Supreme Court is Juleann Hornyak, Supreme Court Building, Springfield, Illinois 62705 (217-782-2035).

2. Appellate Court

There is an Appellate Court in each of the State's five Judicial Districts:

Appellate Court, First Judicial District
160 N. LaSalle
Chicago, Illinois 60601
Tel: (312) 793-5600

Appellate Court, Second Judicial District

Appellate Court Building
55 Symphony Way
Elgin, Illinois 60120
Tel: (847) 695-3750

Appellate Court, Third Judicial District
1004 Columbus
Ottawa, Illinois 61350
Tel: (815) 434-5050

Appellate Court, Fourth Judicial District
201 West Monroe Street
P.O. Box 19206
Springfield, Illinois 62794-9206
Tel: (217) 782-2586

Appellate Court, Fifth Judicial District
14th and Main Street
P.O. Box 867
Mt. Vernon, Illinois 62864
Tel: (618) 242-3120

Appellate Court Justices are elected to ten-year terms. Ill. Const. art. VI, §10. The position of presiding Justice rotates each year. Three Justices participate in the decision of every case, and the concurrence of two is necessary to a decision. ***People v. Ortiz***, 196 Ill.2d 236, 752 N.E.2d 410 (2001). The Appellate Court is in session throughout the year and sit periodically as judicial business requires.

B. JURISDICTION

Generally, an appeal from the Circuit Court is taken to the Appellate Court. However, cases in which a sentence of death was imposed or a statute held invalid are appealed directly to the Supreme Court.

1. Supreme Court

(a) Criminal appeals in which a statute has been held invalid lie directly to the Supreme Court. Sup. Ct. Rule 603 (hereafter cited as Rule).

(b) Appeals from judgments of the Circuit Court imposing a sentence of death lie directly to the Supreme Court. Rule 603; Ill. Const. art. VI, §4(b).

(c) Appeals from final judgments of the Circuit Court in any post-conviction proceeding involving a judgment imposing a death sentence lie directly to the Supreme Court. Rule 651(a); ***People v. Gaines***, 105 ll.2d 79, 473 N.E.2d 868 (1984).

(d) The Supreme Court exercises original jurisdiction under its supervisory authority over all courts (Ill. Const. art. VI, §16; Rule 383) in cases relating to mandamus, prohibition, and habeas corpus, and "as may be necessary to the complete determination of any case on review." Ill. Const. art. VI, §4(a); Rule 381. See ***People ex rel. Foreman v. Nash,*** 118 Ill.2d 90, 514 N.E.2d 180 (1987) (mandamus, prohibition, supervisory); ***Moore v. Strayhorn***, 114 Ill.2d 538, 502 N.E.2d 727 (1986) (mandamus, prohibition, supervisory); ***Maloney v. Bower***, 113 Ill.2d 473, 498 N.E.2d 1102 (1986) (prohibition); ***Daley v. Hett***, 113 Ill.2d 75, 495 N.E.2d 513 (1986) (mandamus, prohibition, supervisory); ***People ex rel. Carey v. Cousins***, 77 Ill.2d 531, 397 N.E.2d 809 (1979) (mandamus); ***People ex rel. Ward v. Moran***, 54 Ill.2d 552, 301 N.E.2d 300 (1975) (mandamus, supervisory); ***Faheem-El v. Klincar***, 123 Ill.2d 291, 527 N.E.2d 307 (1988) (habeas corpus).

(e) Appeals from the Appellate Court to the Supreme Court are a

matter of right if a constitutional question arises for the first time in and as a result of the action of the Appellate Court. Ill. Const. art. VI, §4(c); Rule 317. Appeals from the Appellate Court to the Supreme Court are also a matter of right if the Appellate Court certifies that a case decided by it involves a question of such importance that it should be considered by the Supreme Court. Ill. Const. art. VI, §4(c); Rule 316.

(f) In cases not appealable from the Appellate Court as a matter of right, any party may file a petition for leave to appeal to the Supreme Court. The granting of a petition is within the discretion of the Supreme Court. Ill. Const. art. VI, §4(c); Rule 315.

(g) The Supreme Court may also order that an appeal to the Appellate Court be taken directly to the Supreme Court if the "public interest requires prompt adjudication by the Supreme Court." Rule 302(b). See also ***People v. Waid***, 221 Ill.2d 464, 851 N.E.2d 1210 (2006).

2. Appellate Court

(a) Other than cases appealable directly to the Supreme Court, all final judgments of the Circuit Court are appealable as a matter of right to the Appellate Court in the Judicial District in which the Circuit Court is located. Ill. Const. art. VI, §6; Rules 301, 603, 651(a); ***People ex rel. Mosley v. Carey***, 74 Ill.2d 527, 387 N.E.2d 325 (1979). The final judgment in a criminal case is the pronouncement of sentence. ***People v. Allen***, 71 Ill.2d 378, 375 N.E.2d 1283

(1978); ***People v. Rose***, 43 Ill.2d 273, 253 N.E.2d 456 (1969); ***People v. Stoops***, 313 Ill.App.3d 269, 728 N.E.2d 1241 (4th Dist. 2000).

(b) No appeal may be taken from a judgment of acquittal in a criminal case. Ill. Const. art. VI, §6; ***People v. Van Cleve***, 89 Ill.2d 298, 432 N.E.2d 837 (1982).

(c) The State may appeal from orders which substantially affect its ability to prosecute a case (such as orders suppressing evidence), from orders dismissing the charge or arresting judgment due to a defective charge from orders decertifying a prosecution as a capital case because the conviction is based solely on uncorroborated informant testimony concerning a confession or on the uncorroborated testimony of a single eyewitness or accomplice, and from orders finding that a capital defendant is mentally retarded. Rule 604 (a)(1).

A defendant may be incarcerated or held to bail during a State appeal only if there are compelling reasons for doing so. Rule 604(a)(3). Time during which a State appeal is pending is excluded from speedy trial calculations. Rule 604(a)(4); ***People v. Young***, 82 Ill.2d 234, 412 N.E.2d 501 (1980); ***People v. Flatt***, 82 Ill.2d 250, 412 N.E.2d 509 (1980); ***People v. Carlton***, 98 Ill.2d 187, 455 N.E.2d 1385 (1983).

(d) Circuit Court orders that are not final judgments may be appealed only if allowed by Supreme Court Rule. ***Flores v. Dugan***, 91 Ill.2d 108, 435 N.E.2d 480 (1982). The Supreme Court Rules permit the following appeals:

(1) A defendant placed on supervision or convicted and

sentenced to probation, conditional discharge or periodic imprisonment may appeal either the finding of guilt or the conditions of the sentence. A defendant may also appeal an order revoking or modifying such a sentence. Rule 604(b).

(2) A defendant may appeal from orders setting, modifying, revoking or denying bail and from orders refusing to modify bail. Rule 604(c).

(3) A defendant or the State may appeal from an order holding the defendant unfit to stand trial or be sentenced. Rule 604(e).

(4) A defendant may appeal the denial of a motion to dismiss on the grounds of former jeopardy. Rule 604(f).

(5) The defendant may petition the Appellate Court for leave to appeal from an order granting the State's motion to disqualify defense counsel due to a conflict of interest. Rule 604(g).

(6) For appeals from guilty pleas, see Ch. III, §B, *infra*.

II.

POST-TRIAL REMEDIES

There are various ways in which a defendant and the State may challenge the rulings or results in the Circuit Court. The following is a brief description of such procedures.

A. DIRECT APPEAL

1. By the defendant

The most common way a defendant challenges a conviction and sentence is by direct appeal to the Appellate Court. In limited circumstances, an appeal may lie directly to the Supreme Court.

In a direct appeal, review is limited to what appears in the record. Any issue that has been properly preserved in the Circuit Court may be raised on direct appeal. In addition, the reviewing court may elect to consider, as "plain error," substantial issues that were not properly preserved in the trial court. Rule 615(a).

After a decision by an Appellate Court, a party may petition for rehearing. Rule 367. If the Appellate Court acts on a rehearing petition and enters a new judgment, no further rehearing petitions are permitted. Rule 367(e). If the petition for rehearing is denied or the decision is reaffirmed on rehearing, a petition for leave to appeal may be filed in the Supreme Court either as a matter of right or of discretionary review. Rules 315; 317. Review may also be obtained if the Appellate

Court certifies the issue as one of particular importance. Rule 316.

If the Supreme Court grants the petition for leave to appeal, the case is briefed and argued. Rule 315(h). A petition for rehearing may be filed if an adverse decision is obtained from the Supreme Court. Rule 367.

The proceeding in the Supreme Court completes the direct appeal in Illinois courts. If a federal issue has been preserved, a petition for certiorari may be filed in the United States Supreme Court, or a federal *habeas corpus* petition may be filed in U.S. District Court.

2. By the State

The State may appeal certain orders of the Circuit Court, as authorized by Supreme Court Rule. Rule 604(a), (e). However, the State may not appeal from a judgment of acquittal (Ill. Const. art. 6, §6), or from an order granting post-judgment DNA testing under 725 ILCS 5/116-3. ***People v. Kliner***, 203 Ill.2d 402, 786 N.E.2d 976 (2002). On the other hand, the State may appeal an order denying a petition to revoke probation, although the appeal must be brought under the rules governing civil appeals. ***People v. Bredemeier***, 346 Ill.App.3d 557, 805 N.E.2d 261 (5th Dist. 2004). The procedure for a direct appeal by the State is the same as that for a direct appeal by a defendant.

B. COLLATERAL REMEDIES

Illinois law also allows a defendant to challenge a conviction in the following ways:

1. Post-conviction petitions

The Post-Conviction Hearing Act, 725 ILCS 5/122-1 through 5/122-8, provides a means for raising substantial constitutional violations in the proceedings that resulted in conviction. This is the normal procedure by which a defendant raises constitutional claims not shown by the record, such as ineffective assistance of counsel, coercion to plead guilty, or knowing use of perjured testimony. If a defendant takes a direct appeal, every issue that was or could have been raised on direct appeal will normally be considered waived for post-conviction proceedings.

The legislature has frequently shortened the statute of limitations for post-conviction cases. At the present time, the post-conviction petition must be filed within six months after proceedings in the United States Supreme Court are completed. If no *certiorari* petition is filed, the petition must be filed within six months after the date on which a *certiorari* petition was due. If no direct appeal is taken in a non-death case, the petition must be filed no later than three years after the date of the conviction. 725 ILCS 5/122-1.

The statute of limitations is inapplicable if the petitioner shows that the untimely filing is due to reasons other than the petitioner's culpable negligence. In addition, the statute of limitation does not apply to a petition asserting actual

innocence. 725 ILCS 5/122-1. In view of the frequency with which the statute of limitations changes, you must always consult the most recent legislation before reaching a conclusion as to the applicable filing deadline.

Once a post-conviction petition is filed in the Circuit Court, counsel must be appointed if the petitioner is under a sentence of death. 725 ILCS 5/122-2.1. In non-death cases, the petition may be dismissed without appointment of counsel if, within 90 days of the filing, the judge determines that the issues are frivolous or patently without merit. 725 ILCS 5/122-2.1.

Unless the petition of an indigent petitioner is dismissed as frivolous, counsel must be appointed. 725 ILCS 5/122-4. The petitioner can then amend the petition, the State is required to answer or move to dismiss, and an evidentiary hearing may be held. 725 ILCS 5/122-5; 122-6. The defendant must be given notice of the trial court's action, and either a denial of the petition on its merits or dismissal as frivolous may be appealed. Rule 651. Although 725 ILCS 5/122-8 provides that the petition must be considered by a judge who was not involved in the original conviction, that provision was held unconstitutional in ***People v. Joseph***, 113 Ill.2d 36, 495 N.E.2d 501 (1986).

Case law regarding post-conviction petitions is contained in Section 9-1 of the **Illinois Handbook of Criminal Law Decisions** (a joint publication of the Office of the State Appellate Defender and the Illinois State Bar Association).

2. State *habeas corpus*

Habeas corpus in Illinois (735 ILCS 5/10-101 through 5/10-137) is a narrow, infrequently-utilized remedy to obtain immediate relief from illegal confinement. The only grounds for relief by *habeas corpus* are those set out in Section 5/10-124. See ***Faheem-El v. Klincar***, 123 Ill.2d 291, 527 N.E.2d 307 (1988).

Case law regarding *habeas corpus* is contained in Section 9-4 of the **Illinois Handbook of Criminal Law Decisions**.

3. Section 2-1401 petitions

735 ILCS 5/2-1401 provides a method of collateral relief which replaced certain common law writs. A Section 2-1401 petition (formerly referred to as a Section 72 petition) must be filed within two years following the conviction or order, unless the petitioner was under legal disability or duress or the grounds for relief were fraudulently concealed (***People v. Coleman***, 206 Ill.2d 261, 794 N.E.2d 275 (2002)) or the judgement in question is void. ***People v. Gosier***, 205 Ill.2d 198, 792 N.E.2d 1266 (2001). Section 2-1401 is used to raise factual matters that were unknown and unavailable at the time of trial and which would likely have prevented the judgment from being entered. ***People v. Berland***, 74 Ill.2d 286, 385 N.E.2d 649 (1979). Section 2-1401 relief cannot be based on events which occur after the conviction. ***People v. Howard***, 363 Ill.App.3d 741, 844 N.E.2d 980 (1st

Dist. 2006). Case law regarding Section 2-1401 petitions is contained in Section 9-2 of the **Illinois Handbook of Criminal Law Decisions**.

Persons convicted of criminal offenses may also have the right to DNA and other scientific testing that was unavailable at the time of their trial. See 725 ILCS 5/116-3.

4. Mandamus, prohibition, supervisory authority

In certain circumstances, relief may be obtained by petitioning in the Supreme Court for *mandamus* or prohibition (Rule 381) or as a matter of the Supreme Court's supervisory authority. Rule 383. A writ of *mandamus* orders a lower court to perform a ministerial duty to which the petitioner is entitled, but is not available to require a lower court to exercise its discretion in a particular way or to change an act involving the exercise of judgment or discretion. ***Daley v. Hett***, 113 Ill.2d 75, 495 N.E.2d 513 (1986). A writ of prohibition may be issued to prevent a judge from acting where he or she has no jurisdiction, or to prevent a judge from acting beyond his or her legitimate authority. ***Daley v. Hett***, supra.

The court's supervisory authority is conferred by the Illinois Constitution, and is a general and comprehensive power to keep lower courts "within the bounds of their authority." ***McDunn v. Williams***, 156 Ill.2d 288, 620 N.E.2d 385, 392 (1993). ***McDunn*** held that the court's supervisory authority is not limited by "any rules or means but is bounded only by the exigencies which call for its exercise." As "new instances of these occur, [supervisory authority] will be found

able to cope with them." 620 N.E.2d at 394.

Case law concerning these remedies is contained in Section 9-3 of the **Illinois Handbook of Criminal Law Decisions**.

5. Federal *habeas corpus*

Federal *habeas corpus* is available for a state prisoner when a federal constitutional violation makes custody, or its conditions, unlawful. Before a prisoner can file a federal *habeas corpus* petition, he must "exhaust state remedies." This is a term of art which means that the petitioner has raised the same issue in the highest state court that can provide an appropriate remedy. Federal *habeas corpus* petitions are filed in the federal district where the prisoner is incarcerated or from which he or she was sentenced.

Case law regarding federal *habeas corpus* is contained in Section 9-5 of the **Illinois Handbook of Criminal Law Decisions**.

III.

PERFECTING CRIMINAL APPEALS

In most criminal cases, an appeal is perfected by filing a notice of appeal with the Clerk of the Circuit Court. Rule 606(a). Notable exceptions are guilty plea cases, appeals concerning pretrial bail, and death penalty cases. These exceptions are discussed below.

A. NOTICE OF APPEAL

1. Time to file

The notice of appeal must be filed within 30 days of final judgment or, if a motion directed against that judgment is timely filed, within 30 days of the entry of the order disposing of that motion. Rule 606(b). A notice of appeal that is placed in the mail within 30 days of the final judgment is timely. ***People v. White***, 333 Ill.App.3d 777, 776 N.E.2d 836 (3d Dist. 2003).

The final judgment in a criminal case is the sentence. ***People v. Allen***, 71 Ill.2d 378, 375 N.E.2d 1283 (1978). Generally, the trial judge's oral pronouncement of sentence is the judicial act which constitutes the final judgment, even though a written order is filed later. ***People v. Ervin***, 103 Ill.App.3d 465, 431 N.E.2d 453 (5th Dist. 1982).

Where an appeal is taken from a ruling on a motion “other than in the

course of trial," on the other hand, the final judgment is the trial judge's written order, not the oral ruling. ***People v. Jones***, 104 Ill.2d 268, 472 N.E.2d 455 (1984); ***People v. Dylak***, 258 Ill.App.3d 141, 630 N.E.2d 164 (2d Dist. 1994).

2. Late notice of appeal

The reviewing court may grant leave to file a late notice of appeal, upon a motion filed within 30 days after expiration of the time for filing the notice of appeal and showing a "reasonable excuse" for failing to file a timely notice of appeal. The court may also allow a late notice of appeal upon a motion, filed within six months after expiration of the time for filing the notice of appeal, showing by affidavit that there is "merit to the appeal" and that the failure to file a timely notice of appeal was not due to appellant's "culpable negligence." Rule 606(c).

3. Form of

The form of a notice of appeal is set out at Rule 606(d). Deficiencies in the contents of a notice of appeal do not deprive the trial court of jurisdiction if the notice fairly apprises the appellee of the notice of appeal and no prejudice results. ***People v. Clark***, 268 Ill.App.3d 810, 645 N.E.2d 590 (4th Dist. 1995).

A notice of appeal from a circuit court judgment holding a statute unconstitutional must include a copy of the trial court's order under Rule 18, which requires certain findings when a statute is held unconstitutional. Rule 606(d)(8).

4. Trial court jurisdiction

The filing of a notice of appeal deprives the trial court of jurisdiction to modify the judgment or act on matters within the scope of the appeal. Once the notice of appeal is filed, the trial court may act only on "purely ministerial" matters that are "independent of, and collateral to, the judgment on appeal." ***People v. Larry***, 144 Ill.App.3d 669, 494 N.E.2d 1212 (2d Dist. 1986); ***People v. Circella***, 6 Ill.App.3d 214, 285 N.E.2d 254 (1st Dist. 1972). For example, the trial judge may not grant a new trial (***Daley v. Laurie***, 106 Ill.2d 33, 476 N.E.2d 419 (1985)), vacate a portion of the judgment (***People v. Long***, 55 Ill.App.3d 764, 370 N.E.2d 1315 (4th Dist. 1977)), or reduce or modify the sentence (***People ex rel. Carey v. Collins***, 81 Ill.2d 118, 405 N.E.2d 774 (1980)). However, the trial judge may correct the record to reflect the judgment that was actually entered. ***People v. Latona***, 184 Ill.2d 260, 703 N.E.2d 901 (1998).

The absence of subject matter jurisdiction is not subject to waiver. Thus, the parties cannot confer jurisdiction by failing to raise an appropriate objection. ***People v. Flowers***, 208 Ill.2d 291, 802 N.E.2d 1174 (2004).

Appellate courts have differed on whether the trial court has jurisdiction

where both a notice of appeal and a post-judgment motion are filed. The Supreme Court has resolved this confusion by amending Rule 606(b) to provide:

> When a timely post-trial or post-sentencing motion directed against the judgment has been filed by counsel or by defendant, if not represented by counsel, any notice of appeal filed before the entry of the order disposing of all pending post-judgment motions shall have no effect and shall be stricken by the trial court. . . . This rule applies whether the timely post-judgment motion was filed before or after the date on which the notice of appeal was filed. A new notice of appeal must be filed within 30 days following the entry of the order disposing of all timely post-judgment motions. . . . The clerk of the appellate court shall notify any party whose appeal has been dismissed under this rule.

Before the record on appeal is filed in the reviewing court, the trial judge may dismiss the appeal on motion of the appellant or by stipulation of the parties. Rules 309, 612(a).

B. APPEALS FROM GUILTY PLEAS

Perfecting an appeal from a guilty plea depends on the type of plea involved. Under Rule 604(d), a defendant may appeal from a *non-negotiated* plea by filing, within 30 days of sentencing, a motion asking the trial court to reconsider the sentence (if only the sentence is being challenged) or a motion to withdraw the plea of guilty and vacate the judgment (if the plea is being challenged).

The sentence on a *negotiated* plea may be challenged as excessive if, within 30 days of sentencing, defendant moves to withdraw the plea. A "negotiated" guilty plea is one in which the prosecution has bound itself to "recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending."

The post-plea motion must be in writing, and if based on facts outside the record must be supported by affidavit. Rule 604(d). If the motion is denied, the defendant has 30 days in which to file a notice of appeal. Rule 604(d).

A guilty plea defendant does not lose his right to appeal, even where he failed to file an appropriate motion, if the trial court gave erroneous admonishments concerning the right to appeal. In ***People v. Diaz***, 192 Ill.2d 211, 735 N.e.2d 605, 249 Ill.Dec. 1 (2000), the trial court erroneously told defendant he could challenge the sentence by filing either a motion to withdraw the plea or a motion to reconsider the sentence. The cause was remanded so defendant could be properly admonished and given an opportunity to move to withdraw his plea.

See also ***People v. Flowers***, 208 Ill.2d 291, 802 N.E.2d 1174 (2004) (discussing the admonition exception).

Diaz also holds that even where a negotiated plea is involved, a motion to withdraw the plea is not required where the defendant argues that the sentence is unauthorized. *See also* ***People v. Wilson***, 181 Ill.2d 409, 692 N.E.2d 1107, 229 Ill.Dec. 896 (1998). The same rule applies when the sentence is outside the range contemplated by the plea bargain. ***People v. Herman***, 349 Ill.App.3d 107, 810 N.E.2d 647 (2d Dist. 2004); ***People v. Renner***, 321 Ill.App.3d 1022, 748 N.E.2d 1272 (5th Dist. 2001).

Rule 604(d) applies to juvenile adjudications based on admissions of guilt. See ***In re J.W.***, 204 Ill.2d 50, 787 N.E.2d 747 (2003). Thus, a motion to withdraw the admission or reconsider the disposition is required before an appeal can be taken. ***In re William M.***, 206 Ill.2d 595, 795 N.E.2d 269 (2003). The failure to file an appropriate motion in a juvenile case does not require dismissal of the appeal, however; the Appellate Court must remand the cause for "strict compliance with Rule 604(d)." ***Id.***

By contrast with the situation concerning guilty pleas, the trial court's failure to give required admonishments following a trial does not necessarily require a remand for proper admonishments. A remand is required only if the defendant asserts sentencing issues which he failed to preserve after receiving the faulty admonitions. ***People v. Henderson***, 217 Ill.2d 449, 841 N.E.2d 87 (2005). Furthermore, rather than remand for accurate admonishments and an

opportunity to file post-sentencing motions, the Appellate Court may elect to reach sentencing issues which were raised on appeal but not properly preserved. ***People v. Medina***, 221 Ill.2d 394, 551 N.E.2d 1220 (2006).

C. DEATH PENALTY APPEALS

When a sentence of death has been imposed, an appeal is automatically perfected without any action by the defendant or his counsel. Rule 606(a). However, post-trial or post-sentencing motions may be required to avoid waiving issues. See ***People v. Howery***, 178 Ill.2d 1, 687 N.E.2d 836 (1988).

D. STATE APPEALS

Under Rule 604(a), the State may appeal from an order or judgment which effectively dismisses a charge for any ground in 725 ILCS 5/114-1, arrests judgment due to a defective charges, quashes an arrest or search warrant, or suppresses evidence. See ***People v. Young***, 82 Ill.2d 234, 412 N.E.2d 501 (1980); ***People v. Flatt***, 82 Ill.2d 250, 412 N.E.2d 509 (1980). See ***People v. Young***, 82 Ill.2d 234, 412 N.E.2d 501 (1980); ***People v. Flatt***, 82 Ill.2d 250, 412 N.E.2d 509 (1980). There is no distinction between pretrial orders "excluding" and "suppressing" evidence; thus, whether the State may appeal does not depend on whether the trial judge's ruling rests on a constitutional basis. ***People v. Drum***, 194 Ill.2d 485, 743 N.E.2d 44 (2000). In ***Drum***, an order denying the State's motion *in limine* to present certain evidence had the substantive effect of barring

use of the evidence at trial, and therefore could be appealed, "whether the order is characterized as 'excluding' the testimony or 'suppressing' it."

When the State appeals a suppression order, the prosecutor must file a certificate of impairment certifying that the order substantially impairs the State's ability to prosecute the case. This certificate is not a jurisdictional requirement and may be filed as a supplement to the record on appeal. ***People v. Carlton***, 98 Ill.2d 187, 455 N.E.2d 1385 (1983). A certificate of impairment filed in good faith is not open to challenge on the ground that the State's ability to prosecute the case was not in fact impaired. ***People v. Young***, 82 Ill.2d 234, 412 N.E.2d 501 (1980); ***People v. Keith***, 148 Ill.2d 32, 591 N.E.2d 449 (1992).

In addition, the State may appeal orders decertifying a capital case and orders finding that a capital defendant is mentally retarded. Rule 604 (a)(1).

A defendant may be incarcerated or held to bail during a State appeal only if there are compelling reasons for doing so. Rule 604(a)(3). Time during which a State appeal is pending is excluded from speedy trial calculations. Rule 604(a)(4).

Case law pertaining to State appeals is contained in Section 2-4 of the **Illinois Handbook of Criminal Law Decisions**.

E. APPEALS CONCERNING BAIL

Under Rule 604(c), a defendant may appeal a bail order before a conviction occurs. A written motion stating the relief sought must first be filed in the trial court. This motion must contain information concerning the defendant's financial

condition, residence, employment history, present occupation, family situation, prior criminal record and "other relevant facts." Rule 604(c)(1).

If the motion is denied in the trial court, an appeal may be taken by filing a verified motion for review in the Appellate Court. This motion must contain the motion filed in the trial court, a description of the trial court's order, the crimes charged, the amount and conditions of bail, an argument in support of the motion, and a statement of the relief sought. No briefs are permitted, and oral argument is allowed only when ordered by the court. Rule 604(c)(2).

F. DOCKETING STATEMENT

Within 14 days after the notice of appeal is filed, the appellant must file a docketing statement with the clerk of the reviewing court. The form of the docketing statement is set out in Rule 606(g). The docketing statement contains information such as the date the notice of appeal was filed, a description of the judgment appealed from, the present status of the defendant, the names and addresses of counsel and court reporters, and a general statement of the issues likely to be raised.

IV.

THE RECORD ON APPEAL

A. CONTENTS OF THE RECORD

The record on appeal has two parts: the "Common Law Record," (a reproduction of the clerk's file containing copies of the charging documents, written motions and orders, and the judgment), and the "Report of Proceedings," which is the transcript of the court reporters' minutes of the hearings in the case. "There is no distinction between the common law record and the report of proceedings, for the purpose of determining what is properly before the reviewing court." Rule 608(a).

Upon the filing of a notice of appeal and in all cases in which a death sentence is imposed, the clerk must prepare the record on appeal. The record must contain the following:

(1) a cover sheet showing the title of the case;

(2) for charges brought by indictment, the clerk's certificate showing the impaneling of the grand jury;

(3) the indictment, information, or complaint;

(4) transcripts of the arraignment and plea;

(5) all motions, transcripts of motion hearings and orders on motions;

(6) all arrest and search warrants, consent to search forms, eavesdropping orders, and similar documents;

(7) transcripts of any counsel or jury waivers;

(8) the report of proceedings from the trial (including opening and closing statements, testimony, objections and rulings, instructions offered and given, communications from the jury during deliberations, and any responses or supplemental instructions;

(9) in death cases, a transcript of jury selection proceedings;[1]

(10) exhibits at trial and sentencing, along with objections, offers of proof, arguments, and rulings thereon,[2]

(11) the jury verdict or court's finding;

(12) any post-trial motions;

(13) a transcript of sentencing proceedings;

(14) the judgment and sentence; and

(15) the notice of appeal. Rule 608(a).

Within 14 days after the notice of appeal is filed (or a sentence of death is imposed), either party may designate additional portions of the record to be included in the record on appeal. Rule 608(a). Upon motion by either party, the court may allow accurate photographs of exhibits to be filed in lieu of the exhibits

---

[1]The court reporter must take jury selection proceedings in non-death cases, but transcription is required only if requested by a party.

[2]However, physical and demonstrative evidence, other than photographs, that will not fit on a standard size record page shall not be included in the record unless ordered by the court.

themselves. Rule 608(a). This provision was added for non-photographic exhibits that are large, bulky or otherwise do not fit easily in the record on appeal. The exhibits themselves should be included "when they are relevant to the determination of an issue on appeal or needed for an understanding of the case." See Committee Comments, Rule 608.

B. FILING THE RECORD

The report of proceedings "shall" be filed in the trial court within 49 days after the notice of appeal is filed or a death sentence imposed. Rule 608(b). The record on appeal "shall" be filed in the reviewing court within 63 days after the notice of appeal is filed or a sentence of death imposed. In death cases, two copies of the record must be filed. (Rule 608(c)).

Where there are multiple appellants, the trial court may allow the record on appeal to be filed in the reviewing court any time up to 63 days after the last notice of appeal was filed. If an extension of time has been granted for filing the report of proceedings in the trial court, the record "shall" be filed in the reviewing court within 14 days after the extended time expires. Rule 608(c).

The reviewing court may extend the time for filing the report of proceedings in the trial court. To obtain an extension, a motion showing "necessity" must be made before the due date, or within 35 days thereafter. Rule 608(d). If the motion is filed after the due date, it must show a reasonable excuse for failing to make an earlier request. Rule 608(d).

C. CORRECTING THE RECORD

The procedure for correcting the record on appeal is set out in Rule 329, which is made applicable to criminal cases by Rules 608(b) and 612(g). See also ***People v. Allen***, 109 Ill.2d 177, 486 N.E.2d 873 (1985); ***People v. Chitwood***, 67 Ill.2d 443, 367 N.E.2d 1331 (1977); ***People v. Vincent***, 165 Ill.App.3d 1023, 520 N.E.2d 913 (1st Dist. 1988). A party may request leave to supplement the record on appeal, but only with documents that were before the trial court. ***People v. Patterson***, 192 Ill.2d 93, 735 N.E.2d 616 (2000). Documents that were not in the record or properly supplemented may not be included in a brief. See ***People v. Gonzalez***, 268 Ill. App. 3d 224, 643 N.E.2d 1295 (1st Dist. 1994).

D. SUFFICIENCY OF THE RECORD

The appellant is responsible for presenting a sufficient record to allow the court to review any claim of error. Any doubts that arise from an incomplete record are usually resolved against the appellant. See ***People v. Pecor***, 153 Ill.2d 109, 606 N.E.2d 1127 (1992); ***People v. Ramos***, 295 Ill.App.3d 522, 692 N.E.2d 781 (1st Dist. 1998).

Due process is not violated merely because no court reporter is present to take notes of *voir dire* in a non-death penalty case. ***People v. Culbreath***, 343 Ill.App.3d 998, 798 N.E.2d 1268 (4th Dist. 2003). Because the defendant can obtain a bystander's report or agreed statement of facts, there is an adequate opportunity to provide a sufficient record to resolve *voir dire* issues. ***People v.***

Houston, 363 Ill.App.3d 567, 843 N.E.2d 465 (3d Dist. 2006). It should be noted, however, that the presumption normally taken against the appellant from an incomplete record does not apply where a bystander's report is submitted in lieu of a complete record. ***People v. Majka***, 365 Ill.App.3d 362, 849 N.E.2d 428 (2d Dist. 2006).

Furthermore, where an indigent defendant makes a colorable showing that a complete transcript is necessary to resolve an issue, the State has the burden to show that a bystander's report is a satisfactory substitute. ***Id.***

V.

READING THE RECORD & FINDING THE ISSUES

A. PRELIMINARY THOUGHTS

Probably the most difficult step in the brief writing process is the discovery and development of the issues. In order to correctly determine whether potential issues exist, the appellate lawyer must have knowledge of two things - the facts and the applicable law. The facts, of course, are discovered by reading the complete record. The law is discovered by research.

A lawyer's knowledge of the law can be divided into two parts. First is general knowledge of criminal law, procedure, evidence, constitutional principles, etc. A broad general knowledge greatly assists the appellate lawyer in quickly and accurately determining, as he or she reads the record, what possible errors exist.

The second type of legal knowledge is that acquired by research after the lawyer reads the record and notes all potential errors. Because broad general knowledge will usually save valuable time in finding and rejecting issues and in doing research, an important step in the issue-spotting process is to diligently attempt to increase one's overall legal knowledge.

As with most aspects of appellate work, there is no single, "best" method for reading the record. There are, however, certain principles and guidelines that should be followed. The record should be read very carefully and with great concentration. Nothing in the record should be overlooked, and the record must

be read accurately. Be sure you know exactly what occurred and what was said. If you overlook or misunderstand something, you may miss a winning issue.

It is also important to make detailed notes while reading the record. Good notes make it much easier to review possible issues, connect possible errors, and find things in the record. Additionally, good notes will save time in writing the statement of facts. Your notes should contain a brief summary or notation about all important matters in the record such as motions, objections, testimony, arguments and rulings. A citation to the pertinent pages of the record must be included.

You should develop a method of note taking that insures thorough examination of both the facts and the potential issues. One method is to use two notepads - one to list the motions, testimony, arguments, and other relevant events that occurred in the lower court (with citations to the appropriate volume and page of the record), and the second to set out potential issues or thoughts you may have about potential strategies for the appeal. Alternatively, you may decide to use only one set of notes and "flag" possible issues for later examination. Some lawyers prefer to dictate their notes for later transcription, or to type their notes on a computer. Whatever method of note taking you is used, all relevant material from the record must be organized so you can find it, and all potential issues must

be marked and thoroughly analyzed before being either discarded or raised on appeal.

In reading the record, it is important to ask over and over, page by page, line by line, “Is that error?" There are four possible answers to this basic question, and you *must* give one of these answers to virtually every occurrence in the record. The possible answers are:

1. Yes.

2. No.

3. I don't know.

4. It doesn't matter.

A lawyer with a great deal of general legal knowledge may answer "I don't know" sparingly; a lawyer without such broad knowledge will likely answer "I don't know" frequently. If you find yourself frequently answering "I don't know," you may need to work harder at learning the law.

"It doesn't matter" should be used when a possibly improper occurrence is wholly insignificant in regard to a fair trial. For example, leading questions that are unimportant as to guilt or innocence likely had no impact on the trial and are not potential issues. The lawyer must be certain before answering "no" or "it doesn't matter," because those answers mean that a potential issue will not be raised. If there is any doubt about whether something is error, you should answer "yes" or "I don't know." A "yes" answer, if it stands after research, turns into an issue on appeal. An "I don't know" answer must be researched and a conclusive answer found before the final issues are determined.

B. WHERE TO BEGIN

There is no best way to begin. Some experienced lawyers prefer to read the closing arguments first to get an overview of the case; others prefer to read the post-trial motions first; others prefer to talk with trial counsel or the client first. Use whatever starting point you prefer, but be certain to carefully read the entire record.

The authors prefer to read the record in the following manner. First, read the charging document or documents. Then go to the verdicts or findings and determine what convictions were entered. Then examine the statute and list the elements which must be proved for the offense(s) of which the defendant was convicted.

If the elements are not sufficiently clear after reading the statute, research the relevant cases that explain those elements. This procedure is important because you should anticipate in every case that the evidence may have been insufficient to prove the essential elements. In addition, knowing the elements of the offenses you will allow you to determine the relevancy and prejudicial effect of the evidence and arguments.

After completing the above steps, read the complete record from beginning to end.

1. What to look for - Where to look

Simply stated, the appellate lawyer should look everywhere in the record for

possible errors:

1. You should be alert for the possibility of erroneous conduct or statements by the prosecutor or judge, and for the possibility of ineffective assistance of counsel. Although such issues may not occur often, little things do add up, so look for them from beginning to end.

2. Certain events should "red flag" possible error. Be alert for defense objections that are overruled, prosecution objections that are sustained, and defense motions that are denied.

3. Use your "gut reaction." If something doesn't seem correct or fair, maybe it wasn't.

4. Remember that an appellate advocate has an overview of the case. For example, trial counsel may not object to the first preliminary questions relating to "other crimes," but repeated questions on this subject could be gathered into a very powerful point on appeal.

5. Get involved. If you can't convince yourself, it will be difficult to convince others.

6. Watch for unusual occurrences. These often create error because the judge and lawyers may not know how to deal with the problem.

7. Watch the behavior of trial counsel. Through objections, motions to strike, and motions for mistrial, counsel is attempting to "preserve" for appeal what he or she perceives as error. Another method of doing this is to check written post-trial motions to learn the grounds on which trial counsel argued for a new

trial.

It may also be beneficial to talk with trial counsel, because he or she may be able to point out issues which should be raised on appeal. It may be better to talk with trial counsel after you have read the record and are familiar with what occurred at trial. Before reading the record you can only listen, but after you are familiar with the case you can ask questions and engage in a more useful conversation.

8. You should talk with your client. Although not an attorney, he or she was there during trial and may shed light on possible issues.

VI.

THE BRIEF

A. GENERALLY

The format for briefs is set out by Rules 341, 342, 343, 607, and 612. Every appellate lawyer must know the requirements of the Rules and insure that every brief complies with the Rules. The reviewing court has inherent authority to dismiss an appeal where the appellant's brief fails to comply with the applicable Supreme Court Rules. See ***People v. Wrobel***, 266 Ill.App.3d 761, 641 N.E.2d 16 (1st Dist. 1994); ***People v. Webb***, 267 Ill.App.3d 954, 642 N.E.2d 871 (1st Dist. 1994).

1. Appellant's Brief

In all appeals, the appellant's brief must contain the following items, in the order listed:

(a) a white cover;

(b) points and authorities;

(c) a statement of the nature of the case;

(d) a statement of the issues presented for review;

(e) a concise statement of the applicable standards of review;

(f) a statement of jurisdiction;

(g) if statutory questions are at issue, a statement of the pertinent portions of the statutes involved;

(h) a statement of facts;

(i) the argument;

(j) a conclusion stating the precise relief sought;

(k) the names of counsel as on the cover;

(l) counsel's certification that the brief complies with the form and length requirements of Rule 341; and

(m) an appendix. (See Rules 341(c)(d)(h), 342).

2. Appellee's Brief

The appellee's brief must contain the following items, in the order listed:

(a) a light blue cover;

(b) points and authorities;

(c) the argument;

(d) a conclusion stating the precise relief sought; and

(e) the names of counsel as on the cover. (See Rule 341(d)(i)).

Counsel must also certify that the brief complies with the form and length requirements of Rule 341. Rule 341(c). To the extent that the appellant's presentation is deemed unsatisfactory, the appellee's brief may include the remaining items required for the appellant's brief. Rule 341(i).

3. Reply Brief

A reply brief must be "confined strictly to replying to arguments presented in the brief of the appellee." Rule 341(j). A reply brief is required to include only a light yellow cover, argument, and counsel's certification that the brief complies with the form and length requirements of Rule 341. (See Rule 341(c)(d)(j)).

4. Time for Filing Briefs

Unless otherwise ordered by the reviewing court, the appellant's brief is due 35 days after the record is filed. The appellee's brief must be filed within 35 days from the due date of the appellant's brief. The reply brief must be filed within 14 days from the due date of the appellee's brief. Rules 343(a), 612(k). For the time periods applicable to cross-appeals and separate appeals, see Rule 343(b).

Upon a motion showing good cause, or *sua sponte*, the reviewing court or a judge thereof may extend or shorten the time for filing a brief. Rule 343(c). However, Rule 610 states that "motions for extension of time are looked upon with disfavor." Motions for extension of time must be supported by affidavit or verification and show:

(a) the date counsel was appointed;

(b) the date the record was filed in the reviewing court; and

(c) the reasons for the requested extension. Rules 610, 343(c).

The affidavit or verification must also show the number of previous extensions and the reason for each extension. Rule 361(f).

Although the requirements for motions filed in the Supreme Court and Appellate Court are set out in Rules 361 and 610, motion practice regarding extensions of time varies widely between appellate districts. Attorneys should discuss the situation with an experienced appellate lawyer before moving for an extension of time.

5. Form of Briefs; Number of Copies; Service

Under amendments to the Supreme Court Rules which took effect in September of 2006, briefs must be produced on 8½ by 11 paper with margins of 1½ inches on the left side and one inch on the right side. The text must be double-spaced, although headings may be single-spaced. Only one side of the page may be used, and the document must be securely bound on the left side. Briefs may be produced by using a word-processing system, and need not be commercially printed. Rules 341(a), 612(i). A minimum font size of 12-point is required, and condensed type is prohibited. Rule 341(a).

When the defendant is not represented by appointed counsel, nine copies of the brief are required in Appellate Court appeals. Rules 341(e), 612(i). Twenty copies are required in Supreme Court appeals. Rule 341(e). In either case, three copies must be served on each party to the appeal who is represented by separate counsel. Rule 341(e). If the Attorney General and the State's Attorney both appear on a case, each must be served with three copies. Rule 341(e).

Where the defendant is represented by court-appointed counsel, six copies

of briefs or petitions are required in the Appellate Court, and fifteen copies are required in the Supreme Court. Rule 607(d).

A proof of service must be filed with all briefs. Rules 341(e), 612(i). Proof of service may be by certificate of an attorney or by the affidavit of a person other than an attorney. Rule 12.

6. Electronic Format

Briefs may be furnished on digital media; however the required number of hard copies must also be filed. The electronic document must be in Adobe Acrobat format. The court, or any member thereof, may require the parties to file briefs in electronic format. Rules 341(l),612(i).

7. Page Limitations

Appellant's and appellee's briefs may not exceed 50 pages each, excluding those matters required to be in the Appendix. The reply brief may not exceed 20 pages. In capital cases, the limits are 75 and 27 pages, respectively. Rules 341(b), 612(i).

The reviewing court may allow briefs that exceed these page limitations. A motion to allow the filing of a brief in excess of the page limitation must be filed not less than 10 days (five days for reply briefs) before the brief is due, and must state the maximum number of pages requested. Rule 341(b). However, motions to exceed the page limitations "are not favored," and the specific grounds establishing the necessity for the excess pages must be stated. Rules 341(b), 612(i).

It is essential that counsel comply with the requirements governing the form and length of briefs, because clerks of reviewing courts have discretion to refuse briefs which violate those requirements. (See Miscellaneous Record 20959, May 24, 2006).

8. References to Parties

The parties are to be referenced by the terms that would be used in the trial court, not as "appellant," "appellee," "petitioner," or "respondent." Other persons involved in the case may be referred to by name or by descriptive terms such as "complainant," "the deceased," or "the police officer." Rules 341(f), 612(i).

Juveniles and persons subject to mental health proceedings are to be denoted by their first name and last initial. First and last initials are to be used only if use of the first name would create a substantial risk of revealing the individual's identity. Rule 341(f).

9. Footnotes

Rule 341(a) states that footnotes are "discouraged."

10. Citations

The citation of legal authority in State Appellate Defender briefs should comply with the suggestions below, which are based on Rule 6, the Uniform System of Citation and citation form used by the Illinois Supreme Court.

a. Illinois cases

Rule 6 provides:

> Citations of cases must be by title, to the page of the volume where the case begins, and to the pages upon which the pertinent matter appears in at least one of the reporters cited. It is not sufficient to use only *supra* or *infra*. Citation of Illinois cases shall be to the official reports, but the citation to the North Eastern Reporter and/or the Illinois Decisions may be added. Quotations may be cited from either the official reports or the North Eastern Reporter or the Illinois Decisions. Citation of cases from other jurisdictions shall include the date and may be to either the official State reports or the National Reporter System, or both. If only the National Reporter

> System citation is used, the court rendering the decision shall also be identified. Textbook citations shall include the date of publication and the edition. Illinois statutes shall generally be cited to the Illinois Compiled Statutes (ILCS) but citations to the session laws of Illinois shall be made when appropriate. Prior to January 1, 1997, statutory citations may be made to the Illinois Revised Statutes instead of or in addition to the Illinois Compiled Statutes.

Note that Illinois cases *must* be cited to the official reports (*i.e.* Ill.2d and Ill.App.3d). Although Rule 6 states that citations to the North Eastern Reporter are optional, Appellate Defender briefs should include such citations.

Rule 6 does not require that citations include the date of Illinois cases. However, the date is frequently useful, and the Illinois Supreme Court normally includes it when citing Illinois cases. Thus, citations to Illinois cases in State Appellate Defender briefs should include the date.

Finally, Rule 6 does not require that citations include districts or divisions of the appellate court. However, the district may be important and should be included. For First District cases, the appropriate division may also be included.

b. Example citations of Illinois cases

(1) Reported cases

When quoting from a case or relying on a case for a particular principle (unless the case contains only a single principle), you must cite to the page or pages on which the pertinent matter appears. Rule 6. The pertinent page cites may be made to the official reports, the North Eastern Reporter or both.

> ***People v. Simms***, 121 Ill.2d 259, 273, 520 N.E.2d 308, 314 (1988)
>
> ***People ex rel. Foreman v. Nash***, 118 Ill.2d 90, 514 N.E.2d 180, 182 (1987)
>
> ***Wilson v. Clark***, 84 Ill.2d 186, 190, 417 N.E.2d 1322 (1981), cert. denied, 454 U.S. 836, 102 S.Ct. 140, 70 L.Ed.2d 117 (1981)
>
> ***People v. Taylor***, 165 Ill.App.3d 1016, 520 N.E.2d 907, 912-913 (1st Dist. 1988)
>
> ***People v. Bennett***, 162 Ill.App. 3d 36, 44, 515 N.E.2d 840 (1st Dist., 5th Div., 1987)
>
> ***In re D.P.***, 165 Ill.App.3d 346, 348, 519 N.E.2d 32, 24 (4th Dist. 1988)
>
> ***People v. Carlyle***, 159 Ill.App.3d 964, 967, 513 N.E.2d 61 (1st Dist. 1987), appeal denied 116 Ill.2d 564 (1987)
>
> ***People v. Bryant***, 165 Ill.App. 3d 996, 520 N.E.2d 890, 892-893 (1st Dist. 1988), appeal allowed 121 Ill.2d 574 (1988)
>
> ***People v. Fonville***, 158 Ill.App.3d 676, 508 N.E.2d 1255, 1258 (4th Dist. 1987), appeal denied, 515 N.E.2d 117 (1987)
>
> ***People v. Mitchell***, 165 Ill.2d 211, 215, ___ N.E.2d ___ (1995)
>
> ***People v. Buress***, ___Ill.2d ___, 653 N.E.2d 841, 842 (1st

Dist. 1995)

(2) Cases not yet reported

Opinions that are not yet reported should normally be placed in an appendix to the brief, unless the opinion was issued by the court in which your brief will be filed. When referring to the case, the page in the appendix or the slip opinion on which the pertinent material appears should be cited. The citation should include the docket number, court (if not clear from the citation), and date of the opinion.

People v. Sims, ____ Ill.2d ____, ____ N.E.2d ____ (1995) (No. 74002, September 21, 1995) slip op. at 7

People v. Solis, ____ Ill.App.3d ____, ____ N.E.2d ____ (1st Dist. 1995) (No. 1-93-0824, August 25, 1995) slip op. at 2

People v. Matthews, ___Ill App.3d ___, ___N.E.2d ___ (4th District, 1995) (No. 4-94-0051, June 29, 1995) (1995 Ill. App. LEXIS 478)

Fitzsimmons v. Walter, Sup. Ct. No. 55795 (Nov. 24, 1981) (Supervisory Order)

(3) Subsequent citations

If you refer to a case more than once on the same page of the brief, or when it is otherwise not confusing, you need not repeat the entire citation. However you may not simply use the terms "supra" or "infra" (See Rule 6). The following forms should be used:

Weaver, 92 Ill.2d at 547

People v. Weaver, 92 Ill.2d at 547

McKibbins, 449 N.E.2d at 823

c. Cases from other jurisdictions

Rule 6 requires that citations to cases from other jurisdictions must include the title of the case, volume, page where the case begins, page upon which the pertinent matter appears (in at least one of the reporters), and the year of the decision. In addition, if only an unofficial reporter is cited, the court which rendered the decision must be identified.

(1) United State Supreme Court

Citations must include the official (U.S) reports and should include the unofficial reports (S. Ct. and L. Ed.) as well. If a case is not yet published in the official reports, citation to either or both of the unofficial reports is sufficient. If a case is not yet published in any reports, a citation to United

States Law Week (U.S.L.W.) or Criminal Law Reporter (CrL) is sufficient. In the alternative, citation may be established by electronic database (*i.e.*, Westlaw or Lexis), and the opinion placed in an Appendix to the brief.

Lee v. Illinois, 476 U.S. 530, 541, 90 L.Ed.2d 514, 106 S.Ct. 2056 (1986)

Griffith v. Kentucky, 479 U.S. 314, 93 L.Ed.2d 649, 652, 107 S.Ct. 708(1987)

Powell v. Nevada, ____ U.S. ____, 128 L.Ed.2d 1, 11, 114 S.Ct. 1280 (1994)

Wilson v. Arkansas, ___U.S. ___ (No. 94-5705, May 22, 1995), 57 CrL 2122 (May 24, 1995)

Cunningham v. California, ___ U.S. ___, 207 U.S. Lexis 1324 (No. 05-6551, Jan. 22, 2007)

(2) Other Federal Courts

United States ex rel. Duncan v. O'Leary, 806 F.2d 1307, 1315 (7th Cir. 1986)

United States v. Schmuck, 840 F.2d 384, 386 (7th Cir. 1987) (en banc), cert. granted, 486 U.S. 1004, 100 L.Ed.2d 192, 108 S.Ct. 1727 (1988)

United States v. Jacobs, 431 F.2d 754 (2d Cir. 1970), cert. denied, 402 U.S. 950, 91 S.Ct. 1613, 29 L.Ed.2d 120 (1971)

Gaines v. Thieret, 665 F.Supp. 1342, 1348 (N.D. Ill. 1987)

Taylor v. United States, 385 F.Supp. 1034, 1036 (N.D. Ill. 1974), rev'd on other grounds, 528 F.2d 60 (7th Cir. 1976)

Sigmond v. Brown, 645 F.Supp. 243, 246-47 (C.D. Cal. 1986), aff'd, 828 F.2d 8 (9th Cir. 1987)

(3) Other States

Cases from other states may be cited to the official reports, the unofficial reports or both. The citation must include the date and the court rendering the decision. If the name of the report (*i.e.* Cal. 3d) is the same as the name of the state, it is presumed that the decision was by the State's highest court.

Hovey v. Superior Court, 28 Cal.3d 1, 616 P.2d 1301, 1308 (1980)

State v. Bowling, 151 Ariz. 230, 726 P.2d 1099, 1101 (1986)

People v. Anthony, 204 N.W.2d 289, 834 (Iowa, 1973)

Hart v. Hart, 539 S.W.2d 679, 682 (Mo.App. 1976)

People v. Ulrich, 268 N.W.2d 269, 271 (Mich.App. 1978)

d. Constitutions, Statutes, Court Rules

U.S. Const., art I, §9

U.S. Const., amend IV

Ill. Const. 1970, art. I, §11

725 ILCS 5/112-4[3]

Public Act 84-1450

18 U.S.C. sec. 1005

Illinois Supreme Court Rule 604(a)

[3]Because 25 ILCS 135/5.04 provides that the Illinois Compiled Statutes are an official compilation of Illinois laws, use of the publisher's name (*i.e.*, 1994 State Bar Edition) is optional.

e. Electronic Citations

The Supreme Court Rules do not specifically authorize or prohibit use of citations to electronic or online materials. Where materials is readily available in both print and electronic formats, the citation to the print source should be used. If the material is available only in electronic format or may be difficult to find in print, an electronic citation may be used.

Electronic citations may be unique to a commercial provider (*i.e.*, West or Lexis), or may include the URL of a World Wide Web page on which the material was found. Because Internet sites may not carry the trustworthiness of commercial databases, the source of Internet material should be clearly indicated. In addition, whenever an electronic citation is utilized, it is advisable to include a printed copy of the material in an Appendix.

f. Books

Citations to books should include the volume number (if more than one), author, title, section or paragraph and/or pages, edition and date of publication.

> 4 W. LaFave, **Search and Seizure**, sec. 11-6(b) (2d ed. 1987)
>
> E. Cleary and M. Graham, **Handbook of Illinois**

Evidence, sec. 611.14 (6th ed. 1994)

Illinois Pattern Jury Instructions, Criminal, No.7.01A (3d ed. 1992)

McCormick on Evidence, sec. 37, at 121 (4th ed. 1992)

Blacks Law Dictionary 12 (4th ed. 1957)

Annot., 12 **A.L.R.** 2d 382 (1950)

g. Law Review Articles

Amsterdam, *"Perspectives on the Fourth Amendment,"* 58 **Minn.L.Rev.** 349 (1974)

Winick, *"Prosecutorial Peremptory Challenges in Capital Cases: An Empirical Study and a Constitutional Analysis,"* 81 **Mich.L.Rev.** 1 (1982)

Note, *Expert Legal Testimony*, 97 **Harv.L.Rev.** 797, 811-812 (1984)

Note, *The Constitutionality of Warrantless Home Arrests*, 78 **Colum.L.Rev.** 1550 (1978)

Comment, *Hearsay Witnesses' Prior Statements and Criminal Justice in Illinois*, 1974 **U.Ill.L.F.** 675

Comment, *Effective Assistance of Counsel: Strickland and the Illinois Death Penalty Statute*, 1987 **U.Ill.L.Rev.** 131, 154-155

h. Final Note

The Illinois Supreme Court cites cases in a slightly different manner than that set out above. The Supreme Court uses only official citations, places the date immediately after the case name, and does not specify the district of the Appellate Court that rendered the decision. The Supreme Court also includes the publisher when citing to the Illinois Compiled Statutes.

People v. Zehr (1984), 103 Ill.2d 472, 476-477

People v. Thompson (1987), 155 Ill.App.3d 871

Griffith v. Kentucky (1987), 479 U.S. 314, 318, 107 S.Ct. 708, 93 L.Ed.2d 649

United States v. Delaney (8th Cir. 1984), 732 F.2d 639, 642

Lakeside v. Tahoe (D. Nev. 1978), 461 F.Supp. 1150

720 ILCS 5/9-1(a) (West 1992)

The Supreme Court's citation method may be used. However, for the convenience of the reader it is helpful to include citations to the North Eastern Reporter and to identify the Appellate Court district. Whatever form you choose to use, citations should be consistent throughout the brief.

B. THE COVER OF THE BRIEF

The cover must contain:

(1) the number of the case in the reviewing court;

(2) the name of the reviewing court;

(3) the name of the court from which the case is brought;

(4) the title of the case as it appeared in the lower court;

(5) the status of the parties in the trial and reviewing courts (*i.e.*, “defendant-appellant");

(6) the name of the trial judge who entered the judgement; and

(7) the name and address of the attorney filing the brief. Rules 341(d), 612(i).

Additionally, if oral argument is desired, the appropriate request must be stated at the bottom of the cover. Rule 352(a).

The color of the cover must be as follows: appellant's brief or petition, white; appellee's brief or answer, light blue; appellant's reply brief, light yellow; appellee's reply brief, light red; petition for rehearing, light green. A separate appendix must have the same color cover as the brief it accompanies. Rule 341(d).

Sample brief covers are set forth on the following pages.

NO. 3-88-0001

IN THE

APPELLATE COURT OF ILLINOIS

THIRD JUDICIAL DISTRICT

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Circuit
	) Court of the ____
Plaintiff-Appellee,	) Judicial Circuit, _____
	) County, Illinois
vs.	) No. _____
	)
JOHN DOE,	) Honorable
	) _____
Defendant-Appellant,	) Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLANT

_____
Deputy Defender

_____
Assistant Defender
Office of the State Appellate
Defender
____Judicial District
_____
_____, Illinois _____
(Telephone #)
COUNSEL FOR DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

NO. _____

IN THE

SUPREME COURT OF ILLINOIS

PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from the Appellate
	) Court of Illinois, _____
Plaintiff-Appellant,	) Judicial District, No.
	) _____
vs.	) _____
	) There heard on appeal from
JOHN DOE,	) the Circuit Court of the
	) _____ Judicial Circuit,
Defendant-Appellee.	) _____ County
	) Honorable _____,
	) Judge Presiding.

BRIEF AND ARGUMENT FOR DEFENDANT-APPELLEE

_____
Deputy Defender

_____
Assistant Defender
Office of the State Appellate
Defender
_____
_____
(Telephone)

COUNSEL FOR DEFENDANT-APPELLEE

ORAL ARGUMENT REQUESTED

C. POINTS AND AUTHORITIES

The first section of every brief (both appellant and appellee) must contain a listing of "Points" and "Authorities." Rules 341(h), 612(i). The "Point" is the argumentative heading which begins each argument in the brief. The "Authorities" are the court decisions and other precedent on which you rely, or which you distinguish, in your argument. Court decisions must be listed "as near as may be in the order of their importance." Rule 341(h). In addition, the page number of the brief on which each point and authority appears must be listed. Rule 341(h).

It is extremely important that some authority be cited in support of each point or argument. Rule 341(h) requires a party to not only offer argument on the issue, but also to support that argument with some citation of authority. ***People v. Franklin***, 167 Ill.2d 1, 656 N.E.2d 750 (1995); ***People v. Patterson***, 154 Ill.2d 414, 610 N.E.2d 16 (1992). Reviewing courts have refused to consider arguments for which no authority was cited. See ***People ex rel. Aldworth v. Dutkanych***, 112 Ill.2d 505, 511, 493 N.E.2d 1037 (1986); ***People v. Felella***, 131 Ill. 2d 525, 546 N.E.2d 492 (1989). On the other hand, citation of multiple authorities in support of the same point (chain-citing) "is not favored." Rule 341(h)(7). Counsel should also be aware that Appellate Court opinions issued before 1935 are not regarded as precedential. ***People v. Glisson***, 202 Ill.2d 499, 782 N.E.2d 251 (2002).

It is important to remember that the formation of the heading, or point, often controls the answer. Choose your language carefully so that the "Point" is clear, complete, and forceful. Each "Point" should be as concise and specific as possible, and should state a conclusion based upon the application of the law to the facts of the case. Generally, the "Point" should tell the reviewing court what happened or why error was committed.

In some briefs it may be necessary to make the "Point" long and detailed; in others, a short, simple or conclusionary "Point" is sufficient. The wording of the "Point" depends largely on the facts of the case, the nature of the issue and your strategy on appeal. The phrasing of the “Points” will often be similar to that used for the “Issues” section of the brief.

The following are examples of "Points" that are poorly drafted because they fail to tell the court what happened or why error was committed:

> THE DEFENDANT WAS NOT PROVED GUILTY BEYOND A REASONABLE DOUBT (compare with examples (1) through (4) below)
>
> THE TRIAL JUDGE ERRED IN ALLOWING THE STATE TO PRESENT IMPROPER EVIDENCE (compare with examples (5), (6), and (7) below)
>
> THE TRIAL JUDGE ERRED IN PROHIBITING THE DEFENDANT FROM PRESENTING CERTAIN EVIDENCE (compare with examples (8) and (9) below)
>
> THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE WAS IMPROPERLY DENIED (compare with examples (10) and (11) below)
>
> DEFENDANT'S SENTENCE IS EXCESSIVE (compare with examples (12) and (13) below)

The following are examples of well written "Points":

(1) THE DEFENDANT WAS NOT PROVED GUILTY BEYOND A REASONABLE DOUBT BECAUSE HIS CORROBORATED ALIBI WAS CONTRADICTED ONLY BY AN IDENTIFICATION THAT WAS DOUBTFUL AND UNCERTAIN DUE TO INTEREST, CONFLICT AND MATERIAL IMPEACHMENT.

(2) THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT DEFENDANT WAS GUILTY OF AGGRAVATED BATTERY WHERE THE DEFENDANT'S UNCONTRADICTED AND UNREBUTTED TESTIMONY ESTABLISHED THAT HE ACTED IN SELF-DEFENSE.

(3) THE STATE DID NOT PROVE DEFENDANT GUILTY OF ARMED ROBBERY BEYOND A REASONABLE DOUBT WHERE THE ONLY WITNESS WHO CLAIMED A POSITIVE IDENTIFICATION WAS CONTRADICTED BY OTHER STATE TESTIMONY, WHERE OTHER OCCURRENCE WITNESSES WHO SAW THE DEFENDANT PRIOR TO THE CRIME TESTIFIED THAT DEFENDANT WAS NOT ONE OF THE ROBBERS AND WHERE THE DEFENDANT PRESENTED A CLEAR AND CONVINCING ALIBI DEFENSE.

(4) DEFENDANT WAS NOT PROVED GUILTY BEYOND A REASONABLE DOUBT WHERE THE TESTIMONY OF THE COMPLAINING WITNESS RESULTED FROM INSUFFICIENT OPPORTUNITY TO OBSERVE AND WAS SERIOUSLY INCONSISTENT WITH HER INITIAL DESCRIPTION OF HER ASSAILANT, AND WHERE SHE HAD BEEN UNABLE TO IDENTIFY DEFENDANT AT THE FIRST LINEUP.

(5) THE DEFENDANT WAS DENIED A FAIR TRIAL BECAUSE EVIDENCE THAT HE HAD STOLEN A CAR AND LEFT THE STATE EIGHTEEN HOURS AFTER THE OFFENSE ALLEGEDLY OCCURRED WAS INTRODUCED AS "EVIDENCE OF FLIGHT," BUT THE STATE DID NOT SHOW THAT THE DEFENDANT KNEW HE WAS WANTED BY THE POLICE.

(6) THE TRIAL COURT ABUSED ITS DISCRETION AND DEPRIVED THE DEFENDANT OF A FAIR TRIAL BY ALLOWING THE DEFENDANT TO BE IMPEACHED WITH ELEVEN PRIOR CONVICTIONS, INCLUDING FIVE WHICH WERE THE SAME AS OR SIMILAR TO THE OFFENSE IN THE INSTANT CASE.

(7) THE ADMISSION OF THE CO-DEFENDANT'S STATEMENT IMPLICATING THE DEFENDANT WAS ERROR BECAUSE IT

CONSTITUTED HEARSAY UNDER ILLINOIS LAW AND DENIED THE DEFENDANT THE RIGHT OF CONFRONTATION UNDER THE UNITED STATES CONSTITUTION.

(8) THE COURT ERRED IN PROHIBITING THE DEFENSE FROM QUESTIONING THE STATE'S CHIEF WITNESS AS TO PENDING CRIMINAL CHARGES IN ORDER TO SHOW POSSIBLE BIAS ON THE PART OF THE WITNESS.

(9) THE TRIAL COURT ERRED BY PRECLUDING THE DEFENSE FROM PRESENTING EVIDENCE OF THE DECEASED'S REPUTATION FOR VIOLENCE, WHERE SUCH EVIDENCE WAS HIGHLY RELEVANT TO THE CLAIM OF SELF-DEFENSE.

(10) THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO QUASH THE ARREST WHERE A WARRANTLESS ARREST WAS MADE INSIDE THE DEFENDANT'S HOME AND THERE WERE NO EXIGENT CIRCUMSTANCES.

(11) THE WARRANT TO SEARCH DEFENDANT'S RESIDENCE WAS IMPROPERLY GRANTED, AND THE EVIDENCE OBTAINED IN THE EXECUTION OF THE WARRANT SHOULD HAVE BEEN SUPPRESSED.

A.

THE AFFIDAVIT FOR THE SEARCH WARRANT WAS DEFECTIVE IN THAT IT FAILED TO STATE ANY OF THE UNDERLYING CIRCUMSTANCES ON WHICH THE INFORMANT, AND THROUGH HIM THE AFFIANT, BASED HIS CONCLUSION THAT DEFENDANT WAS INVOLVED IN CRIMINAL ACTIVITY.

B.

THE AFFIDAVIT FOR THE SEARCH WARRANT WAS DEFECTIVE AS IT FAILED TO SUPPLY THE ISSUING JUDGE WITH THE UNDERLYING CIRCUMSTANCES NECESSARY TO ESTABLISH THE INFORMANT'S CREDIBILITY.

C.

THE SEARCH WARRANT WAS IMPROPERLY GRANTED BECAUSE THE CONTENTS OF

THE SUPPORTING AFFIDAVIT WERE NOT SWORN TO UNDER OATH BY THE AFFIANT.

(12) THE THIRTY-YEAR SENTENCE FOR MURDER IS EXCESSIVE WHERE DEFENDANT WAS EIGHTEEN YEARS OLD AND HAD NO PRIOR RECORD, AND THERE WAS STRONG EVIDENCE THAT HE ACTED IN SELF-DEFENSE.

(13) A TWENTY-SIX-YEAR SENTENCE WAS EXCESSIVE WHERE THE CO-DEFENDANT RECEIVED JUST SIX YEARS IMPRISONMENT, BOTH DEFENDANTS WERE ACTIVE PARTICIPANTS IN THE OFFENSE , AND BOTH HAD SIMILAR PRIOR RECORDS.

The following are examples of the format to be used for "Points and Authorities."

EXAMPLE 1

POINTS AND AUTHORITIES

I.

DEFENDANT WAS DENIED A FAIR TRIAL WHERE THE TRIAL JUDGE SUMMARILY AND ARBITRARILY DENIED DEFENSE COUNSEL'S REQUEST TO PRESENT A BRIEF ARGUMENT IN SUPPORT OF A MOTION FOR DIRECTED VERDICT.....10

(1) THE RULING WAS AN ABUSE OF DISCRETION WHICH INFRINGED ON THE DEFENDANT'S RIGHT TO RECEIVE THE FULL AND EFFECTIVE ASSISTANCE OF COUNSEL.....10

EXAMPLE 2

I

POINTS AND AUTHORITIES

D. NATURE OF THE CASE

The appellant's brief must contain a statement of "the nature of the action and of the judgment appealed from and whether the judgment is based upon the verdict of a jury, and . . . whether any question is raised on the pleadings, and if so, the nature of the question." Rule 341(h). The "Nature of the Case" merely apprizes the reviewing court of "the general area of what the case is about." See Rule 341, Committee Comments.

EXAMPLES

(1) The defendant was charged by information with the offense of murder. Following a jury trial he was convicted of that offense. Defendant was subsequently sentenced to a term of imprisonment of 30 years. No issue is raised concerning the information.

(2) After a jury trial the defendant was convicted of armed robbery and sentenced to a term of imprisonment of 15 years. The defendant appeals from the judgment and sentence imposed. No question is raised on the pleadings.

(3) The defendant was charged by indictment with the offenses of murder and armed robbery. The defendant was tried by the court without a jury, and on April 3, 2003 was found guilty of both offenses. Defendant was sentenced to 40 years for murder and 20 years for armed robbery, the sentences to run

consecutively.

This appeal challenges the sufficiency of the indictment in charging the offense of murder, in that it failed to allege the necessary intent.

(4) On December 13, 1993, the defendant entered a plea of guilty to the offense of burglary and was sentenced to 5 years imprisonment. On December 29, 1990, the defendant filed a motion to vacate his plea of guilty. After a hearing, the motion was denied.

This is a direct appeal contesting the denial of the defendant's motion to vacate his guilty plea. No issue is raised regarding the pleadings.

(5) On May 8, 1991 the defendant was convicted of murder following a jury trial. He was subsequently sentenced to a term of not less than 14 nor more than 25 years. His conviction and sentence were affirmed on appeal.

On October 25, 1993 defendant filed a post-conviction petition, which was dismissed without an evidentiary hearing on December 6, 1993. This is an appeal from the dismissal of the post-conviction petition.

E. ISSUES PRESENTED FOR REVIEW & APPLICABLE STANDARDS OF REVIEW

1. Issues Presented

This section of the brief should state the crux of the case in terms of the issues to be decided, "without detail or citation of authorities." Rule 341(h)(3). The "Issues" should be written in a clear, concise and (to the extent possible) appealing manner which invites the attention of the court and makes the issues seem significant. A lengthy, confusing, vague, or dull presentation of issues may cast the appeal in its worst possible light.

The statement of the issues should not simply assert abstract principles of law. Instead, it should be keyed to the facts of the case, fairly and accurately stated, and related to the legal proposition asserted:

> The goal should be to frame the issue in such a manner as to include the key facts of the specific case on appeal. That is, it should be possible to state the ultimate or key facts which give rise to the issue that is to be determined on the appeal.[4]

Ideally, the "Issues" section should do more than merely "state the issue"; "[p]ersuasive issue statements present the issues in a light favorable to the advocate's position, and invite the reader to view the issues from that perspective."[5] However, the statement:

> must strike a delicate balance between subtle

---

[4]Re, **Brief Writing and Oral Argument** 118 (8th ed. 1999).

[5]Sorkin, *Persuasive Issue Statements*," 83 **Ill Bar Journal** 139 (1995).

> persuasion and obvious bias. A judge who perceives your statement of an issue as unduly slanted may discount or even ignore what you have written and rely more heavily upon your opponent's version. Better to leave the judge indifferent after reading your issue statement than to risk losing your credibility.[6]

It is important to make certain that the "Issues" are actually the questions that are both presented by the facts and dispositive of the case. For example, an "Issue" phrased as "whether a suspect who is taken into custody and subjected to police questioning must be given Miranda warnings" most likely does not accurately state the question. The answer to this question or issue is obviously "yes," but is that answer likely to control the outcome? In all likelihood, the question to be decided is whether the defendant was actually in custody, whether he was questioned, or whether proper Miranda warnings were given.

EXAMPLES

(1) Whether the defendant's waiver of counsel was entered knowingly and intelligently where he was not informed of his right to a court-appointed attorney.

(2) Was the defendant denied a fair opportunity to present his defense, and thereby denied due process of law, where the trial court excluded a defense witness from testifying solely because she had gotten married and changed her

[6]Sorkin, *supra* at 139.

name from that provided to the State in discovery.

(3) Whether, in the absence of any other positive proof and in light of unimpeached alibi testimony, one uncorroborated and unreliable identification established defendant's guilt beyond a reasonable doubt.

(4) Whether the prosecutor committed reversible error in closing argument when he referred to the defendant as a "mad dog."

(5) Whether the trial court erred in giving an admission instruction based on defendant's statement that he knew the complaining witness, since that statement did not in any way infer guilt.

(6) Whether the defendant was prejudiced by the trial court's ruling allowing the State to impeach him with evidence of a twenty-eight-year-old minor military infraction and a nine-year-old misdemeanor conviction for resisting arrest.

(7) Whether the defendant is entitled to a new sentencing hearing because the trial court sentenced him for a felony without requiring a presentence investigation.

2. Standard of Review

A brief must include a "concise statement of the applicable standard of review for each issue, with citation to authority." Rule 341(h)(3). This "concise statement" may be included in the Argument or in a separate section of the brief.

In ***People v. Coleman***, 183 Ill.2d 366, 701 N.E.2d 1063, 233 Ill.Dec. 789 (1998), the court stressed that the "abuse of discretion" and "manifestly erroneous" standards of review apply only where the trial court is in a superior position to determine the issue. The "manifestly erroneous" standard applies where the reviewing court is required to "review . . . factual and credibility determinations," but not where only legal issues are involved. "Abuse of discretion" is the standard most deferential to the lower court's findings, and is "traditionally reserved . . . for those decisions of the lower court which deserve great deference on review, *i.e.*, decisions made by the trial judge in overseeing his or her courtroom or in maintaining the progress of the trial."

De novo review, on the other hand, applies where only legal issues are involved, because the reviewing court "has the same capability as does a circuit court" to determine the question.

The Illinois Supreme Court has recognized "mixed" standards of review for certain questions. For example, although the trial court's factual findings on a motion to suppress a confession will be reversed only if against the manifest weight of the evidence, *de novo* review is applied to the ultimate question of whether the confession was voluntary. ***In re G.O.***, 191 Ill.2d 37, 727 N.E.2d

1003, 245 Ill.Dec. 269 (2000). *See also* ***People v. McDaniel***, 326 Ill.App.3d 771, 762 N.E.2d 1086, 261 Ill.Dec. 159 (1st Dist. 2001) (trial court's factual findings and credibility determinations on a motion to suppress are reversible only for manifest error, but *de novo* review is applied to the legal question of whether suppression was warranted and where neither factual nor credibility determinations are at issue.) In ***People v. Luedemann***, 222 Ill.2d 530, 857 N.E.2d 187 (2006) the court clarified that its prior holdings were not intended to modify the two-part, "blended" standard of review.

Case law concerning standard of review can be found in §2-7 of the **Illinois Handbook of Criminal Decisions**.

EXAMPLES

(1) The standard of review is *de novo* because the question involves the application of Illinois law to undisputed facts. See ***In re D.G.***, 144 Ill.2d 404, 408-409, 581 N.E.2d 648 (1991).

(2) Since the facts are undisputed, whether the trial judge considered improper factors in aggravation is a question of law which this court may review *de novo*.

(3) The denial of a motion to withdraw a plea of guilty is typically reviewed

to determine whether the court abused its judicial discretion. ***People v. Hale***, 82 Ill.2d 172, 411 N.E.2d 867, 868 (1980). That discretion is more limited than that usually afforded a trial court, however, and "should always be exercised in favor of innocence and liberty and in the light of the preference that is shown by law for a trial upon the merits by a jury." ***People v. Morreale***, 412 Ill. 528, 107 N.E.2d 721, 723 (1952). In this case, *de novo* review seems most appropriate because the claims are based upon the ineffective assistance of counsel, which should be considered a legal issue, and legal issues are reviewed *de novo*. ***People v. Landwer***, 166 Ill.2d 475, 655 N.E.2d 848, 854 (1995).

(4) The standard of review is whether the sentence imposed by the trial court was an abuse of discretion. ***People v. McPhee***, 256 Ill.App.3d 102, 628 N.E.2d 523, 531 (1st Dist. 1993).

(5) The issue is whether defendant was proven guilty beyond a reasonable doubt. The standard of review for this issue is whether, after reviewing the evidence most favorably to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. ***Jackson v. Virginia***, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); ***People v. Collins***, 106 Ill.2d 237, 478 N.E.2d 267 (1985).

(6) In Illinois, claims of ineffectiveness that appear on the record may be raised “for the first time on direct appeal.” Review of such claims is necessarily *de novo*.

F. JURISDICTION

1. Supreme Court

In cases appealed to the Supreme Court directly from the trial court or as a matter of right from the Appellate Court, the appellant's brief must contain a brief statement of the jurisdictional grounds for the appeal. This statement is to be contained under the heading "Jurisdiction." Rule 341(h)(4).

EXAMPLES

(1) Because a sentence of death was imposed upon the defendant, the appeal from his convictions and death sentence lies directly to this Court pursuant to Article VI, sec. 4(b) of the Illinois Constitution and Supreme Court Rule 603.

(2) Because this is an appeal from a final judgment of the circuit court in a post-conviction proceeding involving a judgment imposing a sentence of death, the appeal lies directly to this Court pursuant to Supreme Court Rule 651(a).

(3) The jurisdiction for this appeal is Supreme Court Rule 603, which provides that an appeal in which a statute has been held invalid shall be directly to this Court. In this case, the circuit court held that 730 ILCS 5/5-8-1(a)(2) is unconstitutional.

(4) The jurisdiction for this appeal "as a matter of right" is Supreme Court Rule 317, in that a question under the United States and Illinois Constitutions arose for the first time in and as a result of the action of the Appellate Court. The Appellate Court reversed the defendant's conviction for burglary, and ordered the circuit court to enter a judgment of guilty on the offense of theft. Since the defendant was not charged with theft and theft is not a lesser included offense of burglary, the Appellate Court's decision resulted in conviction of an uncharged crime, in violation of due process under the United States and Illinois constitutions.

2. Appellate Court

In cases appealed to the Appellate Court, the "Jurisdiction" section must contain "a brief, but precise" statement or explanation of the basis for appeal. Rule 341(h)(4).

EXAMPLES

(1) The defendant's appeal is from a final judgment of conviction, pursuant

to Article VI, Section 6 of the Illinois Constitution and Illinois Supreme Court Rules 603 and 606. The defendant was found guilty of burglary and was sentenced on August 22, 1994. The defendant's notice of appeal was timely filed on September 6, 1994.

(2) This appeal from a final adjudication of delinquency is pursuant to Illinois Supreme Court Rules 660, 603 and 606.

(3) The defendant's appeal is from a final judgment of conviction entered upon a plea of guilty, pursuant to Illinois Supreme Court Rules 603, 604(d) and 606. The defendant pleaded guilty to burglary on November 22, 1993, and sentence was imposed on the same date. A motion to withdraw the guilty plea was timely filed on December 6, 1993, and that motion was denied on December 27, 1993. The defendant's notice of appeal was timely filed on December 29, 1993.

(4) This interlocutory appeal is from the denial of the defendant's motion to dismiss charges on grounds of former jeopardy, pursuant to Illinois Supreme Court Rule 604(f).

G. STATUTES INVOLVED

When an issue in the brief involves the construction or validity of a statute,

constitutional provision, ordinance or regulation, the pertinent parts thereof must be included verbatim in a "Statutes Involved" section. Rule 341(h)(5).

When the pertinent provisions are lengthy, the citation alone may be placed in this section and the complete text set out in an appendix. In such cases, the "Statute Involved" section may simply state:

> 725 Illinois Compiled Statutes, 5/108B-4 et. seq. Due to its length, the text of the statute is set out in Appendix A.

H. STATEMENT OF FACTS

1. Generally

An appellant's brief must contain a State of Facts containing "the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment, and with appropriate references to the pages of the record on appeal . . ." Rule 341(h)(6). The Statement of Facts is a non-argumentative recitation of all facts needed by the reviewing court to fully understand the case and decide the issues.

The Statement of Facts is extremely important and should be written with great care. It should present the case in its most interesting and intelligible light - keeping in mind the issues raised - and must be accurate and honest. The Statement of Facts is the appellant's first opportunity to explain exactly what occurred below and to give the reviewing court an overall impression of the case:

> It is trite that it is in the statement of facts that the advocate has his first, best and most precious access to the court's attention. The court does not know the facts

> and it wants to. It is trite among good advocates, that the statement of facts can, and should, in the very process of statement, frame the legal issue, and can, and should, simultaneously produce the conviction that there is only one sound outcome.[7]

2. Accuracy, Completeness, Honesty

The presentation of the facts must be accurate and complete. A reviewing court will have little confidence in you or your brief if your Statement of Facts is inaccurate.

One division of the Appellate Court noted:

> A careful review of the record demonstrates that the State selectively excluded from its citation to this court the prosecutor's final statement to the trial court . . . This statement is crucial to the resolution of this cause. We view the State's presentation in its brief as unprofessional. An advocate's duty is to present evidence and argument so the cause may be decided according to law, not to omit testimony and evidence which is damaging to its cause. An esteemed modern historian once said: "A biographer is a writer under oath." That is a wise remark, and as relevant to appellate advocates as to biographers.[8]

If it cannot be said that an honest and candid relationship with the reviewing court will win cases, in the long run the opposite is certainly true.

State the facts as they are. Never state that such and such is a fact when it is contradicted by other evidence or when an inference is required to reach that

---

[7]Llewellyn, *The Modern Approach to Counselling and Advocacy . . .* , 46 **Colum. L. Rev.** 167 (1946).

[8]***People v. Walker***, 256 Ill.App.3d 466, 628 N.E.2d 207, 209 (1st Dist. 1993).

conclusion. For example, don't claim in the Statement of Facts that the prosecutor admitted such and such when all he or she did was remain silent. Instead, you should state that the prosecutor remained silent, and in your argument contend that the silence constituted an admission.

Trying to avoid facts contrary to your position is simply dishonest, and may well hurt your case and client when the prosecutor informs the reviewing court of the matters you failed to mention.

3. Nonargumentative

The Statement of Facts may relate only that - the "facts" - as shown by the record and without argument, opinion, or conclusions. For example, it is improper to say in the Statement of Facts that a certain witness' testimony was "incredible," or that the witness "lied" when he said he was at the crime scene. However, it is proper to point out, if supported by the record, that the witness admitted that he testified in the hope of having other charges dismissed, or that he made prior statements that were inconsistent with his trial testimony.

Likewise, in the Statement of Facts it is improper to voice an opinion or state a conclusion concerning the meaning or legal effect of a comment by the prosecutor. For example, if the prosecutor in closing argument said that the State's evidence was "uncontradicted, unrebutted and undenied," the Statement of Facts should not claim that the prosecutor commented on the defendant's failure to testify. Instead, only set forth what the prosecutor said, and in the

Argument section of the brief urge that the comment constituted an improper comment on the defendant's failure to testify. Of course, if defense counsel objected to the above comment on the ground that it was an improper comment on defendant's failure to testify, the Statement of Facts may point out the objection, because it simply relates something that occurred.

The First District Appellate Court has made the following observations:

> In the statement of facts, attorneys can properly present evidence that is favorable to their clients but not at the cost of this court's understanding of the case - in the hope that obfuscation, selection, and premature argument can persuade appellate judges to reach conclusions rejected by a trier of fact presented with all the evidence . . . When attorneys set out to win cases, not by argument designated as such, but by editorial comment, coloration, and querulousness in the statement of facts, it not only manifests disrespect for the intelligence of the court, but serves to obscure rather than enlighten and needlessly makes this court's job more difficult.[9]

4. Order of Presenting the Facts

The Statement of Facts should be organized in a way that enables the reviewing court to easily and quickly understand the important facts. Usually, the best way to accomplish this is to set out the facts in chronological order instead of the order in which the evidence was presented at trial. Chronological order is helpful to the reader because it starts at the beginning of an occurrence and

---

[9] ***Midland Hotel v. Donnelley Corp.***, 149 Ill.App.3d 53, 57-58, 501 N.E.2d 1280, 1283 (1st Dist. 1986) (rev. in part 118 Ill.2d 306, 515 N.E.2d 61 (1987)).

continues through to the end. Presenting the facts in the same order as the witnesses were called at trial may result in the reviewing court reading testimony without knowing its importance, or even overlooking contrary testimony which came in later at the trial.

If chronological order is not the best method in a particular case, use another method that is concise, clear and easy to follow. However, you must use some orderly method.

Sometimes it is helpful to use subheadings within the Statement of Facts to separate the evidence, arguments or rulings on various points. For example, if a brief presents issues concerning the trial itself and motions to suppress, subheadings such as "Motion to Suppress Confession" and "Proceedings at Trial" might be used.

It may also be easier for the reviewing court to understand the facts if you have an introductory paragraph summarizing each party's evidence and theories at trial. For example, you might explain to the court that the State sought to connect the defendant to the crime by the identification testimony of the complainant, while the defense contended that the complainant was mistaken and that defendant was elsewhere. This technique is often helpful because it lets the reviewing court know at the outset what critical questions faced the jury and why certain testimony was important. If you do use an introductory paragraph or summary of the case, make certain it is accurate.

Keep in mind that the positioning of the evidence in your Statement of Facts may be very helpful in putting the case in a favorable (but accurate) light. For example, you could state that the defendant was identified as the murderer by two State witnesses, and leave to the next page any evidence about their credibility. A more favorable impact might be gained by putting all the evidence together:

> Two State witnesses identified the defendant as the person who shot the deceased. (R. 310, 350) One of these witnesses gave a prior statement to the police in which he denied any knowledge of the shooting - this was acknowledged by the witness himself (R. 316) and by two police officers. (R. 410, 423) The other witness admitted that he testified in this case after the State's Attorney agreed to dismiss a murder charge which was pending against him. (R. 374)

The positioning of facts, such as weaving the State and defense evidence together, may also highlight the importance of a particular evidentiary ruling that you claim was error. For example, if a State's witness testified that he saw the defendant run from the crime scene, the credibility question is highlighted if you immediately point out that four defense witnesses testified that at the time of the offense, the witness was with them over five miles from the crime scene. If you plan to argue that the credibility of the State's witness was improperly enhanced by inadmissible evidence or comments by the prosecutor, the reviewing court should be able to easily see from the Statement of Facts that any improper

evidence or comment may have influenced the jury in deciding crucial credibility questions.

A direct quote is frequently a powerful and forceful attention-getter. For example:

> When asked whether she was sure that defendant was the attacker the witness said: "I'm sure, the policeman said it had to be him." (R. 110)

5. Source of Facts

Rule 341(h) requires that you set out the appropriate record citation for all facts included in the Statement of Facts. Make sure that your record cites are sufficient to allow the reviewing court and opposing counsel to quickly and easily locate the source of the facts in the record. "The court is not aided by a statement of facts which is replete with argument and conclusions and contains factual assertions without appropriate references to the abstract or record." ***Harper v. Kennedy***, 15 Ill.2d 46, 153 N.E.2d 801, 806 (1958).

6. Length

Keep your statement of facts as short as possible without omitting necessary facts. Don't waste time (yours and the court's) by describing facts or events that have no bearing on the outcome of the appeal.

Remember, the statement of facts is not meant to be a dramatic novel:

> It is Friday, March 2nd. Chicago rookie police officer Anthony Shaw Stein was performing his duties to defend and protect the people when suddenly three

shots rang out! Blood ran in the streets of Chicago.

7. Check Your Work

Go over your Statement of Facts very carefully and make certain it is accurate, complete, and nonargumentative, and that all appropriate record citations are included. When rereading the Statement of Facts, keep asking yourself whether it is easy for the court to follow and whether each fact is necessary. You should also ask whether the facts could be better phrased, positioned or organized, and whether the reviewing court might be curious about anything that is missing.

I. THE ARGUMENT

1. Generally

The form and style of an argument are the essence of advocacy, yet impossible to specifically describe. There is no such thing as the "perfect argument"; given exactly the same facts and law, it is likely that experienced appellate lawyers would write substantially different arguments. Consequently, no list of steps can be followed to result in a "perfect argument." However, it is possible to make certain suggestions and observations to improve your arguments.

Generally, the Argument section of the brief should contain the following parts:

(a) an introduction - an assertion of the specific error alleged;

(b) presentation of facts showing the conduct, ruling, or error complained of;

(c) presentation of relevant legal authorities;

(d) discussion of why the legal authorities apply to the facts of the case;

(e) discussion of why the error prejudiced the defendant; and

(f) a conclusion restating the assertion that prejudicial error was committed.

When the issue was not properly preserved in the trial court, the Argument section should also address waiver and plain error.

Whether the facts or legal authorities should be presented first depends on the particular case and issue, and on the style of the attorney writing the argument. Sometimes it is better to present the facts first, so that the reviewing court knows at the outset exactly what occurred and understands the importance of the legal authorities. In other cases, it is better to set out the law and then present the facts that show how the law was violated.

2. Purpose of the Argument

Keep in mind at all times that you are attempting to persuade the court that your position is correct and that relief should be rendered in favor of your client:

> (T)he real and vital central job is to satisfy the court that sense and decency and justice require the rule which you contend for . . . Your whole case, on law and facts, must make sense, inescapable sense, sense in simple

terms of life and justice.[10]

3. State Your Position

As soon as possible, usually in the first paragraph, tell the court exactly what your position is. Sometimes your position or the issue is so clear from the heading that it is unnecessary to repeat it in the first paragraph. However, do not let the court read through your argument, or a few pages thereof, without knowing exactly what you are contending. For example, when arguing insufficiency of the evidence, tell the court at the outset what you are going to show - that there was a fatal variance, a mistaken or suggestive identification, inherently incredible testimony, or conflicting testimony, or that no crime was committed.

Former Chief Justice of the Illinois Supreme Court Walter V. Schaefer commented on this problem:

> I have literally read as much as ten pages of a brief without being told what the case was about. In fact, our Court has read entire briefs and in at least one instance, heard an oral argument without being told what the lawyer's point was - and this after some effort to abstract a clarifying statement by questions from the bench. So keep in mind that your main objective is clarity. You are trying to get the court to understand.

It is extremely important to determine the specific legal ground or grounds for your argument and make sure that all appropriate grounds are clearly and fully presented. It is difficult to convince the reviewing court that error occurred,

---

[10]Llewellyn, *The Modern Approach to Counselling and Advocacy*, 46 **Colum. L. Rev.** 167, 183 (1946).

and that relief is warranted, when it doesn't know the specific legal basis for your contention.

Contentions of error may be based upon various grounds such as the violation of a statute, Illinois Supreme Court Rules, evidentiary rules established by court decisions, or the Illinois or United States constitutions. Make sure you present every appropriate ground in support of your agreement. For example, if the admission of certain evidence was improper because it was hearsay, irrelevant, not disclosed in pretrial discovery, and a violation of the Federal and Illinois constitutional rights to confrontation, all these grounds should be argued.

It is particularly important to raise and argue all federal constitutional issues, as the failure to do so will likely preclude raising the issue in federal court. Don't foreclose the possibility of litigation in federal court by failing to assert an appropriate issue in federal constitutional terms.

4. Argue the Facts

A common error is to devote 75% of the "argument" to the law. You are not trying to show the court that you have worked hard and have found numerous court decisions which support your general principal of law - if the law is that settled, the court will probably be aware of it.

Usually the court is not hearing about an issue for the first time in your brief. Your primary job is to argue the facts of your case, to show how the events at trial improperly combined to unfairly convict your client. Argue the facts to

make the reader "feel" the injustice of events.

After setting out the facts and the law at the beginning of your argument, you should discuss the applicability of the law to the facts and show how applying the law to the facts of the case justifies the relief you request.

5. Assertions

An argument is not an "assertion." To repeat an assertion over and over is not to argue or convince. In other words, instead of repeating “the sentence is excessive, the sentence is excessive, the sentence is excessive,” the court should be told *why* the sentence is excessive. It is not enough to say that an error is prejudicial; counsel must explain *why* it is prejudicial.

In addition, the use of flowery words or phrases, cliches, and general platitudes do not answer the question “why.” For example, to tell the court that the sentence for burglary is “unjust, unfair, and unconscionable” is merely repeating that it is excessive. Instead, counsel must tell the court *why* the sentence is unjust.

6. Authorities

Authorities are usually used for two purposes - as "threshold" authorities to roughly mark the area of the law in which your issue lies, and as "controlling" case law. Generally, threshold authorities need not be set out in great detail or with a lengthy explanation of the facts. Remember that citation of "numerous

authorities in support of the same point is not favored." Rule 341(h).

It is rare to have precedents which control a situation completely. Therefore, it is generally necessary to do more than merely set out the "controlling cases," add the facts of your case, and conclude. After setting out the "controlling cases," you generally must explain to the court why the principle that controlled in the precedent should also control in your case. If your facts fit into a general rule, then tell the court. But if your facts fit into an exception to a general rule, let the court know that also. Don't let the court think that you are requesting a change in a general rule if you are not.

Frequently, a case relied on to support your main proposition should be analyzed with a concise statement of the facts, the reasoning and the conclusion. This may be accomplished by a short quotation. However, long quotations should generally be avoided. After reading a brief or a court decision containing lengthy quotations, ask yourself if the following isn't true: "The reading eye tends to skip over lengthy quotes." It is generally more effective to summarize lengthy passages and then tell the court why the case is sound and applies to your case.

Of course, there may be times when a lengthy quotation is necessary or advantageous. For example, a quotation may sometimes be so compelling, clear and well written that a paraphrase would detract from its value.

Don't ignore court decisions that contradict your position. This is not to say that you must seek out all possible contrary authority or that you must cite all contrary authority from other states or lower courts. Just be honest - ask yourself

if the contrary authority is important to the court in deciding your case. If so, it is much better to explain the adverse authority in your brief than to allow opposing counsel or the court to point out that you failed to mention a significant decision or line of authority.

The court will be highly suspicious of you and your work, present and future, if it thinks you are dishonest. It is better to confront the contrary authority head-on. Discuss it, explain it, distinguish it from the facts of your case, tell why it should not control your case, and when appropriate explain why it was erroneously decided or is obsolete.

A final, but extremely important, point: check the accuracy of the authorities you cite. Make certain that your presentation of the facts and the reasoning and rules of your authorities are correct. Make certain that every citation in your brief is accurate, and that none of your authorities have been overruled.

7. Show the Prejudice

It is not enough to convince the court that error occurred or that a certain principle controls the issue. The court is not going to reverse a conviction merely because some error was committed during the trial; you must show how your client was adversely affected. Show the prejudice - the principle of "harmless error" is alive and well.

8. Brevity

Make your argument as brief as possible, without leaving out any of your key points. The court is not impressed by the length of arguments - don't take a paragraph or entire page to say what could be said in one sentence. "The long, burdensome brief is never read sympathetically - if it is read at all." Re, **Brief Writing and Oral Argument**, 10 (8th ed. 1999).

The key to brevity is organization. Before you write, organize your argument - know the facts that must be included, the court decisions, and the points of which you are trying to convince the court.

J. THE CONCLUSION

Every appellant's and appellee's brief must contain a conclusion which states the "precise relief sought, followed by the names of counsel as on the cover." Rule 341(h)(8). Be specific and tell the reviewing court the exact relief you want.

EXAMPLES

(1) For the foregoing reasons, the defendant requests that his conviction be reversed and the cause remanded for a new trial.

(2) For the foregoing reasons, the defendant requests that her conviction be

reversed or, in the alternative, that she be granted a new trial.

(3) Because the State failed to prove defendant guilty beyond a reasonable doubt, the defendant asks that his conviction be reversed. Alternatively, because the trial court failed to consider a presentence report, the defendant asks that his sentence be vacated and the cause remanded for a new sentencing hearing.

K. APPENDIX

Supreme Court Rule 341(h)(9) requires that every appellant's brief contain an appendix. The appendix must include:

(1) a table of contents to the appendix;

(2) a copy of the judgment;

(3) any opinion, memorandum, or findings of fact by the trial judge;

(4) the notice of appeal; and

(5) a complete table of contents of the record, including:

(a) the nature of each document order or exhibit (the information, motions to suppress, judgment, notice of appeal, etc.);

(b) the date of filing or entry of pleadings, motions, notices of appeal, orders and judgments;

(c) the names of all witnesses and the record pages on which their direct, cross and redirect examinations begin; and

(d) reference to the record page on which all documents will be found.

Rule 342(a).

The Appellate Court has inherent authority to dismiss an appeal where the appellant's brief lacks the appendix required by Rule 342, although the court may elect to reach the issues raised. ***People v. Wrobel***, 266 Ill.App.3d 761, 641 N.E.2d 16 (1st Dist. 1994).

The following examples illustrate how a table of contents may be written.

EXAMPLE 1

INDEX TO THE RECORD

COMMON LAW RECORD	PAGE OF RECORD
Information	R. 100
Jury Instructions	R. 120
Pre-Sentence Investigation	R. 710
Notice of Appeal	R. 715
REPORT OF PROCEEDINGS	
Voir Dire	R. 2
State's Motion in limine	R. 14
OPENING STATEMENTS	
For the State	R. 28
For the Defense	R. 34

EXAMPLE 2

INDEX TO THE RECORD

Report of Hearing of 9-4-79 on Motion to Quash Arrests

Report of Hearing of 10-29-30 and 31-79 - Defendant's Trial

L. BRIEF WRITING CHECKLIST

1. Keep in mind your purpose as the appellant's counsel: to *persuade* the reviewing court, based upon the facts of this particular case and legal authority, that reversible error was committed.

2. Comply with court rules on brief writing; reread the rules.

3. Keep in mind that all sections of the brief are important and require your thoughtful attention. Make sure your brief includes every section required.

4. Know your reviewing court - read opinions of that court, particularly dissenting and concurring opinions, and attend oral arguments.

5. Be accurate - check and recheck your work.

6. Be concise. Reviewing courts have heavy caseloads, and if your brief is longer or more complicated than necessary, the court may choose to rely on your opponent's version of the case. Make sure your essential ideas are written in as few words as necessary; reread your work and ask yourself why each sentence is necessary and how it may be shortened.

7. Be clear - use plain, direct language. Reread your work, and have someone else read it to make sure the reader understands it as you meant it.

8. Make sure the legal issue you raise is actually presented by the facts of your case.

9. Make sure the legal issue is phrased in terms of the facts of your case, not simply as an abstract principle of law.

10. Make sure that your statement of facts is clear, accurate, complete, concise, and non-argumentative, and that it contains sufficient references to the record.

11. Make sure your argument contains the following essential parts: your contention of error, the facts which show the error, the legal authority, the application of the legal authority to the facts, a showing of prejudice, and a conclusion.

12. Make sure your argument presents a sound analysis of the legal question.

13. Recheck the legal basis for every issue raised. Make sure that every legal ground or basis (such as whether the error is based upon a violation of Illinois statutes, Illinois evidentiary rules, or the State or federal constitution) is specifically urged and supported by pertinent authority.

14. Recheck the legal authorities you cite. Make sure they are cited correctly, stand for the proposition you claim, and have not been overruled or significantly altered.

15. Avoid using footnotes. (See Rule 341(a)).

16. Avoid lengthy, numerous, or broad quotations.

17. Be sure to request the specific relief that you want.

18. Make sure the appendix contains all necessary material.

19. Make sure your final product is complete, in the proper order and contains clear copies.

20. File the brief on time.

VII.

THE APPELLEE'S BRIEF

The brief for the appellee is required to contain the following, in the order listed:

(1) a light blue cover;

(2) points and authorities;

(3) argument; and

(4) a conclusion. (Rule 341(d), (i)).

In addition, counsel must certify that the brief meets the length and form requirements of Rule 341. Rule 341(c).

Unless the presentation in the appellant's brief is deemed unsatisfactory, an appellee's brief need not contain the nature of the case, a statement of the issues presented, a jurisdictional statement, the statutes involved, a Statement of Facts, or an appendix. Rule 341(i).

A Statement of Facts should be included when you disagree with a substantial portion of the appellant's Statement of Facts or when the appellant's statement of the facts is confusing, incomplete or lacks sufficient citations to the record. However, instead of writing a complete statement of facts when the appellant's facts are incorrect or incomplete, it is sometimes more effective to merely point out the appellant's errors and omissions.

The counsel for appellee should always read the record to find the facts of

the case - it is not sufficient to merely rely on the facts as presented in the appellant's brief.

In writing the appellee's brief, keep in mind that you do not have to phrase the issues as the appellant did. As appellee, you won in the court below, a fact that should be used whenever possible. For example, if the State appeals from an order of suppression, it may phrase the issue as "whether the search of defendant's home was valid." You, on the other hand, may view the issue differently, such as "whether the trial judge's findings were against the manifest weight of the evidence." Whenever a trial judge rules in favor of your client below, it is important to state the appropriate standard of review and consider arguing that the trial court did not abuse its discretion.

Likewise, the appellee's brief need not argue the issues in the same order as in the appellant's brief. But no matter how the appellee phrases the issues or arranges their order, all of the appellant's arguments must be discussed.

It is important to remember that the question before the reviewing court is the correctness of the result reached below and not the correctness of the reasoning. See ***People v. Johnson***, 208 Ill.2d 118, 803 N.E.2d 442 (2003). Thus, as counsel for the appellee, you can argue the correctness of the result below even though your reasons differ from those of the lower court.

Even if the appellant requested oral argument, you should also request oral argument on the cover of the appellee's brief. If the appellant later withdraws its request, your request for oral argument will be preserved.

The page limitation for the appellee's brief is the same as for the appellant's brief - 50 pages in non-capital cases, including any appendices or attachments other than the appendix required by Rule 342(a). Rule 341(b). In capital cases, the limit is 75 pages. Rule 341(b).

The earlier discussion concerning the cover, Points and Authorities, Argument and Conclusion of the appellant's brief generally applies to the appellee's brief as well.

VIII.

THE REPLY BRIEF

The reply brief, if one is filed, must be "confined strictly to replying to arguments presented in the brief of the appellee." Rule 341(j). A reply brief need contain only a light yellow cover and Argument. (Rule 341(d), (j)). In addition, counsel must certify that the brief meets the form and length requirements of Rule 341(e). Rule 341(c).

A reply brief is limited to 20 pages in non-capital cases and 27 pages in capital cases. Rule 341(b).

The filing of a reply brief is optional and depends upon the individual case. The purposes of a reply brief can be generally stated as follows:

(1) To bring new or recent authority to the attention of the reviewing court.

(2) To challenge and correct any misstatement of fact made by the appellee.

(3) To challenge and correct any misstatement of law made by the appellee.

(4) To challenge and correct the appellee's misstatements about the appellant's position.

(5) To point out why the authority relied upon by the appellee should not control the outcome of the case.

(6) To point out why the appellee's position is incorrect (*i.e.*, for policy reasons).

(7) To respond to any new issues or arguments presented by the appellee.

(8) To correct any errors, confusion or misstatements in the appellant's opening brief.

A reply brief should be filed in a particular case if it would serve any of the above purposes. However, the reply brief must not simply restate or reargue what was contained in the original brief, and should be kept as short as possible and limited to important matters.

New issues may not be raised in a reply brief. ***People v. Sparks & Nunn***, 315 Ill.App.3d 786, 734 N.E.2d 216, 248 Ill.Dec. 508 (4th Dist. 2000). Under ***People v. Williams***, 193 Ill.2d 306, 739 N.E.2d 455, 250 Ill.Dec. 692 (2000), however, a plain error argument is not waived because it is raised for the first time in the reply brief. Because the State's waiver argument would itself be waived unless raised in the appellee's brief, "it would be unfair to require a defendant to assert plain error in his or her opening brief."

IX.

ABSTRACTS

Under current practice, abstracts are not to be filed unless ordered by the reviewing court. Rule 342(b). Consequently, in most cases abstracts are not filed.

When an abstract is prepared, it must comply with the requirements set forth in Rule 342. An abstract should include, in verbatim or summary form, those portions of the trial court proceedings which are necessary to fully present every error relied upon for reversal. The abstract should be clear, concise, accurate, and illuminating. Accuracy is extremely important - an abstract that omits relevant matter imposes a burden on the reviewing court and offers little reason for the court to place any confidence in the accuracy of your brief.

X.

ORAL ARGUMENT

A. PROCEDURE FOR ORAL ARGUMENT

Oral argument is not held automatically, but must be requested on the cover of the brief. Rules 352(a), 611. If one party requests argument, all other parties may argue whether or not a request was made. Rule 352(a). If a party requests oral argument and then decides to waive, he or she must promptly notify the clerk and the other parties. Any party who did not previously request oral argument may then do so. Rules 352(a), 611.

If "no substantial question is presented," the reviewing court may disregard a request for argument and decide the case on the briefs. Rule 352(a). Although Rule 352 suggests that reviewing courts should dispense with oral argument only in rare cases, several districts of the Appellate Court permit oral argument only where ordered by the court.

Rule 352(b) provides that, unless otherwise ordered, each side in a capital case shall be allowed 30 minutes for its primary argument. In non-capital cases, each side's primary argument is limited to 20 minutes. In all cases the appellant is allowed an additional 10 minutes "strictly confined to rebuttal." If only one side argues, the argument shall not exceed 15 minutes.

In practice, the Appellate Court imposes time restrictions other than as prescribed by Rule 352(b). It is important, therefore, to check the local rules of the district in which the argument is to occur.

Unless the court grants leave, no more than two attorneys may argue for each side. However, divided arguments by even two attorneys "are not favored." Rule 352(d). If a case involves more than one appellant, the attorneys may determine the order in which they will argue unless the court directs otherwise. Rule 352(e).

B. IMPORTANCE OF ORAL ARGUMENT

At one time there was practically unanimity among experts that oral argument was necessary in almost every case:

"It is not rare that a justice says in conference that oral argument turned me around." (Justice Blackmun, United States Supreme Court)[11]

"Oral argument frequently has a force beyond what the written word conveys." (Justice Frankfurter, United States Supreme Court)[12]

"In a significant number of cases it [oral argument] has a decisive effect on my vote." (Judge Butzner, United States Court of Appeals, 4th Cir.)[13]

---

[11]Bright, *The Ten Commandments of Oral Argument*, 627 **ABAJ** 1136, 1139 (1981).

[12]Wiener, **Briefing and Arguing Federal Appeals,** pp. 277-278 (BNA, 1967).

[13]Bright, 627 **ABAJ** 1136, 1139 (1981).

"Cases that are not [orally] argued are not well decided." (Chief Justice Vanderbilt, New Jersey Supreme Court).[14]

"I see the oral argument as the last clear chance for judges to get answers to the questions that must haunt conscientious judges while they are reading briefs in complex cases." (Judge Goodwin, United States Court of Appeal, 9th Cir.)[15]

When considering such statements, counsel must also recognize the reality of modern appellate practice, in which an increasing caseload and perceived decline in oral advocacy skills causes some courts to dispense with oral argument entirely in most cases, and to limit argument in other cases to as little as ten minutes. In view of this trend, the value of oral argument might be legitimately questioned.

Where argument is available, counsel should utilize it unless he or she is reasonably certain that there can be no benefit to the client. Unless the issues are so simple that there is no possibility of the court misunderstanding them, oral argument gives counsel a final opportunity to make sure that the pertinent facts and specific issues are correctly perceived by the court. It also gives counsel an opportunity to clarify the issues, facts, and arguments, or to emphasize the overall importance of the case. Finally, oral argument affords counsel the opportunity to

---

[14]Wiener, pp. 277-278 (BNA, 1967).

[15]Bright, 627 **ABAJ** 1136, 1139 (1981).

inform the reviewing court, face-to-face, why the client was denied a fair trial and why the case should be reversed.

In short, oral argument is an opportunity which should ordinarily be utilized. Although oral argument may not make a difference in every case, or perhaps in most cases, your case might be the one in which it could be important or even crucial.

C. CHECKLIST FOR ORAL ARGUMENTS

1. Before the Argument

a. Attend other oral arguments. Try to observe arguments in various types of criminal cases - those with strong defense issues and those with weaker issues. Note the style of questioning by the individual justices. Observe the different styles of presenting arguments and attempt to use a style that is comfortable for you.

b. Discuss your case with other lawyers. They may see weak or strong points that you have overlooked, and can help anticipate questions.

c. Check the procedural history of your case; know when, where and how the error was first raised. Know whether there are waiver problems, and the appropriate response, before the court asks.

d. Understand why the errors prejudiced your client.

e. Know the facts of your case - not only the facts on which you rely, but also the facts which favor your opponent and any other fact that is possibly relevant.

f. Know your cases and those cited by the State. Be prepared to point out the differences between the cited cases and your case, and be able to show why these differences are or are not important.

g. Check advance sheets and other publications for recent decisions on your issue, and to find if the cases cited in the briefs have been followed, distinguished or overruled. Shepardize all cases.

h. Prepare not only your own argument, but prepare (or at least know) the State's argument as well. Know your theory and your opponent's theory. Understand the weaknesses and strengths of both sides. Put yourself in the shoes of the prosecutor and attempt to answer the defense arguments.

i. Know where to locate all important material in your brief and record. If you find errors in your brief, notify the clerk and opposing counsel before argument.

j. Know the basic positions the court must accept in order to grant relief to your client. You may be able to gain credibility by conceding points that are not important to your case.

k. Do not write out or memorize your argument. To avoid the impression you are giving a "canned speech," make only a brief outline of the

points you want to make. While it is good to rehearse, try to vary your presentation from one rehearsal to the next.

l. Be prepared to discuss policy and point out the impact of potential rulings on other cases. Courts are frequently reluctant to grant relief that may affect the results of many cases, so let the court know if a ruling in your favor can be limited to a narrow situation.

2. During the Argument

a. Be selective when choosing which arguments to present. You will probably not have enough time to argue every issue in the brief, and the court will expect to hear the best reasons for ruling in your favor. Make certain to say that you are not waiving the issues you don't argue, and be prepared to respond to any questions on those issues.

b. Don't start your argument until your notes and briefs, etc. are in workable order on the podium. Do not rush through your points just to complete them.

c. Speak loudly enough for the justices to hear you clearly, and slowly enough for them to understand.

d. Try to use simple language. Remember that:

> [p]eople cannot absorb complex information through their ears as quickly as they can through their eyes. You do not help your client if no one understands what you are

> trying to argue or if you “lose” the court in a long, convoluted argument.[16]

e. Supreme Court Rule 352(c) specifically prohibits reading "at length from the record, briefs, or authorities." You may read short passages from testimony or authorities when necessary, but be sure to explain why you are reading, identify what you are reading (including the page number and source), and give the court time to find the passage.

f. Be flexible in your approach; by ready to present your argument in any order suggested by the court's questions.

g. Judges ask questions for many reasons: to understand your argument, to explore the ramifications of a decision in your favor, to persuade another justice, or to direct you to an area which some member of the court feels is important. Look upon questioning as an opportunity to gauge the court's thinking, and direct your argument to the court's concerns.

h. Answer all questions when they are asked. Never say that you will deal with a question later:

> The judge who asked the question thinks it is important to ask it at the particular time he does. Even if it destroys the thread of your legal argument, answer that question immediately. Anything else will seem evasive, or be read as a confession that you cannot deal with the point.[17]

---

[16]Ryan, *“Appellate Advocacy,”* **The Champion**, Nov. 1994 at 38 (National Association of Criminal Defense Attorneys).

[17]Cripe, *“Effective Appellate Argument,”* 70 **ABAJ** 56, 59 (Dec. 1984).

i. Never interrupt a question, even if it seems irrelevant to your case. Wait for the questioner to finish, respond as best you can, and then try to direct the court's attention back to your case.

j. If you don't understand a question, say so and ask the judge to repeat it. If necessary, admit that you don't know the answer instead of risking an ill-conceived concession. You can offer to find the answer and report it in a supplemental brief.

k. Be respectful, but firm. Stand your ground and show that you believe in your issues. The judges will respect you even if they disagree with your conclusions.

l. Clearly state the relief that you want. Be certain that the client will be helped by the relief and in fact wants it.

m. Take organized notes during the State's argument. Generally, the following areas should be noted for rebuttal: (a) misstatements by the State, (b) questions of the court left unanswered by the State, and (c) new matters raised by the State. Rebuttal is also a time to answer any questions you were unable to answer during your argument.

n. It is not always necessary to make a rebuttal argument. Where the State has not damaged your case, it is better to stand on your opening argument than to merely repeat it.

o. If you make a mistake, correct it as soon as possible. If it can't be corrected, forget about it. Don't allow minor mistakes to upset you and cause you

to do poorly during the rest of the argument.

p. There is nothing wrong with using all of your time, if what you are saying is worthwhile. However, if the court tells you your time has expired, sit down without trying to make additional points and without giving your conclusion.

D. SPEECH ON ORAL ARGUMENT BY WALTER V. SCHAEFER, FORMER CHIEF JUSTICE OF THE ILLINOIS SUPREME COURT

Now as to the oral argument, I suppose the first question in our Court is whether or not you should ask for oral argument at all. That is a question in a good many other appellate courts where oral argument is not required or indicated by the court itself in specific cases. I think oral argument is extremely valuable. Someone has described it in this way: "It's the one opportunity the lawyer has to make sure that the essentials of his argument have passed at least once through the minds of the judges who decide the case." I think oral argument is actually entitled to a much stronger footing than that. In my judgment you ought to argue any case that is worth asking the court to decide. We do not have that many oral arguments now, but I suppose that in the next five or ten years that may come to be so.

So far as the technique of oral argument is concerned, and these are largely generalizations, you should keep in mind your objective. You are talking to a

group of men by way of exposition and persuasion. They will know your case in varying degrees. In our Court it may be that about half of them will have read the briefs. You always ought to try to find out, before you make your argument, what the practice of the reviewing court is with respect to reading the briefs in advance of argument. The answer to this will make a difference in the way in which you present your case. In our Court you cannot be sure. In some cases all of the judges will had read the briefs; in a very rare case, where we are in a terrific jam, it may be that no judge has read them. That would be a rare situation with us today, although it once was the rule. You ought to keep in mind that, to at least some of the judges, your problem is likely not to be at all familiar. You should state your facts, without heat, and then go into your argument.[18]

When you go into your argument, argue without reading. Our rule prohibits reading from the briefs. No court likes reading from the briefs. There is a story told about the Supreme Judicial Court of Massachusetts, in which a man was standing there reading insistently and persistently from his brief, and one judge - so the story goes - wrote a note and passed it to his colleague. The note said, "A brief-reader is the lowest form of animal." The colleague looked at the note for a moment, took his pen, wrote something on the paper, and passed it back, and it read, "He is a vegetable."

---

[18]Counsel should note that current Supreme Court oral argument calendars state: “Prior to oral argument, the members of the Court will have reviewed the facts in the case and will know what the issues are. It is therefore suggested that counsel can use their time for oral argument most profitably by concentrating on the issues being urged.”

In our courts there is a curious practice indulged in - prompted, I suppose, by the rules prohibiting reading from the briefs. The curious practice is that the lawyer writes out his oral argument and then reads it to the court. The only appreciable difference between reading the argument or reading the brief that I can see is that, if a man is reading from his brief, the judge, by looking at his own copy, can gauge the lawyer's progress and can form some rather accurate notion as to when the lawyer is going to finish. Both methods are effective in drawing a curtain between the listener and the speaker. Do not read. It is all right to have some notes to tie yourself to, but you should know your case well enough so that you do not need to read.

Do not try to make the oral argument carry more than it can. In the average argument it does you no good, for example, to cite a case by the full citation, including the page reference and copious quotations. Of course, you want to place the case cited in point of time, and you can do that usually by naming a volume or the approximate year of the decision. Of course, there are unusual situations where you will want to do more than that. But all the oral argument can do is to leave an impression. You cannot expect a court to keep in mind precise facts - the very dramatic facts, yes; the details, no.

Yet the impact of oral argument is very strong. We hear oral arguments in a term, and normally we have perhaps as many as forty or fifty in a term. The surprising thing is that, when the judge comes to work on the case, it slips into focus. It is incredible how this happens. I have a poor memory, and it should not

work with me, but it does. I have checked with my colleagues, and it works with them. The judge will pick up the case; the title will be unfamiliar; the name of the lawyer may not mean a thing, and then all of a sudden there is some fact that is familiar, and the whole argument comes back into focus. I can pretty well see the man argue, and I can pretty well remember what he said, even if I have been so interested in the argument that I have failed to take notes.

Brevity is most important. The tendency of many a lawyer is to think that, because he has half an hour within which to argue his case, he has to take the full time. This does not follow at all. Some of the most effective arguments are made in fifteen or twelve minutes, and, when the argument is over, there is nothing more that needs to be said.

When you are representing the appellee, the temptation to take up time by restating the facts will be terribly strong. I think that this is one of the most fatal mistakes that you can make. When the lawyer for the appellant has finished his argument, the points he has made and the echoes of his argument are still in the courtroom. Now the attorney for the appellee rises to respond, and that is one of the most dramatic moments I think in our whole judicial procedure. The appellant has controlled the show up to that point; now the court is looking to that man who rises to answer, and what does he do?

Ever and ever so often he starts over again and restates the facts. You listen for the first minute or so quite attentively; you are waiting for that difference - that significant difference - in his portrayal of the facts to see how it is going to affect

the outcome of the case. It does not come in the first minute; it does not come in the second; and it does not come in the third. You can just look out of the corner of your eye up and down the bench, and you know he has lost the court. Whether he ever makes up for this lost opportunity is anybody's gamble, but he has not taken advantage of a decisive moment. Do not be afraid to leave the case on your opponent's statement unless it is critically damaging. Then, you will hold the court's interest when you point out the different bearing of the facts or emphasize the omitted facts.

An interesting technique sometimes used by the appellee is to begin by referring not to the facts but to the general background in its legal framework of the case at hand. When successfully done for a brief period, this can take the court away from the details and give a general background. The lawyer cannot do this forever, of course, because we sit there waiting for him to come back to the case. He has got to come down to earth. But this gives him an opportunity to come back with precision on the facts he wants to emphasize, and he has dissipated the atmosphere that existed at the time he began to speak and perhaps substituted some general premises to which the court reacts favorably.

I think the best thing that has ever been said with respect to questions asked by the court is "Rejoice when the court asks you questions," and I think you should. On a minimal basis, as it has been said, at least it is fairly clear proof that the particular judge is not asleep. Starting from that minimal basis, it seems to be that there is nothing harder than arguing a case to a mute court, to a court

that sits there silent, and you do not know how close to the mark your shots are going. You have no notion as to whether you are meeting the problem that is in the court's mind. You have no notion even whether or not the court has a mind. Indeed, the court may be reading the briefs of the next case. You know the court bench is never as open to scrutiny from the other side as are the law-school benches. The court bench slants upward, and that gives the court an advantage which it has always considered itself fully entitled to have.

I think most courts today will permit the use of expository devices by way of charts, maps, and that sort of thing, which can be extremely helpful. This technique can be helpful even on such matters as the construction of a statute, where there may be a full column taken up by the statute but where only about twenty-five words are important. Putting those twenty-five words on a chart will keep them before the court. But, if you are going to use charts, make them big enough. Among the other deficiencies of judges, they tend to be nearsighted. Most of us do not confess to a weakness like that publicly, but, if you watch us lean forward squinting in an effort to follow where counsel says we should look in the brief, you will know it is true.

Another point, I believe, relates to the danger of referring to a photostat in your brief rather than reproducing a big chart. When the reference is to the photostat in the brief, I have never seen it fail but that, when the lawyer thinks he is through with the diagram or map and wants to go ahead with his arguments, he will find that the court will keep right on looking at the page of the abstract.

The court will keep looking at it for the balance of the argument. On the other hand, if you have the chart yourself, when you walk away from it, you can carry the court's eyes with you.

There is one basic point I would impress upon you. Keep in mind that the court is objective and that it is approaching the case as a new matter. Keep in mind also that, in deciding the case, the court, if it is worth its salt, is going to be interested in fitting this case into the existing body of decisions within the state. Therefore, in your argument, put your case at the outset into the existing structure of decisions of your particular jurisdiction. Put it into that existing structure and how the pressures of precedent which would push the decision one way and indicate also any counter pressures of, precedent which might lead to an opposite conclusion.

Do not argue your case, as is too often done, in term of rules. The law does not live in the statement of the rule, including past statements of the rule by the court, any more than it lives in the black letter of the hornbook. The law lives and cases are decided - and advocates become great advocates because they know this - in that area of policy and in the considerations out of which the black-letter rules evolve. Keep your written argument and your oral argument pitched to take account of these considerations - not ostentatiously, I am sure I do not have to tell you that - but do not put your argument solely in terms of a bare absolute rule which the court may have announced in a particular case.

You see, the judge may have written the opinion in that particular case, and

he will not be impressed a bit when you tell him that the law of Illinois is inflexible because of his opinion. The judge will want to know why the rule has evolved and why it is important that the rule either be extended or cut short of your particular case. He will want to know the policy factors that govern the particular case. Your statement of these factors in the light of the structure of decided cases will be most helpful to the court, and happily you will be most helpful to yourself and your clients if you pitch your argument this way, because this is the level on which cases are actually won.

XI.

MOTIONS IN THE REVIEWING COURTS

Most motions in the reviewing courts are governed by Rule 361. However, special requirements apply to motions for extension of time in a criminal case. (See Rule 610 and Ch. VI, §(A)(4) of this Handbook.)

Each District of the Appellate Court is required to adopt procedures for emergency motions. Rule 361(g). Bail motions are deemed emergency motions if so designated by the movant. Rule 361(g).

In addition, special rules apply to "Dispositive Motions," which are motions which raise jurisdictional or other issues which would result in dismissal of an appeal (or a portion of an appeal) without a decision on the merits. Rule 361(h) requires that a dispositive motion (and any objection thereto) include all of the facts necessary for the court to consider the motion. Rule 361(h)(3)(4). Dispositive motions are to be decided promptly where ever possible, and should be taken with the case only if the court cannot resolve the issue without the complete record and full briefing. Rule 361(h)(1).

XII.

REHEARING IN THE REVIEWING COURTS

A. GROUNDS FOR REHEARING

Supreme Court Rule 367 provides that a petition for rehearing may be filed when a party feels that the reviewing court has overlooked or misapprehended important points. In reality, rehearing is rarely granted unless the law changed after the opinion was issued, the court completely misunderstood the facts, or controlling precedent was overlooked. Other possible reasons for rehearing are that the opinion decided an issue which was not argued or fully briefed, failed to reach an issue which the parties raised, or will lead to unforeseen consequences in other cases.

A party is not required to seek rehearing in order to preserve the right to ask for further appellate review.

B. PETITION FOR REHEARING

The petition for rehearing should be brief, and may not merely reargue the case. Rule 367(b). The petition must be filed within 21 days after the opinion is issued, unless the court lengthens or shortens the time. Rule 367(a). However, extensions of time to file a petition for rehearing are "not favored and will be allowed only in the most extreme and compelling circumstances." Rule 367(a). The petition may not exceed 27 pages in length. Rule 367(a). Counsel is required to

certify that the brief complies with the form and length requirements of Rule 341. Rules 341(c), 367(a).

In the Supreme Court, any petition for rehearing or motion to extend the time for rehearing must also be served on the reporter of decisions. Rule 367(c).

C. RESPONSES AND ORAL ARGUMENT

Unless a petition for rehearing is granted, the opposing party may file an answer only if requested by the court. However, a court which denies rehearing may not make a substantive change in the relief that is ordered or denied unless an answer has been requested. Rule 367(d).

If an answer is filed, the petitioner has 14 days in which to reply. Oral argument is permitted only if ordered by the court on its own motion. Rule 367(d).

D. SUBSEQUENT PETITIONS

Once the appellate court has acted on a petition for rehearing, it may not entertain additional petitions. Rule 367(e).

XIII.

SEEKING SUPREME COURT REVIEW

A. STAYING THE MANDATE

The mandate normally issues no earlier than 35 days after the appellate court's opinion, unless the court orders otherwise. Rule 368(a). If a petition for rehearing is denied, the mandate issues 35 days after the denial (unless the court orders otherwise). Rule 368(a).

In all cases except where an injunction has been modified by the Appellate Court, a mandate that has not yet issued is stayed by filing a petition seeking review by the Supreme Court. Rule 368(b). Such a stay is effective until the time for seeking review expires. If the petition seeking Supreme Court review was timely, the stay continues until the Supreme Court disposes of the case. Rule 368(b).

B. TYPES OF REVIEW

The most common method of Supreme Court review is a discretionary appeal, in which the appellant asks the court to entertain the appeal as a matter of sound judicial discretion. Defense attorneys may occasionally encounter two other types of review: appeal as a matter of right, and appeal on a certificate of importance.

1. Discretionary Review - Petitions for Leave to Appeal

a. Generally

Discretionary review is sought by filing a petition for leave to appeal in the Supreme Court. A petition for leave to appeal may not exceed 20 pages, excluding any appendices. Rules 315(d), 612(b). The purpose of the petition "is to state why the Supreme Court should take the case, and not merely to argue the case on the merits . . ." Committee Comments to Rule 315. A common error is to focus on the injustice done to the individual client or on the fact that serious error has occurred, rather than on the policy factors that would justify making the case one of the handful reviewed by the Supreme Court. A former member of the Illinois Supreme Court discussed this problem:

> Many attorneys concentrate exclusively on arguing why the decision of the appellate court should be reversed, without ever explaining why review by the supreme court is warranted. Such a strategy is a mistake. . . Rule 315 enumerates several factors that the court considers in deciding whether to allow a PLA; that the appellate court's decision was wrong is not among them. . .
>
> A properly drafted PLA does not concentrate on why the appellate court's decision was wrong, but on why the appellate court's decision warrants review by the Illinois Supreme court. These are two very different concepts, and keeping them straight will go along way toward ensuring that the Illinois Supreme Court reviews your PLA in the proper light."[19]

At a minimum, the petition for leave to appeal must contain:

---

[19]Rathje, "*Petitions for Leave to Appeal: A Primer*," DuPage County Bar Association Brief at 12-13 (March 1999).

(1) a prayer or formal request for relief;

(2) the dates on which the Appellate Court issued its opinion;

(3) whether rehearing was sought, and if so, the date of the Appellate Court's ruling;

(4) a statement of the points relied upon for reversal;

(5) a "fair and accurate" statement of the facts necessary to understand the case (not merely those facts necessary to understand the issue upon which review is sought);

(6) a short argument explaining why the Supreme Court should exercise its jurisdiction and modify the Appellate Court's decision; and

(7) an appendix containing a copy of the Appellate Court's decision and any other documents necessary to consider the petition. Rule 315(c).

If record abstracts were filed in the Appellate Court, at least two copies must be filed in the Supreme Court. Rule 315(e). The petition may indicate on the cover whether oral argument will be requested if the petition is granted. Rule 315(i). Such a request has significance if leave to appeal is granted and counsel decides to allow the petition to stand as the brief.

b. Time limits for filing

The time limits for filing a petition for leave to appeal depend upon the actions taken after the Appellate Court's decision. If no petition for rehearing was

filed, the petition for leave to appeal is due in the Supreme Court within 35 days after the Appellate Court's decision. Rule 315(b).

If a petition for rehearing was filed, the petition for leave to appeal is due 35 days after rehearing is denied or judgment is entered on rehearing. Rule 315(b). Motions to extend the time in which to file petitions for leave to appeal are "not favored and will be allowed only in the most extreme and compelling circumstances." Rule 315(b). However, on occasion the court has granted motions to file petitions for leave to appeal *instanter*.

If a motion to publish a Rule 23 Order is filed by the prevailing party in the Appellate Court, the opposing party's petition for leave to appeal is due 35 days after the motion is granted. Rule 315(b)(2). This provision is intended to allow a party that did not seek leave to appeal from th unpublished order the opportunity to do so once a motion to publish is granted. Committee Comments to Rule 315. A motion to publish is due within 21 days after the unpublished order is issued. Rule 23(f).

However, a motion to publish does not invalidate a previously filed petition for leave to appeal. Rule 315(b)(2).

c. Grounds for review

Supreme Court Rule 315 specifies four factors to be considered in determining whether discretionary review will be allowed:

(1) the general importance of the question;

(2) whether a conflict exists between the lower court's opinion and an opinion of the Supreme Court or another division of the Appellate Court;

(3) whether it is necessary for the Supreme Court to exercise its supervisory authority; and

(4) whether the judgment below is final or interlocutory. Rule 315(a).

The above list is not exhaustive, but indicates "the character of reasons which will be considered." Rule 315(a). Other reasons which might be considered are the impact of the lower court's ruling on other cases, whether judicial resources will be expended because the question will frequently arise in other cases, whether the lower court's opinion involves an interpretation of a state statute, and whether the issue is one of first impression. In recent years, review has frequently been granted where legislative enactments arguably conflict with Supreme Court Rules concerning the same topic.

As would be expected in view of the large number of petitions which come before the court each year, the presence of one or even several of the above criteria will not guarantee that leave to appeal will be granted.[20] Various justices and members of the research department have indicated several practical considerations that often determine whether leave to appeal will be granted. For example, because the court views its role as assuring a uniform body of state law,

---

[20]It is not unusual for the court to consider several hundred petitions for leave to appeal at a single term. A recent Chief Justice has estimated that the court grants only about ten percent of all petitions seeking discretionary review. (Remarks of Justice William G. Clark, *"Appeals from a Judicial Perspective,"* September 11, 1986.) The success ratio in criminal defense appeals is even lower.

the most likely case to gain review is one which conflicts with precedent from other appellate districts. The court also examines whether a particular case has broad impact on the criminal court system. According to former Justice Seymour Simon, it is more likely that leave to appeal will be granted when there was a dissent in the Appellate Court.[21] Former Chief Justice Clark has stated that the likelihood of leave to appeal being granted increases dramatically when the Appellate Court's opinion not only attracted a dissent but also reversed the trial court.[22]

On the other hand, the court rarely grants leave on reasonable doubt issues or on claims that the trial court abused its discretion by imposing an excessive sentence. Leave to appeal is also less likely where the Appellate Court remands the cause for further proceedings in the trial court instead of finally resolving the case.[23]

Various sources have indicated that each petition is considered separately. Thus, the fact that an identical issue was denied review in a prior term does not necessarily indicate that subsequent petitions will also be refused. Leave to appeal may be denied for many reasons, including the caseload of the court at a particular time. Therefore, a petition which reaches the court when the caseload

---

[21]Simon, Seymour F., *"Thoughts on How to Present a Successful Petition for Leave to Appeal,"* 3 **Appellate Law Review** 25, 27 (Summer, 1991).

[22]Remarks of Justice William G. Clark, *"Appeals from a Judicial Perspective,"* September 11, 1986.

[23]Simon, 3 **Appellate Law Review** 25, 28-29.

is smaller may stand a better chance of being granted.[24]

d. Preparing the petition for leave to appeal

It is important that appellate counsel understand the procedure by which the Supreme Court decides petitions for leave to appeal. Once a petition is docketed, an attorney from the court's research department prepares a memorandum of one to three pages. This document lists the action taken by the trial and appellate courts, a brief statement of the facts, and a one or two-paragraph summary of the arguments. The memorandum normally includes references to specific precedents only if there is a claim that a case is precisely on point or that the lower court's opinion conflicts with other cases. Each of the arguments contained in the petition may receive only two or three sentences in the memorandum.

After receiving the memorandum, a judge may either personally examine the petition or evaluate the case solely from the research department's summary. Each justice indicates to a clerk whether review should be granted, and four votes are needed to grant leave to appeal. Cases are not necessarily discussed by the court as a whole before the vote is taken.

In preparing a petition for leave to appeal, counsel must remember that he

---

[24]For example, during the September term the court considers all petitions that have accumulated over the summer. This means that several hundred petitions may be decided at once. A petition filed a few months later, when the caseload is smaller, may have a better chance of being granted. Experienced appellate attorneys often determine the cut-off date for a particular term (usually about twenty days before the term opens), and whenever possible time their petitions to avoid the periods of heaviest filings.

or she is writing primarily for the benefit of a staff attorney who has perhaps limited knowledge of criminal law, and that the decision whether to grant leave to appeal may be based mostly on that attorney's summary of the arguments. To the extent that counsel can make the staff attorney's job easier, it is more likely that the memorandum will state the argument in the most favorable terms. The petition should therefore be brief and state the reasons for granting review in a straightforward manner, with emphasis on any unusual facts or considerations which might distinguish the case from others on the docket.

Counsel should also remember that even if a justice does examine the petition itself, he or she may do so only briefly and will be looking only for the most important reasons to grant review. Some attorneys like to include a section entitled "Reasons This Court Should Grant Review," which is separate from the argument section.

Generally, the petition should present only the most meritorious arguments. The court rarely grants leave to appeal in cases which present more than one or two issues, and is likely to regard the listing of several issues as an indication that none are particularly strong. Although special circumstances might justify the inclusion of several issues - as where the Appellate Court's opinion interprets a major statute for the first time - such cases are rare.

Counsel should note, however, that federal review may be unavailable for issues that are omitted from the petition for leave to appeal. Before seeking federal *habeas corpus* relief, a State prisoner must “exhaust” State remedies by giving

State courts an opportunity to correct the alleged violation of federal constitutional law.

A petitioner exhausts State remedies by fairly presenting his claim in the appropriate State court and clearly alerting that court to the federal nature of the claim. In ***Baldwin v. Reese***, 541 U.S. 27, 124 S.Ct. 1347, 158 L.Ed.2d 64 (2004), the Supreme Court held that the defendant failed to exhaust State remedies where he filed a petition for discretion any review by the State's highest court, but omitted the issue on which federal *habeas* relief was subsequently sought.

Thus, an issue on which federal *habeas* relief may be sought should be included in the petition for leave to appeal, in order to avoid any issue concerning exhaustion of remedies.

Counsel must also exercise care in deciding which arguments to make because in all likelihood, issues left out of the original petition will not be considered if leave is granted. In ***People v. Anderson***, 112 Ill.2d 39, 490 N.E.2d 1263 (1986), the Supreme Court held that issues not included in the original petition for leave to appeal are waived and may be considered only in the court's discretion. While not specifying what grounds would justify exercising such discretion, the ***Anderson*** court refused to consider arguments that had been rejected by the Appellate Court and not included in the petition. See also ***People v. Ward***, 113 Ill.2d 516, 499 N.E.2d 422 (1986), in which the court refused to consider the sufficiency of the evidence where the only issue raised in the petition for leave to appeal was whether the trial court had considered an improper factor

at sentencing, and the newly-raised argument had previously been rejected by the Appellate Court. The ***Anderson*** and ***Ward*** cases suggest that the court might exercise its discretion to consider additional arguments only in those rare cases where critical issues come to light only after the petition has been filed, or where the constitutionality of a statute is at issue. See ***People v. McCarty***, 223 Ill.2d 109, 858 N.E.2d 15 (2006).

On the other hand, where a petition for leave to appeal is allowed, the appellee may seek any relief warranted by the record, even though he or she did not file a separate petition for leave to appeal. Rule 318(a); ***People v. Roundtree***, 115 Ill.2d 334, 503 N.E.2d 773 (1987). In addition, in the interests of judicial economy the Supreme Court may elect to decide issues that the Appellate Court failed to consider. ***People v. Reid***, 136 Ill. 2d 27, 554 N.E.2d 174 (1990) (issue not considered by Appellate Court was decided by Supreme Court where the trial judge resolved the issue in the appellee's favor, the parties fully briefed and argued the issue, and the interests of judicial economy would be served.)

Where possible, counsel should determine whether the court has granted leave to appeal on a similar issue, and include that fact in the petition. Although the research department attempts to determine whether similar issues are pending, the only way to make certain that the court is aware of this fact is to prominently mention the pending case in the petition itself. The Office of the State Appellate Defender maintains a list of significant pending Illinois Supreme Court cases on its web site at www.state.il.us/defender/.

e. Answering leaves to appeal

Although it is not necessary to file an answer to a petition for leave to appeal, the respondent may do so within 14 days after expiration of the time for filing the petition. The answer should set forth reasons why the leave to appeal should be denied, and should conform as much as possible to the rule for the contents of a petition for leave to appeal. Rule 315(f).

In practice, answers to petitions for leave to appeal are rarely filed. Because the court is able to devote relatively little time to each petition, an answer may attract more attention to a case than might otherwise be the case. Therefore, it is rarely advisable to file an answer unless there are compelling reasons why leave to appeal should not be granted or the case involves an issue on which review is almost certain.

If an answer is to be filed, counsel must keep in mind that the issue is whether the Supreme Court should consider the case, not the merits of the lower court's action:

> Many response briefs that the court receives simply argue that the appellate court's decision was correct on the merits. This may be a perfectly sound reason for the respondent to want the PLA denied, but is not helpful to the court in determining whether review is warranted. If the PLA argues that the appellate court's decision either raises a question of general importance or creates a conflict, the appropriate response is not to argue solely that that decision is correct on the merits. Rather, if your client seeks to avoid review by the Illinois Supreme Court, the appropriate response is to explain (if possible) why the appellate court's decision does *not* raise a question of general importance or does *not* create

an actual conflict.[25]

Under Rule 315(f), a respondent who does not file an answer will be informed of the disposition of the petition only if he or she makes a written request to the clerk.

f. Notice requirements if review is granted (Rule 315(h))

After leave to appeal is granted, the appellant has 14 days to indicate whether he or she will file an additional brief or allow the petition for leave to appeal to stand as the brief. If the appellant decides to file an additional brief, it is due within 35 days after leave to appeal was allowed. Although Supreme Court Rule 315(h) states that motions for extensions of time to file briefs are not favored, such motions are granted far more readily than are motions for extensions of time in which to file petitions for leave to appeal or petitions for rehearing.

An appellant who elects to allow the petition to stand as a brief must prepare a complete table of contents to the record and state the standards of review for each issue. Rule 315(h).

If the appellant elects to allow the petition for leave to appeal to stand as a brief, the appellee must indicate within 14 days whether he or she will let the answer, if one was filed, stand as the brief. Rule 315(h). If an additional brief is to be filed, it is due within 35 days of the appellant's notice of election. Rule 315(h).

---

[25]Rathje, DuPage County Bar Association Brief at 13 (March 1999).

If the appellant chooses to file an additional brief, the appellee has 14 days in which to serve notice whether an additional brief will be filed and 35 days to file the additional brief. Rule 315(h).

2. Review as a Matter of Right

Supreme Court Rule 317 allows review as a matter of right where a federal or state statute is invalidated or a constitutional question raised for the first time in and as a result of the Appellate Court's action. Appeal as a matter of right is initiated by filing a petition that is similar to a petition for leave to appeal, except that the argument concerns whether there is a right to appeal. Where a party seeks to appeal both as a matter of right and as a matter of judicial discretion, Rule 317 requires a single petition including both claims.

3. Review on Certificate of Importance

Supreme Court Rule 316 permits an Appellate Court to certify that its decision involves a question of such importance that it should be decided by the Supreme Court. A party may apply for a certificate of importance within 35 days after the opinion is entered. If a petition for rehearing is filed, the request must be made within 14 days after the Appellate Court acts on the petition. An application for a certificate of importance does not extend the time for filing a petition for leave to appeal.

Certificates of importance are rarely granted, except when different panels

of the same appellate district reach contradictory conclusions on the same question.

APPENDIX A

INDEX TO SUPREME COURT RULES

FOR CRIMINAL APPEALS

APPENDIX B

OFFICE OF THE STATE APPELLATE DEFENDER ISSUES CHECKLIST

The following section contains an issues checklist which may be useful in finding issues in a record. The checklist does not include all possible issues which may be raised, and should serve only as a tool to double check your review of the record. The checklist contains a cross-reference to pertinent sections in the **Illinois Handbook of Criminal Law Decisions** and the **Illinois Criminal Law Digest**.

ISSUES		RESEARCH SOURCE[26]
	A. PRE-TRIAL GENERALLY	
1.	Properly charged by information or complaint	1. 28-1
2.	Offense (elements) properly charged (and specific offense)	2. 28-4
3.	Charge properly amended	3. 28-5
4.	Venue Proper	4. 55
5.	Double jeopardy - collateral estoppel	5. 17

[26]References are sections in the **Illinois Handbook of Criminal Law Decisions** where cases related to the issue may be found. The same numbering system is used for the **Illinois Criminal Law Digest** (available at http://www.state.il.us/defender/).

6.	Delay in commencing prosecution	6. 48-2
7.	Substitution of judge	7. 30-3
8.	Change of place of trial	8. 31-5(b)
9.	Valid counsel waiver	9. 13-2
10.	Fitness for trial properly determined	10. 21
11.	Continuance problem	11. 53-6
12.	Discovery problem	12. 15
13.	Joinder - Severance problem	13. 52
14.	Speedy trial problem	14. 48
15.	Jury selection problem	
	(a) Generally	(a) 31-4(a)
	(b) Exclusion on race or sex	(b) 31-4(b),(c)
16.	Valid jury waiver	16. 31-3

B. SUPPRESSION PROBLEMS

1.	Search and Seizure	
	(a) Standing problem	(a) 45-2
	(b) Warrant	(b)
	(1) Probably cause, facts furnished to judge, hearsay - reliability delay in obtaining	(1) 45-6, 45-7
	(2) Particularly described place/ person to be searched and items to be seized	(2) 45-7(d) & (e)
	(3) Issued by neutral judge and comply with procedures	(3) 45-7(a) & (c)
	(4) Improper execution of - time of, manner of entry, scope of search	(4) 45-8

(c)	Warrantless	(c)
	(1) Warrantless entry	(1) 45-5(b), 45-9
	(2) Incident to arrest - probable cause for arrest, search prior to arrest, scope of search	(2) 45-5(a), 45-13
	(3) Consent to search - valid consent authority of 3d party to consent, scope of search	(3) 45-11
	(4) Plain view - police saw from lawful place, viewing advertent, immediately apparent that item was evidence of crime	(4) 45-10
	(5) Motor vehicles - improper stop, scope of search, probably cause	(5) 45-12
	(6) Inventory search - right to seize, need to open, scope too broad, crime related purpose, standard policy	(6) 45-14
	(7) Stop and frisk - sufficient grounds for stop, was it an arrest, scope of search, airport and terminal	(7) 45-4
	(8) Emergency search - time to obtain warrant, scope of search	(8) 45-9
	(9) Search by private party - acting as police agent	(9) 45-3
	(10) Administrative search	(10) 45-15
(d)	Eavesdropping	(d) 45-17
(e)	Fruit of poisonous tree	(e) 45-18
(f)	Proper suppression hearing, findings of fact, conclusions of law	(f) 45-19

2. Confessions - Admissions

(a)	Miranda violation - in custody, interrogation, proper warnings, effective waiver	(a) 10-4, 10-5
(b)	Interrogation after a request for counsel or to remain silent	(b) 10-5
(c)	Involuntary	(c) 10-6
(d)	Use of defendant's silence or failure to testify	(d) 10-9
(e)	Impeachment with inadmissible statements	(e) 10-8
(f)	Statements after illegal arrest	(f) 10-7, 45-18
(g)	Plea negotiation statements	(g) 10-10
(h)	Use of co-defendant’s statements	(h) 10-11

(i)	Statements during mental exam	(i) 10-12
(j)	Proper suppression hearing	(j) 10-3

3. Identification

(a)	Suggestive	(a) 27-1
(b)	Independent basis for	(b) 27-4
(c)	Right to counsel at	(c) 27-2
(d)	Photographic	(d) 27-3
(e)	Proper suppression hearing	(e) 27-5

C. TRIAL

1. Generally

(a)	Public trial	(a) 53-1
(b)	Defendant present (trial in absentia)	(b) 53-2
(c)	Physical restraints	(c) 53-3
(d)	Defendant in jail clothes	(d) 53-3
(e)	Interpreter problems	(e) 53-5
(f)	Joinder/severance	(f) 52

2. Counsel

(a)	Right	(a) 13-1
(b)	Waiver of	(b) 13-2
(c)	Counsel fees	(c) 13-3
(d)	Ineffective assistance	(d) 13-4
(e)	Conflict of interest	(e) 13-5
(f)	Right to argue, object, make offer of proof	(f) 53-4, 19-7(b)

3. Prosecutor

(a)	Misstating law or evidence	(a) 41-3, 41-4
(b)	Making insinuations	(b) 58-7(h)
(c)	Continuing with argument/question after objection sustained	(c) 41-7
(d)	Using false evidence	(d) 15-1, 41-1, 41-6
(e)	Comments on:	(e)
	(1) Defendant not testifying	(1) 10-9, 41-9
	(2) Defendant's failure to call witnesses	(2) 41-10
	(3) Facts not in evidence (opinion)	(3) 41-4; 41-8
	(4) Rulings of judge/exclusion of evidence	(4) 41-6
	(5) Race	(5) 41-14
	(6) Defense counsel	(6) 41-13
	(7) Victim's family/injuries	(7) 41-15

D. SENTENCING

13.	Sentence credit	13. 46-15
14.	Modification by trial judge	14. 46-10
15.	Resentencing	15. 46-16
16.	Unauthorized sentence	16. 46-14
17.	Delay in executing sentence	17. 46-9

E. GUILTY PLEAS

1.	Voluntary	1. 24-5
2.	Proper admonishments	2. 24-6
3.	Factual basis	3. 24-7
4.	Counsel waiver	4. 24-2
5.	Unfulfilled promises	5. 24-4
6.	Motions to vacate pleas	6. 24-8
7.	Plea bargaining	7. 24-3

APPENDIX C

OFFICE OF THE STATE APPELLATE DEFENDER WEB SITE

The State Appellate Defender World Wide Web Site can be found at "http://www.state.il.us/defender". The web site contains several of the most popular agency publications, including the Illinois Criminal Law Digest, Summary of Issues Pending in the Illinois Supreme Court, and the Handbook on Briefs and Oral Arguments. The site also contains Annual Reports and materials on death penalty litigation. Many of the documents on the web site can be downloaded.

The web site also contains links to several other Internet sites that are useful to attorneys practicing criminal law. Among these are sites containing the text of recent opinions from the United State Supreme Court, the federal courts of appeals, the Illinois Supreme Court, and the Illinois Appellate Court.