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Appellate court brief example

Preparing an appellate brief isn't just about presenting facts but persuading appellate judges through a well-structured written argument. Thus, it demands acute skill and thoughtful strategy. Knowing how to write an appellate brief well becomes mission-critical. At Record Press, we make sure your appellate brief complies with all rules and formatting preferences. We can help take care of the little details so you can focus solely on writing and creating a compelling narrative. Read on to learn our advice on what an appellate brief is, what it requires, and how to write it best. Before we can delve into how to write an appellate brief, it would be helpful if we knew the appellate brief definition. An appellate brief is a detailed document submitted to an appellate court. Think of written appellate briefs as your opportunity to argue your case anew, but this time, you'll do it through a written narrative rather than oral arguments in front of a judge. It's a persuasive brief, a lot like a trial brief. There are two kinds of appellate briefs: an appellant brief and an appellee brief (a.k.a., a respondent's brief). An appellant brief, which outlines why you believe the previous court's decision was incorrect, focuses on legal misinterpretations or procedural errors. It presents evidence from the trial record to persuade the appellate judges that an oversight or mistake influenced the outcome. An appellee brief is filed by the party that won the case originally and argues that the decision should remain. The ultimate objective is to convince the court to reconsider and potentially reverse the initial verdict. An appellee's goal is for the outcome to remain the same. The purpose of an appellate brief is to persuade appellate judges to see the case from your client's perspective. It serves as a key tool for arguing that the trial court's decision contains errors warranting a reversal or modification. By presenting facts, legal precedents, and arguments, you aim to highlight these mistakes and their impact on the case's outcome. Effectively, appellate brief writing is your chance to communicate directly with the judges and explain your viewpoint and reasoning in a concise, compelling manner. Essentially, it's your voice in the appellate court, advocating for a fair reconsideration of your case. Getting an appellate brief right is extremely important because it's your main shot at persuading the appellate court to favor your argument. Written briefs alone are a deciding factor in over 80% of federal appeals, so you want to make sure that both the content and the presentation make as big an impact as possible. A well-crafted brief can shift the judges' perspective by spotlighting overlooked details or misapplied laws. It's important to remember that appellate courts won't reexamine facts or evidence: they'll only review the arguments you present. Thus, clarity, precision, and a strong legal basis in your brief are key to influencing the court's decision. There are many court rules and preferences that you'll want to get right, too. Also, you'll need to correctly format the brief, complete the table of contents/table of authorities, create any forms the court requires, typeset covers that comply with court requirements, print it, bind it, ship it, and serve it. These are all elements that Record Press knows how to apply for maximum impact. Learning how to write an appellate brief demands attention to detail and a solid understanding of legal principles. You'll need to craft arguments that are both persuasive and grounded in law. This section will provide you with the information you need to create a compelling brief. The appellate brief cover page, or title page, is the formal introduction to the brief. You'll list the case name, the appellate court case number, and the lower court's case number. It includes a signature block that affirms the document's authorship and authenticity. This page sets the stage for the arguments that follow by clearly identifying the matter at hand and linking it to its judicial history. The Table of Contents in an appellate brief organizes your arguments by listing all headings and subheadings, along with their respective page numbers. This helps readers navigate your brief more efficiently, similar to chapter headings in a book. The Table of Authorities, on the other hand, compiles every case, statute, and reference you cite, linking each one to the pages where they are mentioned. It underscores the legal foundation of your arguments, ensuring that judges can easily verify your sources and understand the precedents backing your case. It must be organized in the following order: Required authority statutes in numerical order Required authority cases in your jurisdiction in alphabetical order Persuasive authority cases in your jurisdiction (also in alphabetical order) Persuasive authority statutes in numerical order Rules in numerical order Other cited authorities in numerical or alphabetical order In many jurisdictions, if you cite any sources on five or more pages, is is not necessary to list page numbers. Instead, use the term passim, which is Latin for 'here and there.' This section identifies the specific laws relevant to your case. If your argument hinges on particular statutes, this is where you detail them, quoting their language exactly and providing proper citations. This section isn't always necessary, and if you have only one statute to present, that isn't sufficient to require the statute to be listed here. In instances where a statute's wording is central to your argument but too lengthy for this section, you can place it in an appendix. Remember to reference this appendix in your Table of Contents so that readers can find and understand the legal framework underpinning your appeal. This section outlines the criteria appellate courts use to evaluate the lower court's decision. It's essentially the benchmark for assessing the constitutionality of a statute or the correctness of a lower court's ruling. There are three primary standards of review: De novo: This standard applies when the appellate court reviews your matter with fresh eyes, showing little to no deference to the trial court's interpretation of the law. Clearly erroneous: Here, the appellate court shows more respect for the trial court's findings. It will overturn decisions only if they seem obviously incorrect based on the factual evidence presented. Abuse of discretion: This is the most deferential standard. The appellate court may reverse the trial court's decision only if it finds a significant error in judgment, usually related to procedural matters. Understanding these standards helps you better understand how to write an appellate brief and effectively argue how and why the lower court's decision should be reevaluated. This section in an appellate brief distills the core legal issue into a focused inquiry and uses persuasive language to suggest a singular, correct outcome. Writers have two main formatting choices: The traditional model condenses the legal rule, significant facts, and the question into a coherent sentence without a question mark The "Deep Issue" model allows for a more detailed presentation. It presents the legally significant facts, the applicable legal rule, and the posed question across three sentences, capped with a question mark Each model offers a way to succinctly present the issue while implying the desired answer. For example, in Nestlé USA, Inc. v. Doe, each party's "Questions Presented" reflect their strategic emphasis on different facts: Nestlé's questions underscore the challenge of linking domestic corporate activity to alleged harms abroad, questioning the court's authority to impose liability under the Alien Tort Statute The respondents argued against the extraterritoriality bar through claims based on international law violations. They questioned the exclusion of domestic corporations from liability under the same statute The Statement of Facts section is where you shape the narrative to favor your argument. Here, you begin by detailing who the parties are, their roles, and their relevance to the legal issues at hand. This section includes four key elements: The identities and relationships of the parties Legally significant facts for resolving the question Background facts Procedural facts outlining the case's current status Your opening paragraph should identify the parties involved and their connections to each other and the legal dispute. Then, you should present legally significant facts and provide necessary background information. Although your role is to advocate, you must still present facts faithfully without venturing into arguments. Those belong in the Argument section, which comes next. The Summary of Argument section previews the points and reasoning you'll unfold in the full Argument and Citation of Authority sections. Its purpose is to offer a clear, digestible overview that sets the stage for the detailed arguments to follow. You should draft this summary only after finalizing the Argument and Citation of Authority sections so that it accurately reflects the substance and organization of your arguments. Point headings are conclusions for each of the legal arguments you make in your Argument and Citation of Authority. They serve as clear markers to show the reader, step-by-step, where the argument is going. You can have major point headings, which are like a Brief Answer to a Question Presented in a memorandum, as well as minor point headings showing the steps to reach the major point heading. Each heading should be written as a sentence that clearly states the relief being sought, the law that applies, and the key facts that determine the outcome. The Argument and Citation of Authority section is where you get into the legal reasoning supporting your case. Here, you use the CREAC format to structure your analysis and persuasion: C (Conclusion): Start with a strong, persuasive conclusion that states why the court should side with you. This sets the tone for the reader. R (Rule): Present the legal rule in a way that's accurate and favors your position. E/A (Explanation/Application): Here, you apply the rule to your case. This includes: E (Explanation): Cite past cases that establish how the law has been interpreted and applied. A (Application): Relate those interpretations to your case through analogy or distinction, demonstrating how your situation fits within or differs from established legal norms. E/A (Persuasive Authority): If using persuasive authority, apply the following guidelines: E (Positive Authority): Use other cases that support your argument, explaining how similar policy goals led to favorable outcomes.   A (Application): Argue how these outcomes should guide the court to a similar decision in your case. E (Negative Authority): Present cases with differing policy goals to argue against their applicability to your case. You want to show why they should not influence the court's decision. C (Narrowed Conclusion): Conclude by reiterating why your side should win, linking back to your initial conclusion, and emphasizing how the rule applies specifically to your case's facts and circumstances. Your goal is to weave legal rules with persuasive narratives, showcasing how precedent, analogy, and policy considerations align to support your argument. The Conclusion section of your appellate brief is where you state the specific outcome you want from the court. Make sure it's concise yet powerful and reinforces your case without rehashing every detail. You'll typically write this after finalizing the rest of your brief. Writing an appellate brief means following a lot of critical guidelines about content and formatting. However, these elements often distract from your narrative, argument, and strategy. Luckily, Record Press is here to help. We'll handle the cover, table of contents, table of authorities, formatting, compliance review, and the other elements that distract from writing a winning argument. Check out our appellate brief services. Mastering how to write an appellate brief begins by knowing the rules that govern the court you're addressing. Each jurisdiction has its own set of guidelines regarding format, length, and procedural requirements. There are also numerous unwritten rules based on the preferences of certain courts. That's a lot to familiarize yourself with, but you don't have to worry about that if you take advantage of Record Press's services. Once these rules are understood, it's time to start writing. With strict limitations on length, every word you choose must serve a purpose. Aim to be persuasive without being verbose. This discipline in writing not only respects the court's time but also makes your brief more impactful. Once you've refined your arguments, there's one final, critical step. Before submission, check everything from your appellate brief format to the accuracy and compliance of your information with all the court requirements. Errors, no matter how minor, can undermine your credibility and distract from your argument. If your appellate brief experience is minimal or you're pressed for time, Record Press provides compliance review and proofreading services to ensure everything is in place before you send it. At Record Press, we make appellate brief preparation a seamless, efficient process. With a suite of services that includes appellate management, consulting, and document solutions, we ensure your briefs are flawless before they ever reach a courtroom. We have decades of experience with appellate court rules and requirements across the station and know how to deliver a persuasive, compliant document. At Record Press, our goal is to empower attorneys and other legal professionals with the confidence that comes from knowing their appellate briefs are in capable hands. Our services provide you the freedom to concentrate on what you do best: advocating for your clients with compelling, persuasive arguments. For more information or to schedule a consultation, contact us today! These briefs are provided as examples. The State Law Library does not guarantee the validity of the format or legal content. An Appellate Brief is a comprehensive legal document filed by the party appealing a legal decision. This document outlines the arguments and legal analysis supporting the appellant's position and seeks to persuade the appellate court to overturn the lower court's ruling. Also known as an Appellant Brief, Appellants Brief, or Appellate Briefs, this crucial document plays a vital role in the appeals process. Authored in a concise and persuasive manner, an Appellate Brief presents a clear and logical argument, citing relevant case law and statutes to support the appellant's position. It also includes a statement of the case, an overview of the relevant facts, and a comprehensive legal analysis of the issues at hand. The Appellate Brief functions as a roadmap for the appellate court, providing them with a complete understanding of the case and the appellant's positions and enabling them to make an informed decision. Crafting a compelling Appellate Brief requires skill and expertise in legal research and writing. Attorneys involved in the appeals process understand the importance of presenting a compelling argument supported by sound legal reasoning. By carefully constructing an Appellate Brief, attorneys can effectively advocate for their clients' rights and seek a favorable outcome from the appellate court. When preparing an Appellate Brief, lawyers follow specific formatting and citation guidelines dictated by the court of appeals. These guidelines ensure uniformity and clarity in presenting the legal arguments. Attorneys must also adhere to strict deadlines when submitting their Briefs to the court, as missing the deadline can result in the case being dismissed. In summary, an Appellate Brief, also known as an Appellant Brief or Appellants Brief, is a crucial legal document that outlines the arguments and legal analysis supporting the appellant's position in an appeal. Crafted with precision and expertise, the Appellate Brief serves as a roadmap for the appellate court, guiding them through the case and helping them make an informed decision. Attorneys involved in the appeals process understand the significance of constructing a compelling Appellate Brief to advocate for their clients and seek a favorable outcome before the appellate court. An Appellate Brief is a comprehensive legal document filed by the party appealing a legal decision. This document outlines the arguments and legal analysis supporting the appellant's position and seeks to persuade the appellate court to overturn the lower court's ruling. Also known as an Appellant Brief, Appellants Brief, or Appellate Briefs, this crucial document plays a vital role in the appeals process. Authored in a concise and persuasive manner, an Appellate Brief presents a clear and logical argument, citing relevant case law and statutes to support the appellant's position. It also includes a statement of the case, an overview of the relevant facts, and a comprehensive legal analysis of the issues at hand. 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In summary, an Appellate Brief, also known as an Appellant Brief or Appellants Brief, is a crucial legal document that outlines the arguments and legal analysis supporting the appellant's position in an appeal. Crafted with precision and expertise, the Appellate Brief serves as a roadmap for the appellate court, guiding them through the case and helping them make an informed decision. Attorneys involved in the appeals process understand the significance of constructing a compelling Appellate Brief to advocate for their clients and seek a favorable outcome before the appellate court. In every appeal, the Criminal Appeals Lawyer must file a brief. The appellate brief has two major objectives: (1) to make the appellate court aware of some mistake that occurred in the lower court, and (2) to persuade the appeals court that my client's conviction should be vacated and the case remanded for a new trial or even dismissed because of some error that occurred in the lower court. I have put together sections of many of the appellate briefs that I have filed over the years that cover a broad range of appealable issues in criminal cases. Additionally, there is a full criminal appeals brief below filed in the Appellate Division, Second Department. Federal Criminal Appeals Attorney If you have any questions regarding briefs or need assistance, Please call at 1-800-APPEALS Check back on this page often as I will update it with new briefs frequently, or if you have a specific question let me know at newyorkappellatelawyer@gmail.com Fourth Amendment Search and Seizure Issues Cell Phones: The Particularity Clause Of The Fourth Amendment Cell Phones: The Search Of Cell Phones And The Scope Of Cell Phone Searches Appealing Denial of Mapp Dunaway Hearing Standing To Contest Vehicle Search: Fourth Amendment Search And Seizure New York Choice of Law Rules New York Choice of Law Rules Sentencing Issues Defendant's Right To Speak At Sentencing Harsh and Excessive Sentence Jury Deliberations Issues Suspending Jury Deliberations For More Than 24 Hours Court's Inadequate Response To Note From Jury Below is the body of an entire appellate brief submitted to the Appellate Division in New York. This is only an Example and should not be used as a substitute for any other brief. People v. Kennedy Appellate Brief To Appellate Division, Second Department APPELLATE BRIEF BY STEPHEN N. PREZIOSI SUPREME COURT: STATE OF NEW YORK APPELLATE DIVISION: SECOND DEPARTMENT == THE PEOPLE OF THE STATE OF NEW YORK Plaintiff-Respondent, IND.# -against- A.D. #2008-04489 NICHOLAS , Defendant-Appellant. == STATEMENT PURSUANT TO CPLR 5531 1. The indictment number in the court below was . 2. The full names of the original parties in the indictment were the People of the State of New York against Nicholas Kennedy. 3. The action was prosecuted in the County Court, Suffolk County, New York. 4. Defendant-Appellant was originally charged under indictment with one count of criminal possession of a controlled substance in the second degree (Penal Law 220.18), one count of criminal possession of a controlled substance in the third degree (Penal Law 220.16), one count of criminal possession of marihuana in the fifth degree (Penal Law 221.10), one count of failure to signal a turn (Vehicle and Traffic Law 1163b) and one count of failing to display a lit headlamp during hours of darkness (Vehicle and Traffic Law 375.2a). 5. Mr. Kennedy, after a jury trial, was convicted of one count of criminal possession of a controlled substance in the second degree (Penal Law 220.18), one count of criminal possession of a controlled substance in the third degree (Penal Law 220.16), one count of criminal possession of marihuana in the fifth degree (Penal Law 221.10), one count of failure to signal a turn (Vehicle and Traffic Law 1163b) and one count of failing to display a lit headlamp during hours of darkness (Vehicle and Traffic Law 375.2a) on March 28, 2008. 6. This appeal is from a judgment of conviction on April 25, 2008. 7. The Law Firm of ?was retained as counsel for this appeal on the original record and typewritten brief, Stephen N. Preziosi appears of counsel to SUPREME COURT: STATE OF NEW YORK APPELLATE DIVISION: SECOND DEPARTMENT == THE PEOPLE OF THE STATE OF NEW YORK Plaintiff-Respondent, IND.# I-2154-2007 -against- A.D.# #2008-04489 NICHOLAS , Defendant-Appellant. == PRELIMINARY STATEMENT This is an appeal by appellant Nicholas , from a judgment of conviction entered on April 25, 2008, in the County Court, Suffolk County, New York, convicting him of one count of criminal possession of a controlled substance in the second degree (Penal Law 220.18), one count of criminal possession of a controlled substance in the third degree (Penal Law 220.16), one count of criminal possession of marihuana in the fifth degree (Penal Law 221.10), one count of failure to signal a turn (Vehicle and Traffic Law 1163b) and one count of failing to display a lit headlamp during hours of darkness (Vehicle and Traffic Law 375.2a). He was sentenced to eight and one half years incarceration and five years of post release supervision. The Law Firm of Palermo, Palermo and Tuohy was retained as Appellate Counsel and Stephen N. Preziosi, Esq is of counsel. Appellant was represented by the Palermo, Palermo and Tuohy at the jury trial and on appeal is represented by Palermo, Palermo and Tuohy, Stephen N. Preziosi of counsel. The People were represented by the Honorable Thomas Spota, Esq., District Attorney of Suffolk County at plea and sentence and are represented by the Honorable Thomas Spota, Esq. on this appeal. QUESTIONS PRESENTED ON APPEAL POINT I DID THE TRIAL COURT COMMIT REVERSIBLE ERROR WHEN IT ADMITTED MOLINEUX TYPE EVIDENCE THAT WAS OVERLY PREJUDICIAL AND NOT PROBATIVE OF THE ALLEGED CRIME ? POINT II WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED AN EXPERT POLICE WITNESS TO GIVE CONCLUSORY TESTIMONY AS TO AN ULTIMATE FACT ISSUE AND THEREBY USURP THE FACT FINDING AUTHORITY OF THE JURY ? POINT III WHETHER THE INTEGRITY OF THE GRAND JURY WAS IMPAIRED UNDER CPL 210.35 AND ARTICLE 190 AND THE DUE PROCESS RIGHTS OF DEFENDANT VIOLATED WHEN THE PROSECUTOR OMITTED EXCULPATORY EVIDENCE AND FAILED TO APPROPRIATELY INSTRUCT THE GRAND JURY ON THE LAW ? POINT IV DID THE DISTRICT ATTORNEY COMMIT PROSECUTORIAL MISCONDUCT WHEN IT DROVE A KEY DEFENSE WITNESS FROM THE WITNESS STAND THROUGH INTIMIDATION AND THEREBY DENY DEFENDANT HIS DUE PROCESS RIGHT TO A FAIR TRIAL AND IN HIS SUMMATION SHIFT THE BURDEN OF PROOF TO THE DEFENSE BY INVOKING THE SUBJECT OF THIS WITNESS' FAILURE TO TESTIFY ? POINT V WHETHER MR. KENNEDY WAS DENIED HIS RIGHT TO A FAIR TRIAL AND HIS DUE PROCESS RIGHTS VIOLATED WHEN IN SUMMATION THE PROSECTUION MISSTATED THE LAW TO THE JURY AND PROVIDED UNSWORN TESTIMONY ABOUT TRACE EVIDENCE ? POINT VI WHETHER THE SENTENCE IMPOSED UPON THE DEFENDANT WAS UNDULY HARSH AND EXCESSIVE ? STATEMENT OF FACTS Overview Of The Charges In The Indictment . Mr. Nicholas ?was charged with one count of criminal possession of a controlled substance in the second degree, one count of criminal possession of a controlled substance in the third degree with intent to sell, one count of criminal possession of marihuana in the fifth degree, one count of failure to signal a turn and one count of failure to display a lit headlamp during hours of darkness, all under Indictment number I-2154-2007. Factual Background On March 31, 2007 at approximately eight o'clock in the evening Nicholas Kennedy was driving his vehicle, a 2004 Lexus SUV, in Central Islip, New York (T61) [1] . Officer Francis Rathgeber and Sergeant James Scimone stopped his vehicle because his left front headlight was out and because he failed to signal when making a turn (T63). As Officer Rathgeber was standing outside Mr. Kennedy's vehicle he observed a marijuana cigarette on the passenger side floor of the car (T67). Officer Rathgeber had Mr. Kennedy step out and stand toward the back of the vehicle (T68). Sergeant Scimone then went into the vehicle to retrieve the marijuana cigarette and spotted a plastic bag on the floor of the driver's side of the vehicle (T69). Sergeant Scimone called for an assisting unit; Sergeant Regina arrived sometime later, performed a field test on the substance in the bag and found it to be cocaine (T79-80). Shortly thereafter, Kevin Ocasio arrived on the scene and spoke with Officer Rathgeber (T81). He told Officer Rathgeber and Sergeant Scimone that whatever was found in the vehicle was his (T81). It was clear to Officer Rathgeber that Kevin Ocasio was referring to the cocaine (T123). At the time that the police had this conversation with Mr. Ocasio the decision to arrest Nicholas Kennedy had already been made (T124). Mr. Kennedy was arrested and Kevin Ocasio was taken back to the precinct for questioning (T123). Some hours after Mr. Kennedy was arrested and taken back to the precinct, he was subjected to a search as part of the arrest process (T194-195). In the course of that search, performed by Officer Rathgeber, a small amount of cocaine was found in Mr. Kennedy's pants pocket (T195). The indictment did not charge Mr. Kennedy with the possession of this cocaine, which was later the subject of the pre-trial Molineux hearing. The Grand Jury Proceedings This case was presented to a Grand Jury in Suffolk County on July 11, 2007 (GJ1-21). During the course of the Grand Jury proceedings two witnesses were called, Officer Francis Rathgeber and Sergeant James Scimone (GJ3). Although the Assistant District Attorney was aware that Kevin Ocasio had claimed that the cocaine found in the car was his, this exculpatory evidence was never presented to the Grand Jury. The Assistant District Attorney was aware that Mr. Ocasio was at the scene of the arrest and told both police officers that he had placed the cocaine in the car without Mr. Kennedy's knowledge; however, this evidence was never presented to the Grand Jury. The Assistant District Attorney was aware that Mr. Ocasio was taken back to the precinct and questioned where he again stated that the cocaine found in the car was his and was placed there without Mr. Kennedy's knowledge; this evidence was never presented to the Grand Jury. During the Grand Jury proceedings the Assistant District Attorney never asked any questions about Mr. Ocasio or attempted to elicit any evidence of Mr. Ocasio's presence at the scene of the arrest. The fact that Kevin Ocasio was at the arrest scene, claimed the cocaine was his and placed it there without Mr. Kennedy's knowledge was never heard by the Grand Jury. During the Grand Jury proceedings the Assistant District Attorney elicited testimony in the form of legal conclusions from two police witnesses on an ultimate issue of fact. The Assistant District Attorney asked Officer Rathgeber whether he was able to make any "conclusions" about the evidence (GJ9). The Officer responded that it was his conclusion that the cocaine was possessed with intent to sell (GJ9). Again, the Assistant District Attorney asked Sergeant Scimone whether he could "draw any conclusions as to the cocaine" (GJ13). The Sergeant responded that he concluded that the cocaine was going to be used for drug trafficking (GJ13). The testimony elicited from both witnesses was in the form of legal conclusions on an ultimate issue of fact. After completion of the testimony before the Grand Jury the Assistant District Attorney instructed the Grand Jurors on the law (GJ14-20). The Assistant District Attorney gave the Grand Jury part of the law on the automobile presumption rule under Penal Law 220.25 (GJ14); he did not instruct the Grand Jury that the automobile presumption rule was a rebuttable presumption and gave them incomplete instructions. The failure to present exculpatory evidence and a partial instruction of the automobile presumption rule, fatally impaired the integrity of the Grand Jury proceedings. Finally, the Assistant District Attorney failed to elicit any expert qualifications of the testifying officers or instruct the Grand Jury that they were free to reject the legal conclusions testified to by both officers regarding whether the cocaine was possessed with intent to sell. The officers' testimony was conclusory as to an ultimate issue of fact; this, coupled with the failure of the prosecutor to instruct the Grand Jurors that they were free to accept or reject that testimony, misled them to believe that they were bound to accept the legal conclusions testified to by the police witnesses. The Grand Jurors were erroneously instructed on the law and the Grand Jury proceedings were fatally impaired as a result. The Trial Court's Ruling On Molineux . Prior to the commencement of trial the People made an oral application to admit Molineux type evidence. (MH 1-10) [3] . The People argued that a separate uncharged crime of possession of trace amounts of cocaine should be admitted into evidence to complete the narrative of the case (MH 3-4). Defense counsel, relying on People v. Resek , 3 N.Y.3d 385, 787 N.Y.S.2d 683, 821 N.E.2d 108 (2004), argued against admitting such evidence in that it did not fit into any of the recognized exceptions to the Molineux Doctrine (MH 4-5); the evidence of the uncharged crime would only show the propensity to commit the crimes charged in the indictment, would be highly prejudicial and of little probative value (MH 6). Defense counsel further argued that there was no connection between the cocaine in the uncharged crime and the cocaine in the charged crime because they were in different forms (the cocaine in the charged crime was in brick form and the cocaine in the uncharged crime was in powder form); additionally, the cocaine in the charged crime was double sealed in a zip lock bag which was inside of another plastic bag and there was no evidence of holes in the bags or that the contents had leaked out (MH 6-7). The Trial Court granted the prosecution's Molineux application and admitted the evidence reasoning that even though the evidence was highly prejudicial (MH 9) that it was "part and parcel" of the prosecution's proof (MH 10). The Trial Court did not specify what exception to the Molineux Doctrine it was relying on in making its ruling. The Trial During the course of the trial the Trial Court allowed expert testimony from Sergeant James Scimone that consisted of a legal conclusion on an ultimate issue of fact and thereby usurped the fact finding power of the jury. The prosecutor elicited testimony from Sergeant James Scimone as follows: QUESTION: Are you aware of the exact amount in grams approximately? ANSWER: One hundred and fifty grams; QUESTION: Approximately one hundred and fifty grams? ANSWER: Yes. QUESTION: And you said that the most common quantity that cocaine is sold is in a portion of a gram correct? MR. PALERMO: Objection, Your Honor. THE COURT: I'll allow it. ANSWER: Yes. QUESTION: So-And I don't want to put you on the spot with any math here. But approximately how many street level portions would a hundred and fifty grams be? ANSWER: I'd have to pull out my calculator. I don't know. A thousand. QUESTION: Okay. Approximately, in your expert opinion, is that consistent with personal use? ANSWER: No. QUESTION: Do you have any other factors that would go into your decision that that – aside from the quantity – the amount of cocaine in Nicholas Kennedy's Lexus was not for personal use? [emphasis added] ANSWER: Yes. QUESTION: What are those factors? ANSWER: He's a rather young man driving a very expensive SUV. It has nice leather seats, nice flat panel TVs in the head rest. He has two cell phones. Most people only have one. And he has a large amount of cash on him. (T176-177) This testimony conveyed a decision by an expert as to an ultimate issue of fact as to whether the possession was with the intent to sell and usurped the fact finding power of the jury. Prosecutorial Misconduct: Threatening A Defense Witness And In Closing Arguments Misstating The Law And Unsworn Testimony During the trial the intention of the Defense to call Kevin Ocasio to the witness stand came to the Trial Court's attention (T275). Given the nature of Mr. Ocasio's testimony, the Trial Court insisted that Mr. Ocasio's attorney, Lawrence Silverman, advise him of the possible consequences of his testimony on the record, in open court and outside the presence of the jury (T274-296). The Trial Court then allowed the prosecution to question and advise Mr. Ocasio of the consequences of his testimony at this trial (T297-299). The prosecutor advised and threatened Mr. Ocasio with revocation of his probation and jail if he testified. The prosecutor went so far as to advise Mr. Ocasio that even if he were suspected of perjury that he would go to jail. The extensive threats and coercive remarks made to Mr. Ocasio effectively prevented him from testifying and prevented Mr. Kennedy from presenting a defense. The prosecution not only prevented Mr. Ocasio from testifying, but also made the fact that he did not testify central to its closing arguments (T366-337). The prosecutor stated in closing arguments that "there was no proof that came from the witness stand regarding Kevin Ocasio buying anything " (T367). Defense counsel promptly objected to this stating that the prosecution was attempting to shift the burden of proof onto the defendant (T366). Additionally, during closing arguments the prosecution misstated the law to the jury and provided unsworn testimony about trace evidence. During his closing arguments the prosecutor instructed the jury on the law of automobile presumption (T359-360). However, he failed to state the law in its entirety to the jury and did not tell them that the automobile presumption rule was a rebuttable presumption. He further instructed them that because of the automobile presumption rule that the jury "can accept that possession " (T360). The prosecutor's closing remarks were fallacious and led the jury to believe that they were compelled to accept the knowing possession of the cocaine with intent to sell. Finally, in his closing arguments, the prosecutor gave unsworn testimony when he introduced the theory of "trace evidence" when there was no testimony at trial about this type of evidence (T360-361). Defense counsel objected stating that there was no evidence of this theory at trial (T361). The Trial Court overruled the objection (T361). The prosecutor's comments in summation were outside the four corners of the evidence adduced at trial, constituted unsworn testimony and prevented the Defendant from receiving a fair trial. The Sentence The Trial Court sentenced Mr. Kennedy to a determinate term of incarceration of eight and one half years on count one of the indictment, criminal possession of a controlled substance in the second degree; to a determinate term of incarceration of seven years on count two of the indictment, criminal possession of a controlled substance in the third degree, to run concurrently with count one; a determinate term of three months incarceration as to count three of the indictment, criminal possession of marijuana in the third degree to run concurrently with all other counts and as to counts four and five of the indictment failure to signal a turn and failure to display a lit headlamp during the hours of darkness the Trial Court sentenced Mr. Kennedy to serve a period of incarceration of one day on each to run concurrently with all other counts. Some factors that should have been more prominent in the Trial Court's analysis were the fact that Nicholas Kennedy has never been convicted of a felony, he has never served any jail time and the contacts with the criminal justice system that he did have were more than ten years old. Additionally and most importantly, during the trial prosecution made an offer of three years after it had rested (T315). The Trial Court acquiesced to this offer (T315). All of the facts that the Trial Court took into consideration at the sentencing were known to the Trial Court and the prosecutor when the prosecution made an offer of three years and the Trial Court stood ready to accept that plea bargaining arrangement. The prosecution's subsequent recommendation at sentencing of nine years and the Trial Court's sentence of eight and one half years was harsh, excessive and indicative of maliciousness on the part of the prosecution and the Trial Court for Mr. Kennedy seeing the trial through to its conclusion. POINT I DID THE TRIAL COURT COMMIT REVERSIBLE ERROR WHEN IT ADMITTED MOLINEUX TYPE EVIDENCE THAT WAS OVERLY PREJUDICIAL AND NOT PROBATIVE OF THE ALLEGED CRIME ? In general, evidence of crimes other than the one charged is irrelevant and may not be introduced to prove guilt. People v. Allweiss , 48 N.Y.2d 40, 421 N.Y.S.2d 341, 396 N.E.2d 735 (1979). This is true even for evidence of similar prior crimes, which has probative value, because such evidence can induce the jury to convict on collateral matters or because of the defendant's past acts. People v. Alvino , 71 N.Y.2d 233, 525 N.Y.S.2d 7, 519 N.E.2d 808 (1987). Evidence that tends to prove bad character and general criminal propensity may have probative worth regarding the crime charged. Nevertheless, it is excluded as a matter of law when it has no additional relevance to a specific issue in the case, because of the very real danger that the trier of fact will overestimate its significance. People v. Hudy , 73 N.Y.2d 40, 538 N.Y.S.2d 197, 535 N.E.2d 250 (1988). The trial court must make a two part inquiry in deciding whether or not to admit Molineux type evidence: first the proponent must identify an issue other than mere criminal propensity to which the evidence is relevant, this is a question of law. People v. Alvino, 71 N.Y.2d 233, 525 N.Y.S.2d 7, 519 N.E.2d 808 (1987). Assuming that this showing is made the court must then weigh the probative value of the evidence against its potential prejudice to the defendant. People v. Alvino, supra . Evidence that may be admitted to prove guilt is not limited to but generally falls into one of five categories: motive, intent, modus operandi, identity and common plan or scheme, although this list is not exhaustive. People v. Carter, 77 N.Y.2d 95, 564 N.Y.S.2d 992, 566 N.E.2d 119 (1990). Even if the uncharged crime evidence is offered for a legitimate purpose, such evidence must be rejected if its potential for prejudice outweighs its probative value. People v. Till , 87 N.Y.2d 835, 637 N.Y.S.2d 681, 661 N.E.2d 153 (1995);People v. Hudy , 73 N.Y.2d 40, 538 N.Y.S.2d 197, 535 N.E.2d 250 (1988); People v. Foster , 295 A.D.2d 110, 743 N.Y.S.2d 429 (1st Dept. 2002). In the case sub judice the prosecution, prior to jury selection, made the application to introduce on their direct case the uncharged crime of criminal possession of a controlled substance in the seventh degree (i.e. the residue of cocaine found in Mr. Kennedy's pocket). The prosecution argued that this was admissible in order to "complete the narrative". The defense countered that this was not necessary to complete the narrative and that it was, in fact, overly prejudicial and not probative of the crime charged. The cocaine found on the floor of the car was double bagged, sealed in a zip lock bag and in brick form; conversely, the residue of cocaine found in Mr. Kennedy's pocket was in powder form. The Trial Court erroneously held that evidence of residue in the pocket of Mr. Kennedy would be admissible on the prosecution's direct case. The separate and distinct crime of possession of a controlled substance in the seventh degree was not probative in any way of the crimes charged in this case and was overwhelmingly prejudicial to the defendant. The Trial Court erred in admitting such evidence and the conviction must be dismissed. In certain cases, the New York Court of Appeals has ruled that background evidence of other crimes or bad acts is admissible to complete the narrative otherwise juries would "wander helpless trying to sort out ambiguous but material facts". People v. Resek , 3 N.Y.3d 385, 787 N.Y.S.2d 683, 821 N.E.2d 108 (2004) quoting People v. Green , 35 N.Y.2d 385, 363 N.Y.S.2d 910, 323 N.E.2d 160 (1974). However, the Court of Appeals cautioned that there is danger that uncharged crime testimony may improperly divert the jury from the case at hand or introduce more prejudice than evidentiary value. People v. Resek , 35 N.Y.2d at 389. The Court in Resek further opined that decisions regarding Molineux evidence should not be interpreted as automatically allowing the prosecution to introduce evidence of uncharged crimes merely because the evidence is said to complete the narrative or furnish background information. To the contrary, under New York's Molineux jurisprudence we begin with the premise that uncharged crimes are inadmissible and, from there, carve out exceptions. People v. Resek , 3 N.Y.2d at 390. The types of cases where background evidence that included uncharged crimes was admitted are distinguishable and inconsistent with the facts of this case. The Court of Appeals has noted that there are cases in which background information that would "complete the narrative" at times may be too prejudicial. In People v. Montanez , 41 N.Y.2d 53, 390 N.Y.S.2d 861, 359 N.E.2d 861 (1976) the Court held where the prosecution sought to introduce evidence of an argument over drugs demonstrating that the defendant was a drug dealer that the background information that would complete the narrative of facts leading up to the shooting was too prejudicial, outweighed the probative value of the evidence and constituted reversible error. In another Court of Appeals case, People v. Tosca , 98 N.Y.2d 660, 746 N.Y.S.2d 276, 773 N.E.2d 1014 (2002) the Court held that background testimony that explained how and why the police pursued and confronted a defendant was admissible even though it involved an uncharged crime committed by defendant. See also People v. Jenkins , 49 A.D.2d 780, 853 N.Y.S.2d 629 (2d Dept. 2008) where Second Department similarly held that background evidence appropriate to explain police actions. In another case People v. Stanard , 32 N.Y.2d 143, 344 N.Y.S.2d 331, 297 N.E.2d 77 (1973) the Court of Appeals held that in a case where the prosecution sought to prove charges of perjury that they could admit evidence of the illegal activities that the defendant participated in that would explain his motive for perjurious testimony before a Grand Jury and that this was necessary for the jury to understand the entirety of the case. In yet another case decided by the Court of Appeals, People v. Till , 87 N.Y.2d 835, 661 N.E.2d 153 (1995) the Court held that where the defendant was charged with shooting at a police officer as he was fleeing a robbery that he had just committed, the admission of the uncharged robbery was admissible to explain why the defendant was fleeing and shooting at the police officer. The aforementioned cases where Molineux type evidence was admitted to complete the narrative are distinguishable from the facts of this case. In those cases the evidence was generally admitted either to explain the actions of police or the defendant and where the facts where too prejudicial to the defendant they were excluded. In this case the uncharged crime is not part of the narrative. The small amount of cocaine in Mr. Kennedy's pocket was neither a factor no r present in the minds of the police officers when they made the arrest. In fact, the residue in defendant's pocket was not discovered until hours after the arrest back at the precinct. The argument that the Molineux evidence was necessary to complete the narrative is specious and duplicitous. The only reason that the prosecution wanted the uncharged crime in evidence, the only purpose it ultimately served, was to prejudice the Defendant in the eyes of the jury, to demonstrate propensity to commit the crimes in the indictment. The pre-arrest narrative – what happened at roadside – contained no facts regarding the cocaine residue found in his pocket; the post-arrest narrative – the search at the police precinct several hours later and discovery of the residue – was completely separate and distinct in time and place. This was not part of the narrative of the indicted crimes; upon discovery of the residue in his pocket, Mr. Kennedy had already been under arrest for those crimes for several hours. The factual and chronological narrative of this case is simple: The police stopped Mr. Kennedy for a Vehicle and Traffic violation, the police officer saw a marijuana cigarette on the floor of the car in plain view, the police searched the rest of the car and found cocaine on the floor, the police arrested Mr. Kennedy for the crimes for which he stood trial, but not for criminal possession of a controlled substance in the seventh degree. The residue found in his pocket was not a factor in the police analysis of the case when they decided to arrest Nicholas Kennedy. It was not part of the narrative of the discovery of cocaine on the floor of his car and his arrest. The absence of the uncharged crime at trial would not leave the jury to wander helplessly through a maze of ambiguity. Prejudice and propensity were the only things evidenced by the admission of the uncharged crime of possession in the seventh degree. The Trial Court erred in admitting this uncharged crime into evidence and Mr. Kennedy's conviction must be vacated. POINT II WHETHER THE TRIAL COURT ERRED WHEN IT ALLOWED AN EXPERT POLICE WITNESS TO GIVE CONCLUSORY TESTIMONY AS TO AN ULTIMATE FACT ISSUE AND THEREBY USURP THE FACT FINDING AUTHORITY OF THE JURY ? It is well settled that testimony as to an ultimate fact issue in the case will invade the exclusive province of the jury as the finder of fact and admission of such testimony is erroneous. People v. Goodwine , 177 A.D.2d 708, 576 N.Y.S.2d 881 (2d Dept. 1991); People v. Bajraktari , 154 A.D.2d 542, 546 N.Y.S.2d 384 (2d Dept. 1989); People v. Abreu , 114 A.D.2d 853, 494 N.Y.S.2d 762 (2d Dept. 1983); People v. Johnson , 186 A.D.2d 584, 588 N.Y.S.2d 381 (2d Dept. 1992); People v. Vizzini , 183 A.D.2d 302, 591 N.Y.S.2d 281 (1982). In the case of People v. Goodwine, supra the Second Department held that where a police officer, testifying as an expert, gave the opinion that possession of more than four vials of crack cocaine constituted possession with intent to sell, that this invaded the jury's exclusive province of determining the ultimate fact issue of whether or not the possession was actually with the intent to sell. Similarly, in People v. Hewitt , 220 A.D.2d 686, 633 N.Y.S.2d 58 (2d Dept. 1995) it was held that it was error to admit expert testimony that illegal drugs were possessed with the intent to sell. Again, in People v. Williams , 224 A.D.2d 725, 638 N.Y.S.2d 705 (2d Dept. 1996) this Court held that it was error to admit expert testimony that the defendant's possession of 55 vials of crack cocaine evidenced an intent to sell the drugs and was an invasion of the exclusive province of the jury in determining an ultimate issue of fact. In the instant case the prosecutor elicited testimony at trial from Sergeant Scimone that he "decided" that from the weight it could be determined that the cocaine was possessed with intent to sell: QUESTION: Are you aware of the exact amount in grams approximately? ANSWER: One hundred and fifty grams; QUESTION: Approximately one hundred and fifty grams? ANSWER: Yes. QUESTION: And you said that the most common quantity that cocaine is sold is in a portion of a gram correct? MR. PALERMO: Objection, Your Honor. THE COURT: I'll allow it. ANSWER: Yes. QUESTION: So-And I don't want to put you on the spot with any math here. But approximately how many street level portions would a hundred and fifty grams be? ANSWER: I'd have to pull out my calculator. I don't know. A thousand. QUESTION: Okay. Approximately, in your expert opinion, is that consistent with personal use? ANSWER: No. QUESTION: Do you have any other factors that would go into your decision that that – aside from the quantity – the amount of cocaine in Nicholas Kennedy's Lexus was not for personal use? [emphasis added] ANSWER: Yes. QUESTION: What are those factors? ANSWER: He's a rather young man driving a very expensive SUV. It has nice leather seats, nice flat panel TVs in the head rest. He has two cell phones. Most people only have one. And he has a large amount of cash on him. (T176-177) The expert testimony of the Sergeant was that the amount of cocaine was determinative that the possession was with the intent to sell and that Nicholas Kennedy was a drug dealer. The prosecutor made extensive inquiry into the amount of cocaine possessed and how many "street level portions" were contained in that amount. The follow up question asked by the prosecutor at T177 lines 11-14 was "Do you have any other factors that would go into your decisionthat the amount of cocaine in Nicholas Kennedy's Lexus was not for personal use?" [emphasis added]. The fact that the Sergeant/expert witness had made a "decision" about whether the cocaine was for personal use conveys a legal conclusion to the jury that the cocaine was possessed with the intent to sell. This usurped the fact finding power of the jury and conveyed an expert's conclusion with regard to an ultimate issue of fact. An expert unquestionably may not testify that the quantity of drugs a defendant possessed indicated that the defendant possessed the drugs with the intent to sell them. People v. Ingram , 2 A.D.3d 211, 770 N.Y.S.2d 294 (1stDept. 2003); People v. Wright , 283 A.D.2d 712, 725 N.Y.S.2d 711 (3rd Dept. 2001). In this case the testimony was particularly harmful because no other evidence existed that was indicative of the intent to sell on the part of the defendant. When the prosecutor asked what other factors would go into the Sergeant's decision that the cocaine was not for personal use the answer given by the Sergeant was vague and misleading. He stated that Mr. Kennedy drove a very expensive SUV, when in reality he drove a four year old car that was not that expensive (T135); Sergeant Scimone stated that he had a large amount of cash on him, when in reality he had only four hundred dollars on him; and Sergeant Scimone testified that Mr. Kennedy had two cell phones on him when many people have more than one cell phone. Each one of the above factors that Sergeant Scimone testified about have never been held by any court as factors consistent with the intent to sell cocaine or drug trafficking. The facts of this case are altogether inconsistent with the intent to sell cocaine; this was a completely unrelated stop for a Vehicle and Traffic violation. Mr. Kennedy was not being observed in a sale, he was not seen interacting with another person in what might have looked like a sale, the cocaine was not packaged in individual vials or bags, it was not packaged the way sellers typically sell cocaine. There were absolutely no facts that occurred that evening that were consistent with the sale of narcotics or that would have indicated that Nicholas Kennedy intended to sell the cocaine in this case. The Sergeant's unwarranted testimony and opinion that the amount was not consistent with personal use usurped and invaded the fact finding power of the jury in that it was testimony that was determinative of an ultimate issue of fact i.e. whether Nicholas Kennedy possessed cocaine with the intent to sell. Many courts have held that such testimony is harmless error where it is accompanied by overwhelming evidence of intent to sell. This is not the case here. Some of the factors that this Court has held to be indicative of intent to sell are where the cocaine is packaged individually in $5 vials, People v. Williams, supra ; where a defendant possessed 56 vials in distinctive packaging,People v. Hewitt, supra ; where arresting officer actually observed several sales prior to the arrest, People v. Hunt , 249 A.D.2d 246, 673 N.Y.S.2d 69 (1st Dept. 1998); where specific jargon or cryptic language was used consistent with the drug trade, People v. Vizzini, supra ; where electronically intercepted conversations indicated that drugs where being sold, People v. Vizzini, supra . In this case none of the factors that New York Courts have held to be consistent with intent to sell were present. The expert opinion that the weight of the cocaine was determinative of intent to sell which was elicited by the prosecutor from Sergeant Scimone was harmful error specifically because there was no other evidence consistent with that intent. The expert opinion was erroneously admitted and usurped the fact finding power of the jury in that it was determinative of an ultimate issue of fact. The admission of such testimony was error and the conviction must be vacated. POINT III WHETHER THE INTEGRITY OF THE GRAND JURY WAS IMPAIRED UNDER CPL 210.35 AND ARTICLE 190 AND THE DUE PROCESS RIGHTS OF DEFENDANT VIOLATED WHEN THE PROSECUTOR OMITTED EXCULPATORY EVIDENCE AND FAILED TO APPROPRIATELY INSTRUCT THE GRAND JURY ON THE LAW ? A. The Integrity Of The Grand Jury Was Impaired And The Due Process Rights Of The Defendant Were Violated When The Assistant District Attorney Failed To Present Evidence That Would Have Completely Exculpated The Defendant Of Any Wrongdoing. The test for whether a defense need be charged to the Grand Jury rests upon its potential for eliminating a needless or unfounded prosecution. People v. Valles , 62 N.Y.2d 36, 38, 476 N.Y.S.2d 50, 464 N.E.2d 418 (1984);People v. Samuels , 12 A.D.3d 695, 698, 785 N.Y.S.2d 485 (2d Dept. 2004); People v. Edwards , 32 A.D.3d 281, 819 N.Y.S.2d 527 (1st Dept. 2006). The Principal case on whether a particular defense should be presented to the Grand Jury was decided by the New York Court of Appeals in People v. Valles , 62 N.Y.2d 36, 476 N.Y.S.2d 50, 464 N.E.2d 418 (1984). In the Valles case the Court of Appeals drew a distinction between defenses that were simply mitigating and those defenses that are exculpatory 62 N.Y.2d at 38. The Court held that an exculpatory defense is one that would, if believed, result in a finding of no criminal liability and is evidence that must be presented to a Grand Jury. The Grand Jury's function being to protect citizens from having to defend against unfounded accusations, such complete defenses would ordinarily rest peculiarly with that body's proper domain. 62 N.Y.2d 38-39. The Court further opined that the District Attorney must give guidance adequate for the Grand Jury to carry out its function 62 N.Y.2d at 38. In the instant case there existed a completely exculpatory defense. Twice during the course of the police investigation Kevin Ocasio claimed that the narcotics that were being attributed to defendant, Nicholas Kennedy, were actually Mr. Ocasio's and that he had placed them in Nicholas Kennedy's car unbeknownst to Mr. Kennedy. Mr. Ocasio told this to the police at the scene where the police had first encountered Mr. Kennedy at the traffic stop (T121-123). The inculpatory statements of Mr. Ocasio, whereby he claimed that the narcotics were his and that he had placed them in Mr. Kennedy's car, occurred immediately after the police had discovered the drugs. Mr. Ocasio, in fact, came rushing up to the scene where the police had pulled over Mr. Kennedy's car and immediately claimed that the drugs were his and that he placed them there. This was without having even spoken to the police about why they had pulled Mr. Kennedy over or what their search of the car had revealed. Again, later on that day, after Mr. Kennedy was arrested and brought back to the precinct, Mr. Ocasio went to the precinct and requested to speak to the arresting police officer. In the lobby of the police precinct Mr. Ocasio once again told the police that the narcotics were his and that he had placed them in Nicholas Kennedy's car without Kennedy's knowledge. The statements by Mr. Kevin Ocasio were completely exculpatory in nature and the prosecution was obligated to present them to the Grand Jury because the question of whether a particular defense must be charged depends upon its potential for eliminating a needless or unfounded prosecution. In this case the prosecution knew of someone that had claimed complete responsibility for this crime and knew this person's name and where he could be found. The prosecution chose not to present this completely exculpatory evidence to the Grand Jury and thereby impaired the integrity of the proceedings under Criminal Procedure Law 210.35(5) and Article 190 and violated the Due Process rights of the defendant under the Fourteenth Amendment of the U.S. Constitution and Article 1 6 of the New York State Constitution. In determining whether the evidence supports a defense that is exculpatory, and therefore must be presented to the Grand Jury, the evidence must be viewed in light most favorable to the defendant. People v. Padgett , 60 N.Y.2d 142, 144-145, 468 N.YS.2d 854, 456 N.E.2d 795 (1983); People v. Samuels , 12 A.D.3d 695, 698, 785 N.Y.S.2d 485 (2d Dept. 2004). In the instant case the evidence that Nicholas Kennedy did not posses the narcotics found in his car "knowingly" and "unlawfully", as the evidence of Kevin Ocasio's statements indicates, was never presented to the Grand Jury and this deliberate omission of exculpatory evidence did impair the integrity of the proceedings under Criminal Procedure Law 210.35(5) and Article 190 and violated the Due Process rights of the defendant under the Fourteenth Amendment of the U.S. Constitution and Article 1 6 of the New York State Constitution and the indictment must be dismissed. B. The Failure Of The Prosecution To Instruct The Grand Jury That The Presumption Of Possession Was A Rebuttable Presumption Impaired The Integrity Of The Grand Jury And The Indictment Must Be Dismissed. The prosecution instructed the Grand Jury with regard to the automobile presumption statute under Penal Law 220.25. However, the prosecution did not tell the Grand Jury that the automobile presumption rule was a rebuttable presumption under our law. People v. Claggett , 182 A.D.2d 694, 582 N.Y.S.2d 282 (2d Dept. 1992). The presumption may be rebutted by a defendant's own testimony or by any other evidence in the case, including the inherent or developed incredibility of the prosecution's own witnesses. Mejia v. City of New York , 119 F.Supp. 232 (E.D.N.Y. 2000). (See also Leyva v. Superintendent, Green Haven Correctional Facility , 428 F.Supp. 1 (D.C.N.Y. 1977) holding that the presumption of possession of drug by occupant of automobile may be rebutted by any evidence, including inherent or developed incredibility of prosecution's witnesses as well as by defendant's own testimony). Since possession is an ingredient of the crime charged, its existence is a question of fact, which must be submitted to the Grand Jury. It was, accordingly, for the Grand Jury in this case to decide not only whether the foundation of presence was properly laid, but also whether the critical leap to a conclusion of possession was appropriate. Given the inviolable function of the Grand Jury as a fact finder, the prosecution's failure to advise them that the automobile presumption rule under Penal Law 220.25 was a rebuttable presumption usurped the fact finding power of the Grand Jury, impaired the integrity of the Grand Jury process under Criminal Procedure Law 210.35(5) and Article 190 and violated the Due Process rights of the defendant under the Fourteenth Amendment of the U.S. Constitution and Article 1 6 of the New York State Constitution. People v. Rao , 73 A.D.2d 88, 425 N.Y.S.2d 122 (2d Dept. 1980) held that where exculpatory evidence was withheld from the Grand Jury and erroneous instructions were given it was violative of Defendant's due process rights under the U.S. Constitution's Fifth and Fourteenth Amendments and under New York State's Constitution Article 1 6. This Court has consistently held that the failure to instruct a Grand Jury or Petit Jury with regard to the permissible nature of the automobile presumption rule is reversible error. In People v. Williams , 136 A.D.2d 132, 526 N.Y.S.2d 581 (2d Dept. 1988) this Court held that a reading of statutory language regarding presumption of possession of firearm in an automobile was insufficient to put the grand jury on notice that the presumption was rebuttable, and thus, indictments against persons who were present in the automobile at the time the weapon was found required dismissal of the indictment. Again, in People v. Smith , 23 A.D.3d 415, 804 N.Y.S.2d 774 (2d Dept. 2005) the Appellate Division, Second Department held that the failure in a weapons prosecution to instruct the jury that presumption of unlawful intent arising from defendant's possession of a weapon was permissive, or to emphasize that, despite the presumption, the same burden of proof remained with the prosecution, was bound to result in misleading jurors into believing that the presumption was conclusive and binding upon them and constituted reversible error. In the instant case the prosecution did not instruct the Grand Jury that the automobile presumption rule was permissive or a rebuttable presumption, misleading the Grand Jurors into believing that the presumption was conclusive and binding upon them. This error impaired the integrity of the Grand Jury and the indictment must be dismissed. It must be emphasized that the two aforementioned errors together, i.e. the failure of the prosecution to present exculpatory evidence (where someone else claimed the narcotics were his and that he placed it in the vehicle without the knowledge of the defendant) and failure to instruct the Grand Jury on the permissive nature of the automobile presumption rule, are particularly harmful and egregious because of the compounding effect of the combined – improper instruction on the law and the absence of exculpatory evidence. The failure of the prosecution to present exculpatory evidence and the failure of the prosecution to properly instruct the Grand Jury on the law of presumption of possession impaired the integrity of the Grand Jury and the indictment must be dismissed. C.The Police Witnesses Inappropriately Made Legal Conclusions About Whether The Narcotics Were Possessed With Intent To Sell And The Failure Of The Prosecution To Instruct The Grand Jury That They Were Free To Reject The Legal Conclusions Presented By The Two Police Officers Impaired The Integrity Of The Grand Jury Proceedings And The Indictment Must Be Dismissed The integrity of the Grand Jury process was impaired when police witnesses inappropriately made legal conclusions about whether the cocaine was possessed with intent to sell and the prosecution failed to instruct the Grand Jury that they were free to accept or reject those legal conclusions. The rules of evidence applicable to criminal trials are generally applicable to Grand Jury proceedings. CPL 190.30(1) The prosecution must properly instruct the Grand Jury with respect to the significance, legal effect and evaluation of evidence. CPL 190.30(7). Where expert or opinion testimony is elicited the prosecutor must first establish that expert testimony would be helpful, that the subject matter is outside the common knowledge of ordinary jurors and that the witness is qualified by knowledge, skill, experience, training or education. People v. Brown , 97 N.Y.2d 500, 743 N.Y.S.2d 374 (2002);Price v. New York City Housing Authority , 92 N.Y.2d 553, 684 N.Y.S.2d 143 (1998). An expert who relies on necessary facts within personal knowledge that are not contained on the record must testify to those facts prior to rendering the opinion. People v. Jones , 73 N.Y.2d 427, 541 N.Y.S.2d 340 (1989). Where expert opinion is presented, as in this case, such expert testimony must be paired with appropriate limiting instructions, which should be reemphasized in the jury charge – that the jury is free to reject it – and that it should in no way be taken as proof that the defendant was engaged in the sale of narcotics. People v. Brown , 97 N.Y.2d 500, 743 N.Y.S.2d 374, 769 N.E.2d 1266 (2002); see also People v. Gonzalez , 99 N.Y.2d 76, 751 N.Y.S.2d 830, 781 N.E.2d 894 (2002). No such limiting instruction was given to the Grand Jury in this case and the integrity of the proceedings was thus impaired and the indictment must be dismissed. During the course of the Grand Jury proceedings two police witnesses testified, Officer Francis Rathgeber and Sergeant James Scimone. The prosecutor asked the following of Officer Rathgeber: QUESTION: Officer, based on your training and experience, can you come to any conclusions regarding the material that was recovered, taking into account the weight, the way it was packaged, as well as any other things that were recovered from the vehicle and from the subject that day? ANSWER: The cocaine that was recovered is definitely not consistent with personal use. QUESTION: What is it consistent with? ANSWER: Possessing to sell. [emphasis added] (see GJ9) [4] The prosecutor also asked Officer Scimone the following question: QUESTION: Can you draw any conclusions as to the cocaine, based on its weight as well as other things, that you recovered from the subject and his vehicle on that day? ANSWER: Just based on the weight alone , that was a healthy amount. I assumed it was going to be used for drug trafficking. QUESTION: Not for personal use. ANSWER: No, sir. [emphasis added] (GJ13) The prosecutor asked both of the police witnesses to make legal conclusions about whether or not the cocaine was possessed with the intent to sell and thereby usurped the fact

finding power of the Grand Jury and impaired the integrity of the proceedings under Criminal Procedure Law 210.35(5), Article 190 and the U.S. Constitution Fourteenth Amendment and New York State's Constitution Article 1 6. The prosecutor asked both of the police witnesses to interpret the factual evidence and draw a legal conclusion that was specific to an element of the crime alleged. i.e. that the cocaine was possessed with the intent to sell. The prosecutor prefaced each of these questions with "based on your training and experience", but there was no testimony as to what that training and experience was. There was no testimony that adequately qualified either of the police officers as experts in the area of drug trafficking or what factual criteria would lead anyone to believe that this cocaine was possessed with intent to sell. The prosecutor merely asked them to make a legal conclusion on the ultimate issue of whether the cocaine was possessed with intent to sell. This legal conclusion usurped the fact finding power of the Grand Jury in that the police witnesses did not give testimony of their qualifications as experts and made legal conclusions on the ultimate issue of intent, which impaired the integrity of the Grand Jury process. The legal conclusions made by these police witnesses coupled with the fact that the prosecutor failed to instruct the Grand Jury that they were free to accept or reject the testimony of the police witnesses further impaired the integrity of the Grand Jury because it was misleading in that the Grand Jurors were not aware that they could come to their own conclusion about whether or not the cocaine was possessed with the intent to sell. People v. Mario Santucci and Richard Lombardi , 5/18/94 NYLJ 23, col. 1. The primary function of the Grand Jury is to investigate crimes and determine whether sufficient evidence exists to accuse citizens of crimes and subject him to criminal prosecution. The Grand Jury has historically acted as a buffer between the State and its citizens, protecting the latter from unfounded and arbitrary accusations. People v. Calbud,Inc , 49 N.Y.2d 389, 426 N.Y.S.2d 238, 402 N.E.2d 1140 (1980). When the District Attorney's instructions to the Grand Jury are so incomplete or misleading as to substantially undermine this essential function, it may fairly be said that the integrity of that body has been impaired. Under such circumstances, CPL 210.35(5) as well as our State constitutional guarantees might well require dismissal of the Grand Jury's indictments. People v. Calbud,Inc , 49 N.Y.2d 389, 426 N.Y.S.2d 238, 402 N.E.2d 1140 (1980). In the instant case the police witnesses inappropriately made legal conclusions about whether the cocaine was possessed with the intent to sell and the prosecutor failed to instruct the Grand Jury that they were free to accept or reject this testimony. The integrity of the Grand Jury was impaired under Criminal Procedure Law 210.35(5) and Article 190 and the Due Process rights of Mr. Kennedy were violated under the U.S. Constitution Fourteenth Amendment and the New York State Constitution Article 1 6 and the indictment must be dismissed. POINT IV DID THE DISTRICT ATTORNEY COMMIT PROSECUTORIAL MISCONDUCT WHEN IT DROVE A KEY DEFENSE WITNESS FROM THE WITNESS STAND THROUGH INTIMIDATION AND THEREBY DENY DEFENDANT HIS DUE PROCESS RIGHT TO A FAIR TRIAL AND IN HIS SUMMATION SHIFT THE BURDEN OF PROOF TO THE DEFENSE BY INVOKING THE SUBJECT OF THIS WITNESS' FAILURE TO TESTIFY ? A.Background During the course of the trial it came to the attention of the Trial Court that the defense would be calling a witness named Kevin Ocasio. (T275) It was the understanding of the Trial Court that Mr. Ocasio would be testifying to the effect that the cocaine found in Mr. Kennedy's car was not Mr. Kennedy's cocaine, but was Mr. Ocasio's and that he placed the cocaine there without the knowledge of Mr. Kennedy. (T275) The Trial Court, in a most unorthodox setting, required that Mr. Ocasio's attorney, Mr. Lawrence Silverman, advise Mr. Ocasio in open court on the record of the possibility that he might be giving inculpatory testimony. (T275) In the exchange that took place in open court and on the record between Mr. Ocasio and his attorney, Mr. Ocasio was advised in very clear and unambiguous terms that his testimony might lead to him being charged with a crime and to him violating his probation. The on the record conversation between Mr. Ocasio and his attorney is extensive and takes up over twenty-two (22) pages of the record. (T274-296) The Trial Court then allowed the prosecutor to question Mr. Ocasio over the objection of Defense Counsel. (T297) The Assistant District Attorney berated, badgered, threatened and intimidated Mr. Ocasio in a manner that is wholly inconsistent with fairness to the defendant, violative of Due Process and constituted a gross and egregious intrusion upon Mr. Kennedy's right to present a defense and right to due process. The prosecutor threatened Mr. Ocasio that if he testified that he would be subject to a violation of his probation, charges of perjury, jail and a jail sentence even if he were suspected of perjury. The following took place on the record in open court: MR. KUBETZ (Assistant District Attorney): Do you understand that as a result of things you say you may – your probation may be violated? MR. PALERMO: I'm going to object. MR. OCASIO: Well, I'm not really on probation. MR. KUBETZ: You're in mental health court – MR. OCASIO: I'm in mental health court. MR. KUBETZ: –which is a probationary sentence. MR. PALERMO: Objection, Your Honor. THE COURT: First of all, we're not in front of a jury. I'll allow it. MR. PALERMO: My only concern is, if he's going to scare this witness, I would think that we not be – I want to make sure whatever he's saying – THE COURT: I presume he has a good faith basis for it. Correct? By the way, is he also aware of the fact that he also subjects himself to the charge of Perjury? MR. KUBETZ: That's what I was going to get to, Judge. THE COURT: All right. Go ahead. MR. KUBETZ: You're currently on a probationary sentence in mental health court, correct? MR. OCASIO: Yes. MR. KUBETZ: And as a result of things that you say or do on the witness stand, that – that probationary sentence in mental health court could end and you could be sent to jail. Do you understand that? MR. OCASIO: No. I don't know why I would get in trouble again twice for something. MR. KUBETZ: Do you understand what perjury is? MR. OCASIO: Yeah. MR. KUBETZ: What is perjury? MR. OCASIO: It's when you lie about something. MR. KUBETZ: Okay. Do you understand that if you take the stand – MR. OCASIO: Yeah. MR. KUBETZ: –and you lie and you're convicted of perjury or even if you are suspected of it, probation could investigate and they could file a VOP and you could be terminated from mental health court and you could be sent to jail? Do you understand that? MR. OCASIO: Yeah. But I don't know why you keep threatening me about jail because I'm doing what the courts told me to do every week. (T297-299). The transcript may not reflect the tone of the prosecutor during the exchange between the him and Mr. Ocasio, but Mr. Ocasio's words resonate – "I don't know why you keep threatening me about jail ". Mr. Ocasio obviously felt intimidated by the threats of the prosecutor. Significantly, the prosecutor's threats listed above took place after Mr. Ocasio's lawyer had already advised him in open court and on the record of all the possible implications of his testimony. The prosecution's questioning of Mr. Ocasio in this manner was nothing more than threatening and intimidating surplusage that scared the witness and denied Mr. Kennedy his right to present a defense and denied him his rights to Due Process and to a fair trial. Mr. Ocasio's attorney then again, on the record in open court, subjected Mr. Ocasio to more warnings about the implications of his testimony at this trial. This threatening and intimidation of a key defense witness took up over thirty (30) pages of transcript and constituted a flagrant violation of the Due Process rights of the defendant to present a defense and constituted prosecutorial misconduct. On that same day after the prosecutor had threatened, intimidated and drove a key defense witness from the stand, he shifted the burden of proof to the defense when, in his closing argument, he argued that Kevin Ocasio never took the witness stand and there was no merit to the defense that Mr. Ocasio had placed the cocaine in Mr. Kennedy's car without his knowledge. The prosecutor's summation on the subject was as follows (T366-367): MR. KUBETZ: And then at some point we have Kevin Ocasio enter the picture. Granted, all the theories that you heard about Kevin in the defense attorney's opening, Kevin going and buying this cocaine, using his key to snort it – remember when Mr. Palermo said, "You've got to prove it. You can't just say it?" Well, he just said it. MR. PALERMO: Your Honor, I'm going to object. The burden of proof is on the People. THE COURT: Overruled. He's just repeating your summation-your opening. MR. KUBETZ: He – he just said it. There was no proof that came from the witness stand regarding Kevin Ocasio buying anything . [emphasis added]. In fact, all we know about Kevin Ocasio is, he showed up at the scene at some point, he said, "that's my shit". We don't know if he was referring to the cocaine or the marijuana or something else in the car. (T366-367). B.The Applicable Legal Principles The prosecutor serves a dual role as advocate and public officer and is charged with duty not only to seek convictions but also to see that justice is done. People v. Pelchat , 62 N.Y.2d 97, 464 N.E.2d 447, 476 N.Y.S.2d 79 (1984). Although a district attorney is obliged to warn a potential witness of their possible liability for false statements under oath, such warnings must not be emphasized to the point where they become instruments of intimidation. People v. Shapiro , 50 N.Y.2d 848, 431 N.Y.S.2d 422, 409 N.E.2d 897 (1980). Substantial interference by the state with a defense witness' free and unhampered choice to testify violates due process as surely as does a willful withholding of evidence. People v. Shapiro , 50 N.Y.2d at 9, See also, Webb v. Texas , 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed.2d 330. It has been consistently held that where remarks toward a defense witness effectively prevent that witness from testifying that the defendant on trial is denied his due process rights to a fair trial under Fifth and Fourteenth Amendments of the U.S. Constitution. Webb v. Texas , 409 U.S. 95, 03 S.Ct. 351, 34 L.Ed2d 330; People v Ramos , 63 A.D.2d 1009, 406 N.Y.S.2d 123 (1978); U.S. v. Pinto , 850 F.2d 927 (2d Cir. 1988). Additionally, where such intimidation drives a defense witness from the stand it is well settled that the defendant is denied his due process right to present a defense. U.S. v. Williams , 205 F.3d 23 (2d Cir. 2000). In Williams , the Second Circuit held that a defendant has an elementary right to establish a defense by presenting witnesses. The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense. U.S. v. Williams , 205 F.3d at 29. The right to establish defense by presenting witnesses serves the truth seeking function of the trial process by protecting against the dangers of judgments founded on a partial or speculative presentation of the facts. U.S. v. Williams , 205 F.3d at 29 quoting, Taylor v. Illinois , 484 U.S. 400, 108 S.Ct. 646, 98 L.Ed.2d 798 (1988). Finally, in closing arguments, the prosecutor's multiple references to the defense's failure to call Kevin Ocasio as a witness flies in the face of fairness and the due process rights of Mr. Kennedy; it was Mr. Kubetz' threats and intimidation that kept Mr. Ocasio from the witness stand. It is well settled in New York that where the prosecution attempts to shift the burden of proof to the defendant it is a violation of due process and a denial of the defendant's right to a fair trial. Repeated references by prosecuting attorney to defendant's failure to produce witnesses and to their failure to take the stand constitutes prejudicial error. People v. Mirenda, 23 N.Y.2d 439, 245 N.E.2d 194, 297 N.Y.S.2d 532 (1969). It was error for prosecutor to refer to character witnesses who could have been called by defendant as a defendant has no duty to call any witnesses. People v. Thompson , 75 A.D.2d 830, 427 N.Y.S.2d 464 (2d Dept. 1980). Error to make remarks which attempt to shift the burden of proof from the People to the defendant. People v. Ortiz , 116 A.D.2d 531, 497 N.Y.S.2d 678 (1st Dept. 1986). Prosecutor's remarks in summation of defendant's failure to produce evidence was reversible error. People v. DeJesus , 137 A.D.2d 761, 525 N.Y.S.2d 613 (2d Dept. 1988). C.Discussion In the instant case Mr. Kevin Ocasio represented a key witness for the defense. His testimony would, if believed, completely exculpate the defendant, Mr. Kennedy. The Trial Court allowed Mr. Ocasio's attorney to warn him of all the possible implications of his testimony on the record in open court (T274-296). After the extensive explanation by Mr. Ocasio's attorney the prosecutor chose to question, threaten and intimidate Mr. Ocasio with revocation of his probation, charges of perjury and jail time. Most importantly, the prosecutor told Mr. Ocasio that even if he weren't convicted of perjury he would still go to jail. The extent of the threats and intimidation by the prosecutor were wantonly unconscionable and denied Mr. Kennedy his right to present a defense, his right to a fair trial and his right to due process. Moreover, the prosecutor not only drove Mr. Ocasio from the witness stand with threats and intimidation, but then also raised in his summation the fact Mr. Ocasio did not testify. The prosecution effectively shifted the burden of proof to the defense when in its summation it made reference to the fact that Kevin Ocasio was not called to the witness stand and that the exculpatory evidence that the jury would have heard was never presented. The nature of this burden shifting and prosecutorial misconduct is particularly egregious in that the threats and intimidation by the prosecutor were the principal reason that Mr. Ocasio did not testify. The prosecutor committed misconduct in that he intimidated and threatened a key defense witness and prevented Mr. Kennedy from presenting a defense and thereby denied him his due process rights under the Fifth and Fourteenth Amendments of the U.S. Constitution and Article 16 of the New York State Constitution. POINT V WHETHER MR. KENNEDY WAS DENIED HIS RIGHT TO A FAIR TRIAL AND HIS DUE PROCESS RIGHTS VIOLATED WHEN IN SUMMATION THE PROSECTUION MISSTATED THE LAW TO THE JURY AND PROVIDED UNSWORN TESTIMONY ABOUT TRACE EVIDENCE ? A.Background During summation the prosecutor read a portion of the law on automobile presumption. The prosecutor's reading of the law on this point was incomplete and misleading as to precisely what the law of automobile presumption was. Defense counsel immediately objected and was overruled by the trial court. The prosecutor's comments were as follows (T359-360): MR. KUBETZ: The judge is going to instruct you on the automobile presumption. And he'll tell you that the presence of a controlled substance in an automobile is presumptive evidence of knowing possession of that substance by each and every person in the automobile at the time the controlled substance was found. So let's take a look at that. MR. PALERMO: Your Honor, I'd ask, if he's going to read the charge, that the whole charge be read. THE COURT: Overruled. MR. KUBETZ: Let's take a look at that. The automobile, we know it's Nicholas Kennedy's Lexus. The controlled substance we know it's the five point two six ounces of cocaine. And we know that the only person in that automobile was Nicholas Kennedy. So I would urge you to accept that automobile presumption, as the judge is going to tell you you're entitled to. The presence of cocaine in Nicholas Kennedy's Lexus is presumptive evidence of knowing possession of the cocaine by Nicholas Kennedy. You can accept that possession. (T359-360) The prosecutor went on to comment on facts and theories not in evidence and in so doing became an unsworn witness at this trial. The prosecutor's comments were as follows (T360-361): MR. KUBETZ: Two: Nicholas Kennedy had a small amount of cocaine in his pants pocket. There is the theory that every contact, no matter how slight, leaves a trace. Trace evidence. MR. PALERMO: Your Honor, I'm going to object. It's not in the evidence. THE COURT: Overruled. MR. KUBETZ: The nice thing about trace evidence is that its objective. We know, because cocaine was found in Nicholas Kennedy's jeans, that at some point his jeans were in contact with cocaine. Objective. We know that. (T360-361). The prosecutor's statements to the jury in his summation contained facts about "trace evidence" that was never introduced into evidence at trial. Immediately upon hearing this Defense Counsel objected and was overruled by the Trial Court. B.The Applicable Legal Principles It is improper for the prosecutor to misstate the law on summation. People v. Butler , 185 A.D.2d 141, 585 N.Y.S.2d 751 (1st Dept. 1992); People v. Pauli , 130 A.D.2d 389, 515 N.Y.S.2d 251appeal dismissed, 70 N.Y.2d 911, 524 N.Y.S.2d 429, 519 N.E.2d 339. In a criminal case, the district attorney may not refer to matters not in evidence or call upon the jury to draw conclusions, which are not fairly inferable from the evidence. People v. Ashwal , 39 N.Y.2d 105, 383 N.Y.S.2d 204, 347 N.E.2d 564 (1976). Defendant is deprived of a fair trail when the prosecution, in their summation, does not stay within the "four corners" of the evidence. People v. Elder , 207 A.D.2d 498, 615 N.Y.S.2d 915 (2 Dept.1994). A defendant is denied a fair trial when the prosecutor improperly comments on matters unsupported by the record. People v. Bannerman , 110 A.D.2d 706, 488 N.Y.S.2d 192 (2d Dept. 1985). Comments by prosecutor that are not within the four corners of the evidence is reversible error. People v. Facciolo , 288 A.D.2d 392, 734 N.Y.S.2d 179 (2d Dept. 2001). C.Discussion In the instant case the prosecutor misstated the law as to the automobile presumption rule. During his summation the prosecutor initially read only part of the law on automobile presumption at T359. He did not inform the jury that the presumption was a rebuttable presumption and that the jury is not required to infer possession from the fact that the cocaine was found in the automobile. Therefore, the prosecutor was allowed to give in incomplete statement of the law to the jury. Defense counsel timely objected to this and was overruled by the Trial Court. The prosecutor continued to incorrectly state the law in his summation when he told the jury at T360 lines 3-7 that "The presence of cocaine in Nicholas Kennedy's Lexus is presumptive evidence of knowing possession of the cocaine by Nicholas Kennedy. You can accept that possession " [emphasis added]. The prosecutor's comment was, again, an incomplete statement of the law in that it did not tell the jury that they were free to reject the inference of possession under the automobile presumption rule. The manner in which the prosecutor stated the law to the jury and argued his point to them would lead anyone to believe that there was no other option than that they must accept the inference of possession. This was clearly misleading and denied Nicholas Kennedy his due process right to a fair trial under the Fifth and Fourteenth Amendments of the U.S. Constitution and under Article 16 of the New York State Constitution. Furthermore, the prosecutor's comments in summation with regard to "trace evidence" at T360-361 were improper as they were outside the four corners of the evidence adduced at trial. There was no testimony or evidence of any kind elicited at trial with regard to cocaine and trace evidence. The prosecutor's comments about trace evidence were tantamount to unsworn testimony by the prosecutor and as such made him an unsworn witness at the trial not subject to cross-examination. The prosecutor's comments were outside the four corners of the evidence, they did constitute unsworn testimony and this denied Mr. Kennedy his due process right to a fair trial under the Fifth and Fourteenth Amendments of the U.S. Constitution and under Article 16 of the New York State Constitution. POINT VI WHETHER THE SENTENCE IMPOSED UPON THE DEFENDANT WAS UNDULY HARSH AND EXCESSIVE ? Criminal Procedure Law 450.30(1) states that an appeal by the defendant from a sentence, as authorized by subdivision two of section 450.10 , may be based upon the ground that such sentence either was (a) invalid as a matter of law, or (b) harsh or excessive. In the instant case the Trial Court sentenced Mr. Kennedy to a determinate term of incarceration of eight and one half years on count one of the indictment, criminal possession of a controlled substance in the second degree; to a determinate term of incarceration of seven years on count two of the indictment, criminal possession of a controlled substance in the third degree, to run concurrently with all other counts; a determinate term of three months incarceration as to count three of the indictment, criminal possession of marijuana in the third degree to run concurrently with all other counts and as to counts four and five of the indictment failure to signal a turn and failure to display a lit headlamp during the hours of darkness the Trial Court sentenced Mr. Kennedy to serve a period of incarceration of one day on each to run concurrently with all other counts. There are several pertinent factors that this Court should consider in coming to a determination that the sentences outlined above are harsh and excessive. First, Mr. Kennedy has no other felony convictions on his record and only one youthful offender adjudication and one misdemeanor conviction for resisting arrest and both were more than ten years prior to this sentence. Second, Mr. Kennedy has never before been sentenced to a term of incarceration on any of his previous encounters with the criminal justice system. Third, the pre-trial offer in this case was two and one half years. Although this is generally not a reason to reduce a sentence, this fact coupled with the fact that a three year offer had been made by the prosecution during the course of the trial and after the prosecution had rested on their direct case is significant. The fact that an offer had been made during the course of the trial and after the prosecution had rested is noteworthy for two reasons. First, the prosecution had presented the entirety of their case and at the point when they made this new offer of three years all of their evidence had been heard and the prosecution was making this recommendation of what they believed was an appropriate offer of three years. The subsequent recommendation by the prosecution at Mr. Kennedy's sentencing of nine years was vindictive in nature. The prosecution had all of the same facts and circumstances at their disposal when they made the offer of three years. For the prosecution to change the recommendation to nine years at the time of sentencing when no new facts where present is indicative of maliciousness on the part of the prosecution. Second, when the prosecution made an offer of three years during the course of the trial, the Trial Court acquiesced to this offer on the record. The trial transcript of this offer reads as follows: MR. PALERMO: Since we broke at lunchtime, I have been in conference with my client, his family and friends who are here. I've discussed the possibility of offering a plea to – to resolve the case. I've spoken to the People about it. The People have responded that the offer at this point would be an A-2 with a three year recommendation, which I understand the Court will go along with. I've advised my client of this offer. (T315). The Trial Court never raised any objection to this offer or any doubt that the offer was appropriate. It is important to note that at this juncture in the trial, the Trial Court had already heard all of the prosecution's evidence and had been in conference with the Assistant District Attorney and Defense Counsel regarding this case prior to the commencement of trial. When the offer of three years was made during trial, the Trial Court had already heard, and was aware of, all the background information on Mr. Kennedy; numerous in chamber conferences were had on this case prior to the commencement of trial. Therefore, it is axiomatic that the facts that were presented at sentencing on April 25, 2008 were all the same facts and circumstances that the Trial Court was aware of and had before it when the offer of three years was made. No new facts were present at sentencing for the Trial Court to justify the disparity in sentencing between the recommendation that the Trial Court was ready to accept on March 27, 2008 (when the three year offer was made) and on the sentencing date, April 25, 2008. Significantly, the Trial Court noted in its discourse at sentencing that it had conferenced the case numerous times (S24-25) [5] , the Trial Court had shepherded it through the system (S24), the Trial Court had already heard all the evidence (S25), and the Trial Court was fully aware of the case and its nuances (S25). The Trial Court was aware of all of this when the three year offer was made during the trial, after the prosecution had rested and when it acquiesced in the prosecution's recommendation of three years. The Trial Court did attempt to justify the gaping disparity between the two numbers on the day of sentencing by saying that the Trial Court's acceptance of the three-year offer was subject to investigation (S3). Generally, when a trial court learns of something that changes the court's mind and makes it unwilling to go along with a plea deal, it will allow the defendant to withdraw his plea and proceed to trial. In fact, this has been the consistent practice of this trial court. The assertion by the Trial Court that acceptance of the Defendant's plea was subject to investigation and that, ultimately, the Trial Court would not have sentenced Mr. Kennedy to three years, would have required the Trial Court to stop the trial, accept the plea of Mr. Kennedy, dismiss the jury and then, on the day of sentencing, renege on the promise of three years and allow Mr. Kennedy to withdraw his plea and proceed to trial. The possibility seems remote and implausible that the Trial Court could have arrived at that late stage of the proceedings and not known whether it would have ultimately accepted Mr. Kennedy's plea of three years and, if not, allowed him to withdraw his plea and proceed to trial – again. Such an inconceivable prospect can only lead one to conclude that the sentence of eight and one half years is nothing other than a vindictive and punitive measure for Mr. Kennedy exercising his right to see the trial through to the end. The Trial Court's sentence was harsh and excessive and must be reduced to the appropriate sentence of three years, as recommended by the prosecution and as acquiesced to by the Trial Court. CONCLUSION For the reasons set forth above the plea must be vacated and remanded to the Trial Court and reinstated to the Trial Court calendar. STEPHEN N. PREZIOSI, ESQ.