

## **HOW TO DEVELOP AND PRESENT A COMPETING NARRATIVE**

By Larry Gibbs

### **THE TEN COMMANDMENTS OF PERSUASIVE BRIEF WRITING**

1. Introduce your case as if you believe in it and want the judges to believe in it.
2. Do not write the statement of facts first -- before you know and have researched your issues.
3. The statement of facts must not be a trial chronology (Prosecution Case, Defense Case, Rebuttal, Jury Deliberations, Verdict, Sentencing).
4. Lead with your strength.
5. Contextualize bad facts, don't simply present them.
6. Use directive headings.
7. Dump all losers, even if it means less compensation.
8. In drafting a reply, divide and conquer.
9. Make your brief look as least as good as an AG brief.
10. Leave time for editing and employ an editing buddy.

## **Five Steps To Developing A Competing Narrative**

1. Find your legal issue. (That means do your research first.)
2. Identify the larger value your legal issue embodies.
3. Do The O'Connor Test: "This is a case about ....."
4. Outline your legal argument.
5. Then (and only then), write your introduction and statement of facts from the perspective of the larger value, i.e., what the case is about.
  - A. The ordering criterion for the facts is not chronology, but theme.
    - i. Thus, if the theme requires you to begin the statement of facts with material from the defense case, do that.
  - B. Include all the relevant facts, but in the context of your narrative.
  - C. Check: When the facts are told, does the reader know why affirming the conviction would be unjust?

### **Version from the Prosecution Case**

On January 5, Maria Arellano, an informant who worked periodically with agents of the Bureau of Narcotics Enforcement, entered a Radio Shack store in Cupertino. Arellano was approached by petitioner, an employee of the store. Petitioner asked Arellano if she was in “la movida,” a term for the drug trade. Petitioner then asked if Arellano was interested in buying heroin. Arellano said she might be, and asked petitioner how a sale could be arranged. Petitioner gave Arellano a telephone number of a friend who petitioner said sold heroin.

### **Competing Narrative**

The prosecution case against petitioner was based exclusively on the testimony of a paid informant named Maria Arellano. Arellano had worked as an informant for various law enforcement agencies for over 20 years. During that time, she participated in over 100 cases. She received \$4000 for her work in petitioner’s case, a sum she acknowledged was about the average she earned in a given case. Arellano and the agents further admitted that Arellano would not have been paid for her work if the heroin deal had not occurred. Arellano appears to rely on her informant work as her principal source of income. Her only other employment involved a few months’ seasonal work in a cannery and intermittent work in a restaurant. Assuming the truth of Arellano’s representations, she has earned close to half a million dollars over her career as an informant.

Arellano, who used the alias “Blanca,” worked off-and-on as a paid informant for the Bureau of Narcotics Enforcement (hereinafter “BNE”). In January, 1998, Arellano went into a Radio Shack to buy a cellular phone. Arellano testified that she was approached by petitioner, who worked in the store. Petitioner asked Arellano where she was from. When Arellano responded that she was from Sinaloa, petitioner indicated that petitioner’s boyfriend also was from Sinaloa. According to Arellano, petitioner then asked Arellano if she was in “la movida” – a term for people involved in selling drugs.

## INTRODUCTION (Version 1)

The state charged appellant Brandon Groves with a series of extremely serious criminal offenses. At his first two court appearances, he was represented by a court-appointed lawyer. At his next court appearance, he was represented by a different court-appointed lawyer. At his fourth court appearance, he was represented by yet another court-appointed lawyer.

Three days before trial, and obviously frustrated by the representation he was receiving, Mr. Groves sought to represent himself. Although he made no motion for a continuance, the trial court refused to allow him to represent himself and forced him to trial with a lawyer he did not want.

Trial began three days later. The court-appointed lawyer had filed no motions on Mr. Groves's behalf. Mr. Groves was convicted. At sentencing, Mr. Groves tried to tell the court that he had received ineffective representation. When the court refused to allow Mr. Groves to explain his position or state the reasons for his complaints, Mr. Groves gamely persisted. The court then had Mr. Groves forcibly gagged and sentenced him to 59 years in state prison.

This appeal follows.

## INTRODUCTION (Version 2)

This case presents a question which, some 200 years after adoption of the due process clause, one assumes would have been settled: whether the State may extract a guilty plea from a defendant by withholding access to necessary medical care.

Appellant, was charged with murder and was in pretrial custody. He was in the end-stage of AIDS and near death. The county jail, however, could not provide him with the medical attention he urgently needed to prolong his life. The chief medical officer for the jail candidly acknowledged that the jail “had come to the end of our road medically in regards to what we’re able to provide for him.” Appellant sought pretrial release so he could obtain medical care. But the court refused to release appellant over the prosecution’s objection. The prosecution then made an offer: If appellant would plead guilty to second-degree murder, it would not object to his release to a hospice to obtain the medical care he needed. Perceiving no other alternative, appellant agreed, entered the plea and was immediately released to the hospice.

There, appellant received adequate medical care and his condition improved. Several months later, the prosecution demanded its bargain. Appellant moved to withdraw his plea on the ground that it had been coerced. The motion was denied on the improbable reasoning that appellant got the benefit of his bargain (adequate medical care) and now the People were entitled to the benefit of their bargain (a life sentence). Appellant was sentenced to 18 years to life in prison on his plea.

It is difficult to imagine a plea entered under more coercive circumstances. Due process demands that the judgment be reversed and appellant be permitted to withdraw the plea he entered only to save his own life.