

Work Sample:

What follows is the written legal argument prepared by Don Murray in an actual case in New York City. Please be advised that the document has been edited in order to protect client confidentiality. Therefore, our client's name has been changed to "Stanley Roper" and the police officer's name has been changed to "Officer Tripper". In all other respects, the written legal argument is what was presented to the judge. Other motions were filed in connection with the "Roper" case, but this memo presents some of the most interesting issues in the pretrial phase of the case.

Supreme Court of the State of New York
County of Queens : Part TAP-A

People

against

Stanley Roper

Motion to
Dismiss
Indictment
Counts

LEGAL ARGUMENT

PART ONE

Bootstrapping Presumptions

Or,

“The blind leading the blind” (NY Court of Appeals)

Or,

When One Presumption isn't enough and two is One Too Many

No meaningful direct evidence was presented to the members of the Grand Jury (as far as defense counsel can tell in the absence of complete access to the Grand Jury proceedings) that Stanley Roper possessed any weapon.

Officer Tripper's testimony suggests with a sort of mathematical accuracy that (absent any other evidence) there is a 33 % chance that Stanley Roper's hand was the hand that emerged from the car and fired off a weapon.

While that 33% chance does represent a strict mathematical statistical probability, no direct evidence was presented to the Grand Jury (the defense believes) that would suggest even the remotest reason to take one step

beyond that 33% chance and find that Stanley Roper, as opposed to any other occupant of the car, actually physically possessed a weapon.

The direct evidence that Stanley Roper actually possessed a weapon begins and ends with that 33 % chance only and no other evidence to suggest that Mr. Roper (as opposed to either of the two other occupants) touched any weapon.

Essentially, this 33% statistical probability is the same chance that exists if the gun had simply been recovered from underneath the seat of one of the occupants of the car, and in the absence of testimony that a gun had actually been fired.

Therefore, the Government must have relied on one or more of the presumptions permitted *under the appropriate circumstances* under our law in order to prove the possession of weapons counts.

The Government obtained indictments for possession of a weapon using three different theories:

- 1) “Plain” possession of a weapon,
- 2) Possession of a defaced weapon, and
- 3) Possession of a weapon with the intent to use unlawfully against another.

The first theory, “plain” possession, under the circumstances, required the application of a presumption as a substitute for direct proof of Mr. Roper’s possession of the weapon.

The second theory, possession of a defaced weapon, required the application of an additional presumption founded on the automobile presumption, as a substitute for direct proof of Mr. Roper’s knowledge of the defaced character of the weapon.

The third theory, possession with intent to use unlawfully against another, required the application of an additional presumption, founded on the automobile presumption, as a substitute for direct proof of Mr. Roper’s intent to use a weapon unlawfully against another.

[The Automobile Presumption – Enter the Ethereal World](#)

The defense believes that the Government initially entered the ethereal world of presumed facts by way of the so-called “automobile presumption”. [Penal Law 265.15\[3\]](#), provides: "[t]he presence in an automobile ... of any firearm ... is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon ... is found ..."

The use of a “permissive” presumption as a means of supplying the Government with proof of possession when there is no direct proof has been held to be Constitutional. The leading United States Supreme Court case is *Leary v. United States*. *Leary v. United States*, 395 US 6 (1969).

Attempting to reconcile the use of government created “presumptions” to help fill in the gaps in the Government’s ability to prosecute citizens in criminal cases clearly generates some uncomfortable issues.

The concept of the initial presumption of possession within an automobile is nevertheless a concept that is ripe for injustice in clear and obvious ways.

Innocent passengers in cars are at risk of being held accountable for guns in secret compartments of those cars. The innocent person can always go to trial and attempt to rebut this presumption, of course, but to pretend that the power of a judge reading a presumption to a jury is not a terrifying prospect to the innocent passenger of a car is to ignore reality.

One might well expect, for example, that in the United States, the only presumption to be employed in the context of a criminal case would be the presumption of innocence.

The dangers of permitting the Government to relieve citizens of their freedom by way of ethereal proof seem to be of concern to the courts, although in the end, within certain specific limits, this form of ethereal patching of the Government's ability to convict its citizens is held to be consistent with our Constitutions.

Nevertheless, to read the lengthy and detailed analysis of the United States Supreme Court in *Leary*, is to get the sense that it is rather begrudgingly permitted. It is almost as if the Supreme Court finds the concept acceptable, but "almost Unconstitutional".

The sense is that the Government seems to be tacking uncomfortably close to the wind in this world of ethereal proof. Great analytical pains are taken to justify the limited nature of the presumption and the care with which presumptions must be crafted in order to retain their "almost Unconstitutional" status.

Indeed, the United States Supreme Court, in *Leary* engaged in an exhaustive, monumental, almost unbelievable factual and legal analysis, citing legislative history, and conducting its own broad fact finding mission in order to ensure that the legislatively developed presumption was the sort of conclusion that could constitutionally be relied upon in a criminal courtroom.

The United States Supreme Court recognized that a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the fact presumed. Therefore, in scrutinizing the viability of a legislatively created presumption, the Court must determine, with substantial assurance, that the presumed fact is more likely than not to flow from the *proved fact upon which it is made to depend* (*Leary v. U.S.*, at pp. 33, 36, 89 S.Ct. at pp. 1546, 1548).

At the core of the Supreme Court's analysis of the legitimacy of a legislatively created presumption is a requirement that there be some fact proved upon which to base the presumption.

It is impossible to leave a review of that case without the impression that, while permitted individually under the right circumstances, presumptions in criminal cases are teetering at the edge of an unconstitutional abyss.

In the instant case, however, the Government was not satisfied with its plain old automobile presumption. The Government in this case sought further assistance from the ethereal world of presumptions in order to seek indictment on two additional weapons possession theories, one of which being substantially more serious than the "plain" weapons theory. And not only did the Government seek assistance from additional presumptions, the

Government asked the Grand Jurors to use the presumed fact from the first presumption as the foundation to justify the additional presumed facts.

Now, instead of teetering at the edge, the Government has leaped head-first **deep** into the unconstitutional abyss of “bootstrapped” presumptions. The Government abandoned the safety of the Supreme Court’s *Leary* decision and entered into a different realm. Under the protection of *Leary*, the Government was within its rights to charge the initial automobile presumption. The Government proved the two required facts to trigger the presumption:

- 1) The defendants were in the car, and
- 2) The guns were in the car.

But to move ahead and obtain the benefit of the additional presumptions based upon the first presumption, as opposed to requesting additional presumptions based upon directly proved facts, is to go beyond the protection afforded by the *Leary* analysis. The Supreme Court’s opinion suggests that the presumption must bear a rational relationship to the underlying fact proved, not an underlying fact proved, speculated about, or presumed.

[Let the Bootstrapping Begin...](#)

In two distinct instances (four if you count each gun), the Grand Jury was asked to employ an additional presumption founded not on some direct evidence, but instead founded on the conclusion authorized by the automobile presumption.

The two additional presumptions charged to the Grand Jury (the defense believes) were the “unlawful use” presumption and the “defaced” presumption.

According to the unlawful use presumption, a person who possesses a loaded firearm is presumed to intend to use the weapon unlawfully against another.

[Penal Law § 265.15\[4\]](#), provides:

“... [t]he possession by any person of any ... weapon ... is presumptive evidence of intent to use the same unlawfully against another.”

The Grand Jury was instructed that it was permitted to employ the “automobile presumption” in order to conclude that Stanley Roper possessed the guns in question. The Grand Jury was further informed that it could then presume that Mr. Roper’s “possession” was a fact upon which the Grand Jury could presume that he intended to use it unlawfully against another.

Put another way, the Grand Jury was informed that they could employ a presumption based on presumptive possession.

The Grand Jury was instructed also that it was permitted to presume that Mr. Roper knew that the guns in question were defaced based upon the already presumed fact of possession.

Penal Law Section 265.15(5) provides, “The possession by any person of a defaced machine-gun, firearm, rifle or shotgun is presumptive evidence that such person defaced the same.”

Once again, the Grand Jury was informed that they could employ a presumption founded on presumptive possession.

In 1988, a New York County Supreme Court Justice, in reviewing the element of actual knowledge with respect to the defacement of a weapon, analyzed it as follows:

The statutory **presumption** (that the mere possessor is the one who **defaced** the gun) is constitutional only if it is based upon a rational connection between the fact proved (that is, **possession** of a **defaced weapon**) and the ultimate fact to be presumed (the act of **defacement**) *Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777; *People v. Lemmons*, 40 N.Y.2d 505, 387 N.Y.S.2d 97, 354 N.E.2d 836. Unless there is evidence that the possessor actually knew the gun was defaced, there would be no rational basis for presuming he was the defacer. *People v. Velasquez*, 139 Misc.2d 822, 528 N.Y.S.2d 502 (RENA K. UVILLER, 1988)

If permissive presumptions in criminal cases based on objective directly proved facts are teetering on the brink of unconstitutionality, then it

would seem that presumptions founded on permissive presumptions in criminal cases have made the leap into the unconstitutional abyss.

New York Appellate Courts have not specifically wrestled with these strange “double presumption” entities, although a Brooklyn Supreme Court judge has specifically found the practice to be illegal. *People v. Dumas*, 156 Misc.2d 1025, 595 N.Y.S.2d 644 (Kings County Supreme Court, J. Miller, 1992)

The Brooklyn Court, in canvassing other jurisdictions who dealt with the issue, noted that the practice is nearly universally condemned in jurisdictions that have specifically dealt with the issue. Just a few examples of such condemnation follow:

In a case dating back to 1928, a Federal court in Kansas dismissed a case in which the proof amounted to multiple levels of presumptions founded one upon the other. *Brady v. United States*, 24 F2d 399 (CA8 Kan 1928).

The Arkansas Supreme Court in 1929 similarly held that it was not allowable to draw one inference from another. *Moran v. State*, 179 Ark 3, 13 SW2d 828 (1929).

Likewise the Kentucky Supreme Court held in 1943 in a case revolving around stolen chickens, that a fact upon which an inference is

based must be “clearly proved” and that if the existence of a fact depends on a previous inference, no subsequent inferences can be legitimately drawn from it. *Pengleton v. Commonwealth*, 294 Ky 484, 172 SW2d 52 (1943).

A strikingly similar issue that New York appellate courts, including the Court of Appeals have addressed is found in the law of circumstantial evidence. Circumstantial evidence is actually a kind of fluid presumption created on the fly by the fact finder based on the particular facts of a particular case.

In the world of circumstantial evidence, direct evidence is presented and the Government is permitted to ask the jurors to draw conclusions that will substitute as direct evidence of some inferred “circumstantial” fact that is sought to be proved.

Jurors are not permitted to draw circumstantial conclusions from other circumstantial conclusions. The courts have recognized the ethereal quality of circumstantial conclusions and are careful to ensure that jurors not engage in a wild series of speculations upon speculations in the context of a criminal case.

The New York State Court of Appeals settled long ago in 1865 that the stacking of one circumstantial inference upon another was like “the blind

leading the blind” and that its impropriety was so clear that the Court felt little explanation was necessary.

We have apparently lost our way from the certainty with which the Court of Appeals understood this issue back in 1865. *People v. Kennedy*, 32 N.Y. 141, 1865 WL 3950 (New York Court of Appeals, 1865) The analysis, then bears repeating:

But suppose the presumption that the prisoner did each of these acts was equally strong. The proof as to one could not tend to prove his criminality in regard to the other. We cannot presume that he burned the barn, because we presume that he attempted to burn the house. One presumption will not aid the other. The infirmity which attaches to the one, equally attaches to the other. The logic upon which circumstantial evidence is based, is this: We know, from our experience, that certain things are usual concomitants of each other. In seeking to establish the existence of one, where the direct proof is deficient or uncertain, we prove the certain existence of the co-relative fact, and thus establish with more or less certainty, according to the nature of the case, the reality of the principal fact. ***But the reasoning is a perfect fallacy, if the defect of proof which renders it necessary to call for the aid of the collateral circumstances equally attached to such collateral circumstance.*** It is like the blind leading the blind.

Supposing this to be **too plain to require further explanation...**

Id at page 145.

The Court of Appeals went on to hold that

circumstantial evidence ... consists in reasoning from facts which are known or proved, to establish such as are conjectured to exist; *but the process is fatally vicious if the circumstance from which we seek to deduce the conclusion depends itself upon conjecture*" [emphasis supplied];
Id., at page 141, 145-146.

The analysis applied by the Court of Appeals in *Kennedy* is virtually indistinguishable from the analysis equally applicable in the instant case.

No consistent reasonable means could justify permitting stacked

presumptions when stacked circumstantial presumptions are impermissible and have been held to be impermissible in no uncertain terms in a rule handed down by our Court of Appeals nearly 150 years ago.

Since a legislative presumption is really simply a Government-sponsored, ready-made, pre-analyzed universally applicable circumstantial inference, then there really is no logical or reasonable basis upon which to apply some special rule authorizing legislative presumptions stacked upon legislative presumptions. The same analysis applies and therefore, the result should be the same – no stacking of inference upon inference.

Therefore, the court ought to dismiss the counts of the indictment charging Criminal Possession of a Weapon in the Second Degree (unlawful use against another) and the counts of the indictment charging Criminal Possession of a Weapon in the Third Degree (subsection 3) (defaced weapon).

PART TWO

IF THE GOVERNMENT CHOSE NOT TO CHARGE THE GRAND JURY AS TO THE DEFACEMENT PRESUMPTION OR THE UNLAWFUL USE AGAINST ANOTHER PRESUMPTION, THEN THE DEFACEMENT COUNTS AND THE UNLAWFUL USE COUNTS OUGHT TO BE DISMISSED FOR LACK OF SUFFICIENT DIRECT EVIDENCE.

OR

“ACTING IN CONCERT” DOESN’T WORK EITHER

It is the defense belief that the Grand Jury heard no direct evidence of Mr. Roper’s knowledge of the defaced status of either gun.

Furthermore, it is the defense belief that the Grand Jury heard no direct evidence of Mr. Roper’s intent to use either gun unlawfully against another.

It is the defense belief that in both cases, the only “proof” offered to the Grand Jurors was by way of presumption founded upon a presumption.

Nevertheless, at the last Court date in TAP-A, the assistant district attorney stated on the record that it was his belief that only the one presumption was given to the members of the Grand Jury.

Later that day, however, defense counsel spoke informally with a supervisor in the District Attorney's Office who indicated that in fact he believed that the defaced and unlawful use presumptions **were given**.

Of course defense counsel is in the rather peculiar position of being obligated to advance legal arguments about the Grand Jury proceedings without being permitted access to the Grand Jury proceedings (a circumstance with which Lewis Carroll would no doubt have been greatly intrigued).

Therefore, on the odd chance that the Government chose not to charge any additional presumption aside from the "standard" automobile presumption, defense counsel must argue the case from both angles. This will also obviate the need for an additional round of motions had defense counsel not addressed the issue.

In the absence of the additional presumptions, there was no evidence before the Grand Jury as to Mr. Roper's intent to use any weapon unlawfully against another.

Likewise, in the absence of the additional presumptions, there was no evidence before the Grand Jury that Mr. Roper defaced either or both weapons, or that he knew that either or both weapons were defaced.

Therefore, in the absence of the presumptions, there was no “ethereal patch” for the lack of direct, objective evidence as to these critical issues in the Government’s presentation to the Grand Jury.

Two relevant cases, including one coincidentally bearing the same name as one of the defendants in the instant case (no relation), illustrate the fact that absent presumptions, the Government did not prove intent to use unlawfully against another or knowledge of defacement as to any of the two guns located in the car in question. *People v. Cummings*, 131 A.D.2d 865, 517 N.Y.S.2d 225 (2nd Department, 1987); *People v. Free*, 233 A.D.2d 463, 650 N.Y.S.2d 257 (2nd Department, 1996).

In *Cummings* the defendant had been convicted of possession of a weapon under circumstances in which the defendant was identified as being a passenger in a car from which shots were fired. The Government did not present actual evidence that the defendant possessed the weapon, but instead relied on a theory of acting in concert.

As the court noted, *the presumption did not apply* because no gun was ever recovered from the car. But the court went on to reject the Government’s theory that acting in concert would somehow justify the gun conviction (the Government apparently arguing that even if the defendant

had not been the one in possession of the gun, as a passenger in the car, he was acting in concert with the person who possessed the gun).

The Court noted, “The defendant was never seen with the gun and there was no evidence adduced to suggest that he had seen the weapon prior to its use, that he was aware of its existence, or that he knew, in advance, that someone in the car was in **possession** of the weapon.”

Therefore, a theory of acting in concert must be accompanied by some form of direct proof that someone specifically maintained the requisite intent. The Court explicitly rejected the concept that because “someone” “must” have harbored the requisite intent that acting in concert would relieve the Government of proving that intent. The Second Department seems to have rejected an attempt to expand the use yet another ethereal concept (acting in concert) as a substitute for direct proof.

The Court of Appeals specifically adopted the reasoning of Roper in reversing a case upheld on appeal and adopting the reasoning of the dissent. *People v. Yarrell*, 146 A.D.2d 819, 537 N.Y.S.2d 294, (2nd Department, 1989), Overruled by the Court of Appeals in favor of the dissenting opinion *People v. Yarrell*, 75 NY2d 828 (1980).

Therefore, in the absence of direct evidence as to Mr. Roper’s possession, use, or knowledge of the gun (prior to its use), the Government

in this case cannot rely on a theory of acting in concert (*with or without the use of a presumption*).

The other Second Department case that is important to consider in the event that the Government failed to charge any additional presumption aside from the automobile presumption is *People v. Free* (cited above).

In *Free*, the defendant was a passenger in a car in which a number of guns were recovered, including at least one defaced gun.

The Court charged the automobile presumption, but its charge with respect to the defaced gun apparently did not include any presumption with respect to knowledge of the gun's defaced status. That left the jury with the charge on defacement which requires proof with respect to the defendant's knowledge of the defaced status.

Relying on the automobile presumption to show possession, the Government offered no actual proof of the defendant's knowledge of the gun's defaced status.

Therefore, the Second Department held that the conviction for the defaced gun had to be reversed in the absence of

- 1) actual evidence of the defendant's knowledge of the gun's defaced status, or

- 2) a lawful presumption charge authorizing the jury to make the inference.

Therefore, in the event that the Government failed to charge any additional presumption beyond the automobile presumption, this Court, in reviewing the sufficiency of the Grand Jury minutes, ought to examine the Grand Jury record for direct evidence of the defendant's knowledge of the defaced character of the guns, and direct evidence of the defendant's intent to use either of the guns unlawfully against another.

Of course, the defense believes that no such direct evidence was presented to the Grand Jury (or indeed even exists). Therefore, the criminal possession of a weapon counts obtained under a theory of unlawful use against another and the criminal possession of a weapon counts obtained under a theory of knowledge of defacement ought to be dismissed.

PART THREE

Firing a Weapon into the Air is not Reckless Endangerment in the First Degree AND ACTING IN CONCERT STILL DOESN'T WORK

With respect to the reckless endangerment in the first degree count, the evidence before the Grand Jury is (or probably is) only that a gun was fired multiple times up in the air. There is no evidence whatsoever as to the purpose or intent (if any intelligible purpose or intent actually existed) of the person who fired the weapon.

There is no evidence that the shots were fired in the presence of or in the view of any particular person who was meant to be intimidated or feel threatened. There is no evidence of any sort of conflict between any one of the occupants of the tan Lexus and anyone around or in the vicinity of the tan Lexus. Officer Tripper himself, the eyewitness to the shooting, was off duty, not in uniform, and not in a marked police car.

Under such circumstances, where the only real allegations is that a gun is fired into the air, the law is that such an act, if it constitutes a crime at all cannot be reckless endangerment in the first degree, but instead (if any crime at all) only the lesser charge of reckless endangerment in the second

degree. *People v. Richardson*, 97 A.D.2d 693, 468 N.Y.S.2d 114 (First Department, 1983).

In *Richardson*, the defendant stood eight feet from the complaining witness and fired a gun into the air. *Id.* At 114. The Court in *Richardson* made it absolutely clear that such conduct did not create the requisite *grave risk of death*, required under a theory of reckless endangerment in the first degree. *Id.*

Therefore, absent testimony about firing a weapon any direction other than straight up, or how that imposed, in this particular case, a grave risk of death to a particular person, at least the felony charge of reckless endangerment in the first degree ought to be dismissed.

Furthermore, absent some sort of indication that the act of firing a weapon straight up caused a risk of serious physical injury to another person, the reckless endangerment lesser included ought be excluded from the indictment as well. In the case of a person firing a gun into the air, unlike the case of the person firing of a gun in the direction of a crowd of people, the manner of injury and the people likely to be injured are not obvious and ought to have been the subject of at least some evidence before the Grand Jury. Leaving the Grand Jurors to speculate on the possibility of bullets

striking the Fuji Blimp or an errant hang gliding enthusiast would seem inappropriate.

Therefore, unless the Grand Jury heard some specific evidence as to who might have been at risk for serious physical injury from bullets fired straight into the air, even the misdemeanor reckless endangerment count ought to be dismissed as having failed to have been sufficiently proved before the Grand Jury.

Furthermore, under the previously cited *Cummings* case, the evidence would not support a theory of reckless endangerment in any degree because there is no direct evidence of any specific person's reckless behavior. Just as in *Roper*, a passenger in a car from which gunfire came could not be legitimately convicted of acting in concert to commit a murder, so too a passenger in a car ought not be held accountable when the evidence is only that he was in the car and might (33%) have pulled the trigger.

The Court of Appeals specifically adopted the reasoning of *Cummings* in reversing a case upheld on appeal and adopting the reasoning of the dissent. *People v. Yarrell*, 146 A.D.2d 819, 537 N.Y.S.2d 294, (2nd Department, 1989), Overruled by the Court of Appeals in favor of the dissenting opinion *People v. Yarrell*, 75 NY2d 828 (1980).

No evidence or testimony, it is believed, was presented to the Grand Jury to suggest that the firing of the weapon advanced some community of purpose or that Mr. Roper shared some intent. Evidence of no mental state, reckless or otherwise, was likely presented to the members of the Grand Jury. In the absence of direct evidence of some behavior or intent of a specific person inside the car, it would be improper, even on a theory of acting in concert to find that sufficient evidence has been presented to establish reckless endangerment of any degree against Mr. Roper.

