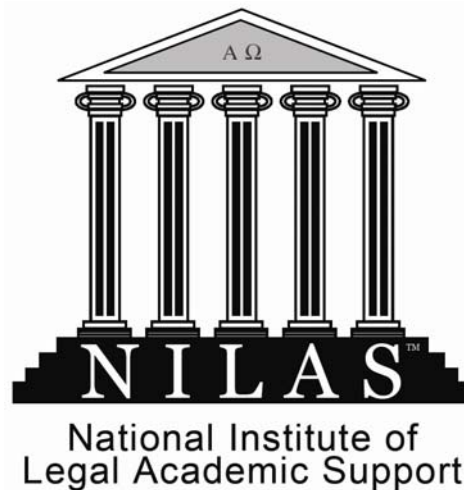


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## HOW TO BRIEF A CASE



### **BRIEFING, READING, NOTE-TAKING AND TIME MANAGEMENT FOR 1L'S**

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# BRIEFING and THE CASEBOOK METHOD

By Brian Herbert Wilson Jr. Esq. M.A. J.D.

## Case Briefing - The Cornerstone of Legal Education

What really is a “brief”? Many times, students have approached me with this question, in fear that the case brief will need to be turned in as part of the class assignments. In my classes, I actually do have students turn in briefs; I correct or critique them and give them back as a learning tool. This short article will help unlock some of the mystery surrounding the case brief. First, below you will be provided with a very clear definition of a brief, but in order to really appreciate the “what” aspect of the brief, you need to understand the “why”.

Part of the fundamentals of law school, you will have to read cases also known as case law. This may come as a surprise to you, but, the professor won’t exactly tell you the law, you will have to find it for yourself. The cases are used by professors as the building blocks of legal understanding. This practice began back at Harvard Law School with Professor Christopher Columbus Langdell back in the mid 1800’s. Langdell believed the typical legal pedagogy or method of “telling” a student what the law “is” was not as effective as a dialectic approach, that is to say, the case method could help the student understand better. So unlike undergraduate college, where a text book often told you what you needed to know, the Socratic Method used in law schools today will only give you a set of bread crumbs to follow, you will have to build what the law is for yourself.

Up until Langdell, the primary pedagogy stemmed from a combination of class time and on hands training. Great lawyers like Abraham Lincoln would have worked as an apprentice for a time to earn the right to practice law. But what made lawyer great was not the wrote memory of laws, rather the understanding of cases and how those cases were decided. In the modern legal education world, the core method of pedagogy builds on the case method. The typical class will assign a substantial number of cases to the student for them to read. Each case will have a major point to make regarding a piece of the legal puzzle on a particular area of law. For example, in Contract Law, you may have five to eight cases on what is an offer. You as the student will never be told exactly what an offer is; you will have to put it together from the cases.

To a better understanding, you have to brief the cases. While there are many methods, it is the *process* of briefing that is the real benefit. Briefs come in two general varieties, the **in-class** brief and the **legal brief**. The first is a tool to be used in

class to de-compress the cases, understand what is going on and find the law. The second is a persuasive paper written to the court taking a position or defining the law on a subject.

As a part of your law school preparation, it has been my experience that the better you are at briefing the better you will be at law in general. While, this paper deals with how to get ready for a law school class, many of my students have used this later for preparation for the MPJ too. This fundamental skill will easily apply to the work you will do as a lawyer writing briefs to a court. Let's look at the anatomy of a case you might read for class.

### **The Anatomy of a Case:**

In general, every case you will read will be an appellate decision or higher. Some of the cases will be published lower court decisions, but not usually. What this means is that the case has come before a higher court for a decision<sup>1</sup>.

#### **The Court**

Cases come in several varieties. First you must determine what court is speaking in the particular case.

#### **The Procedural Disposition**

The procedural disposition tells you how the case got to this particular court. In some cases it will be an appeal from a lower court or remanded to a lower court for the decision. The reason this is important is because it tells you how the case progressed through the court channels.

#### **Facts of the Case**

The facts of the case will tell you the underlying situation and why the circumstance raises a legal question. Sometimes facts of a case will be critical to the outcome of the decision other times, it will only be "supportive" concepts. When you read the case, look for facts that if changed would alter the outcome of the case. This type of fact is known as an operative fact. Defined, an operative fact is a fact that is essential to the case, one that if changed would alter the outcome of the case.

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<sup>1</sup> There are many courts, you will learn about the different level of courts as you go through law school. Typically, there are three "levels" of courts. A trial court is the lowest court and the basis court you go to in the beginning. An appeals court can hear an appeal from a lower court and can decide matters of law but generally won't try the "facts" again. A final appeals court or Supreme Court is the highest court in the land and typically will have final authority over the matter. The US Supreme Court is the highest court in the land and can rule on Federal Questions or the Constitutionality of an issue.

### Issue (s) of the Case

1. Brief the cases, it's what lawyers do – Practicing lawyers understand the need to brief their cases before trial and during research. There is no substitute.

Each case you will read will have a legal issue or issues that the court has to grapple with. The facts of the case as noted above will give rise to certain legal issues. At first you will not understand those facts that give rise to a legal question, but in time you will become very efficient at finding these.

Issues come in several different varieties, some will be questions of fact others will be questions of law. However, these issues may not be clearly spelled out. You will have to learn to dig for them.

### Analysis by the Court

In some cases, the court is giving you a legal analysis. This will be a thorough weighing of the facts to the prevailing law. Watch for the rule here. Sometimes, the court will actually tell you the rule that has been applied.




### The Speed Brief

Years ago, as a tutor, I developed a method to help first year students read through a case and get more from it. I call it the "Speed Brief". Really, the only thing that is speedy about this is that you don't have to go back and re-read the material just before class. This is huge in the life of a first year law student.

The method:

1. Read your case using an active rather than a passive approach. This may seem like a simple statement to make, but this can really make the difference. Begin by making a simple card or sheet for the case you are going to read.

Try this: Format your brief (for in-class use) into 7 topical areas:

-  Case name, location and venue
-  Headliner, a quick sentence describing the case
-  Procedural Facts, how the case came to this court

- ✎ Facts of the case that help you understand what happened or have legal effect
- ✎ Issue (s) that the court is working out
- ✎ Analysis of the facts to the law
- ✎ Ruling, holdings and disposition of the case

What makes this approach active rather than passive is that you MUST take notes that help trigger the information that you are reading. As you read the case, make your marginal notes and develop the case with your brief in mind. Better still, you should follow the speed brief template included with this article.

2. As you read, look for trigger words that will help to focus your understanding. A trigger word is a word the court will use to tell the reader that something important is about to be said.

- a. Under the case.....
- b. The court in (blank) case found....
- c. The restatement says.....
- d. We find that.....
- e. There is a three part “test”.....

All these phrases focus the reader on some area of law that will be important.

Another key to look for stems from the difference between important and not so important facts. We call these operative facts. A fact is operative if that bit of information is so important that if changed, it would alter the outcome of the case. For example, whether the car is red or blue may not matter in a claim for property damage, but could be very important if this is a criminal trial for hit and run.

3. Develop the speed brief fill in the blanks to the best of your ability, and then take the sheet to class with you.

After you have read the case ONCE, and developed a speed brief, you will be able to discuss the case in class if needed. As an illustration, there are hundreds of cases that I briefed as first year using this exact same method that I can recall just by reading the headliner.

To create a great brief, takes time, so practice.

**REMEMBER -**

- READ the CASE ONLY ONCE
- READ ACTIVELY by Taking NOTE in the SPEED BRIEF
- LOOK for the RULE of LAW (known as black letter law)
- TAKE YOUR NOTES from CLASS ON THE SPEED BRIEF

Below, you will find a sample case, while fictitious; we give you a sample brief of the case to demonstrate how you might want to brief this case. Then we give you a speed brief of the same case to demonstrate the difference.

The final word on briefing

Take the time to make your own briefs of the case material. Do it through all law school. As an educator, I have been personally involved with many top of the class students. Each of these top performers briefed their cases and was ready for class. You too will be ready if you follow the maxim below:

**The difference between A students and the rest of the class is that while most students “think” they know what is going on in class, the A students briefed the cases and really do know what is going on in class!**

Sample Case ( **Fictional** )

**GALE v. PEOPLE OF KANSAS**  
**SUPREME COURT OF KANSAS, 1952**  
991 P. 2<sup>nd</sup> 445, (1952) KS, S.Ct

J.Melroy-

Plaintiff Dorothy Gale the original Defendant, brings this action in response to the Trial Court and Appellate Courts decision for the People of Kansas. At Trial, the Defendant was convicted of murder under a statute making it a crime to cause the death of another my any means, in which the actor was grossly negligent or acted in a grossly negligent manner that is the cause of death through the reckless disregard for human life.

The facts of this case are largely undisputed and tried with a variety of witnesses and evidence in support of the facts, that, Ms. Gale on or about the date and time in question took a bucket of water and splashed it upon the victim, one Mrs. Gazelda Crump, also known as, “The Wicked Witch of the West”. During the encounter, it was established at the Trial level, that on that evening, the Defendant Ms. Gale having arrived in her red ruby slippers at the residence of Mrs. Crump, a large castle in a very large mystical forest somewhere in the “land of Oz” broke into the castle, encountered Mrs. Crump, and after a brief discussion threw a bucket of water onto the victim, melting her.

The Defendant Gale also had three accomplices with her that were tried separately and found guilty of conspiracy to commit murder.

At the trial court, the captain of the guard testified that the Defendant picked p the bucket of water and intentionally threw the water in the direction of Mrs. Crump killing her instantly. As noted in the Trial notes, no body was recovered, and therefore no DNA testing or autopsy was available. The Defendant then fled the scene with her accomplices and left in a hot air balloon with her dog Toto.

The Defendant argued at trial that she lacked the appropriate mental state that being the depraved heart needed to be found guilty of murder. The Defendant also argued that a mistake of fact exists, and that Ms. Crump was not in fact human, and that the Kansas statute requires that the victim be a human. However, the Defendant did not raise the affirmative defense of self-defense at the opening of trial, and when counsel attempted to raise the defense during direct, the Prosecution objected and the Trial judge sustained the objection. However, on cross-examination, the Defendant again attempted to raise the self-defense argument, and no objection was sustained.

The Prosecution argued in this case that the Kansas Well Pled Complaint rule governs in cases of affirmative defense, that if a defense is not raised at arraignment, the Defendant is barred from such relief. Defense requested that jury instructions of self-defense should be included in cases involving capitol murder and that in any case, the Kansas Well Pled Complaint rule did not apply in criminal proceedings.

The question for this court is two-fold, first, whether the Kansas Well Pled Complaint rule governs criminal cases and second, whether jury instructions of self-defense should have been granted automatically in cases involving capitol murder.

First, the Well Pled Complaint rule, both the Kansas Rules of Civil Procedure and the Federal Rules of Civil Procedure provide for a Well Pled Complaint, that is, when either a complaint or answer is filed that the pleading be complete and without any missing causes of action or possible defenses. Under this rule, the respondent to a complaint must respond with all affirmative defenses available to the defendant to an action. The rule is intended to stop defendants from raising defenses not anticipated by the plaintiff and thereby create an advantage during the litigation.

In the present case however, it is a criminal proceeding governed by the Kansas Rules of Criminal Procedure and the Constitution of the United States. The Well Pled Complaint rule does not apply to criminal cases. The natural and obvious rule of law founded in the Common Law doctrine is one of reasonable defenses, and that, the very notion of being tried by a jury of one's peers should not exclude any and all possible defenses reasonably calculated to offer the finder of fact any reasonable doubt that may have been raised during examination or production of evidence. Since the jury was not given the option of self-defense acquittal, we rule that the trial court erred in applying a civil rule to a criminal case.

Second, the policy concerning jury instructions in capitol murder cases has never been tested in this court. The lower court adopted the rule based on a strict construction of the statute and a liberal interpretation of the policy underlying the rule. Judges as a matter of course have wide discretion to include evidence reasonably and rationally based in fact or of the type that would be helpful to the finder of fact and to exclude any irrelevant evidence that may tend to prejudice the jury. In the present case, the question of jury instructions should accompany any charge where the potential for reasonable doubt has been raised by either; (1) the development of the reasonable belief standard or (2) the amount of force used was reasonable given the circumstances.

Furthermore, the Kansas Penal Code § 3.05 states, “ under this rule, a defendant may be legally justified in killing to defend another, even if the intervenor acted under a mistaken belief as to who is at fault, provided their belief was reasonable”.

When circumstances present themselves, as they did in this case, some facts lend themselves to the obvious use of defenses. As a matter of public policy, the courts in Kansas should adopt the jury instructions appropriate to any defense reasonably foreseeable or that would arise out of a natural consequence of the facts presented.

This court holds that the facts of this case support a self-defense potential, and send this case back to the trial court for a re-trial not inconsistent with this opinion.

J.Mcroy

Section  
2

## Briefing

Criminal Law Defenses to Homicide or Murder with Malice

Case- Gale v. People, 1952, Kansas S.Ct. Judge McIroy

**Headliner-** Young lady finds herself in a surreal setting only to commit a homicide with three odd characters.

**Procedural Facts:** P, People of Kansas won at both TC and AC. Now D, Gale Appeals to K. S.Ct., on two issues.

**Facts:** Dorothy Gale was brought up on charges of Murder in the first degree for the malicious killing of the Wicked Witch of the East. At TC the stipulated facts included that D. Gale intended to splash the water bucket on the Scarecrow, but instead splashed the water onto the Wicked Witch killing her.

The defense did not raise the affirmative defense of self defense at trial, so the judge at the trial court did not properly instruct the jury that if it found that Ms. Gale did not act either 1. With the requisite intent to commit the crime or 2. In fact, acted out of self defense or defense of others, it should acquit.

**Issue 1:** When Dorothy Gale, threw the bucket of water onto the Wicked Witch of the West, did she act out of self defense or the defense of others?

**Issue 2:** When the judge at the trial court level failed to instruct the jury to acquit if it found that Dorothy acted in self defense was this an error such that Dorothy should be granted a new trial?

Generally, it is a well settled rule of law, that a defense to the common law crime of murder with malice, depraved heart murder or murder by reckless behavior can be met with the affirmative defense of self defense.

The S.Ct. holds, that in cases where the defense of self defense is so obvious, that a normal juror would have been able to distinguish between the merits of the case, it should have been so properly instructed. Court finds that here, since the D, was not given the proper opportunity of self defense instructions, the lower court should re-try the case.

**Conclusion:**

New Trial for Dorothy with proper jury instructions.

**Comment [A1]:** The subject area is nice but not essential, a date the brief was written can also be helpful

**Comment [A2]:** This heading helps the reader to know the subject area

**Comment [A3]:** The headliner can be fun, use your imagination

**Comment [A4]:** Procedural Facts must be short and to the point

**Comment [A5]:** Don't get too long, keep the facts to the point, use the ABC's of writing an issue statement

**Comment [A6]:** Issue Statements should be asked in a Yes or No format.

**Comment [A7]:** The Holding is the functional decision on the facts of the case at hand but may not be the ruling or rule of law used.

Figure 1

**Case Name**

Gale v. People of the State of Kansas, Kansas S.Ct. 1952

**Headliner**

Young lady finds herself in a surreal setting only to commit homicide with three odd characters

**Procedural**

P won at TC and on Appeal. Now, D Gale is appealing to S.Ct. on two issues.

**Facts of the Case**

D Gale went to the castle of the victim during the nighttime and apparently threw a bucket of water on the victim killing her. D was found guilty of depraved heart murder for recklessly killing another person. A question of whether the victim was human was raised, plus whether or not the D had a defense of self defense.

**Issue (s)**

1. When the judge failed to give the proper jury instructions concerning the use of self-defense was it an error on his part, so that the D Gale should be given a new trial? Yes for D—Court should have included.
2. Did the D Gale fail to raise an affirmative defense and thereby forfeit her right to raise the defense during trial? Yes for D she gets a new Trial.

**Analysis**

The court considered both issues above and found that the TC had erred by not considering the proper jury instructions. Here, the court should have included any reasonable defense that could have helped the finder of fact conclude there was a doubt. The court also found that as a matter of policy, the court should include any jury instructions reasonable considering the facts of the case.

**Ruling, Holdings and Disposition**

Court held that the facts did support a reasonable connection between the facts and the possible defense, and that jury instructions should have been included.

The Court ruled, that a new trial should be granted, and that the Well plead complaint rule did not apply in Criminal cases, since it was a civil rule. The Court erred in not allowing the testimony or evidence.

New Trial for D

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Case Name
Headliner
Procedural
Facts of the Case
Issue (s)
Analysis
Ruling, Holdings and Disposition

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## Note-Taking

A quick word on notes in class

Now that you have a speed brief, when you go to class, take your notes on your speed brief. This will save you time later when you begin to create study rubrics for testing. We have learned that understanding the case material is essential to good writing skills.

One way to take notes with the speed brief is to use loose leaf note book paper and a three ring binder for your notes. Even though many of the law schools today require laptops, there is no rule against paper! We have learned that you need to have a written companion for your laptop.

If you MUST use the laptop, you may want to consider putting your speed brief into a template and creating an active notebook online or in the computer.

## Time Management

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<sup>i</sup> The dialectic approach or the dialogue approach is more commonly known as the Socratic Method. Coined as such because of the discussion based education used in the Classical Greek world, the assumption being that if everyone in the class is at the same level of “understanding” of a subject, a comprehensive dialogue could increase the overall understanding of the subject material.