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ISSUES TO DEVELOP AT TRIAL

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This month we bring to your attention a speedy trial decision from the Court of Appeals. We appellate types have long been imploring our trial brethren and sistren to file replies on their 30.30 motions in order to preserve the issue for appeal. This appeared to be what People v. Beasley, 16 N.Y.3d 289 (2011) required, and certainly what the Appellate Divisions were holding.

While trial counsel should still do replies, a recent, unanimous Court of Appeals case, ***People v. Dru Allard*** *(Oct. 20, 2016), makes clear that a defendant who brings a 30.30 motion is entitled to a hearing unless the prosecution presents "unquestionable documentary proof" that "conclusively refute[s]" the defendant's motion. Trial counsel should incorporate this decision into their practice and use it to insist on a pretrial 30.30 hearing when such a motion is brought. However, as the decision also makes clear, failure to do a reply, while not always fatal (as in the past) may still jeopardize your client's rights. Certainly, it may be seized upon by the lower courts as a reason to deny your motion, notwithstanding Allard.*

The Law: In Allard, the Court clarified that speedy trial motions are governed by the same procedural protocols governing all motions to dismiss under C.P.L. § 210.45: "CPL 210.45 furnishes the general procedure application to *all* motions to dismiss an indictment — including, among others motions based on defective grand jury proceedings, untimely prosecutions, a defendant's immunity, and CPL 30.30 grounds (CPL 210.20[1])." Allard (emphasis in original).

As such, there is no special "reply" requirement in order to preserve a speedy trial claim. Instead, "pursuant to CPL 30.30, unless the People's opposition "conclusively refute[s]" defendant's motion "by unquestionable documentary proof," Supreme Court can not deny the motion without conducting a hearing. See Allard (citing CPL 210.20[1]). To the extent the Court's prior decision in Beasley had been interpreted otherwise, that was not what Beasley meant.

Allard explained that at the 30.30 hearing, the defendant may raise his or her specific challenges to the People's claimed exclusions, and that will adequately bring them to the court's attention at a time when it could avert reversible error, thus fulfilling the purposes of preservation.

However, the Court cautioned that "**a defendant would be well-advised to raise any 30.30 arguments in a reply so as to ensure their preservation."** Allard. As the Court pointed out, if the defendant mistakenly believes the People failed to conclusively refute his motion and therefore doesn't reply, the defendant risks summary denial of his motion, leaving him with "an unsuccessful and unpreserved claim." However, the Court stressed, a defendant's failure to reply will not be fatal when the defendant properly requests and receives a hearing, and then raises and

develops his arguments at that hearing.

Practical Application: Trial lawyers should immediately incorporate Allard into their practice. Here are some tips for doing so:

- **In your initial motion, state that you are entitled to a pre-trial hearing under Allard and CPL § 210.45(5)(c).** [Note that if you go the extra mile and attach unquestionable documentary proof that conclusively substantiates your position, you will be entitled to a summary grant of the motion! CPL § 210.45(4)(c)]. State your intention to challenge any proof the prosecution puts forth at such hearing.

- **BEST PRACTICE**: Once the prosecution responds, **DO A REPLY** to challenge the prosecution's proof or the legal argument they make from the proof, if possible, and/or to set forth that there are still disputed periods that the prosecution has not conclusively refuted. Do a reply even if the prosecution has not come forward with "unquestionable documentary proof " (such as minutes). At worst, you will have submitted something not strictly necessary to getting a hearing under Allard. However, **if you fail to do a reply, you then risk summary denial if the court believes the prosecution has met its burden or does not apply Allard correctly.**

Bottom line: Although Allard places the burden squarely on the prosecution in the first instance and eases the way to getting a hearing, a failure to reply may still prejudice your client and expose you to an IAC claim, if you could have challenged the prosecution's proof and your motion would otherwise have succeeded on the merits. So insist on your right to a hearing under Allard, and then do a reply anyway.

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