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ISSUES TO DEVELOP AT TRIAL

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Welcome to the first in an ongoing series of memos intended to share with our trial counsel brethren both emerging and long-open issues that we believe are ripe for further litigation. We don't want to deluge you, so each month or so, we'll shoot you a couple of issues to keep in mind. A regular feature will also be a "General Reminders" section referencing a few commonly arising preservation points.

This month's selected issues both relate to flaws in certain CJI instructions — one with respect to affirmative defenses, and the other with respect to constructive possession.

- **Request the court to charge the jury that it must reject an affirmative defense unanimously before finding a defendant guilty. The CJI currently does not contain this unanimity requirement with respect to any of the affirmative defenses.**

The issue: As you know, New York requires a unanimous finding of guilt. (This is not a federal constitutional requirement, but is true by common law in New York State.) It follows that if the jury has not unanimously rejected an affirmative defense, any verdict of guilty would be defective, as it would not reflect a unanimous finding of guilt by the jury. E.g. If one juror found EED, even if the rest didn't, then there would not have been a unanimous finding of guilt of murder. If one juror found entrapment or duress, even if the rest didn't, then there wasn't a unanimous finding that the defendant was guilty of the crime.

Preserving the issue: When the court charges an affirmative defense, request the court to charge the jury that it can only find the defendant guilty if it unanimously agrees that the defense has not met its burden of proof on the defense. If not all jurors agree, then it should report a deadlock. Cite the New York requirement of unanimity as well as the 14th Amendment's requirement for the People to prove the defendant guilty b/r/d. If even one juror finds the affirmative defense, then not all the jurors have found the defendant guilty.

Relatedly, if the jury returns a guilty verdict where an affirmative defense has been charged, you should request the court to **poll the jury on the affirmative defense**. If a juror reports that he or she did not reject the defense, then do not accept the verdict.

If the court refuses your requests, you will have made a great record for appeal.

Relevant cases: People v. DeCillis, 14 N.Y.2d 203, 205 (1964)(While there is no express state constitutional provision requiring a unanimous verdict in a criminal case, it is undisputed that a "jury verdict in a criminal case must be unanimous"); see People v. Sea, 49 N.Y.2d 1032 (1980)(CPL §310.80's requirement that jury be polled is to assure unanimous verdict); CPL §310.60 (where unanimity is lacking, a mistrial must be declared); People v. Harris, 98 N.Y.2d 452, 494 n.20 (2002)(Court assumed unanimity was required in jury's rejection of EED defense,

neither party having disagreed in their briefing; cites to Donnino practice commentary stating that it's an "open issue"); United States v. Southwell, 432 F.3d 1050, 1055 (9th Cir. 2005)(Kozinski, J.)(holding that a jury must unanimously reject the insanity defense before it can find the defendant guilty: "a jury united as to guilt but divided as to an affirmative defense (such as insanity) is a hung jury.").

- **In a constructive possession case, request the court to charge that the People must prove not only that the defendant has the ability to control the contraband and the area in which it is found (per the CJI) but also that he must have the intent to control. The CJI does not presently include the intent requirement.**

The issue: In People v. Wesley, 73 N.Y.2d 351, 361-62 (1989), the Court of Appeals required both ability and intent as elements of constructive possession. In distinguishing the automobile presumption from constructive possession, the Court stated with regard to the latter that the prosecution bears "the substantial burden of establishing defendant's ability and intent to exercise dominion or control over the contraband." Three years later, the Court decided People v. Manini, 79 N.Y.2d 561, 573 (1992), and essentially dropped the element of intent, referencing instead the requirement for the People to prove that "the defendant exercised 'dominion or control' over the property by a sufficient level of control over the area in which the contraband is found or over the person from whom the contraband is seized." The issue of intent could be very important in a joint possession case where your client may have tolerated the co-habitant/possessor's contraband but did not necessarily intend to possess it.

The CJI charge for Possession: Physical and Constructive, adopts Manini's language. In 2010, in People v. Diaz, 15 N.Y.3d 764 (2010), the Court of Appeals found the evidence sufficient to establish the defendant's dominion and control over, and knowledge of, drugs secreted in a hidden compartment in the car he was driving but which was registered to someone else. The Court did not expressly discuss an intent requirement, although the dissent below had focused on that. See People v. Diaz, 68 A.D.3d 642, 647-48 (1st Dep't 2009).

Every Federal Circuit except for the 10th either includes the intent element in its pattern jury instructions or has found that a court's failure to charge both ability and intent is reversible error. The Appellate Divisions have reached inconsistent and conflicting decisions.

Preserving the issue: Request the court to charge both ability and intent, citing Wesley. Argue that refusing to so charge diminishes the People's burden of proof under the 14th Amendment.

Relevant authority: Representative federal authority: 1A Federal Jury Practice and Instructions § 16.05 (6th ed.)(“a person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it”); United States v. Hastings, 918 F.2d 369, 371 (2d Cir. 1990)(“The district court erred in not requiring power and intention to control the firearm as elements of ‘constructive’ possession.”)(emphasis in original); People v. Huertas, 32 A.D.3d 795 (1st Dep't 2006)(a defendant's mere knowledge of the presence of marijuana, without proof that he had the 'ability and intent to exercise dominion and control over the contraband' is insufficient to establish constructive possession (quoting Wesley).

General Reminders:

- When you move to dismiss at the close of the People’s case, **specifically cite the element or elements that the People have failed to establish by sufficient proof.** A general motion to dismiss for failure to make out a prima facie case does not preserve a sufficiency issue for appeal.
- If you are litigating a 30.30 issue, **you must do a reply to preserve any issue as to a contested period.**
- If you’ve unsuccessfully challenged any prospective juror for cause, then, barring a strategic reason for not doing so, **exhaust your peremptories**, or the denied cause challenge will not be preserved for appeal;
- Also on the subject of jury selection, if you are litigating a *Batson* challenge against the prosecution, remember the “third step” — challenge the prosecution’s race or gender neutral reasons as pretextual by showing (1) that similarly situated jurors of a different race or gender were not challenged. Use the information you’ve culled about prospective jurors from that round or prior rounds; or (2) that the challenged juror would be expected to favor law enforcement (e.g. was a crime victim, has law enforcement ties, gave prosecution-friendly answers).