CENTER FOR APPELLATE LITIGATION

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ISSUES TO DEVELOP AT TRIAL

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This month's issue addresses a common frustration: you present your summation in the blind, having to anticipate the prosecution's arguments, rather than being able to respond with direct hits. This strikes us unfair. You, representing an individual facing conviction and loss of liberty, should have the chance to respond — particularly when the prosecution deviates from their opening statement and suggests a different theory of guilt before the jury. Other states and the feds would agree as New York is something of an outlier in the ordering of summations.

While statutory law (CPL 260.30) controls the order - you first, then the prosecutor - we believe, as set forth below, that there is a constitutional basis to argue for a chance to respond to the prosecution's arguments, and that the court has the discretion to allow this.

Being realists, we don't expect trial courts to be receptive. But we do encourage you to plant the seed to allow for further litigation on appeal.

While we think the right to rebut should be available in all circumstances, you will have the strongest argument for rebuttal if you can point to new matters the prosecution raises in summation. This might happen, for example, if the prosecution posited a particular cause of death in opening, but then expands the cause of death to include a different or alternative cause after all the evidence comes out, or if the prosecutor switches from a guilt-as-principal to accessorial liability theory of guilt in summation. (This newsletter does not address any independent objections you might have in those events). The court may be more willing to exercise its discretion to allow rebuttal if you can identify such a new line of argument, or specific points you want to respond to.

Also included with this newsletter is a special appeal from CAL for your help, and a Practice Alert concerning a recent win in the Court of Appeals in People v. Rouse. So please read on!

The Law

Herring v. New York, 422 U.S. 853 (1975) established defendants' constitutional right to make a closing argument, holding that such a right inheres in the Sixth Amendment right to counsel. The Supreme Court acknowledged the critical role summations play in mounting a defense, noting that closing is "a basic element of the adversary factfinding process in a criminal trial." Id. at 858.

In New York, CPL § 260.30 expressly delineates this right, providing:

> The order of the jury trial, in general, is as follows:
>
> * * *

8. At the conclusion of the evidence, the defendant may deliver a summation to the jury.
9. The people may then deliver a summation to the jury.

Although CPL § 260.30 does not expressly provide for a right of rebuttal in summation, it does not expressly preclude the opportunity either. We suggest these arguments in support of your application:

- Right to counsel: Herring contemplates the right to an "*effective* closing argument," People v. Reina, 94 A.D.2d 727 (2d Dep't 1983) (emphasis added)("The right of the defense to make an effective closing argument is substantially impaired when counsel is unjustifiably limited . . . ."). Closing argument cannot fully serve its purpose of "sharpening and clarifying the issues for resolution," Herring, 422 U.S. at 862, if you're unable to respond to the prosecution's claims. If the prosecutor has raised new arguments, denying you rebuttal "unjustifiably limit[s]" your ability to effectively close.

- Due process: The presumption of innocence and your client's right to be heard in full support a right of rebuttal. Closing argument is "the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." Herring, 422 U.S. at 862. Your client should have every opportunity to defend his innocence in order to ensure the burden of proof remains with the People.

- Allowing rebuttal is consistent with fairness and justice. In federal court, where the prosecutor closes first, the Advisory Committee has explained that the "fair and effective administration of justice is best served *if the defendant knows the arguments actually made by the prosecution in behalf of his conviction* before the defendant is faced with the decision whether to reply and what to reply." In New York, where the defense goes first in New York, this interest can be served by allowing rebuttal.

- The prevailing practice in a majority of jurisdictions is to afford the defense the opportunity for reply following the People's initial argument.

The prosecutor and/or court might point to the fact that § 260.30 does not provide for any rebuttal in summation, while, in contrast, the statute does provide for rebuttal during the trial portion, see 260.30(7). This, they would argue, reflects that the legislature did not contemplate a right of rebuttal.

You can argue in response the law affords trial courts **substantial discretion** over the ordering of proceedings, up to the time the case is submitted to the jury. See People v. Terry, 309 A.D.2d 973, 973-74 (2d Dep't 2003) ("the order of a criminal trial, fixed by statute, is not a rigid one and the common-law power of the trial court to alter the order of proof in its discretion and in the furtherance of justice remains").
Note that C.P.L. § 260.30 itself states that "The order of a jury trial, in general, is as follows: . . . ." (emphasis added), suggesting the discretion trial courts retain to do things differently. Argue that this discretion includes allowing the defense to rebut the prosecution's summation.

Again, your position will likely be strongest if the prosecutor has raised new arguments, or you are able to identify certain specific points made by the prosecutor that necessitate reply.

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A special appeal from CAL:

Dear Friend:

We hope you will consider donating to CAL's fundraiser in support of our incredible Books Beyond Bars program. Our office founded BBB in 2016 to provide reading materials to indigent incarcerated individuals and to advocate for policies that support prisoners' access to information. BBB's goal is to encourage literacy, education, self-empowerment, personal growth, and to provide a brief escape from the dehumanization of the criminal justice system.

*Since its inception, BBB has sent **thousands of books and magazines** to indigent individuals in New York jails and prisons. Initially a program limited to CAL's clients, BBB now sends reading materials to the clients of other major public defense offices and to unrepresented incarcerated individuals across New York State.*

Here is the link to our donation site, where you can watch a video about BBB and read letters from BBB clients. We hope you'll learn more about the program, make a (tax-deductible) donation, and share with others. By doing so, you'll be contributing directly to the enrichment and well-being of some of society's most marginalized individuals.

With our deepest gratitude and happy holiday wishes,
CAL

PRACTICE ALERT

In People v. Rouse (decided November 25, 2019), the Court of Appeals reaffirmed your right to cross-examine cops with specific allegations of misconduct (such as those contained in federal civil rights lawsuits) and also held that prior judicial determinations that a cop was dishonest (e.g., a finding that a cop's testimony was incredible) is also proper fodder for cross-examination (subject to the usual showings of good faith and relevance, and the court's balancing of probative value versus prejudicial impact).

With this decision,

- The prosecution is required (as with civil suit allegations) to disclose judicial determinations of dishonesty that they know about. See People v. Garrett, 23 N.Y.3d 878 (2014). We believe Rouse requires the prosecution to disclose *any* determinations of wrongdoing they know about (CCRB, internal police discipline).

- Make sure to frame your *Brady* disclosure demands to include any judicial determinations involving the police officers, as well as CCRB findings, departmental disciplinary findings, etc.

- Do your own research. Legal research platforms should turn up any published decisions where a police officer has been found incredible/unreliable/unworthy of belief.

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