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ISSUES TO DEVELOP AT TRIAL

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This month's newsletter proposes a constitutional and statutory challenge to CPL § 350.10(3)(c) if the court tells you its waiving summations in a nonjury trial on an information. CPL § 350.10(3)(c) gives courts the discretion to deny you the opportunity to sum up in a local criminal court bench trial.

The Law:

In People v. Harris, __ N.Y.3d__ (June 26, 2018), the Court of Appeals reversed where counsel was not permitted to sum up, because the defendant, on trial for a B misdemeanor, ended up with 90 days in jail, thus triggering the Sixth Amendment right to counsel. The Court described Herring v. New York, 422 U.S. 853 (1975), which guarantees the right to summation, as (so far) applicable only to trials on indictments, even though the Herring ruling was not so limited. In a footnote the Harris Court expressly left open the "unpreserved" questions of whether CPL 350.10 violates Herring where the defendant eventually received no jail time, or whether the court's action violated CPL 170.10, which provides for the right to counsel in the local criminal court.

The notion that a defendant's right to summation is limited only to situations where the defendant faces jail time is simply wrong. The right to summation is a corollary of the right to the assistance counsel. See Herring. **New York statutory law guarantees the right to counsel in ALL offenses – even violations (aka "petty offenses, CPL § 1.20(39)) — except for traffic infractions.** See C.P.L. § 170.10(3) (c); People v. Ross, 67 N.Y.2d 321 (1986); People v. Farinaro, 36 N.Y.2d 283 (1975).

If a defendant has the right to counsel's assistance, s/he also has the right to have counsel make a closing argument on his/her behalf. See Herring.

(FYI: A 1978 Appellate Term, Second Department case appears to the source for the mistaken idea that a defendant charged with something other than a traffic infraction might not be entitled to counsel. In People v. London, 98 Misc.2d 298 (App. Term 2nd Dep't 1978), the court wrongly lumped together traffic offenses and other "petty offense cases which do not entail a 'real likelihood' or a 'practical possibility' of incarceration" as not requiring "adherence to exacting standards." As noted, this is wrong, as New York guarantees the right to counsel on a violation. Note too that most violations do carry the possibility of jail time.)

Practice Tips:

Harris invites a direct challenge by the defense bar to the absurd position that because no jail time may be involved, the defendant is not entitled to closing argument — what the Supreme Court described in Herring as "a basic element of the adversary factfinding process," and, as

such, an important aspect of the right of assistance of counsel. 422 U.S. at 858. Should the court tell you that it doesn't need or want closing arguments, or is waiving summations in your client's criminal court bench trial:

- **Object that your client's statutory right to the assistance of counsel on any offense except for a traffic offense entitles him to closing argument as a basic ingredient of counsel's assistance. Cite CPL § 170.10 (3) and Herring.** Argue to the judge that, in our adversarial system, the closing argument presents counsel the most salient opportunity to advocate on behalf of the client. Other than at opening, nowhere else in the trial does counsel have the ability to clearly lay out the client's defense and characterize the circumstances more fully in light of the testimony and evidence presented during trial. Denying you that opportunity interferes with your client's right to counsel and effective assistance of counsel

- **Explain that belittling the costs of a conviction that may not include a jail sentence ignores the potentially devastating consequences your clients may face if found guilty of even so-called "petty" offenses.** Consider these arguments:

    - *Collateral consequences.* Make it clear that even a conviction without a jail sentence can have drastic effects on your client's ability to retain and gain employment; eligibility for public housing, public assistance, and even federal student loans; parental rights and child custody; future sentence enhancement and/or parole or probation revocation; potential immigration consequences; etc.

    - *Procedural justice.* Regardless of our clients' level of understanding of the adjudicatory process, they likely have some gut instincts as to what is considered fair. They expect, or at least hope, that their counsel will take every opportunity to put forth their best defense, including at the close of trial. The opportunity to give a closing argument directly speaks to the perceptions of representativeness and impartiality of the system—that counsel is adequately speaking on behalf of the client and that the judge is open to hearing the entirety of the client's defense.

These consequences and rationales come into play whether or not a client faces jail time. Given the proliferation of collateral consequences, the line between what constitutes a serious or petty crime has become so blurred as to make the current criteria for determining a client's rights nearly unworkable. To afford your clients the basic constitutional right of effective counsel and zealous advocacy to which they are entitled, the right to summation must be granted in criminal nonjury trials, regardless of the risk of incarceration.

> General reminder:
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> - Never rely on an objection, motion, or request made only by a co-defendant's attorney. It will not preserve an issue for your client.

see prior issues at:
https://www.appellate-litigation.org/issues-to-develop-at-trial

also check out our Court of Appeals roundup on CAL's Eye on Eagle, available at:
https://www.appellate-litigation.org/eye-on-eagle/