

I Object!

– James Eckert, Esq.

Renewing Your Trial Order of Dismissal Motion

If the defense puts on any proof whatever, then the Trial Order of Dismissal motion you made at the close of the People's proof becomes irrelevant, and the TOD must be renewed (*People v Hines*, 97 NY2d 56 (2001)). The defense could conceivably fill in any gaps in the People's proof, and if you've read cross-examination of defendants you know this can happen. Once the defendant has put on a case, the question of whether the People's proof was sufficient - standing alone - is no longer relevant to the direct appeal. The only issue is whether all of the proof, in the People's case and the in the defense case, is enough to support the conviction. When you renew your TOD, you are claiming that *all* the proof is insufficient. Otherwise, all you have claimed in the initial TOD is that the People's proof was insufficient, and that no longer matters.

Consider the following example. Your client is accused of DWI. At trial, the People call no witnesses, but engage in an hour-long interpretive dance. You make a TOD motion, which the court reserves on. Then your client insists on testifying. What you said in your TOD motion means nothing. Yes, the People's proof was insufficient, but whether the conviction should be affirmed now depends entirely on you client's testimony. Because he might testify to every element of the crime, the proof might be sufficient. In this example, he engages in his own interpretive dance, and the proof is insufficient. However, if you fail to renew your TOD motion, then your client's conviction based on the People's interpretive dance and your client's interpretive dance will be upheld. You could become famous!

It may well be enough to renew your TOD by saying "I renew the TOD I made at the close of the People's case", but consider your own proof carefully. If any aspect of the TOD could be affected by your proof, specifically argue why the proof remains insufficient.