CARLTON FIELDS

Criminal Appeals for the Mostly Civil Lawyer

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You are a lawyer engaged primarily in civil practice and are presented with a new case. The catch: It is a criminal appeal. You have significant appellate experience, but it is mostly in civil law. And though you vaguely recall a particular affinity for your criminal-law class, you have limited, if any, criminal experience and have perhaps never handled a criminal appeal. You wish to take the case and expand your practice to this area. Whether you are a young lawyer, or a not-so-young lawyer, how do you tackle the first appeal? The good news is that if you have appellate experience, you have a fundamental understanding of the process in which you are about to engage. You know how to work with the record and recognize the various ways in which you may be constrained by it. You are aware of the potential complexities affecting appeals in general, but you may not have a working knowledge of what those substantive and procedural issues are likely to be in a criminal case. Beyond seeking the always-advisable mentorship of a more experienced lawyer—in this case, a criminal lawyer—it is useful to start thinking about procedural and substantive issues that uniquely impact criminal appeals. Analyzing a criminal appeal is similar in many respects to analyzing any other appeal. You will review the record below for error and identify your strongest arguments. In particular, you will want to identify preserved error. *See, e.g.*, *United States v. Capers*, 708 F.3d 1286, 1296 (11th Cir. 2013) (if an appellant challenging the denial of *Franks* hearing does not claim that the false statement in the affidavit was necessary to a finding of probable cause, the issue is abandoned). The nature and extent of the error, and the corresponding standard of review, will play a significant role in forming your appellate strategy, as it would in a civil matter. *See, e.g.*, *Griffin v. California*, 380 U.S. 609 (1965) (reversible error to comment on criminal defendant's exercise of the right to remain silent); *United States v. Reeves*, 742 F.3d 487 (11th Cir. 2014) (harmless-error doctrine can bar appellate relief even if an error occurred); *United States v. Cox*, 544 F. App'x 908 (11th Cir. 2013) (plain error affecting substantial rights seriously affecting fairness of the judicial proceedings reversible even when not preserved by objection below); *United States v. Herberman*, 583 F.2d 222 (5th Cir. 1978) (cumulative-error doctrine allowed appellate relief when an aggregation of non-reversible errors denied criminal defendant's right to a fair trial). Other threshold considerations are decidedly different. To begin with, the odds are not in your favor. The statistics for a criminal appellant differ among jurisdictions and depend on your type of case and the questions presented. However, the statistics for a defendant-appellant are not favorable. For instance, among the federal

courts of appeals, the combined reversal rate for the 12-month period ending September 2013 was 6.7 percent. The reversal rate for criminal appeals was 6.1 percent. The Eighth Circuit reversed a mere 2.4 percent of criminal cases in that period. Other factors certainly contribute to these odds, including the often-deferential standard of review on appeal, and that a fact finder has already examined the evidence and found against your client. Constitutional issues are common in criminal appeals, particularly those involving the Fourth, Fifth, and Sixth Amendments. *See, e.g.*, *Fernandez v. California*, 134 S. Ct. 1126 (2014) (Fourth Amendment prohibits unreasonable searches and seizures without probable cause); *see also Salinas v. Texas*, 133 S. Ct. 2174 (2013) (addressing whether or under what circumstances the Fifth Amendment's self-incrimination clause protects a defendant's refusal to answer law-enforcement questioning before he or she has been arrested or read *Miranda* rights); *Berghuis v. Smith*, 559 U.S. 314, 319 (2010) ("The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross section of the community." (citing *Taylor v. Louisiana*, 419 U.S. 522 (1975)). Constitutional law frequently addresses new issues in the criminal context, including questions raised by new circumstances and technologies that affect constitutional rights. For example, once it is determined whether or not the Fourth Amendment applies to a case, *see United States v. Benoit*, 713 F.3d 1 (10th Cir. 2013) (private-party search of defendant's computer was not a governmental scam implicating the Fourth Amendment), the court considers to what extent an individual's person and belongings may be searched, as well as the individual's reasonable expectation of privacy under the circumstances. *United States v. Edelman*, 726 F.3d 305, 310 (2d Cir. 2013) (defendant lacked reasonable expectation of privacy in sublet apartment he occupied after escaping from the reentry facility where negotiated condition of his supervised release permitted warrantless search of his person and property at any time). New technology has raised questions about digital searches. *See, e.g.*, *United States v.Galpin*, 720 F.3d 436 (2d Cir. 2013); *United States v. Katzin*, 732 F.3d 187 (3d Cir. 2013),*rehearing en banc granted, opinion vacated by Katzin*, 2013 WL 7033666 (3d Cir. Dec 12, 2013); *United States v. Brown*, 744 F.3d 474 (7th Cir. 2014); *United States v. Wurie*, 728 F.3d 1 (1st Cir. 2013). Many of these questions are presently being debated in the law. Recently, in *Riley v. California* and *United States v. Wurie*, the Supreme Court granted certiorari to consider whether evidence obtained in smartphone searches and admitted at a petitioner's trial violated the Fourth Amendment. 134 S. Ct. 999 (Jan. 17, 2014). The Supreme Court held that police may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. *Riley v. California*, ___ S. Ct. ___, 2014 WL 2864483 (U.S. June 25, 2014). In *Riley*, the defendant-petitioner was arrested after two firearms were found in his vehicle. *See People v. Riley*, No. D059840, 2013 WL 475242 (Cal. App. 4th Dist. 2013), reversed and remanded by *Riley*, 2014 WL 2864483. During the arrest, a police officer seized the defendant's smartphone from his person. Officers later performed two separate warrantless searches of the phone's digital contents, finding several photographs and videos that suggested that the defendant was a gang member and potentially implicated him in a prior shooting. At a suppression hearing, the court below ruled that because the phone was on the petitioner's person at the time of arrest, the evidence was obtained pursuant to a valid search incident to arrest. The lower court further found that the record

established that the smartphone searches were conducted for investigative purposes relating to the crime for which the petitioner had been arrested. The jury found the defendant guilty, and he appealed. The defendant challenged, among other things, the lower court's ruling on the suppression motion. The California Court of Appeal affirmed the lower court's judgment, concluding that the searches were lawful searches incident to arrest because the smartphone was "immediately associated" with his person when he was stopped. By contrast, in *Wurie*, the First Circuit examined the common use of mobile devices, including cell phones, in connection with the Fourth Amendment. *United States v. Wurie*, 728 F.3d 1, *cert. granted*, 134 S. Ct. 999 (Jan. 17, 2014). The court noted the "highly personal nature" of information frequently stored on mobile devices, including "photographs, videos, written and audio messages, contacts, calendar appointments, web search and browsing history, purchases, and financial and medical records." *Id.* at 8 (citing *United States v. Cotterman*, 709 F.3d 952, 957 (9th Cir. 2013)). The court acknowledged that mobile devices "increasingly store personal user data in the cloud instead of on the device itself," which "allows the data to be accessed from multiple devices and provides backups." *Id.* at 8 n.8 (quoting James E. Cabral et al., "Using Technology to Enhance Access to Justice," 26 *Harv. J. L. & Tech.* 241, 268 (2012)). Although the government in *Wurie* did not advocate for a rule that would permit access to information stored in the cloud, the court of appeals expressed concern that "it may soon be impossible for an officer to avoid accessing such information during the search of a cell phone or other electronic device, which could have additional privacy implications." *Id.* (citing *Cotterman*, 709 F.3d at 965). The court found that the search-incident-to-arrest exception did not authorize a warrantless search of data contained on a cell phone seized from the arrestee's person because the government did not show that such a search was ever necessary to protect arresting officers or preserve destructible evidence. *Id.* at 13 (citing *Chimel v. California*, 395 U.S. 752 (1969)). The U.S. Supreme Court unanimously affirmed the First Circuit, finding that the privacy interests at stake outweighed the government interest in searching digital data incident to arrest, but acknowledging that other exceptions, such as exigency, could provide a basis to perform warrantless searches of cell phones. *Riley*, 2014 WL 2864483. In addition to constitutional issues, various procedural issues uniquely impact criminal appeals. For instance, one such issue is whether the defendant received a speedy trial. Generally, under the Speedy Trial Act, a defendant must receive a federal criminal trial 70 days after being charged or first appearing. *Zedner v. United States*, 547 U.S. 489, 492 (2006) (citing 18 U.S.C. § 3161 et seq.) (addressing prospective waiver of the act). In the event of a mistrial, a new trial must begin within 70 days "from the date the action occasioning the retrial becomes final." *United States v. Mosteller*, 741 F.3d 503, 506 (4th Cir. 2014) (citing 18 U.S.C. § 3161). A speedy trial analysis requires calculating the time requirements of the Speedy Trial Act, which "comprehensively regulates the time within which a trial must begin." *Zedner*, 547 U.S. at 500. Moreover, it requires consideration of the numerous exceptions to the act, including waiver, delay for other proceedings a defendant is involved in, unavailability of the defendant or an essential witness, a defendant's mental incompetence, and a defendant's contribution to the delay. *See id.* at 497; *see also Mosteller*, 741 F.3d at 507 (citing *Zedner*, 547 U.S. at 502) (although defendant may not waive future application of the act, a waiver will result by operation of the statutory-waiver provision if the

defendant fails to move to dismiss the indictment before the new trial begins). Certain jury issues arise more frequently, sometimes exclusively, in criminal cases and can provide a basis for appeal. As in any appeal from a case tried by jury, you will have to consider how the jury was charged and whether proper instructions were given, because such errors can form the basis for reversal. *See, e.g.*, *Connecticut v. Johnson*, 460 U.S. 73 (1985); *United States v. Grigsby*, 111 F.3d 806, 814 (11th Cir. 1997) (federal courts of appeal review jury instructions de novo to determine whether they misstate the law or mislead the jury such that it prejudiced the opposing party). You may also have an appealable issue based on jury composition, juror misconduct, or additional charges to a jury when deadlocked. A jury issue that arises far more frequently in the criminal context is a *Batson* challenge to an opponent's exercise of a peremptory strike against a juror on the basis of a protected category, such as race, ethnicity, or sex. Criminal cases account for an overwhelming majority of *Batson* challenges. *See Davis v. Fisk Elec. Co.*, 268 S.W.3d 508, 519 n.9 (Tex. 2008) (citing Kenneth J. Melilli, "*Batson* in Practice: What We Have Learned About *Batson* and Peremptory Challenges," 71 *Notre Dame L. Rev.* 447, 457–58 (1995) ("Although the opportunity to make a *Batson* claim is now available to all parties in both criminal and civil cases, the fact is that *Batson* is a tool used almost exclusively by criminal defendants.")). During jury selection, a party may exercise a certain number of peremptory challenges without showing cause. In *Batson v. Kentucky*, the U.S. Supreme Court limited the use of peremptory challenges, ruling that the use of such challenges based on race violates equal protection. 476 U.S. 79, 87 (1986) (stating that "by denying a person participation in jury service on account of his race, the State unconstitutionally discriminated against the excluded juror"); *see also United States v. Allen-Brown*, 243 F.3d 1293, 1297–99 (11th Cir. 2001) (race-based peremptory challenges exercised by criminal defendant to obtain a racially diverse jury not permissible). The *Batson* procedure for evaluating an objection to a peremptory challenge involves the following: (1) the objector must make a prima facie showing that the peremptory challenge was exercised on the basis of race; (2) the burden then shifts to the challenger to articulate a race-neutral explanation for striking jurors in question; and (3) the trial court must determine whether the objector has carried its burden of proving purposeful discrimination. *Allen-Brown*, 243 F.3d at 1297 (citations omitted). Although peremptory challenges are important, "the right to exercise them is neither immutable nor unconditional." *See id.* at 1299 (citing *Georgia v. McCollum*, 505 U.S. 42, 48 (1992) (peremptory challenges are not constitutionally protected rights but, rather, one state-created-means to the constitutional end of an impartial jury and a fair trial)). There is no "fundamental federal right to exercise challenges to particular jurors free from judicial examination." Thus, a district court's ruling on a *Batson* challenge, arising predominantly in criminal cases, can often provide grounds for appeal. Sentencing issues also arise frequently in criminal appeals and are unique to criminal cases. *See, e.g.*, *United States v. Kerr*, 2014 WL 1978690 (2d Cir. 2014) (defendant has the burden of showing entitlement to minor role adjustment based on conduct that was minor compared with the average participant in the crime of conviction); *United States v. Rendon*, 2014 WL 2118649 (8th Cir. 2014) (reviewing for plain error, court of appeals held district court did not err in failing to reduce sentence for acceptance of responsibility where defendant sent court three letters disclaiming responsibility for a certain portion of drugs involved in the offense after making plea

agreement); *United States v. Garcia*, 2014 WL 1817510 (5th Cir. 2014) (district court did not abuse discretion in increasing sentence based on criminal history score). Accordingly, you will need to consider whether the sentence in your case was assessed accurately, which generally involves review of the sentencing transcript, the Sentencing Guidelines, the presentence report, your client's conduct, the conduct of any codefendants, and the course of criminal conduct as a whole as supported by the record. In handling a criminal appeal, it is necessary to familiarize yourself with the issues that uniquely impact criminal cases. Attorneys lacking substantial experience in criminal law must consider these issues but should not be deterred from expanding their practice. An appeal presents the opportunity to handle substantive and procedural criminal issues in a narrower context than, for instance, a criminal trial. This holds true for pro bono appeals, which provide the same opportunity to gain relevant experience and which benefit the client, the practitioner, and the judicial system at the direction of an experienced litigator or mentor. And although criminal appeals carry with them their own substantive, procedural, and even ethical challenges, they can also provide a rewarding experience for those interested in pursuing them. Co-Authored by Lara O'Donnell, Berger Singerman LLP **Republished with permission by the American Bar Association**

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