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4317(b) and will hinder, rather than advance, the legislature's attempt at calendar relief.

Robert Joseph Rando

CRIMINAL PROCEDURE LAW

CPL § 270.35: Trial judges granted broad discretion to discharge juror who fails to appear at the trial two hours after scheduled time

Fundamental to our democratic system of jurisprudence is an accused's right to a trial by jury,¹ as recognized by the sixth and fourteenth amendments to the United States Constitution.² Inher-

¹ See *Dimick v. Schiedt*, 293 U.S. 474 (1935). "Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Id.* at 486. See generally L. MOORE, *THE JURY, TOOL OF KINGS, PALLADIUM OF LIBERTY* (1973) (tracing development of jury from ancient Greece to Henry II of England to Revolutionary America); H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 3-20 (1966) (tradition and scope of Anglo-American criminal jury). "The right to jury trial is immemorial; it was brought from England to this country by colonists, and it has become a part of birthright of every free man." 47 AM. JUR. 2D *Jury* § 12, at 635 (1969). The Magna Carta has often been credited with guaranteeing trial by jury. See *Thompson v. Utah*, 170 U.S. 343 (1898). "When Magna Charta [sic] declared that no freeman should be deprived of life, etc., 'but by the judgment of his peers or by the law of the land,' it referred to a trial by twelve jurors." *Id.* at 349.

The right to trial by jury has had many staunch supporters, including Thomas Jefferson, who wrote: "Were I called upon to decide whether the people had best be omitted in the Legislative or Judiciary department, I would say it is better to leave them out of the Legislative. The execution of the laws is more important than the making [of] them." Letter from Thomas Jefferson to the Abbé Arnoux (July 19, 1789), reprinted in 15 *THE PAPERS OF THOMAS JEFFERSON* 282, 283 (J. Boyd ed. 1958). See also *Duncan v. Louisiana*, 391 U.S. 145, 157-58 (1968) (grant of jury trial for serious offenses essential for preventing miscarriages of justice and assuring fair trials). Despite overwhelming support, the jury trial concept has had its critics as well. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), *overruled*, *Duncan v. Louisiana*, 391 U.S. 145 (1968). In *Palko*, Justice Cardozo wrote, "[t]he right to trial by jury . . . [is] not of the very essence of a scheme of ordered liberty. To abolish [the jury] is not to violate a 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.'" *Id.* at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). See also *Duncan*, 391 U.S. at 188 (Harlan J. dissenting) (criticizing jury system as cumbersome); Lummus, *Civil Juries and the Law's Delay*, 12 B.U.L. REV. 487, 489 (1932) (jury system contributes to delay).

² See U.S. CONST. amends. VI, XIV. The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . ." *Id.* The right to trial by jury applies to nearly all criminal cases whether at the federal

ent in this right is a guarantee of a fair and impartial jury³ which is assured by permitting the accused to participate in jury selection.⁴ At times, however, a chosen juror may be unable to, or prohibited from, completing his duty,⁵ resulting in his replacement by an alternate.⁶ Under CPL section 270.35,⁷ a judge must dismiss a juror

level or, through the fourteenth amendment, at the state level. *See Duncan*, 391 U.S. at 149. In *Duncan*, the Court stated that because "trial by jury in criminal cases is fundamental to the American scheme of justice, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases which—were they to be tried in a federal court—would come within the Sixth Amendment's guarantee." *Id.*

The constitutional right to a jury trial, however, encompasses only serious offenses. *See Duncan*, 391 U.S. at 159-62. An offense is "serious" if imprisonment for more than six months is authorized by a statute. *See Baldwin v. New York*, 399 U.S. 66, 69 (1970). While there is no constitutional right to a jury of twelve people, *see Williams v. Florida*, 399 U.S. 78, 103 (1970), the sixth and fourteenth amendments require at least six jurors to satisfy the right to a jury trial. *See Ballew v. Georgia*, 435 U.S. 223, 244 (1978). Furthermore, an absolute right to unanimity of the verdict is not mandated. *See Apodaca v. Oregon*, 406 U.S. 404, 410-12 (1972).

Most states' constitutions also recognize the accused's right to a jury trial. *See, e.g.*, N.J. CONST. art. 1, § 9 (trial by jury to remain inviolate); N.Y. CONST. art. 1, § 2 (trial by jury in all cases where it has heretofore been guaranteed shall remain inviolate forever). *See also* N.Y. JUD. LAW § 500 (McKinney Supp. 1988). ("[i]t is the policy of this state that all litigants in the courts of this state entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community").

³ *See Irvin v. Dowd*, 366 U.S. 717, 722 (1961) (right to jury trial guarantees accused fair trial by panel of impartial jurors); *In re Murchison*, 349 U.S. 133, 136 (1955) (right to fair trial necessarily means tribunal is fair); *People v. Harris*, 53 App. Div. 2d 1007, 1007, 386 N.Y.S.2d 263, 264 (4th Dep't 1976) (same).

⁴ *See Hildreth v. City of Troy*, 101 N.Y. 234, 238, 4 N.E. 559, 562 (1886) (incompetent juror could not be seated against defendant's objections); *People v. Ivery*, 96 App. Div. 2d 712, 712, 465 N.Y.S.2d 371, 372 (4th Dep't 1983) (defendant has constitutional right to jury in whose selection he participated); *People v. West*, 92 App. Div. 2d 620, 622, 459 N.Y.S.2d 909, 913 (3d Dep't 1983) (Mahoney, P.J., dissenting) (accused has constitutional right to have case heard by jury he helped select), *rev'd*, 62 N.Y.2d 708, 465 N.E.2d 37, 476 N.Y.S.2d 530 (1984); *People v. Freistadt*, 23 Misc. 2d 534, 535, 196 N.Y.S.2d 147, 149 (Sup Ct. Nassau County 1960) (same).

A defendant has a right to have the jury selected from a representative cross-section of the community and may complain of the exclusion of a significant segment of the community even if not a member of that segment. *See Taylor v. Louisiana*, 419 U.S. 522, 525-31 (1975). A fair cross-section of the community must include minorities and women, and possibly other distinct and significant groups. *See Duren v. Missouri*, 439 U.S. 357, 364 (1979). In *Duren*, the Court held that a state may neither exclude women from jury duty nor automatically exempt them upon request. *Id.* at 366-67.

⁵ *See, e.g.*, *State v. Savan*, 148 Or. 423, 428, 36 P.2d 594, 598 (1934) (juror dismissed because of "important business engagement"); *see also* 47 AM. JUR. 2D *Jury* § 121, at 725 (1969) (age, sickness, death in family, involvement in other action as party or witness all grounds for dismissal).

⁶ *See, e.g.*, FED. R. CRIM. P. 24(c) (may replace regular juror any time prior to commencement of deliberations); CPL § 270.35 (McKinney 1982) (before jury deliberations judge may replace juror with alternate whose name was first drawn); *see also* United States

who becomes unable to serve due to illness or incapacity.⁸ However, a conflict exists among departments of the appellate division regarding the level of scrutiny mandated by this provision.⁹ Recently, in *People v. Washington*,¹⁰ the Appellate Division, First Department, held that a trial judge has discretion to discharge an allegedly ill juror without adjournment and without direct proof of the illness.¹¹

In *Washington*, the defendant was tried for larceny after allegedly snatching a gold chain from a pedestrian's neck.¹² At the end of the first day of trial, the judge reminded the jurors to return promptly at nine-thirty the following morning.¹³ At 11:30 a.m. the next day, juror number five was still missing, and a telephone call to the juror's mother revealed that her son had come down with a cold and had gone to the hospital for treatment.¹⁴ When questioned as to the name of the hospital, the juror's mother became evasive.¹⁵ Consequently, the court concluded she was covering up for her son, who was attempting to avoid further jury service.¹⁶

v. Hillard, 701 F.2d 1052, 1056-57 (2d Cir.) (may replace ill juror where defendant not prejudiced), *cert. denied*, 461 U.S. 958 (1983).

⁷ CPL § 270.35 (McKinney 1982). Section 270.35 provides in pertinent part:

If at any time after the trial jury has been sworn and before the rendition of its verdict, a juror is unable to continue serving by reason of *illness or other incapacity*, or for any other reason is *unavailable for continued service*, or the court finds, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case . . . , the court must discharge such juror.

Id. (emphasis added).

⁸ *See id.* Although the statute does not define the phrase "illness or incapacity," courts have held that those words should be given their ordinary meaning. *See, e.g., People v. Pierce*, 97 App. Div. 2d 904, 905, 470 N.Y.S.2d 737, 738 (3d Dep't 1983) (giving words common meaning affords trial court broader discretion in deciding whether juror is fit to continue serving).

⁹ *Compare People v. Karadimas*, 99 App. Div. 2d 652, 653, 472 N.Y.S.2d 62, 63 (4th Dep't 1984) (mem.) (strict construction of § 270.35 requires sufficient corroboration of juror's inability to continue before dismissal) *with People v. Burns*, 118 App. Div. 2d 864, 865, 500 N.Y.S.2d 545, 545 (2d Dep't 1986) (liberal interpretation of § 270.35 affords trial judge broad discretion in ordering juror dismissal) *and People v. Pierce*, 97 App. Div. 2d 904, 905, 470 N.Y.S.2d 737, 738 (3d Dep't 1983) (defer to judge's discretion in statutory application).

¹⁰ 131 App. Div. 2d 118, 520 N.Y.S.2d 151 (1st Dep't 1987)

¹¹ *See id.* at 122, 520 N.Y.S.2d at 153.

¹² *Id.* at 119, 520 N.Y.S.2d at 151. After grabbing a gold chain from the complainant's neck, the defendant was chased by the complainant, apprehended by two off-duty police officers, and identified at the scene. *Id.*

¹³ *Id.* at 119, 520 N.Y.S.2d at 151.

¹⁴ *Id.*, 520 N.Y.S.2d at 152.

¹⁵ *Id.*

¹⁶ *Id.*

Counsel for the defendant requested a one day adjournment to find the missing juror, but this request was denied.¹⁷ The court discharged the missing juror and replaced him with an alternate.¹⁸ The defendant was subsequently convicted of grand larceny in the third degree and sentenced as a predicate felon to a term of two to four years incarceration.¹⁹

On appeal, the Appellate Division, First Department, unanimously affirmed the defendant's conviction, holding that it was within the trial judge's discretion to dismiss a juror under CPL section 270.35.²⁰ Writing for the court, Justice Kassal concluded that the statute, which provides for the discharge of a juror "unable to continue by reason of illness or other incapacity," or who is otherwise "unavailable for continued service," permits a judge to determine such incapacity according to the facts of a particular case.²¹ The court analyzed the different statutory constructions applied to section 270.35 by the departments of the appellate division, and opted to follow the more liberal approach of the Second and Third Departments.²² Reasoning that the approach of the Fourth Department, which requires a credible basis on the record as to why the juror is unable to serve, is unduly burdensome,²³ the

¹⁷ *Id.*

¹⁸ *Id.* Replacing a dismissed juror with an alternate is provided for under CPL § 270.35. See *infra* note 20.

¹⁹ *Washington*, 131 App. Div. 2d at 119, 520 N.Y.S.2d at 151.

²⁰ *Id.* at 122-24, 520 N.Y.S.2d at 153-54. See *supra* notes 7-8 and accompanying text. In New York, "[i]f an alternate juror or jurors are available for service, the court must order that the discharged juror be replaced by the alternate juror whose name was first drawn and called, provided however, that if the trial jury has begun its deliberations, the defendant must consent to such replacement." CPL § 270.35 (McKinney 1982).

²¹ *Washington*, 131 App. Div. 2d at 122-23, 520 N.Y.S.2d at 153-54. On the facts of this case, the court concluded that no error had been made in dismissing the absent juror and replacing him with an alternate. *Id.* Therefore, the defendant's constitutional right to a jury trial had been adequately protected. *Id.* at 124, 520 N.Y.S.2d at 154.

²² See *id.* at 122, 520 N.Y.S.2d at 153. The court examined the Third Department cases of *People v. Caputo*, 13 App. Div. 2d 861, 214 N.Y.S.2d 803 (3d Dep't 1961), and *People v. Pierce*, 97 App. Div. 2d 904, 470 N.Y.S.2d 737 (3d Dep't 1983). See *Washington*, 131 App. Div. 2d at 121, 520 N.Y.S.2d at 153. Under *Caputo*, if a court excuses a juror and substitutes an alternate, it must state for the record the reasons for the dismissal. See *Caputo*, 13 App. Div. 2d at 861, 214 N.Y.S.2d at 805. Furthermore, the *Pierce* court had rejected the Fourth Department's strict interpretation of section 270.35 in favor of the more flexible approach adopted by the United States District Court for the Southern District of New York in *McShall v. Henderson*, 526 F. Supp. 158, 162 (S.D.N.Y. 1981). See *Pierce*, 97 App. Div. 2d at 905, 470 N.Y.S.2d at 738.

²³ See *Washington*, 131 App. Div. 2d at 122, 520 N.Y.S.2d at 154. The court cited two Fourth Department cases which strictly interpreted CPL section 270.35 to require a "sound basis" on the record as to any alleged illness causing a juror to be "unable" to serve. See *id.*

court held that a flexible approach would more appropriately accord deference to a trial judge's discretion while conserving judicial time and energy.²⁴

Though properly attempting to preserve judicial resources, it is submitted that the *Washington* court erred in holding the interests of judicial economy outweigh a proper interpretation of CPL section 270.35 and its underlying policies. The statute permits a juror's dismissal only when a juror is unable to continue serving due to "illness," "incapacity," or if otherwise "unavailable for continued service."²⁵ Since these terms are not defined in the statute, they should be afforded their ordinary, everyday meaning.²⁶ It is submitted, therefore, that by dismissing a juror because the juror was seeking to avoid further jury service and not because he was ill or unqualified, the *Washington* court has gone beyond the discretion envisioned by the statute.²⁷

Despite the *Washington* court's liberal interpretation of section 270.35, the New York Court of Appeals had previously con-

at 121, 520 N.Y.S.2d at 153 (citing *People v. Karadimas*, 99 App. Div. 2d 652, 653, 472 N.Y.S.2d 62, 63 (4th Dep't 1984); *People v. Rial*, 25 App. Div. 2d 28, 31, 266 N.Y.S. 2d 426, 430 (4th Dep't 1966)).

The *Washington* court concluded that any approach which requires confirmation of illness beyond the methods used by the lower court, such as, a phone call to the juror's mother, would "unnecessarily delay and disrupt the proceeding to verify what the court had already ascertained by informal means, namely, that the juror would not, in fact, be present, whatever the reason or justification." *Washington*, 131 App. Div. 2d at 123, 520 N.Y.S.2d at 154.

²⁴ See *id.* The court noted that if more was required than an informal search, the judicial process would come "to a grinding halt whenever there is a malingering juror, unwilling to fulfill his civic responsibility . . . That approach is unreasonable, unjustifiably interferes with the exercise of judicial discretion in the management of a criminal trial and would be an unwarranted perversion of the principles of justice underlying our criminal justice system." *Id.*

²⁵ See *supra* notes 7 & 20 (text of CPL § 270.35).

²⁶ See *McShall v. Henderson*, 526 F. Supp. 158, 162 (S.D.N.Y. 1981). The *McShall* court noted that, because the language in CPL section 270.35 is not defined, a court must exercise its judgment in determining its everyday meaning. *Id.* at 162. In *McShall*, the judge refused to dismiss an ill juror because the illness was perceived to be "mere anxiety and nervousness." *Id.* It is submitted that the flexible standard allegedly used in *McShall* was not a broad exercise of judicial discretion to dismiss a juror, but a literal construction of the statutory meaning of the phrase "unable to continue serving by reason of illness or other incapacity . . ." See *id.*

²⁷ See *Washington*, 131 App. Div. 2d at 119, 520 N.Y.S.2d at 152. The *Washington* court did not base its dismissal of the juror on a judicial interpretation of the words "illness" or "incapacity," but on a belief that the juror was neglecting his civil duty. *Id.* at 123, 520 N.Y.S.2d at 154. It is suggested that such a basis for dismissal is unfounded within the plain meaning of the statute.

strued part of this provision more narrowly.²⁸ In *People v. Anderson*,²⁹ the court stated that prior to dismissing a juror as "grossly unqualified," there must be a "tactful and probing inquiry" into the nature of the juror's alleged position.³⁰ In particular, any dismissal based upon a juror's partiality may not be the product of speculation based upon an equivocal response from that juror.³¹ It is suggested that the *Anderson* standard be applied throughout this statute to require verification of any alleged illness or incapacity.

The right to a jury trial is one of the most solemn privileges of citizenship.³² To dismiss a juror without thorough scrutiny of the underlying facts deprives a defendant of the constitutional right to a trial by a "particular jury chosen according to law, in whose selection he has had a voice."³³ It is suggested that all New York courts adopt the approach of the Fourth Department, which requires verification or corroboration of any potential problem beyond a mere statement by a third party.³⁴

²⁸ See *People v. Anderson*, 70 N.Y.2d 729, 730, 514 N.E.2d 377, 377, 519 N.Y.S.2d 957, 957 (1987) (mem).

²⁹ *Id.*

³⁰ *Id.* In *Anderson*, a juror advised the court that he felt his judgment might be "colored, distorted" because of the racial composition of the jury. *Id.* After a hearing on the issue, the trial judge dismissed the juror, stating, "I think maybe the risk in view of what he's told us, the risk of this juror continuing is one that we shouldn't really take in this case." *Id.* No further inquiry was made into the juror's statement that he could not be fair and partial. On appeal, the New York Court of Appeals reversed and held that the juror's equivocal responses were not sufficient to dismiss a juror as "grossly unqualified." *Id.* See also *People v. Buford*, 69 N.Y.2d 290, 291, 506 N.E.2d 901, 905, 514 N.Y.S.2d 191, 195 (1987) (under "grossly unqualified" standard, possible inability on juror's part to deliberate fairly not grounds for dismissal); *People v. Cargill*, 70 N.Y.2d 687, 688, 512 N.E.2d 313, 314, 518 N.Y.S.2d 792, 793 (1987) (same). Applying the standard set forth in *Buford*, the Court of Appeals recently found that a juror with a strong racial bias should have been discharged. See *People v. Rodriguez*, 71 N.Y.2d 214, 221, 519 N.E.2d 333, 337, 524 N.Y.S.2d 422, 426 (1988) (per curiam).

³¹ See *Anderson*, 70 N.Y.2d at 730, 514 N.E.2d at 378, 519 N.Y.S.2d at 958. See also *Buford*, 69 N.Y.2d at 300, 506 N.E.2d at 906, 514 N.Y.S.2d at 196 (trial court applied standard less stringent than "grossly unqualified" when it discharged juror for mere possible inability to deliberate fairly).

³² See *supra* notes 1 & 2.

³³ *People v. Ivery*, 96 App. Div. 2d 712, 712, 465 N.Y.S.2d 371, 372 (4th Dep't 1983). Accord *Anderson*, 70 N.Y.2d at 730-31, 514 N.E.2d at 378, 519 N.Y.S.2d at 958 (to deny defendant his chosen jury on improper basis violates constitutional right to jury trial).

³⁴ See *People v. Karadimas*, 99 App. Div. 2d 652, 653, 472 N.Y.S.2d 62, 63 (4th Dep't 1984); *People v. Rial*, 25 App. Div. 2d 28, 31, 266 N.Y.S.2d 426, 430 (4th Dep't 1966). These cases asserted that CPL section 270.35 should be strictly construed in order to protect a defendant's constitutional right to a fair jury trial. In *Rial*, a juror was dismissed after the jury foreman informed the court that the ill juror could not continue. See *Rial*, 25 App. Div.

While such an approach may slow the judicial process as was feared by the *Washington* court, it is not contended that the court conduct a full-scale investigation. The facts of each case must be scrutinized by the court in accordance with both the evidence and a strict reading of CPL section 270.35. A certain amount of judicial discretion will be warranted, but such decisions should be made within the confines of the statute. If a juror is late or missing from a trial without a confirmed statutory excuse, a one-day adjournment may be reasonable and necessary in light of the defendant's constitutional rights. It is urged that the New York Court of Appeals alleviate the division among the appellate departments by adopting a stricter statutory interpretation of section 270.35.

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2d at 31, 266 N.Y.S.2d at 430. On appeal, the Appellate Division, Fourth Department, held that:

before deciding to substitute an alternate the court minimally should have had before it some direct proof (by testimony or affidavit) from the doctor that the juror in question was too ill to proceed instead of the statement of the foreman and that of the trial judge that he had communicated with the doctor.

Id. 266 N.Y.S.2d at 430-31. Although this case was decided prior to the enactment of section 270.35, it is indicative of the strict scrutiny demanded by the Fourth Department before discharge of a juror is permitted. *See also* *People v. Sosnicki*, 30 App. Div. 2d 576, 576, 291 N.Y.S.2d 197, 197 (2d Dep't 1968) (substitution of alternate juror for ill juror after jury began deliberations proscribed defendant's constitutional right to trial by jury). *But see* *United States v. Domenech*, 476 F.2d 1229, 1232 (2d Cir.) (not deprivation of defendant's rights to discharge juror who was ten minutes late on morning jury was to be charged), *cert. denied*, 414 U.S. 840 (1973).

The Fourth Department standard was established in *People v. Karadimas*, 99 App. Div. 2d 652, 472 N.Y.S.2d 62, 63 (4th Dep't 1984) (mem.). In *Karadimas*, a juror informed the court that another juror was absent due to the illness of that juror's mother. Over defendant's objection, the trial court dismissed the absent juror and selected the first alternate. *Id.* at 653, 472 N.Y.S.2d at 63. The Fourth Department unanimously reversed a conviction, holding that, "[c]learly on this record it was not established that the absent juror was 'unable to continue serving by reason of illness or other incapacity . . .'" *Id.*