St. John's Law Review

Volume 92, Summer 2018, Number 2 Article 2

Resolving the Conflict Between the Temporarily Unavailable Juror and New York's Mandatory 24-Hour Limit on the Separation of Jurors During Deliberations

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ARTICLES

RESOLVING THE CONFLICT BETWEEN THE TEMPORARILY UNAVAILABLE JUROR AND NEW YORK'S MANDATORY 24-HOUR LIMIT ON THE SEPARATION OF JURORS DURING DELIBERATIONS

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INTRODUCTION

Isolating deliberating trial jurors from contact with the outside world has been a feature of the American criminal justice system since the founding of the country. At common law, "[t]his generally meant no going home at night, no lunch breaks, no dispersing at all until they reached a verdict."[1] Commonly referred to as jury sequestration,[2] every state has at some point mandated it as a necessary tool to ensure the integrity of a criminal jury trial.[3] Over the years, however, a wide spectrum of views has developed regarding the usefulness of this procedure. Some states forbid sequestration absent exceptional circumstances.[4] Other states mandate it in every trial when a jury begins to deliberate.[5] New York State has a unique approach. While jury sequestration is no longer mandated, a deliberating jury in New York must return to court to continue its deliberations on the next day the court is open for business. If all deliberating jurors do not return the next day, even if due to the most extreme personal emergency, the law arguably mandates a mistrial if the defendant does not consent to a longer

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[1] Dietz v. Bouldin, __U.S.__, 136 S. Ct. 1885, 1895 (2016).

[2] Sequestration as it relates to juries is defined as a "custodial isolation of a trial jury to prevent tampering and exposure to publicity . . . ." *Sequestration*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[3] *See infra* Part V.

[4] *See infra* Part V.

[5] *See infra* Part V.

recess.[6] As illustrated by the hypothetical below, the remedy of an automatic mistrial in this circumstance does nothing to protect a defendant's Sixth Amendment right to an impartial jury;[7] nor does it ensure that the trial is a fair one.

I. A HYPOTHETICAL "24-HOUR RULE" VIOLATION

A grand jury in New York County (Manhattan) returned an indictment, charging John Smith with Murder in the Second Degree, in violation of New York Penal Law § 125.25(1), and two counts of Criminal Possession of a Weapon in the Second Degree, in violation of New York Penal Law § 265.03. At the trial, which lasted more than two months, the prosecution called over sixty witnesses and presented over 100 exhibits. At least two essential witnesses had moved to other states and had to be flown back to New York at the prosecution's expense.[8] Several witnesses were reluctant to testify, fearing for their safety and the safety of their families. In fact, due to safety concerns, at least one witness had to be relocated after testifying.

Given the anticipated length of the trial, it took over one week to select a jury of twelve individuals who could not only be fair and impartial but who could also devote two months to the trial.[9] The expected length of the trial also led the trial judge to direct the selection of four alternate jurors.[10] Many potential jurors had legitimate commitments that kept them from serving on a jury for a two-month trial; the jurors who were selected, although inconvenienced by the significant length of the trial, made the necessary adjustments to their schedules, consistent with the obligations of jury service.[11] One potential juror, who

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[6] *See* N.Y. CRIM. PROC. LAW §§ 280.10; 310.10(2) (McKinney 2018).

[7] U.S. CONST. amend. VI. *See* Duncan v. Louisiana, 391 U.S. 145, 149 (1968) (holding that the Fourteenth Amendment Due Process Clause requires states to provide the right to trial by jury for serious offenses); N.Y. CONST. art. I, § 2 (guaranteeing the right to trial by jury).

[8] *See* N.Y. CRIM. PROC. LAW § 640.10(3) (providing the procedure for issuing subpoenas to out-of-state witnesses).

[9] New York mandates that "every trial of an indictment must be a jury trial" consisting of twelve jurors. *Id.* §§ 260.10; 270.05(1). A trial jury of an information charging a misdemeanor in a local criminal court consists of six jurors. *Id.* § 360.10(1).

[10] The law also permits, but does not require, the selection of up to six alternate jurors in a trial of an indictment, *id.* § 270.30(1), and up to two alternates in a trial of a misdemeanor in a local criminal court. *Id.* § 360.35(1). The exact number of alternates selected, if any, is a matter left to the discretion of the trial judge.

[11] Mere inconvenience is an insufficient basis for excusing a person from jury service. *See* People v. Wilson, 52 A.D.3d 941, 942, 859 N.Y.S.2d 518, 519 (3d Dep't

was ultimately selected, informed the court that he had a weekend trip to Seattle planned, which could not be rescheduled. However, because he was scheduled to leave Friday evening and return Sunday night, the juror's travel plans did not pose any impediment to jury service.

Although the trial judge was diligent in ensuring that the trial progressed expeditiously, there were several interruptions, including one day each week for the judge to deal with the approximately 200 other cases on his calendar.[12] In addition, the trial was not in session on one day because a juror had a medical procedure and on another day for a religious holiday observed by several of the jurors.[13] Although the law leaves to the trial court's discretion the length and number of recesses,[14] the judge presiding at Smith's trial, mindful of the need to keep the case on schedule, granted recesses infrequently and only for exceptional circumstances. When the court did grant recesses, or when the business for the day had concluded, the court "permit[ted the

2008) ("Slight interference with employment or inconvenience related to sitting on a jury are insufficient grounds to support a challenge for cause."). If a juror, despite financial loss or other personal inconvenience, gives assurance that he or she can be fair and impartial, a court cannot grant a challenge for cause based on such factors. *See, e.g.*, People v. Butler, 281 A.D.2d 333, 333, 722 N.Y.S.2d 510, 510 (1st Dep't 2001) ("The court properly declined to discharge a sworn juror when, prior to the completion of jury selection, the juror expressed concern and bitterness about the time and money he was losing."). However, when jury service "would cause undue hardship or extreme inconvenience to [a potential juror], a person under his or her care or supervision, or the public," a potential juror can be excused from service. *See* N.Y. JUD. LAW § 517(c) (McKinney 2018); People v. Mulinar, 185 A.D.2d 996, 998, 587 N.Y.S.2d 403, 404 (2d Dep't 1992) (court properly discharged "five of the seven prospective jurors . . . due to physical impairments, family obligations, or work commitments").

[12] There are approximately thirty trial judges who sit in New York County Supreme Court, the trial-level court for felony cases. Twenty of these judges have a designated calendar day. *See Supreme Court, Criminal Term, Term Schedule, Term 9*, NYCOURTS.GOV, http://www.nycourts.gov/courts/1jd/criminal/termschedule.pdf (last visited Aug. 26, 2018).

[13] Christmas is the only religious holiday officially recognized by the New York State Court System. *See Future Court Terms & Holidays*, NYCOURTS.GOV, https://www.nycourts.gov/admin/holidayschedule.shtml (last visited Aug. 26, 2018).

[14] *See* N.Y. CRIM. PROC. LAW § 270.45 (allowing a court to permit a jury to separate during "pre-deliberation" recesses without specifying a time limit on the length of any such recess); *see also* People v. Diggins, 11 N.Y.3d 518, 524, 900 N.E.2d 959, 962–63, 872 N.Y.S.2d 408, 411–12 (2008) ("[t]he granting of an adjournment for any purpose is a matter resting within the sound discretion of the trial court") (quoting Matter of Anthony M., 63 N.Y.2d 270, 283, 471 N.E.2d 447, 454, 481 N.Y.S.2d 675, 682 (1984)).

jury] to separate,"[15] to return to their respective homes, and come back on the next scheduled trial date. That was usually, but not always, the next day the courthouse was open for business.

At the close of the two-month evidentiary portion of the trial, the defense and prosecution delivered their final arguments, which took a total of two days.[16] The jury was then given extensive legal instructions before retiring to deliberate on a Friday.[17] As required by New York Criminal Procedure Law ("CPL") § 310.10(1), the jury was taken to a conference room immediately outside of the courtroom to conduct its deliberations, where they were "continuously kept together under the supervision of a court officer or court officers."[18] The court officers, "[e]xcept when so authorized by the court or when performing administerial duties with respect to the jurors, . . . [did] not speak to or communicate with them or permit any other person to do so."[19] The supervising court officers at Smith's trial also took custody of each juror's cellular telephone. If the jurors needed any physical or testimonial evidence, or had legal questions, they communicated their requests in notes, signed by the foreperson, which were given to a supervising court officer and delivered to the judge.[20] The jury was then returned

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[15] N.Y. CRIM. PROC. LAW § 270.45.

[16] *Id.* §§ 260.30(8), (9).

[17] Article 300 of the Criminal Procedure Law sets forth the requirements for a judge's charge to the jury. *Id.* § 300.10. Further, CPL § 300.10(5), provides that "[b]oth before and after the court's charge, the parties may submit requests to charge, either orally or in writing, and the court must rule promptly upon each request." *Id.* § 300.10(5). This is typically done at a "charge conference" held before the court instructs the jury. *See, e.g.*, People v. Walker, 26 N.Y.3d 170, 172, 42 N.E.3d 688, 690, 21 N.Y.S.3d 191, 193 (2015) ("At the charge conference, Supreme Court indicated that it would, at defendant's request, give a charge on the justification defense.").

[18] N.Y. CRIM. PROC. LAW § 310.10(1).

[19] *Id.*

[20] A jury may "request the court for further instruction or information with respect to the law, with respect to the content or substance of any trial evidence, or with respect to any other matter pertinent to the jury's consideration of the case." *Id.* § 310.30. While the statute does not mandate that the request be in writing, the practice in New York State is that a request be made in the form of a note. *See* People v. O'Rama, 78 N.Y.2d 270, 277–278, 579 N.E.2d 189, 192, 574 N.Y.S.2d 159, 162 (1991); *Exhibits, Readback & Law Questions,* NYCOURTS.GOV, http://www.nycourts.gov/judges/cji/1-General/CJI2d.Exhibits_Readback_Law.pdf (last visited Aug. 26, 2018) (instructing jurors to transmit requests via a note signed by the foreperson).

to the courtroom and the trial judge, in the presence of the parties, responded to the jury's inquiry. No other contact with the jury during deliberations was permitted.

Until 1995, New York law required juries to be sequestered from the time they began deliberations until they reached a verdict.[21] If no verdict was reached before the end of a court day, jurors were taken to hotels and returned to court the next morning to continue their deliberations. In 1995, the mandatory sequestration rule was relaxed with the enactment of CPL § 310.10(2).[22] The initial version of CPL § 310.10(2) did not apply to the most serious cases, including murder and other violent felonies.[23] That section, which was subsequently amended in 2001 to apply to all cases, provides, in relevant part:

> At any time after the jury has been charged or commenced its deliberations, and after notice to the parties and affording such parties an opportunity to be heard on the record outside of the presence of the jury, the court may declare the deliberations to be in recess and may thereupon direct the jury to suspend its deliberations and to separate for a reasonable period of time to be specified by the court, not to exceed twenty-four hours, except that in the case of a Saturday, Sunday or holiday, such separation may extend beyond such twenty-four hour period. Before each recess, the court must admonish the jury as provided in § 270.40 of this chapter and direct it not to resume its deliberations until all twelve jurors have reassembled in the designated place at the termination of the declared recess.[24]

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[21] 1970 N.Y. Laws 2281 (enacted as N.Y. CRIM. PROC. LAW § 310.10).

[22] Act of June 20, 1995, ch. 83, 1995 N.Y. Laws 111–12.

[23] *Id.* The 1995 version of Criminal Procedure Law § 310.10(2) did not apply to an indictment charging a "class A felony or a class B violent felony offense or class C violent felony." Class A felonies include: Murder in the First Degree, N.Y. PENAL LAW § 125.27 (McKinney 2018); Murder in the Second Degree, N.Y. PENAL LAW § 125.25; Aggravated Murder, N.Y. PENAL LAW § 125.26; Arson in the First Degree, N.Y. PENAL LAW § 150.20; Kidnapping in the First Degree, N.Y. PENAL LAW § 135.25 and certain serious drug offenses, such as Criminal Sale of a Controlled Substance in the First Degree, N.Y. PENAL LAW § 220.43. For a list of class B and C violent felonies, which include various degrees of assault, robbery and burglary, see N.Y. PENAL LAW § 70.02(1).

[24] N.Y. CRIM. PROC. LAW § 310.10(2). This statutory provision is a limited exception to the mandatory sequestration provision of CPL § 310.10(1), which is still in effect. Under CPL § 310.10(1), a jury, once deliberations begin, must, "except as otherwise provided in [CPL § 310.10(2)] be continuously kept together under the supervision of a court officer or court officers." During each of the recesses, the trial court is required to give to the jury certain instructions designed to ensure that it does not resume deliberations until all twelve jurors are back in the jury room, and

According to its plain language, the statute permits a separation for "up to twenty-four hours," but court holidays and weekends are not counted in this time. Thus, if jury deliberations are declared in recess at 5:00 p.m. on a Friday, the statute requires that the court direct jurors to return to deliberate on Monday before 5:00 p.m. If jury deliberations are declared in recess at the close of business on a Thursday at 5:00 p.m., the statute requires that the court direct jurors to return to deliberate on Friday before 5:00 p.m. In practice, jurors are directed to return to court the following day at 9:30 a.m. to resume deliberations. The statute, however, is technically satisfied if deliberations resume, even for just a few moments, within the 24-hour period. In other words, deliberations of any length serve to "reset" the 24-hour clock.

The statute does not control until the jury begins deliberations, even if all the evidence has been submitted, the parties have delivered summations, and the court has given most, but not all, of its final instructions. Until deliberations have begun, recesses are controlled by CPL § 270.45, which grants the judge unfettered discretion and sets no time limit.[25] Thus, a trial judge who is otherwise prepared to charge a jury on a Monday morning, but who anticipates juror unavailability on Tuesday, can delay the charge and the start of deliberations until Wednesday morning—after the potential scheduling issue has passed.

The statute also does not control after the jury has informed the court that it has reached a verdict.[26] Thus, in the rare circumstance when a juror becomes ill after the verdict is reached, but before it is formally announced in court, there is no requirement that the juror return to court or that the verdict be announced within the time period set forth in CPL § 310.10(2).

Accordingly, at Smith's trial, as the close of business drew near on Friday without a verdict, the trial judge, "after notice to the parties, and affording such parties an opportunity to be heard on the record outside of the presence of the jury,"[27] instructed the

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that it is not improperly exposed to any information about the case that was not presented in court. *Id.* §§ 310.10(2); 270.40.

[25] *See supra* note 14.

[26] *See* People v. Monroig, 223 A.D.2d 730, 731, 637 N.Y.S.2d 451, 451 (2d Dep't 1996) (finding no abuse of discretion in declining to sequester jury after verdict was reached, but before it could be fully read into the record, because of the sudden illness of a juror).

[27] N.Y. CRIM. PROC. LAW § 310.10(2).

court officers to tell the jurors to cease deliberations and return to the courtroom. When all jurors were present, the court instructed them not to discuss the case until they were all present in the jury room on Monday. The court also admonished the jury not to speak with "anyone else upon any subject connected with the trial; [not to] read or listen to any accounts . . . of the case reported by newspapers or other news media; [and not to] visit or view the premises or place where the offense [was] allegedly committed . . . ."[28] The court reminded the jury not to do any internet research on the case, and to "promptly report . . . any incident within their knowledge involving an attempt by any person improperly to influence any member of the jury."[29] This was the same admonition that the trial judge gave before each recess—an instruction that the law presumes the jurors will follow.[30] The jury was then dismissed from the courtroom with instructions to return on Monday.

Eleven of the deliberating jurors returned on Monday as instructed. The twelfth juror informed the court by telephone that his return flight to New York City from Seattle was delayed until late that evening, and consequently, he would not be able to return to court until Tuesday morning. Although there were several alternate jurors available, Smith would not consent to a substitution.[31] Since deliberations would not resume until the next day, the recess would be more than the statutorily authorized period permitted by CPL § 310.10(2). The court asked the juror to see if any other flights were available that would facilitate an earlier return. After all, if the juror returned to court at any time before 5:00 p.m., deliberations could resume, even for just a few moments, and the statutory mandate would be satisfied. The juror informed the court that no earlier flights were available.

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[28] *Id.* CPL § 310.10(2) requires that these instructions, codified in CPL § 270.40, be given prior to any time that a deliberating jury is allowed to separate. *See, e.g.*, *Jury Separation During Deliberations*, NYCOURTS.GOV, http://www.nycourts.gov/judges/cji/1-General/CJI2d.Jury_Separation_Rev.pdf (last visited Aug. 27, 2018).

[29] N.Y. CRIM. PROC. LAW § 270.40.

[30] *See* People v. Baker, 14 N.Y.3d 266, 273–74, 926 N.E.2d 240, 245, 899 N.Y.S.2d 733, 738 (2010).

[31] CPL § 270.35(1) requires a defendant to consent, in writing, to substitution of a sworn juror with an alternate juror after deliberations have begun.

Smith's attorney was obviously aware of this juror's travel plans because the juror had relayed this information to the court during jury selection.[32] Nonetheless, although Smith's attorney was unable to articulate any prejudice that his client would suffer from the brief delay in resuming deliberations, he moved for a mistrial, which the court granted with great reluctance. Unlike other time limitations specified in the Criminal Procedure Law, which may be extended "for good cause shown," CPL § 310.10(2) on its face affords judges no discretion to extend a recess in deliberations beyond the period specified in the statute.[33] In considering Smith's application, the court was mindful of its obligation to construe laws "so as to give effect to the plain meaning of the words used [by the Legislature]."[34] Without any controlling appellate authority granting trial judges authority to extend recesses beyond the period specified in CPL § 310.10(2), and cognizant of the fact that this statute was a relatively recent and limited exception to the long tradition of mandatory sequestration of criminal trial jurors in New York, the trial court concluded that a recess beyond the statutorily authorized period would be contrary to the legislative intent.

Given the plain language of CPL § 310.10(2), defendants argue that judges have no discretion to react to unexpected, yet temporary, instances of juror unavailability. They contend that the statute mandates a mistrial when deliberations do not resume on the next day the court is open for business. These applications are sometimes granted even when defendants have suffered no prejudice from the delay in resuming deliberations. And since a mistrial granted at the defendant's request is not subject to appellate review, prosecutors have no remedy.[35]

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[32] *See supra* text following note 11.

[33] *See, e.g.*, N.Y. CRIM. PROC. LAW § 180.80(3) (authorizing, for good cause, extension of the time after which an incarcerated defendant must be indicted before being released from custody); *id.* § 700.70 (providing that notice of an eavesdropping investigation must be served within fifteen days after arraignment unless good cause shown); *id.* § 710.30(2) (requiring prosecution to serve within fifteen days after arraignment notice of any statements made by defendant which prosecution seeks to offer on direct case—a period which can be extended by the court for good cause shown); *id.* § 250.10(2) (notice of psychiatric defense must be served within thirty days of arraignment, although court can extend the time for good cause shown).

[34] Myers v. Schneiderman, 30 N.Y.3d 1, 12, 85 N.E.3d 57, 61, 62 N.Y.S.3d 838, 842 (2017) (quoting People v. Finnegan, 85 N.Y.2d 53, 58, 647 N.E.2d 758, 760, 623 N.Y.S.2d 546, 548 (1995)).

[35] The prosecution's right to appeal is governed by statute and only those orders listed in CPL § 450.20 may be appealed by the prosecution. These include orders dismissing an accusatory instrument, setting aside a verdict, or granting a motion to

When courts grant mistrials under these circumstances, the state is put through the expense and burden of retrying an entire case even when there is no suggestion that the original trial was anything but fair. The mischief caused by this statute is not confined to unnecessary mistrials. The statutory mandate has other consequences, such as assigning temporary judges to cover a trial judge's calendar day, scheduling jury deliberations during a calendar day (when responding to jury notes can be difficult and time consuming),[36] and ordering jurors to appear in court even when they have a serious personal emergency.[37]

Various bills have been proposed, but never enacted, to give New York trial judges express statutory discretion to suspend jury deliberations for a period longer than that currently permitted by CPL § 310.10(2).[38] Nonetheless, based upon earlier

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suppress evidence that renders the remaining evidence insufficient to sustain the prosecution's burden of proof. An improperly granted mistrial is not one of the statutorily authorized grounds for an appeal by the prosecution. Further, it is unlikely that a writ of prohibition, brought pursuant to Article 78 of the New York Civil Practice Law and Rules, would be a viable method by which the prosecution could challenge a mistrial granted for an alleged violation of CPL § 310.10(2). *See* Holtzman v. Goldman, 71 N.Y.2d 564, 569, 523 N.E.2d 297, 300, 528 N.Y.S.2d 21, 24 (1988) ("Because of its extraordinary nature, prohibition is available only where there is a clear legal right, and then only when a court—in cases where judicial authority is challenged—acts or threatens to act either without jurisdiction or in excess of its authorized power."). By contrast, Article 78 relief is available to a defendant who claims that a mistrial was declared without manifest necessity and that a second trial is barred on double jeopardy grounds. *See, e.g.*, *In re* Capellan v. Stone, 49 A.D.3d 121, 124–25, 849 N.Y.S.2d 530, 532–33 (1st Dep't 2008).

[36] There may well be times where, given the posture of jury deliberations, a trial court, in its discretion may think it prudent that the jury continue deliberating through a calendar day. However, this decision should be entrusted to the sound discretion of the trial court.

[37] The trial court would also have to make an inquiry to determine whether the personal emergency rendered the juror grossly unqualified to continuing serving. *See, e.g.*, People v. Hernandez, 227 A.D.2d 162, 162, 642 N.Y.S.2d 634, 634 (1st Dep't 1996) (trial court properly discharged juror suffering from stomach flu since the juror stated that the illness "might . . . affect[] his ability to concentrate and deliberate").

[38] In 2012, the New York State Senate introduced a bill authorizing the suspension of jury deliberations "upon good cause shown" for up to 72 hours. N.Y. State Senate, S06679, 199 Legislative Session (N.Y. 2012). The bill was not approved by the Senate. In 2016, a similar bill was introduced but again was not approved by the Legislature. *See* N.Y. State Assembly, A07031, 201 Legislative Session (N.Y. 2016) (permitting suspension of jury deliberations until close of business the next day or, for good cause shown, beyond close of business on the third day following recess of jury deliberations unless both parties consent to a longer period). Finally, in 2017, a third attempt was made to amend the law. The Legislature has yet to adopt this amendment. *See* N.Y. State Assembly, A07448, 201 Legislative Session (N.Y. 2017) (permitting suspension of jury deliberations until the close of business

versions of New York's sequestration rule and case law interpreting those provisions, this Article contends that CPL § 310.10(2) is not violated when deliberations do not resume within the prescribed statutory period due to an unexpected delay occasioned by a juror's temporary inability to return to court. Rather, a violation occurs only when, in the absence of such a circumstance, a court orders a recess in deliberations, over the timely objection of the defense, and directs the jury to return on a day other than the next day that court is open for business. Further, even when there is an alleged violation of the statute, a defendant should still be required to show how he was prejudiced by the delay in resuming deliberations before a mistrial is granted.

This Article proceeds as follows: Part II reviews the law regarding judicial control over jurors, both before and after deliberations begin. Part III discusses the historical origins of jury sequestration and the path to the enactment of the current version of CPL § 310.10(2). Part IV discusses case law relevant to CPL § 310.10(2). Part V surveys the law in the other forty-nine states, none of which has a per se reversal rule in cases where a deliberating jury is separated out of necessity. Part VI recommends an amendment to the statute that would permit recesses in jury deliberations for as long as is necessary to accommodate the temporary unavailability of a deliberating juror or to address an unforeseen circumstance that makes it impractical for deliberations to resume. The proposed amendment would also permit deliberations to be adjourned for up to 48 hours in non-emergency situations to afford judges the ability to deal with non-trial matters at least one day per week.

II. JUDICIAL CONTROL OVER JURORS

Under New York law, a trial judge has a sliding scale of discretion, from jury selection to jury discharge. A judge's discretion is at its greatest during jury selection, when he or she may excuse potential jurors for cause.[39] A court may grant either

on the next business day or "for good cause shown, beyond close of business on the third day following recess of jury deliberations"). For the complete text of all of these proposed amendments, see http://nyassembly.gov/leg (last visited Aug. 26, 2018).

[39] *See* N.Y. CRIM. PROC. LAW § 270.20 (McKinney 2018). When jurors express a doubt about their own impartiality, "[j]udges should either elicit some unequivocal assurance of their ability to be impartial when that is appropriate, or excuse the juror when that is appropriate, since, in most cases, the worst the court will have

side's challenge for cause and dismiss a prospective juror when the juror "has a state of mind that is likely to preclude him from rendering an impartial verdict based upon the evidence adduced at the trial."[40] There is no need, if the prosecution is making the challenge, for the defendant to consent before the prospective juror is excused.[41] There is also no statutory restriction on the length of the jury selection process, or on any recesses taken during the process.[42]

The standard for removal of a sworn juror and replacement with an alternate juror is more onerous.[43] CPL § 270.35 authorizes the trial court to replace a sworn juror with an alternate juror if the sworn juror "is unable to continue serving by reason of illness or other incapacity, . . . or the court finds, from facts unknown at the time of the selection of the jury, that [the juror] is grossly unqualified to serve in the case . . . ."[44] Prior

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done . . . is to have replaced one impartial juror with another impartial juror." People v. Harris, 19 N.Y.3d 679, 685, 978 N.E.2d 1246, 1250, 954 N.Y.S.2d 777, 780 (2012) (internal citations omitted).

[40] N.Y. CRIM. PROC. LAW § 270.20(1)(b); *see also* People v. Johnson, 94 N.Y.2d 600, 611, 730 N.E.2d 932, 938, 709 N.Y.S.2d 134, 140 (2000). In addition, depending on the level of offense, the law affords each party a certain number of "peremptory challenges," which can be used to strike a potential juror without a showing that the juror cannot be fair and impartial. N.Y. CRIM. PROC. LAW § 270.25. An erroneous ruling granting a challenge for cause by the People is not reversible error "unless the people have exhausted their peremptory challenges at the time or exhaust them before the selection of the jury is complete." N.Y. CRIM. PROC. LAW § 270.20(2). Similarly, an "erroneous ruling by the court denying a challenge for cause by the defendant does not constitute reversible error unless the defendant has exhausted his peremptory challenges at the time or . . . before the selection of the jury is complete." *Id.*

[41] N.Y. CRIM. PROC. LAW § 270.20(2); *see also* People v. Smith, 136 A.D.3d 532, 533, 25 N.Y.S.2d 178, 178 (1st Dep't 2012) (rejecting defendant's claim that the court improperly granted "two challenges for cause by the People").

[42] *See* N.Y. CRIM. PROC. LAW § 270.15; *see also* People v. Jean, 75 N.Y.2d 744, 745, 551 N.E.2d 90, 91, 551 N.Y.S.2d 889, 890 (1989) (finding a fifteen-minute time limit on each attorney's voir dire in the first two rounds and a ten-minute limit for the third round to be an appropriate exercise of discretion). *But see, e.g.*, People v. Steward, 17 N.Y.3d 104, 107, 950 N.E.2d 480, 482, 926 N.Y.S.2d 847, 849 (2011) (finding that a "five minute limitation on counsel for the questioning of jurors . . . in this multiple felony case" was an abuse of discretion).

[43] *See* People v. Henderson, 74 A.D.3d 1567, 1570, 903 N.Y.S.2d 589, 593 (3d Dep't 2010) ("This exacting test, which requires a greater showing than a for-cause challenge, may not be based upon speculation as to a juror's possible partiality premised upon equivocal responses.") (internal citations omitted).

[44] N.Y. CRIM. PROC. LAW § 270.35(1). *See* People v. Buford, 69 N.Y.2d 290, 299, 506 N.E.2d 901, 906, 514 N.Y.S.2d 191, 196 (1987) (holding that, when a trial court learns that a juror may have become grossly unqualified, the court is obligated to make a "probing and tactful inquiry" of the juror, and must put the reasons for its ruling on the record).

to discharging a sworn juror based on unavailability, the trial judge is required to "make a reasonably thorough inquiry . . . ."[45] Trial courts are further authorized to presume a juror unavailable for continued service if "there is no reasonable likelihood such juror will be appearing[] in court within two hours of the time set by the court for the trial to resume."[46] If the juror is discharged prior to deliberations, the defendant's consent is not required for the trial court to discharge and replace the juror with an alternate juror.[47]

A trial judge is vested with almost unfettered discretion to adjourn the trial and "permit separation of the jurors . . . at any stage of the trial up until submission of the case to the jury."[48] CPL § 270.45 authorizes the trial court to permit a jury to "separate during recesses and adjournments."[49] Although lengthy mid-trial adjournments are generally undesirable, there is no limitation on the number or length of adjournments that a judge can authorize during the pendency of a trial.[50]

Once the jury begins to deliberate, a trial judge's discretion with respect to replacement of sworn jurors with alternate jurors and adjournments of deliberations all but disappears. First, while a trial judge can discharge a deliberating juror without the consent of the defendant, an alternate juror cannot replace the discharged juror unless the defendant signs a waiver, in open court, consenting to the substitution.[51] If the defendant neither consents to the substitution, nor consents to an eleven-person jury, the court must declare a mistrial.[52] Further, as noted above, any adjournments of the trial after deliberations commence are subject to the restriction of CPL § 310.10(2).[53]

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[45] N.Y. CRIM. PROC. LAW § 270.35(2)(a).

[46] *Id.*

[47] *See id.*

[48] People v. D'Alvia, 171 A.D.2d 96, 103, 575 N.Y.S. 495, 500 (2d Dep't 1991).

[49] N.Y. CRIM. PROC. LAW § 270.45.

[50] *See* People v. Molinas, 21 A.D.2d 384, 385–86, 250 N.Y.S.2d 684, 686 (1st Dep't 1964) (finding that a "five week adjournment of trial necessitated by illness of the trial judge was not grounds for a mistrial"); People v. Cooper, 173 A.D.2d 551, 552, 570 N.Y.S.2d 147, 148 (2d Dep't 1991) (holding that the trial court properly declined to declare a mistrial based upon a six-week interruption of the trial when the defense counsel fell ill).

[51] N.Y. CRIM. PROC. LAW § 270.35(1). Such consent "must be in writing and must be signed by the defendant in person in open court in the presence of the court." *Id.*; *see* People v. Gajadhar, 9 N.Y.3d 438, 443–44, 880 N.E.2d 863, 866, 850 N.Y.S.2d 377, 380 (2007).

[52] N.Y. CRIM. PROC. LAW § 270.35(1).

[53] *See supra* text accompanying notes 22–24.

III. HISTORICAL ORIGINS AND DEVELOPMENT OF JURY SEQUESTRATION IN NEW YORK

Historically, sequestration not only meant isolating jurors from the outside world; it also included keeping them "without meat, drink, fire, or candle . . . till they are all unanimously agreed."[54] This was done not to ensure jurors' impartiality, but to compel them to reach a verdict. In the time of Edward I, King of England from 1272 to 1307, the "sheriff could cause the jurors in an assize to be kept *sine cibo et potu* until they agreed."[55] Judges at the time also had the option to "afforce the jury," namely by "adding jurors to the majority until twelve were found to be unanimous."[56] When afforcing juries became obsolete in the time of Edward III, "lock[ing] up the jury in a room, without meat, drink, or fire, or candle" became one of the most powerful methods to compel a unanimous verdict.[57]

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[54] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 375–76 (15th Edition 1809). There are other historical instances, apart from a jury trial, where isolation has been used to compel and accelerate agreement. The most well-known example is the isolation of cardinals during the election of a new pope. This practice was instituted in 1274 when Pope Gregory X called a "general council of the Church . . . ." MICHAEL WALSH, THE CONCLAVE: A SOMETIMES SECRET AND OCCASIONALLY BLOODY HISTORY OF PAPAL ELECTIONS 85 (2003). The council issued various decrees which mandated certain procedures to be followed by the cardinals who were charged with the selection of a new pope. *Id.* Much like sequestration of a jury, cardinals called to elect a pope were required, during the election process, to "live in common in one room, with no partition or curtain." *Id.* Until a new pope was elected, the cardinals were locked into one room, no person was allowed to speak with them and "[i]f, after three days, there has been no election, they are allowed only one dish at lunch and supper, then after five days only bread, wine, and water are to be given [to] them until they come up with a pope." *Id.*

Another historical instance was the election of the Roman Emperor in the 1300s. In 1356, Charles IV of Germany published the "Golden Bull of Charles IV" which outlined the election process. SIR ROBERT COMYN, CHARLES IV OF GERMANY PUBLISHES HIS GOLDEN BULL *reprinted in* 7 THE GREAT EVENTS BY FAMOUS HISTORIANS 160 (Rossiter Johnson, ed. 1905). The process required that upon the death of the emperor, seven electors were to be summoned to Frankfort. *Id.* Further, the electors were forbidden from leaving the city before an emperor was elected. *Id.* If the electors after thirty days had still not elected a new emperor, their diets would be restricted to only bread and water. *Id.* at 161.

[55] JOHN PROFATT, TREATISE ON TRIAL BY JURY § 77, at 113 (1877). *Sine cibo et potu* is translated as "without food or water"; *assize* is defined as "[a] session of a court or council; [or] a meeting of a court presided over by a judge or judges who travel periodically from town to town." *Assize*, BLACK'S LAW DICTIONARY (10th ed. 2014).

[56] PROFATT, *supra* note 55, § 77, at 113.

[57] *Id.* § 77, at 113 n.4.

These practices were employed with little concern that a defendant receive a fair trial, or that the jury remain impartial.[58] Jurors would almost always convict a person, especially in cases involving high treason or crimes against the state, regardless of the actual evidence presented at trial.[59] It was widely known that "the royal will or wish" for a specific verdict was "without opposition carried into effect [by a jury]."[60] Indeed, "to be accused of a crime against the state and to be convicted were almost the same thing"[61] and jurors were fearful of imprisonment should they return a verdict of not guilty. Convictions were quick and almost guaranteed.[62] For example, during the trial of John Fisher, Bishop of Rochester, for High Treason, the jury returned a verdict of guilty. Yet they did so "onely [*sic*] for safety of their goods and lives, which they were well assured to lose, in case they had acquitted him."[63]

Up until the late 1600s, jurors could be legally punished or imprisoned by the presiding judge for returning a verdict that the court found improper. In the trial of Sir Nicholas Throckmorton for High Treason, after the jury returned a verdict of not guilty, "the court being dissatisfied with the [v]erdict, committed the [j]ury to prison."[64] Similarly, in 1670, William Penn and William Mead were indicted for "tumultuous assembly."[65] The indictment charged that the two men, "with force and arms, in the parish of St. Bennet Grace-church in Bridge-ward, London, in the street called Grace-church street, unlawfully and tumultuously did assemble and congregate themselves together, to the disturbance of the peace of the said lord the king."[66]

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[58] *Id.* § 77, at 114.

[59] *Id.* § 35, at 52.

[60] *Id.*

[61] *Id.* § 36, at 53.

[62] During the Trial of Philip Howard, Earl of Arundel, the jury "went together" and "[w]ithin one hour after, . . . the noblemen of the [j]ury came every one back" and returned a verdict of guilty. Trial of Philip Howard, Earl of Arundel, 1 HOWELL'S STATE TRIALS 1258 (1816). In the trial of Sir Thomas More for treason, the jury withdrew from the courtroom and returned fifteen minutes later with a guilty verdict. Trial of Sir Thomas More for High Treason, 1 HOWELL'S STATE TRIALS 392 (1816).

[63] Trial of John Fisher, 1 HOWELL'S STATE TRIALS 402 (1816).

[64] Trial of Sir Nicholas Throckmorton, 1 HOWELL'S STATE TRIALS 900 (1816).

[65] Trial of William Penn and William Mead, 6 HOWELL'S STATE TRIALS 952 (1670).

[66] *Id.* at 955.

After the trial was completed, "[t]he [j]ury were commanded up to agree upon their verdict . . . . After an hour and a half's time eight [jurors] came down agreed, but four remained above," apparently unwilling to convict Mead or Penn.[67] The court then "used many unworthy threats to the four that dissented," and told the foreperson, "you are the cause of this disturbance and manifestly shew yourself an abettor of faction; I shall set a mark upon you."[68] The jury, after listening to this "menacing language," was sent to "consider of bringing in their verdict, and after some considerable time they returned to the Court."[69] While the jury found the two "[g]uilty of speaking in Grace-church street,"[70] they would not return a verdict of guilty for the actual crime charged—unlawful assembly.[71] The court threatened the jurors by telling them that "[t]he law of England will not allow you to part till you have given in your [v]erdict,"[72] and warned "you shall not be dismissed till we have a verdict that the court will accept; and you shall be locked up, without meat, drink, fire, and tobacco . . . we will have a verdict . . . or you shall starve for it."[73] The jury was brought back to court the next morning, and found both Penn and Mead not guilty.[74] The jurors were all fined and imprisoned until the fine was paid.[75]

The foreperson, Edward Bushel, filed a Writ of Habeas Corpus. The reviewing court noted the absence of any allegation that the jury "acquitted the persons indicted, against full and manifest evidence corruptly."[76] Accordingly, "how manifest soever the evidence was, if it were not manifest to [the jury], and that they believed it such, it was not a finable fault, nor deserving imprisonment."[77] The writ was ultimately granted and the jurors were released from prison.[78]

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[67] *Id.* at 961.
[68] *Id.*
[69] *Id*. at 962.
[70] *Id.*
[71] *Id.* at 964–65.
[72] *Id.* at 962.
[73] *Id.* at 963.
[74] *Id.* at 966.
[75] *Id.* at 967–68.
[76] Case of the Imprisonment of Edward Bushell, 6 HOWELL'S STATE TRIALS 1005 (1670).
[77] *Id.*
[78] *Id.* at 1024.

Bushel's Case, decided in 1670, is widely regarded as the seminal case for the independence of a jury.[79] Following this decision, imprisonment could no longer be used to punish a jury for returning a verdict that the trial court found disagreeable.[80] However, "[i]n the early stages of the legal history of England many of the rules regulating the conduct of the court and jury on trials were very strict."[81] Notably, jurors "were not permitted to separate, after they had been charged by the court, until they had rendered a verdict."[82] This rule was "carried so far that, if the jury failed to agree during the session of the court . . . [they] were held in confinement until they rendered a verdict."[83] It became "an established principle of the common law, in relation to the trial by jury, that after the jurors are once impaneled, they have no right to disperse, or take refreshments without the leave of the court."[84]

Although courts slowly began to recognize the limited value of sequestration, New York case law from the early 1800s reveals that it was still the practice to sequester jurors and deprive them of various necessities because appeals were based upon the fact that jurors separated without court authorization and supervision. In *Smith v. Thompson*, "two of the jurors eluded the care of the constable, left the jury room, and one of them remained at a neighboring tavern during the night."[85] Both of the jurors returned the next morning and found for the plaintiff. The court held that "[i]t was clearly irregular in the two jurors to separate from their fellows," but declined to set aside the verdict.[86] In *People v. Douglass*, two of the jurors separated from the rest of the jury without permission from the trial judge.[87] The two jurors not only ate and consumed liquor, but freely "conversed on the subject of the trial."[88] As an implicit

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[79] Mark Brodin, *Accuracy, Efficiency and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 27 (1990).

[80] *See* Nancy Marder, *The Myth of the Nullifying Jury*, 93 NW. U. L. REV., 877, 950, n.336 (1999) ("Although this case did not officially recognize the right of juries to decide questions of law, it did establish that juries could not be punished for acquitting a defendant, thus establishing the power of the criminal jury to nullify.").

[81] Stephens v. People, 19 N.Y. 549, 553 (1859).

[82] *Id.* at 554.

[83] *Id.*

[84] People v. Ransom, 7 Wend. 417, 423 (Sup. Ct. 1831).

[85] Smith v. Thompson, 1 Cow. 221 (Sup. Ct. 1823).

[86] *Id*.

[87] People v. Douglass, 4 Cow. 26, 33 (Sup. Ct. 1825).

[88] *Id.* at 35.

recognition of the limited value of sequestration, the New York Supreme Court of Judicature held that separation of a jury against the orders of the court would not be a basis to set aside the verdict in the absence of "any farther abuse."[89] However, given the allegations of jury misconduct during the separation in *Douglass*, a new trial was ordered.[90]

What is notable about *Douglass* is that it recognized the authority of judges to permit a jury to separate during the trial, and declined to adopt a per se reversal rule even in cases of unauthorized jury separations.[91] The *Douglass* court and other New York courts at the time relied on *King v. Kinnear*, for the authority to separate a deliberating jury.[92] In *Kinnear*, the defendants were indicted for misdemeanor conspiracy.[93] The trial began at 10:00 a.m. and continued until approximately 11:00 p.m., when the prosecution finally finished presenting evidence.[94] Given the late hour, it became "a matter of necessity to adjourn" the case until the following morning.[95] The jury, without either the knowledge or consent of the defendants or judge, "separated and went to their respective homes."[96] The unauthorized separation was not discovered until after the jury reached a verdict. In declining to set aside the verdict, the court held that "standing alone," an unauthorized separation of a jury "is not sufficient to vacate the verdict."[97] The court further held that "the law has vested a discretion in the [j]udge, to allow the jury to go to their homes, during the necessary adjournment in each particular case; and, therefore, that no sufficient ground has been laid [to set aside the verdict]."[98]

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[89] *Id.* at 36. The Supreme Court of Judicature was a court of general as well as appellate jurisdiction. *See* Williams Press Inc. v. Flavin, 35 N.Y.2d 499, 503, 323 N.E.2d 693, 694, 364 N.Y.S.2d 154, 156 (1974). It was the highest court of law in New York until 1846. *Id.*

[90] *Douglass*, 4 Cow. at 35–36.

[91] *Id.* at 36. ("We do mean to be understood, however, as saying, that the mere separation of the jury, without any farther abuse, is not sufficient ground for setting aside a verdict; though it may deserve severe reprehension from the court.").

[92] *Douglass*, 4 Cow. at 33; King v. Kinnear, 2 B. & Ald. 462 (K.B. 1819).

[93] *Kinnear*, 2 B. & Ald. at 462.

[94] *Id.*

[95] *Id.* at 464.

[96] *Id.* at 462.

[97] *Id.* at 466.

[98] *Id.* at 465.

Kinnear was relied upon by New York courts for two related propositions—that a court had the authority to separate a jury contrary to the common law requirement of sequestration, and that separation of a jury, without more, is an insufficient basis to set aside a verdict.[99] *Kinnear* makes another equally important point: keeping a jury in court for long periods of time may be "most injurious to the cause of the defendants, that their case should be heard by a jury, whose minds were exhausted by fatigue."[100] This observation is an acknowledgment of the coercive nature of mandatory sequestration and its potential to do more harm than good.

In 1859, the New York Court of Appeals,[101] the state's highest court, echoed this sentiment in *Stephens v. People*:

> Where jurors are subjected to a long confinement their patience is exhausted, their power of endurance is weakened and . . . unable to give the necessary consideration to a long and often complicated case, involving the life of a fellow-man, when

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[99] *Ransom*, 7 Wend. at 424; Smith v. Thompson, 1 Cow. 221 (Sup. Ct. 1823); Stephens v. People, 19 N.Y. 549, 557 (1859).

[100] *Kinnear*, 2 B. & Ald., at 464.

[101] New York appellate courts are comprised of various intermediate appellate courts, as well as the Court of Appeals. An appeal from a judgment of the Supreme Court or County Court (the trial-level courts for felony cases) must be taken to the appellate division of the department in which such judgment was entered. N.Y. CRIM. PROC. LAW § 450.60 (McKinney 2018). New York State is divided into four "departments" and accordingly, there is an appellate division for each department. *See New York State Judicial Departments and Districts,* NYCOURTS.GOV, https://www.nycourts.gov/courts/ad4/Court/Dept-Districts.html (last visited, Aug. 26, 2018).

Criminal defendants have a statutory right to appeal a judgment of conviction to an intermediate appellate court. N.Y. CRIM. PROC. LAW § 450.10(1). Intermediate appellate courts can review rulings when the alleged errors have been "preserved" by an objection, made with specificity. N.Y. CRIM. PROC. LAW § 470.05(2). The intermediate appellate court may also review unpreserved claims "in the interest of justice," N.Y. CRIM. PROC. LAW §§ 470.15(3)(c), (6)(a), or may find that a conviction was "in whole or in part, against the weight of the evidence." N.Y. CRIM. PROC. LAW § 470.15(5).

An appeal to the Court of Appeals from an intermediate appellate court is by permission only, and requires a certificate granting leave to appeal, issued by either "a judge of the court of appeals or . . . a justice of the appellate division of the department which entered the order sought to be appealed." N.Y. CRIM. PROC. LAW § 460.20(2)(a). The Court of Appeals may only review "question[s] of law" and is not authorized to review issues reached by the intermediate appellate court "in the interest of justice." N.Y. CRIM. PROC. LAW § 460.20(1); *see* People v. Caban, 14 N.Y.3d 369, 373, 927 N.E.2d 1050, 1051, 901 N.Y.S.2d 566, 567 (2010) ("[A]n Appellate Division reversal that is based on an unpreserved error is considered an exercise of the Appellate Division's interest of justice power, not reviewable in [the Court of Appeals].").

> it is finally committed to them. Jurors are generally charged, in such cases, to hold no conversations on the subject of the trial, but in the long and dreary nights of their confinement a compliance with such charge is very difficult.[102]

In addition to recognizing that sequestration can undermine the integrity of the deliberative process, the Court of Appeals also recognized that sequestration does little to ensure that the integrity of the jury is not compromised. The court observed that "[a]ttempts to bribe jurors would be very hazardous" and had "little prospect of success."[103] Further, any attempt to tamper with an unsequestered jury would usually be in favor of the defendant because "[t]here have been but few, if any, attempts to corrupt a juror in behalf of the prosecution."[104] The court also noted that sequestration was an outmoded practice given "[t]he great improvement in the character, intelligence and position of jurors . . . ."[105]

Not every jurisdiction shared this view. In a case decided by the Supreme Court of Virginia in 1812, during a "temporary adjournment of the court, [a juror] went to the house at which he boarded . . . [and] was absent 15 or 20 minutes."[106] Although there was no evidence of juror tampering, the court reversed the conviction and held that "keeping the jury together until they agree without communication with others" is the only means by which impartiality can be guaranteed.[107] Committed to the

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[102] Stephens v. People, 19 N.Y. 549, 554–55 (1859). Some intermediate appellate courts, recognizing the coercive nature of sequestration have even reversed convictions when juries were informed that they would be sequestered if they did not reach a verdict. In *People v. Nelson*, an appellate court reversed a narcotics sale conviction after the trial judge told the deadlocked jury that they were to return the next morning for further deliberations and that they should come prepared for the possibility of being sequestered overnight in the event they did not reach a verdict by the end of the day. 30 A.D.3d 351, 352, 818 N.Y.S.2d 204, 204 (1st Dep't 2006).

[103] *Stephens*, 19 N.Y. at 555.

[104] *Id*.

[105] *Id.* at 556. *Stephens* dealt with an alleged sequestration violation which occurred during the trial, as opposed to during deliberations. After each day, the trial court, with the consent of the defendant, allowed the juror to return to their homes for the evening and come back to court the following day. *Id.* at 553–55. The Court of Appeals found that separation of a jury during the trial, without more, is an insufficient basis to set aside a verdict. *Id.* at 568–69. However, the holding is limited to a pre-deliberation separation of a jury with the consent of the defendant.

[106] Commonwealth v. McCaul, 3 Va. Cas. 271, 303 (Va. 1812).

[107] *McCaul*, 3 Va. Cas. at 302.

necessity of this practice, the court held that it "will preserve 'with fear and jealousy,' and will not expose the trial by jury in criminal cases, to such risque of contamination . . . ."[108]

The perceived value of mandatory sequestration thus began to vary based upon jurisdiction, as did the remedy for violating it. Although New York State seemed to recognize that mandatory sequestration does little to ensure that a defendant receive a fair trial, it remained an element of trials in New York State. In the 1881 codification of New York's criminal procedure laws,[109] § 421 of the Code of Criminal Procedure limited mandatory sequestration to jury deliberations.[110] Specifically, it provided:

> After hearing the charge, the jury may either decide in court, or may retire for deliberation. If they do not agree without retiring, one or more officers must be sworn, to keep them together in some private and convenient place, and not to permit any person to speak to or communicate with them, nor do so themselves, unless it be by order of the court, or to ask them whether they have agreed upon a verdict, and to return them into court when they have so agreed, or when ordered by the court.[111]

Although sequestration during deliberations was still mandatory, specific laws were enacted to expressly ensure that jurors were not starved into agreement. Sections 423 and 424 of the former Code of Criminal Procedure mandated that a

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[108] *Id.* at 305. The evolution of Virginia law on sequestration provides an interesting contrast to that of New York. In the early 1800s, Virginia adopted a rule requiring per se reversal of cases where a jury unnecessarily separated. *Id.* at 306. That rule was in place until the late 1800s and was subsequently softened to create a presumption of prejudice that the government had to refute. Owens v. Commonwealth, 167 S.E. 377, 379 (Va. 1933). In 1922, Virginia made sequestration discretionary in all but capital cases. *See* Robinson v. Virginia, 28 S.E.2d 10, 11 (Va. 1943), and it subsequently made it fully discretionary. VA. CODE OF CRIM. PROC. 19.2-264 (1950). *See* McFalls v. Peyton, 270 F. Supp. 577 (W.D. Va. 1967) (citing Code of Va § 19.1-213 (1950)). By contrast, in the 1800s, New York did not mandate per se reversal in cases of unnecessary jury separation. *See infra* note 205. Yet, it was not until 2001 that sequestration became discretionary in New York. *See infra* note 125 and accompanying text.

[109] Act of June 1, 1881, ch. 442, 1881 N.Y. Laws 601 (enacting Code of Criminal Procedure).

[110] Sequestration before deliberations was authorized but not mandatory. *See* former N.Y. Code of Criminal Procedure § 414 (1881) ("The jurors sworn to try an indictment may, at any time before the submission of the cause to the jury, in the discretion of the court, be permitted to separate, or be kept in charge of proper officers.").

[111] Former N.Y. Code of Criminal Procedure § 421 (1881).

deliberating jury be provided with "suitable furniture, fuel, lights and stationery," as well as "suitable and sufficient food and lodging."[112]

The rule mandating sequestration during deliberations was preserved when the Code of Criminal Procedure was replaced with the Criminal Procedure Law in 1971.[113] Section 310.10, which mandated sequestration during deliberations in all cases until 1995, replaced § 421 of the Code of Criminal Procedure. However, following at least one unsuccessful attempt to amend the law in 1987,[114] in 1995 the Legislature relaxed the mandatory sequestration requirement. Primarily a cost saving mechanism,[115] CPL § 310.10(2) was created to permit a judge to allow a jury to separate for up to 24 hours if the defendant was not charged with a "class A felony or a class B violent felony offense or a class C violent felony."[116] In so doing, the accompanying bill memorandum stated that "New York [was] the only State that mandates deliberating juries to be sequestered from the time testimony ends until a verdict is reached."[117] The Legislature also recognized that juries are frequently not sequestered during the evidentiary phase of the trial, thus undermining an argument that sequestration during deliberations serves an important purpose.[118]

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[112] Other jurisdictions had rules which, on their face, continued the coercive nature of sequestration. In a 1984 decision, the Court of Appeals of Minnesota held that the current statute "provides that jurors are to be kept together without food or drink except water unless otherwise ordered by the court. This language is over a hundred years old and is reminiscent of a time when jurors were the virtual prisoners of court officers." State v. Holly, 350 N.W.2d 387, 390 (Minn. App. Ct. 1984). The court found this provision of the statute to be "punitive and inappropriate and [directed that it] should be removed." *Id.*

[113] N.Y. Sess. Laws Chapter 996, 2147 (McKinney 2018).

[114] STATE OF NEW YORK LEGISLATIVE DIGEST, LEGISLATIVE BILL DRAFTING COMMISSION, ALBANY NY (1987) at A512, A7506. The proposed 1987 amendment would have eliminated mandatory sequestration of jurors in all cases except in class A and B felony cases. This was a slightly more expansive amendment than the version proposed and adopted in 1995.

[115] There apparently was some opposition to eliminating mandatory sequestration from the Court Officer's Union given the effect it would have on overtime. *See* Somini Sengupta, *New Law Releases Juries in New York From Sequestering*, N.Y. TIMES (May 31, 2001), https://www.nytimes.com/2001/05/31/nyregion/new-law-releases-juries-in-new-york-from-sequestering.html.

[116] Act of June 20, 1995, ch. 83, 1995 N.Y. Laws 111–12.

[117] Bill Memorandum, N.Y. Bill Jacket, 1995 A.B. 8063, 218th Leg. Reg. Sess. (1995). This assertion was not correct. There are still six jurisdictions that mandate sequestration during deliberations in all cases.

[118] *Id.*

Once the statute was amended, a survey was conducted to evaluate the effects of the now authorized separations.[119] Between July 5, 1995 and February 14, 1997, the Office of Court Administration collected data from all criminal trials in which the jury deliberated, regardless of whether the jury was sequestered.[120] Juries separated during deliberations in 688 cases and only one mistrial was granted for reasons relating to the jury's separation during deliberations.[121] Further, there was no appreciable difference between the time a separated jury deliberated and the time a sequestered jury deliberated.[122] The study ultimately concluded that the "experiment permitting deliberating juries in criminal trials to separate [had] been successful."[123] Jurors no longer had to bear the burden of sequestration, and "[t]he predicted negative impact—more mistrials and increased costs—simply did not occur."[124] Accordingly, in 2001, the statute was amended to its current form, authorizing judges to permit juries to separate in all criminal cases at the close of court on one day, and resume deliberations on the next day that the courts are open for business.[125] Although the "24-hour rule" is an improvement over past practices, it deprives judges of much-needed flexibility in dealing with unpredictable instances of juror unavailability.

IV. CASE LAW INTERPRETING CRIMINAL PROCEDURE LAW § 310.10(2)

The limited case law arising from claimed violations of the "24-hour rule" in CPL § 310.10(2) has not clarified whether and under what circumstances a defendant is entitled to a mistrial without the need to show prejudice if deliberations do not resume within the statutory time period. Trial judges are therefore understandably hesitant to deviate from the statutory mandate

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[119] The report was mandated by the Legislature. At the same time that CPL § 310.10(2) was enacted, the Legislature enacted CPL § 310.10(3). *See* Act of June 20, 1995, ch. 83, 1995 N.Y. Laws 111–12. That section provided that "[t]he chief administrator of the office of court administration shall prepare a report on the number of cases where the court separated the jury pursuant to this section."

[120] HON. JONATHAN LIPPMAN, SEPARATION AND SEQUESTRATION OF DELIBERATING JURIES IN CRIMINAL TRIALS 5 (1999).

[121] *Id*. at 5–6.

[122] *See generally id.*

[123] *Id.* at 16.

[124] *Id.*

[125] Act of May 30, 2001, ch. 47, 2001 N.Y. Laws 102.

and adjourn deliberations, even in cases of necessity, or to deny motions for mistrial when there is a recess in deliberations in excess of the 24-hour period.

A violation of CPL § 310.10(2), if viewed as a "mode of proceeding" error, would require an automatic mistrial or reversal on appeal. A mode of proceeding error is a doctrine unique to New York that is best described as "an umbrella term for a loose grouping of various process-oriented errors," usually occurring during the course of the trial.[126] These types of errors are said to undermine "the essential validity of the process and are so fundamental that the entire trial is irreparably tainted [when a mode of proceeding error occurs]."[127]

The mode of proceeding doctrine has its origins in an 1858 decision of the Court of Appeals—*Cancemi v. People*.[128] In that case, one of the jurors was discharged and, with the consent of the defendant, the murder trial proceeded with, and the verdict was rendered by, only eleven jurors.[129] At the time, New York had no provision for a defendant to waive a jury in a felony prosecution; it was not until 1938 that the State Constitution was amended to permit a defendant to waive his jury rights in all non-capital cases.[130] Accordingly, the Court of Appeals held that the defendant's waiver of a twelve-person jury was invalid and it reversed his conviction, reasoning as follows:

> [T]he right of a defendant in a criminal prosecution to affect, by consent, the conduct of the case [is] much more limited than in civil actions. It should not be permitted to extend so far as to work radical changes in great and leading provisions as to the organization of the tribunals or the mode of proceeding prescribed by the constitution and the laws.[131]

The Court of Appeals further explained the mode of proceeding doctrine in *People v. Patterson*, when it rejected a claim requiring a murder defendant to prove by a preponderance of the evidence the affirmative defense of extreme emotional

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[126] Gary Muldoon, *Understanding New York's "Mode of Proceeding" Muddle*, 59 BUFFALO L. REV. 1169, 1173 (2011).

[127] People v. Kelly, 5 N.Y.3d 116, 119, 832 N.E.2d 1179, 1181, 799 N.Y.S.2d 763, 765 (2005).

[128] 18 N.Y. 128 (1858).

[129] *Id.* at 131.

[130] People v. Gajadhar, 9 N.Y.3d 438, 443–44, 880 N.E.2d 863, 866, 850 N.Y.S.2d 377, 380 (2007).

[131] *Cancemi*, 18 N.Y. at 137.

disturbance and unconstitutionally shifted the burden of proof.[132] Although the court held that the defendant's due process rights were protected by the prosecution's initial burden of having to prove beyond a reasonable doubt his intent to kill his victim, it nevertheless acknowledged that in certain instances, not present in the case before it, a trial error "that . . . affect[s] the organization of the court or the mode of proceedings prescribed by law," would result in reversal even without preservation of the error at trial.[133] The purpose of the doctrine, the court stated, "is to ensure that criminal trials are conducted in accordance with the mode of procedure mandated by Constitution and statute. Where the procedure adopted by the court below is at a basic variance with the mandate of law, the entire trial is irreparably tainted."[134] The court further explained that "where the court had no jurisdiction, or where the right to trial by jury was disregarded, or where there was a fundamental, nonwaivable defect in the mode of procedure, then an appellate court must reverse, even though the question was not formally raised below."[135]

As the doctrine has developed, it has become more difficult to understand and therefore predict which procedural errors fall under the mode of proceeding umbrella because "[w]ith each area that the Court of Appeals has found a mode [of proceeding] violation, the court has seemingly found the need to emphasize the narrowness of the issue, and often to deny its application in a later case."[136] Some errors that have been classified as implicating the mode of proceeding doctrine include a trial judge's failure to preside over portions of the trial by delegating responsibility to a law secretary,[137] failing to disclose to the defense the full contents of a jury note before responding to it,[138] violating a defendant's right to be present at material stages of the proceeding,[139] and the conviction of a nonexistent crime.[140]

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[132] 39 N.Y.2d 288, 301, 347 N.E.2d 898, 907, 383 N.Y.S.2d 573, 581 (1976), *aff'd*, 432 U.S. 197 (1977).

[133] *Id.* at 295, 347 N.E.2d at 902, 383 N.Y.S.2d at 577.

[134] *Id.* at 295–96, 347 N.E.2d at 932, 383 N.Y.S.2d at 577–78.

[135] *Id.,* 347 N.E.2d at 932, 383 N.Y.S.2d at 577–78.

[136] Muldoon, *supra* note 126, at 1206.

[137] People v. Ahmed, 66 N.Y.2d 307, 310, 487 N.E.2d 894, 895, 496 N.Y.S.2d 984, 985 (1985).

[138] People v. O'Rama, 78 N.Y.2d 270, 279, 579 N.E.2d 189, 193, 574 N.Y.S.2d 159, 163 (1991).

[139] People v. Rivera, 23 N.Y.3d 827, 832, 18 N.E.3d 367, 370, 993 N.Y.S.2d 656, 659 (2017).

Designating a procedural error as a "mode of proceeding" error has significant ramifications—the most important of which is that it results in reversal of a conviction without any consideration of the prejudice that the error may have caused.[141] Prejudice will be presumed when a mode of proceeding error occurs and there is no opportunity for the prosecution to rebut that presumption.[142] Additionally, mode of proceeding errors cannot be waived or consented to by a defendant.[143] For example, in *People v. Ahmed*, the trial judge's law secretary responded to several jury notes, which included a request for a rereading of the instructions on reasonable doubt.[144] Notwithstanding the defendant's consent, the Court of Appeals reversed the conviction and held that "the absence of the trial judge, and the delegation of some of his duties to his law secretary . . . deprived the defendant of his right to a trial by jury, an integral component of which is the supervision of a judge."[145]

As shown by the *Patterson* case, in addition to being non-waivable, mode of proceeding errors can also be reviewed by an appellate court even though the complained of error was not preserved by a proper objection.[146] Under New York law, in order to preserve an issue for appellate review, a party must object and state with specificity the reasons why the complained of ruling was error.[147] If the ruling is not corrected after the objection, the issue is deemed preserved for appellate review. Generally, alleged errors which are unpreserved can only be reviewed on

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[140] People v. Martinez, 81 N.Y.2d 810, 812, 611 N.E.2d 277, 278, 595 N.Y.S.2d 376, 377 (1993).

[141] People v. Mack, 27 N.Y.3d 534, 540, 55 N.E.3d. 1041, 1046, 36 N.Y.S.3d 68, 73 (2016) (holding that "[m]ode of proceedings errors are immune not only from the rules governing preservation and waiver but also from harmless error analysis").

[142] *Id.,* 55 N.E.3d. at 1046, 36 N.Y.S.3d at 73.

[143] People v. Becoats, 17 N.Y.3d 643, 650, 958 N.E.2d 865, 867, 934 N.Y.S.2d 737, 739 (2011) ("A defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of the court or the mode of proceedings pr[e]scribed by law") (quoting People v. Patterson, 39 N.Y.2d 288, 294, 347 N.E.2d 898, 902, 383 N.Y.S.2d 573, 577 (1976)); *see also Mack*, 27 N.Y.3d at 539, 55 N.E.3d at 1046, 36 N.Y.S.3d at 73; *rehearing denied*, 28 N.Y.3d 944, 60 N.E.3d 407, 38 N.Y.S.3d 513 (Mem) (2016).

[144] People v. Ahmed, 66 N.Y.2d 307, 309, 487 N.E.2d 894, 895, 496 N.Y.S.2d 984, 985 (1985).

[145] *Id.,* 487 N.E.2d at 895, 496 N.Y.S.2d at 985.

[146] *See supra* text accompanying notes 132–135.

[147] N.Y. CRIM. PRO. LAW § 470.05(2) (McKinney 2018).

appeal under limited circumstances, such as when an intermediate appellate court, in the exercise of its discretion, reviews a claim "in the interest of justice."[148]

Apart from interest of justice jurisdiction, mode of proceeding errors are another exception to the preservation rule and can be reviewed by both intermediate appellate courts and the Court of Appeals in the absence of a timely objection.[149] Thus, if an alleged error is classified as a mode of proceeding error, then the Court of Appeals is empowered to review it even if the issue was not preserved in the trial court.[150]

Although the Court of Appeals has not ruled on whether a violation of CPL § 310.10(2) is a mode of proceeding error, it temporarily classified a violation of the earlier, mandatory sequestration requirement as a mode of proceeding error, requiring automatic reversal. In *People v. Coons*, deliberating jurors were permitted to "go to their homes for dinner, separately and unsupervised."[151] At the time of the trial, CPL § 310.10(2) had not yet been enacted and, accordingly, judges were required to sequester juries during deliberations.[152] Although the defendant in *Coons* did not object to the separation of the deliberating jurors, the Court of Appeals classified the violation as a mode of proceeding error, reversed the conviction, and held

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[148] N.Y. CRIM. PRO. LAW § 470.15(3)(c). The basis of a discretionary reversal of a judgment in the "interest of justice" includes, but is not limited to, a determination that an "error or defect . . . deprived the defendant of a fair trial." N.Y. CRIM. PRO. LAW § 470.15(6)(a). "Interest of justice" jurisdiction is conferred solely on intermediate appellate courts; the Court of Appeals is exclusively a court of law. N.Y. CRIM. PRO. LAW § 470.20(6); People v. Hawkins, 11 N.Y.3d 484, 492 n.1, 900 N.E.2d 946, 950 n.1, 872 N.Y.S.2d 395, 399 n.1 (2008).

[149] The authority of the Court of Appeals to review unpreserved "mode of proceeding" errors is derived from CPL § 470.35(1), which provides that the Court of Appeals may consider "any question of law involving alleged error or defect in the criminal court proceedings resulting in the original criminal court judgment, . . . regardless of whether such question was raised" in the intermediate appellate court. N.Y. CRIM. PRO. LAW § 470.35(1). A mode of proceeding error is classified as a "question of law." People v. Patterson, 39 N.Y.2d 288, 296, 347 N.E.2d 898, 903, 383 N.Y.S.2d 573, 578 (1976).

[150] *Patterson*, 39 N.Y.2d at 296, 347 N.E.2d at 903, 383 N.Y.S.2d at 578.

[151] People v. Coons, 75 N.Y.2d 796, 797, 551 N.E.2d 587, 588, 552 N.Y.S.2d 94, 95 (1990).

[152] The requirement that jurors be "continuously kept together" during deliberations remains in effect, as provided in CPL § 310.10(1). N.Y. CRIM. PRO. LAW § 310.10(1). However, based on the phrase, "except as otherwise provided by subdivision two of this section," the trial court has discretion to permit the jurors to return home each evening so long as the "24-hour rule" in CPL § 310.10(2) is observed. N.Y. CRIM. PRO. LAW § 310.10(2).

that "[e]rrors which 'affect the organization of the court or the mode of proceedings prescribed by law' need not be preserved and, even if acceded to, still present a question of law for this court to review."[153]

Less than two years later, in *People v. Webb*,[154] the Court of Appeals was faced with another case that involved the separation of a jury in violation of the mandatory sequestration rule. However, unlike in *Coons*, the defendant in *Webb*, in the presence of his counsel, expressly consented, on the record, to the proposed separation of the jury during deliberations.[155] The issue in *Webb* was whether the mandatory sequestration rule could be waived given the recent mode of proceeding classification in *Coons*.[156]

The court, citing *Coons*, rejected the defendant's attempt to equate an error that is "sufficiently linked to the mode of proceedings so as not to require preservation," with an error "which necessarily entails a part of the process so essential to the form and conduct of the actual trial that the defendant may not waive it."[157] The court found the defendant's reasoning—"what need not be preserved may not be waived"—to be fatally flawed, and held that "the sequestration provision does not implicate fundamental rights that are an integral part of the trial itself."[158] Moreover, the court noted, the "requirement that a deliberating jury be sequestered is entirely statutory and reflects no established common-law right of the defendant."[159] But, most importantly, the court reasoned:

> The protection which the provision affords a defendant does not relate to the actual trial proceeding or to how, by what proof or by whom a defendant may be tried and adjudged guilty. Rather CPL 310.10 relates to what happens after completion of the trial proper and simply prescribes the separate place, outside the courtroom, the supervisory personnel and interdiction against anyone speaking to or being permitted to speak to any of the

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[153] *Coons*, 75 N.Y.2d at 797, 551 N.E.2d at 588, 552 N.Y.S.2d at 95 (internal citations omitted).

[154] People v. Webb, 78 N.Y.2d 335, 336, 581 N.E.2d 509, 509, 575 N.Y.S.2d 656, 656 (1991).

[155] *Id.* at 336–37, 581 N.E.2d at 509–10, 575 N.Y.S.2d at 656–57.

[156] *Id.*, 581 N.E.2d at 509–10, 575 N.Y.S.2d at 656–57.

[157] *Id.* at 337–38, 581 N.E.2d at 510–11, 575 N.Y.S.2d at 657–58.

[158] *Id.* at 338, 581 N.E.2d at 511, 575 N.Y.S.2d at 658.

[159] *Id.,* 581 N.E.2d at 511, 575 N.Y.S.2d at 658.

> jurors. Thus, we conclude that the sequestration requirement does not entail a right of defendant that is so essential to the trial proceeding that it may never be waived.[160]

Significantly, the court noted that the "ancient common-law practice of keeping the jurors locked up without food or drink, and sometimes without heat and light, until they reached a verdict was simply to force them to agree," as opposed "to protect[ing] *the defendant* by keeping the deliberating jurors from being improperly influenced by contacts with or communications from outside sources . . . ."[161]

By holding that a defendant can waive the sequestration requirement, the Court of Appeals implicitly removed the mode of proceeding classification. Indeed, not only are mode of proceeding errors exempt from the preservation requirement, they "are not waivable and therefore require reversal even if the defense affirmatively consents to the court's action."[162] Further, the court in *Coons* had specifically held that mode of proceeding errors still present "a question of law for this court to review" even "if acceded to."[163] Thus, the holding in *Webb* was completely at odds with the holding in *Coons*.

That *Webb* effectively overruled *Coons* was made clear by the Court of Appeals in *People v. Agramonte*, a consolidated appeal of two separate cases decided when sequestration was still mandatory.[164] In each case, the deliberating jurors were permitted to dine with the alternate jurors in violation of both CPL § 310.10 and CPL § 270.30(1).[165] No objection was raised by the defendant in either case before the jurors and alternates were sent to dinner together.[166] The court acknowledged that in *Coons*, it had concluded that a violation of the mandatory sequestration rule was a "mode of proceedings error," but

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[160] *Id.,* 581 N.E.2d at 511, 575 N.Y.S.2d at 658 (internal quotation and citation omitted).

[161] *Id.* at 340 n.*, 581 N.E.2d at 511 n.*, 575 N.Y.S.2d at 658 n.* (emphasis in original).

[162] People v. Mack*,* 27 N.Y.3d 534, 543, 55 N.E.3d. 1041, 1049, 36 N.Y.S.3d 68, 76 (2016).

[163] People v. Coons, 75 N.Y.2d 796, 797, 551 N.E.2d 587, 588, 552 N.Y.S.2d 94, 95 (1990).

[164] People v. Agramonte, 87 N.Y.2d 765, 767, 665 N.E.2d 164, 165, 642 N.Y.S.2d 594, 595 (1996).

[165] CPL § 270.30(1) requires that "[a]fter the jury has retired to deliberate, the court must . . . direct the alternate jurors not to discuss the case and . . . be kept separate and apart from the regular jurors."

[166] *See Agramonte*, 87 N.Y.2d at 770, 665 N.E.2d at 166, 642 N.Y.S.2d at 596.

admitted that it had done so "without discussion of the underlying requirement."[167] The court relied exclusively on its reasoning in *Webb*, noting that in that case it had "clarified" that "the sequestration requirement does not 'entail[] a part of the process essential to the form and conduct of the actual trial' [nor does it] . . . '*implicate fundamental rights that are an integral part of the trial itself*.' "[168] Reaffirming the viability of *Webb* over *Coons*, the court added: "*Webb* makes plain that the failure to sequester the deliberating jurors does not constitute a *fundamental* deviation from the proper mode of judicial proceedings," and "do[es] not fall within the 'one very narrow exception to the requirement of a timely objection.' "[169]

The Court of Appeals' brief classification of a sequestration violation as a mode of proceeding error is difficult to understand. While the court on other occasions has removed the "mode of proceeding" classification from certain types of error, the brevity with which this occurred in the context of jury sequestration is unusual.[170] The decision in *Coons* is even more perplexing since the court denied leave to appeal in at least one pre-*Coons* case where a defendant waived the sequestration requirement. In *People v. Silvernail*, the jury was not sequestered with the consent of the defendant.[171] The conviction was affirmed by the intermediate appellate court, finding that a jury can be properly separated during deliberations, with the consent of the defendant.[172] A judge of the Court of Appeals subsequently denied leave to appeal.[173] In 1982, the Chief Administrative Judge of New York State stated that "there is no basis in constitutional mandate, logic or experience which should compel our continued blind adherence to a system in which deliberating jurors in all criminal cases are held in a virtual state of

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[167] *Id.*, 665 N.E.2d at 166, 642 N.Y.S.2d at 596.

[168] *Id.*, 665 N.E.2d at 166, 642 N.Y.S.2d at 596 (emphasis in original).

[169] *Id.*, 665 N.E.2d at 166, 642 N.Y.S.2d at 596 (emphasis in original) (quoting People v. Patterson, 39 N.Y.2d 288, 295, 347 N.E.2d 898, 902, 383 N.Y.S.2d 573, 577 (1976)).

[170] Waiving a twelve-person jury was "declassified" as a mode of proceeding error after the State Constitution was amended to permit a defendant to waive a jury trial in a felony case. *Compare* Cancemi v. People, 18 N.Y. 128, 129 (1858) *with* People v. Gajadhar, 9 N.Y.3d 438, 448, 880 N.E.2d 863, 870, 850 N.Y.S.2d 377, 384 (2007).

[171] People v. Silvernail, 55 A.D.2d 72, 75, 389 N.Y.S.2d 641, 643 (3d Dep't 1976).

[172] *Id*. at 75–76, 389 N.Y.S.2d at 643–44.

[173] People v. Silvernail, 41 N.Y.2d 869, 362 N.E.2d 635, 393 N.Y.S.2d 1037 (Table) (1977).

imprisonment until their verdicts are rendered."[174] Further, in 2001, when the current version of CPL § 310.10(2) was enacted, the late Court of Appeals Chief Judge Judith Kaye, who joined in the *Coons* decision, celebrated the end of mandatory sequestration—noting that "[t]here's no need to truck [jurors] out to hotels, separate them from their lives and their families in every case."[175]

A possible explanation for the court's decision to briefly classify a sequestration violation as a mode of proceeding error is that the court may have inadvertently conflated the different types of sequestration violations. The statute, as it existed when *Coons* was decided, had three separate mandates: (1) keeping the jury together at all times after deliberations begin; (2) prohibiting other individuals from speaking with the jury, except by order of the court; and (3) prohibiting anyone but deliberating jurors from entering the jury room.[176]

In classifying a sequestration violation as a mode of proceeding error, the court in *Coons* cited to *People v. Bouton*, an appeal from convictions for sexual abuse and related offenses that involved a violation of CPL § 310.10 different from that which occurred in *Coons*.[177] On the morning of the day the verdict was announced, a court clerk inadvertently delivered to the jury items that had never been admitted into evidence.[178] These items included two versions of defendant's confessions from which a reference to uncharged sexual activity had not been redacted.[179] The same clerk, after realizing that prohibited material had been delivered to the jury, made an unauthorized entry into the jury room to retrieve the unadmitted evidence.[180] In reversing the convictions, the court noted, while citing to CPL § 310.10, "[t]he strong public policy favoring the absolute confidentiality of jury deliberations," and the prohibition against

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[174] Evans, *Mandatory Jury Sequestration Deemed Archaic by Administrative Judge*, N.Y.L.J., Apr. 28, 1982, at 25, col. 4, at 32, col. 4.

[175] Somini Sengupta, *New Law Releases Juries in New York From Sequestering*, N.Y. TIMES (May 31, 2001), https://www.nytimes.com/2001/05/31/nyregion/new-law-releases-juries-in-new-york-from-sequestering.html.

[176] The second and third mandates remain under the current statute. The first is subject to the "24-hour rule" of CPL § 310.10(2).

[177] People v. Coons, 75 N.Y.2d 796, 797, 551 N.E.2d 587, 588, 552 N.Y.S.2d 94, 95 (1990) (citing People v. Bouton, 50 N.Y.2d 130, 138, 405 N.E.2d 699, 703, 428 N.Y.S.2d 218, 222 (1980)).

[178] *Bouton*, 50 N.Y.2d at 136–37, 405 N.E.2d at 702, 428 N.Y.S.2d at 221.

[179] *Id.*, 405 N.E.2d at 702, 428 N.Y.S.2d at 221.

[180] *Id.*, 405 N.E.2d at 702, 428 N.Y.S.2d at 221.

dealing with "so-called 'emergencies' " by anyone other than the trial court except "in the rarest and most inescapable of circumstances."[181]

The entry of the clerk into the jury room, an event that the Court of Appeals strongly condemned, indeed violated CPL § 310.10. That is a serious departure from proper procedure which could, and likely did, have an impact of the defendant's right to a fair trial. Such an occurrence is a far cry from a brief separation of jurors during deliberations, which is a pure statutory violation that does not implicate the defendant's constitutional rights or expose the jury to tampering or improper influence.[182] The court's reliance on *Coons* in *Bouton* was thus inappropriate and conflated two very different types of CPL § 310.10 violations.

Whatever the reason for the holding in *Coons*, it is over twenty-five years old and was implicitly overruled in *Webb*.[183] Further, since the Court of Appeals decided *Agramonte*, *Coons* has never been cited for the proposition that the failure to sequester a deliberating jury is a non-waivable, fundamental defect in the trial.[184] It should therefore have no bearing on the proper remedy for a violation of the 24-hour rule of CPL § 310.10(2) and, indeed, the lower appellate courts have thus far declined to classify violations of CPL § 310.10(2) as mode of proceeding errors. For example, in *People v. Encarnacion-Cross*, the defendant was indicted and tried for possession of felony weight narcotics.[185] Prior to jury selection, the judge announced that the trial would not be in session on Wednesday because that was the judge's conference day.[186] The intermediate appellate court held that "[d]efendant did not preserve his claims regarding

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[181] *Id.* at 138, 405 N.E.2d at 703, 428 N.Y.S.2d at 222.

[182] *See* People v. Webb, 78 N.Y.2d 335, 339–40, 581 N.E.2d 509, 511, 575 N.Y.S.2d 656, 658 (1991).

[183] *Id.*, 581 N.E.2d at 511, 575 N.Y.S.2d at 658.

[184] The intermediate appellate courts that have cited *Coons* addressed issues similar to the claimed intrusion into deliberations that occurred in *Bouton*, rather than a failure to sequester a jury. *See, e.g.*, People v. McKay, 214 A.D.2d 685, 686, 625 N.Y.S.2d 590, 590 (2d Dep't 1995) (finding reversible error in allowing a clerk to respond to a jury's substantive legal question); People v. Lara, 199 A.D.2d 419, 419–20, 605 N.Y.S.2d 339, 339 (2d Dep't 1993) (finding mode of proceeding error when court sent message, through non-judicial staff member, that jury had to continue deliberating); People v. Boyd, 166 A.D.2d 659, 659, 561 N.Y.S.2d 257, 257 (2d Dep't 1990) (instructing a court officer "to go into the jury room and tell the [deadlocked] jury to continue deliberating" constituted a mode of proceeding error).

[185] 132 A.D.3d 422, 423, 17 N.Y.S.3d 291, 291 (1st Dep't 2015).

[186] Transcript of Record at 18–21, People v. Encarnacion-Cross, No. 685/2013, at 12 (Sup. Ct. N.Y. Co. Oct. 10, 2013).

events that transpired during jury deliberations, and there were no mode of proceeding errors exempt from preservation requirements."[187]

Because a violation of CPL § 310.10(2) is not a mode of proceeding error, the 24-hour rule can be waived by the defendant, although there is no requirement that the defendant personally waive the restriction.[188] Waiver can be established by the defendant's consent to extend a recess for a specific period.

Waiver can also be established by a defendant's failure to clearly and timely object to a recess which is in excess of the 24-hour period. In *People v. Garcia*, jury deliberations began on a Monday.[189] On Friday, two jurors failed to appear, one because of illness and another ("juror number two") due to an assault on her child that resulted in hospitalization.[190] The defense moved for a mistrial arguing that the condition of juror number two's child rendered the mother " 'grossly unqualified' because she would not be able to concentrate on the case when she returned."[191]

On Monday, both jurors returned, but before deliberations resumed, the trial judge questioned juror number two and concluded that she remained qualified.[192] Defendant then moved for a mistrial on the previously unstated ground that jury deliberations had been suspended for more than 24 hours, in violation of CPL § 310.10(2), but the court denied the motion as

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[187] *Encarnacion-Cross*, 132 A.D.3d at 423, 17 N.Y.S.3d at 291 (citing People v. Agramonte, 87 N.Y.2d 765, 770, 665 N.E.2d 164, 166, 642 N.Y.S.2d 594, 596 (1996)). The application of *Encarnacion-Cross* to CPL § 310.10(2) is not readily apparent from the appellate court's opinion. The court uses the phrase "events that transpired during jury deliberations," but does not expressly state that the claim of error relates to the length of a mid-deliberation recess.

[188] People v. Bello, 82 N.Y.2d 862, 863, 631 N.E.2d 104, 104, 609 N.Y.S.2d 162, 162 (1993) (rejecting the argument that waiver of mandatory sequestration must be "made by the accused personally, and that his attorney's waiver on the record was insufficient"); *see also In re* Daniel Capellan v. Stone et al., 49 A.D.3d 121, 125, 849 N.Y.S.2d 530, 533 (1st Dep't 2008) ("The court's conclusion that the statute precludes a waiver of continuous deliberations is contrary to the decisional law interpreting both the predecessor statute of CPL § 310.10 and the statute as presently enacted.").

[189] 24 A.D.3d 308, 308, 808 N.Y.S.2d 34, 34 (1st Dep't 2005), *leave to appeal denied*, 6 N.Y.3d 833, 847 N.E.2d 378, 814 N.Y.S.2d 81 (Table) (2006).

[190] The specific details of the jury issue were described in the subsequent habeas corpus petition. *See* Garcia v. Burge, 2008 WL 627508 (S.D.N.Y. Feb. 28, 2008) (report of magistrate judge), adopted by Garcia v Burge, 2009 WL 102142 (S.D.N.Y. Jan. 15, 2009).

[191] *Garcia*, 2008 WL 627508 at *4.

[192] *Id.*

untimely.[193] In affirming the conviction, the appellate court found that "[t]he record establishes that defendant waived his present contention that the court improperly suspended deliberations of the nonsequestered jury for more than the statutorily mandated period of 24 hours."[194]

Waiver can also be established by a defendant's consent, obtained before the trial begins, to take a certain day of the week off during the trial. This agreement will carry through to the deliberation phase and relieve the trial court of any statutory obligation to have the jury deliberate during that particular day of the week. In *People v. Mullings*, defendant argued that his conviction should be reversed based upon a violation of the mandate of CPL § 310.10(2).[195] The trial, which began in January 2012, lasted over six months. Prior to the start of the trial, the court approved a request by the defense to not convene on Fridays.[196] During deliberations, on Thursday, July 19, 2012, with no verdict having been reached, two jurors had unexpected developments that made their continued presence on Friday and the following Monday extremely difficult.[197] One juror's oldest daughter, who babysat for a younger sibling, needed tonsil surgery.[198] The only person who could care for the younger child was the juror's sister, who was unavailable until 5:00 p.m. on Monday.[199] A second juror's brother had been recently murdered and the juror was scheduled to travel to Mississippi for a memorial service.[200] Without sufficient funds for a last-minute airline trip, the juror planned to drive, which would take him 22 hours each way, thus making him unavailable to deliberate until 5:00 p.m. on Monday.[201]

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[193] *Id.*

[194] *Garcia*, 24 A.D.3d at 309, 808 N.Y.S.2d at 35.

[195] 146 A.D.3d 816, 817, 44 N.Y.S.3d 550, 551 (2d Dep't 2017), *leave to appeal denied*, 29 N.Y.3d 1084 (2017).

[196] Brief for Respondent at 24, People v. Mullings, 146 A.D.3d 816, 44 N.Y.S.3d 550 (2d Dep't 2017) (No. 10-1502) ("On January 3, 2012, [defendant] suggested to the court that it 'might want to consider not working on Fridays.' The court responded, 'yes we will take Fridays off' [T-66-67].").

[197] Transcript of Record at 8501–03, People v. Mullings, No. 1502N/2010 (Sup. Ct. Nassau Co. July 18, 2012).

[198] *Id.*

[199] *Id.*

[200] *Id.* at 8510–12 (July 19, 2012).

[201] *Id.* at 8511.

Although the defense had requested that the trial be in recess on Fridays, counsel insisted on strict compliance with CPL § 310.10(2) after learning of the jurors' unavailability.[202] Not surprisingly, the appellate court rejected the argument, holding that "[t]he defendant waived his contention that the Supreme Court violated the continuous deliberation rule set forth in CPL § 310.10."[203]

These cases confirm that violations of CPL § 310.10(2) are not mode of proceeding errors and are thus subject to rules governing waiver, preservation, and harmless error.[204] However, no case has thus far found a violation of the statute or opined on the appropriate remedy in the event of one.

Confining CPL § 310.10(2) violations to non-emergency, planned separations, and requiring a mistrial or reversal only when a defendant is prejudiced, would be consistent with longstanding common law principles pre-dating the enactment of the Code of Criminal Procedure,[205] and with case law interpreting

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[202] *Id.*

[203] People v. Mullings, 146 A.D.3d 816, 817, 44 N.Y.S.2d 550, 551 (2d Dep't 2017).

[204] Under New York Law, a mistrial is warranted after the occurrence of "an error or legal defect in the proceedings, . . . which is prejudicial to the defendant and deprives him of a fair trial." N.Y. CRIM. PROC. LAW § 280.10(1) (McKinney 2018). Thus, a defendant who moves for a mistrial under this theory would be required to show prejudice. A mistrial is also warranted when a circumstance arises which makes it "physically impossible to proceed with the trial in conformity with law." N.Y. CRIM. PROC. LAW § 280.10(3). Mistrials under this section typically occur in extreme circumstances such as "when the judge or other essential court personnel are unavailable due to death or serious illness." *In re* Marcus B, 95 A.D.3d 15, 19, 942 N.Y.S.2d 38, 41 (1st Dep't 2012). A mistrial under this section would also be warranted when a deliberating juror is appropriately discharged and there are no available alternate jurors, People v. Mason, 233 A.D.2d 271, 272, 600 N.Y.S.2d 131, 132 (1st Dep't 1996), when a disaster occurs that prevents the trial from continuing, People v. Perez, 15 A.D.3d 165, 166, 708 N.Y.S.2d 602, 603 (1st Dep't 2005), when defense counsel is disqualified, *In re* Vilair Fonvil v. Molea, 299 A.D.2d 550, 550–51, 750 N.Y.S.2d 431, 432 (2d Dep't 2002), or in the event of a defense attorney's suspension from the practice of law. People v. Anderson, 186 A.D.2d 140, 140, 587 N.Y.S.2d 430, 431 (2d Dep't 1992). These events either physically prevent the trial from continuing, or implicate a fundamental right of the defendant. A brief and unexpected interruption of jury deliberations can hardly be equated with a disaster which renders the courthouse inaccessible for the near future, or the incapacity of either the defendant's attorney or the presiding judge.

[205] In 1825, in *People v. Douglass*, two jurors separated from the deliberating jurors in order eat and drink "spirituous liquor," and while doing so, they "conversed on the subject of the trial." 4 Cow. 26, 35 (Sup. Ct. 1825). The court, noting the near unanimous rule that an improper separation of a jury, which did not prejudice the defendant, was not a sufficient basis for a mistrial or to set aside the verdict, found such prejudice under the facts of the case. *Id.* at 36. A slightly stricter approach was

violations of the mandatory sequestration provision in § 421 of the Code of Criminal Procedure[206] and its successor provision, CPL § 310.10 prior to the enactment of subsection (2).[207] With the exception of the brief period between the Court of Appeals' decisions in *Coons* and *Webb*, cases applying the mandatory sequestration provisions required defendants to demonstrate prejudice when seeking a reversal or moving for a mistrial based on an improper separation of the jury. Moreover, separation of a deliberating jury in cases of necessity has never been viewed as a

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taken in *Eastwood v. People*, an 1855 murder case where approximately six jurors, without permission, separated from the rest of the jury and went to examine the murder scene. 3 Park. Cr. R. 25 (N.Y. Gen. Term. 1955). The court noted that the "early doctrines of the common law in regard to the misconduct of jurors have been greatly modified in more modern times . . . . [A]fter . . . the trial commenced, they could not . . . be permitted to separate, except in cases of evident necessity, and that any unauthorized separation would be fatal to the verdict." *Id.* at 41. The court concluded that a separation of a jury in a capital case would be grounds for a mistrial "unless . . . it is affirmatively shown on the part of the prosecution, . . . [beyond a reasonable doubt], that no injury could have resulted to the prisoner from the separation, the verdict will not be set aside." *Id.* at 45. Nonetheless, even under this stricter approach, there was still no requirement of per se reversal. *Id.*

[206] In *People v. Dunbar Contracting Co.*, the trial court permitted, during deliberations, "[s]ix jurors were taken to dine at one hotel, and six at another." 215 N.Y. 416, 416, 109 N.E. 554, 554 (1915). The Court of Appeals affirmed, holding that "[d]uring prolonged deliberations, some degree of separation is often inevitable," and noting that "[t]here are times and emergencies when the statute contemplates that leave of the court will justify a separation of jurors." *Id.*, 109 N.E. at 554. Even if the separation were improper, it would be not be a ground for reversal because the defendant suffered no prejudice. *Id.*, 109 N.E. at 554 ("But even if the separation were to be thought an irregularity, no prejudice resulted."). Similarly, in *People v. Hoch*, a juror became ill during trial and required a full day of medical treatment. 150 N.Y. 291, 302, 44 N.E. 976, 980 (1896). Although a court officer was constantly with the juror during his absence, the separation was still, on its face, in violation of the sequestration statute. In declining to order a new trial, the Court of Appeals noted that "there was nothing in the incident, which could have prejudiced the defendant." *Id.*, 44 N.E. at 980.

[207] In *People v. Fernandez*, the trial court permitted "at least one juror to attend church services, during a lunch recess, [allegedly] unsupervised." 183 A.D.2d 605, 606, 586 N.Y.S.2d 246, 247 (1st Dep't 1992), *aff'd*, 81 N.Y.2d 1023, 616 N.E.2d 497, 599 N.Y.S.2d 911 (1993). In affirming the conviction, the intermediate appellate court opined: "During prolonged deliberations, some degree of separation is often inevitable. The trial court must determine to what extent it shall be allowed. We hold, therefore, that the division of the jurors did not infringe the defendants' rights. But even if the separation were to be thought an irregularity, no prejudice resulted." *Id.* at 606, 586 N.Y.S.2d at 247. The Court of Appeals affirmed, finding no reason to construe CPL § 310.10 differently from former Code of Criminal Procedure § 421. People v. Fernandez, 81 N.Y.2d 1023, 1024, 616 N.E.2d 497, 498, 599 N.Y.S.2d 911, 912 (1993) (finding "no legislative intent to overrule our construction of the prior statute [that] has been called to our attention").

violation of the mandatory sequestration provision requiring per se reversal. Accordingly, because a defendant was required to demonstrate prejudice when sequestration was mandatory, he should have to do the same, if not more, when alleging a violation of CPL § 310.10(2). And because separation in cases of necessity was not deemed to be a violation of the mandatory sequestration rule, it should not be considered a violation of the less restrictive limitation on recesses.

At least one trial judge has expressly followed this approach under CPL § 310.10(2), holding that the statute is not violated when deliberations do not resume within the statutory period because of the unforeseen absence of a juror due to illness or other exigency. In *People v. Taylor*, a juror was temporarily hospitalized during deliberations.[208] The following day, the juror contacted the court and stated that "he was anxious to return to continue deliberations."[209] Although there was no articulable prejudice to the defendant, the defense moved for a mistrial, arguing that the juror's one day absence violated CPL § 310.10(2).[210] The trial judge denied the application, holding that the restrictions of CPL § 310.10(2) were only meant to limit planned adjournments, "not to require a mistrial when an unavoidable event or other emergency occurs."[211] However, the defendant was ultimately acquitted and thus no appellate court had the opportunity to review the trial judge's analysis.[212] Accordingly, *Taylor* does not provide any binding authority that judges may rely on when, in cases of necessity, one or more deliberating jurors is temporarily unable to return to court to resume deliberations within the time period specified in CPL § 310.10(2).

V. NO OTHER STATE HAS A PER SE RULE REQUIRING REVERSAL FOR UNPLANNED BUT NECESSARY SEPARATION OF JURORS DURING DELIBERATIONS

The perceived value of jury sequestration varies widely thorough the country. Some jurisdictions prohibit it except in the most exceptional cases. These states take the view that sequestration causes prejudice to a defendant's rights because

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[208] People v. Taylor, 32 Misc. 3d 546, 548, 926 N.Y.S.2d 815, 817 (Sup. Ct. 2011).
[209] *Id.*, N.Y.S.2d at 817.
[210] *Id.*, N.Y.S.2d at 817.
[211] *Id.* at 554, N.Y.S.2d at 821.
[212] *Id.*, N.Y.S.2d at 821.

the fear of being sequestered can coerce a jury to rush to verdict without adequate deliberation. Other states consider sequestration an essential tool to ensure a defendant a fair trial. Common to almost all of these jurisdictions is the rule that separation of a jury, in violation of a statutorily mandated requirement for sequestration, is not grounds for a mistrial, especially in cases of emergency.

There are currently twenty-seven states, as well as the District of Columbia, that leave the decision to sequester a jury entirely to the discretion of the trial judge.[213] These states have no statutory restriction on the length of a separation of a jury at any phase of the trial. A trial judge's decision not to sequester a jury, or even in some cases to order sequestration over the defendant's objection, is reviewable solely for an abuse of discretion.[214] Eight additional states leave separation to the

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[213] ALA R. CRIM. P. 19.3(a)(1)(1997); ARK. CODE ANN. § 16-89-125(d)(1) (2017); ALASKA R. CRIM. P. 27 (e)(2) (2017); ARIZ. R. CRIM. P. 19.4 (2017); CAL PENAL CODE §1121 (2018); COLO. CRIM. P. R. 24(f)(2018); CONN. GEN. STAT. § 51-246 (2018); D.C. SUP. CT. R. CRIM. P., 36-I (2017) ("The judge . . . may sequester the jury, or may take such other approved procedures as seem necessary to insure a fair trial in the case."); Catlett v. United States, 545 A.2d 1202, 1214 (D.C. 1988) ("The decision to sequester a jury lies within the discretion of the trial judge."); Claudio v. State, 585 A.2d 1278, 1301 n.58 (Del. 1991) ("Delaware has adopted various rules and procedures which recognized the trial judge's discretionary right at common law to permit the jurors to eat and even to separate during the course of their deliberations."); HAW. REV. STAT. § 635-32 (2017); ME. R. UNIF. CRIM. P. 24(e) (2017); MD. CTS. & JUD. PROC. 8-422 (2018); MASS. R. CRIM. P. 20(e)(3) (2018); MICH. CODE CRIM. P. § 768.16 (2002); MONT. CODE ANN. § 46-16-501(1) (2017); State v. Smart, 622 A.2d 1197, 1209 (N.H. 1993) ("Sequestration is an extreme measure, one of the most burdensome tools of the many available to assure a fair trial. Furthermore, the decision to grant a motion to sequester the jury is within the sound discretion of the trial court, and is not required simply because of media attention") (internal citations omitted); State v. Martinez, 658 P.2d 428, 432 (N.M. 1983); State v. Griffin, 866 P.2d 1156, 1162 (N.M. 1993) (refusal of court to sequester jury was not abuse of discretion); N.J., CT R. 1:8-6(b) (2018); N.C. GEN. STAT § 15A-1236(b) (2017); OR. R. CIV. P., 59(C)(6) (2018) (permitting a trial judge to "allow the jury to separate during its deliberations when the court is of the opinion that the deliberation process will not be adversely affected."); *see also*, OR. REV. STAT. § 136.330(1) (2018) (making Oregon Rule of Civil Procedure 59[C] applicable to criminal cases); PA. R. CRIM. P. 642(A) (2018); 12 R.I. GEN. LAWS § 12-17-13 (2017); UTAH CODE CRIM. P. 77-17-9(1) (2017); VT. R. CRIM. P. 23(d) (2018); VA. CODE CRIM. P. 19.2-264 (2018); WA. SUPR. CT. CRIM. R. 6.7 (2017); W. VA. CODE § 62-3-6 (2018); WIS. STAT. 972.12 (2017).

[214] *See, e.g.*, Lam Luong v. State, 199 So. 3d 173, 188–89 (Ala. Crim. App. 2015) ("[t]he decision to grant or deny a motion to sequester the jury during trial is within the sound discretion of the trial court") (quoting Belisle v. State, 11 So. 3d 256, 279 (Ala. Crim. App. 2007)); Com. v. Clark, 730 N.E.2d 872, 882 (Ma. 2000) ("The decision whether to sequester a jury lies within the sound discretion of the trial judge.") (quoting Commonwealth v. Cordle, 587 N.E.2d 1372, 1377 (Ma. 1992)).

judge's discretion, but their statutes contain some restriction on the circumstances under which a separation can be granted. Specifically, Kansas, Minnesota, Nevada, South Carolina, and Wyoming all allow a deliberating jury to separate "overnight."[215] Illinois and Iowa permit a deliberating jury to separate overnight, on weekends, and in cases of emergency.[216] South Dakota allows separation until the next meeting of the court, but there is no definition of that term to clarify whether that is the next day the court is open for business or the date that the case is next scheduled.[217]

Eight states, namely, Florida, Georgia, Idaho, Indiana, Mississippi, Missouri, Ohio, and Tennessee, mandate sequestration during deliberations in death penalty cases.[218] However, Florida has express statutory authority for a trial judge to separate a deliberating jury in emergency situations and also permits sequestration to be waived if both the prosecution and defense consent. Ohio also permits separation of a capital jury when emergencies arise.

Only six states—Kentucky, Louisiana, Nebraska, North Dakota, Oklahoma, and Texas—mandate sequestration once deliberations begin in all criminal cases.[219] Texas mandates sequestration when it is requested by either party or the court on its own motion determines it to be appropriate. Kentucky mandates sequestration when deliberations begin unless the parties consent. The remaining four states do not have express statutory authority permitting a judge to dispense with sequestration once deliberations begin.[220]

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[215] KAN. STAT. ANN. § 22-3420(a) (2018); MINN. R. CRIM. P. 26.03(5)(3) (2018); NEV. REV. STAT. § 175.391 (2017); S.C. R. CRIM. P. 23 (2017); WYO. STAT. ANN. § 1-11-207 (2018).

[216] ILL. SUP. CT. R. 436(a) (2017); IOWA R. CIV. P. 1.927(c) (2017); *see also* IOWA R. CRIM. P. 2.19(5)(c) (2017).

[217] S.D. CODIFIED LAWS 23A-24-4 (2017).

[218] FLA. R. CRIM. P. 3.370(c) (2017); GA. CODE ANN. § 15-12-142(a) (2017); IDAHO CODE § 19-2126 (2017); IND. CODE § 35-37-2-4(b) (2017). *But see* Johnson v. Indiana, 749 N.E.2d 1103, 1107 (Ind. 2001) (holding that in capital cases, trial court must sequester jury upon request of the defendant). MISS. R. CRIM. P. 18.8 (2016); MO. REV. STAT. § 494.495 (2017); OHIO REV. CODE ANN. § 2945.33 (2017); OHIO R. CRIM. P. 24(h)(3) (2017) (authorizing separation of capital jury in cases of emergency); TENN. CODE. ANN. § 40-18-116 (2017).

[219] KY. R. CRIM. P. § 9.66 (2017); LA. CODE CRIM. P. art. 791 (2017); NEB. REV. STAT. § 29-2022 (2017); N.D. CENT. CODE § 29-22-02 (2017); OKLA. STAT. tit. 22 § 857 (2016); TEX. CODE CRIM. P. ANN. art. 35.23 (West 2017).

[220] Although trial judges in these six states do not have discretion to dispense with jury sequestration during deliberations, information provided to prospective

States deal with claims of error associated with jury sequestration in different ways. Those that entrust sequestration to the discretion of the trial court will review decisions under an abuse of discretion standard.[221] Claims of error can include that the trial court improperly ordered sequestration,[222] or that the failure to sequester a jury deprived the defendant of a fair trial in light of significant publicity on the subject matter of the trial.[223]

Indiana, which mandates sequestration in capital cases where the prosecution seeks the death penalty,[224] seems to have the strictest approach. Denial of a defendant's request to sequester the jury is reversible error.[225] However, Indiana case law supports the proposition that separation of a deliberating jury in the case of an emergency is not, standing alone, a basis for reversal.[226]

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jurors in five of these states suggests that sequestration is a relatively rare occurrence. *See, e.g.*, *You, The Jury*, *Juror Handbook*, COMMONWEALTH OF KENTUCKY COURT OF JUSTICE, 11 (Nov. 2017), https://courts.ky.gov/resources/publicationsresources/Publications/P7YoutheJury.pdf ("Occasionally, a judge will find it necessary to sequester a jury, which requires keeping a jury overnight."); *North Dakota Juror's Handbook*, NDCOURTS.GOV, *available at* http://www.ndcourts.gov/Court/juror.htm (last visited November 18, 2018) (noting that "it is rare in North Dakota" for a jury to stay overnight); *Jury Commission*, ORLEANS CRIMINAL DISTRICT COURT, http://www.criminalcourt.org/jury-commission (last visited November 18, 2018) (noting that in Louisiana, "the only time one may be sequestered while serving on a jury is on a 1st degree murder case"); *Jury Service*, NEBRASKA JUDICIAL BRANCH, https://supremecourt.nebraska.gov/programs-services/jury-service (last visited November 18, 2018) (noting that "occasionally, it becomes necessary to keep a jury overnight . . . ."); *Jury Selection and Trial Process*, DENTON COUNTY, TEXAS, https://dentoncounty.com/Departments/District-Clerk/Jury-Services/Jury-Selection-Trial-Process.aspx (last visited November 18, 2018) ("Sequestered juries are very rare . . . .").

[221] *See, e.g.*, People v. Ruiz, 749 P.2d 854, 868 (Cal. 1988); Commonwealth v. Clark, 730 N.E.2d 872, 882 (Mass. 2000).

[222] *See* People v. McCoy, 939 N.E. 2d 950, 956 (Ill. App. Ct. 2010) ("extremely brief deliberations after a reference to sequestration may invite an inference that the reference coerced the jury to render its verdict") (internal citations omitted).

[223] *See, e.g.*, Sheppard v. Maxwell, 384 U.S. 333, 353 (1966) (finding failure to sequester jury or take additional precautions in light of the publicity surrounding the case deprived defendant of a fair trial).

[224] The Clark County Prosecuting Attorney, Indiana Death Penalty Laws, http://www.clarkprosecutor.org/html/death/dplaw.htm (last visited Aug. 26, 2018).

[225] Lowery v. Indiana, 434 N.E.2d 868, 870 (Ind. 1982); *see also* Johnson v. Indiana, 749 N.E.2d 1103, 1107 (Ind. 2001).

[226] Smith v. Indiana, 170 N.E.2d 794, 801 (Ind. 1960).

Florida also requires per se reversal for sequestration violations, but has express statutory authorization permitting separations of juries in cases of necessity.[227] Although Ohio permits separation of a deliberating jury in capital cases in an emergency, the standard of review applied for alleged sequestration violations depends on the nature of the violation and whether the issue was preserved in the trial court.[228]

The remaining states that mandate sequestration at some point in the case, either in all cases or only in capital cases, analyze claimed sequestration violations in two ways: (1) Kentucky, North Dakota, Mississippi, Missouri, and Tennessee require a defendant to show prejudice before a conviction will be reversed;[229] (2) Louisiana, Nebraska, Oklahoma, Georgia, Texas, and Idaho presume prejudice but permit the prosecution to rebut the presumption.[230] In all of

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[227] Campbell v. Florida, 2 So. 3d 291, 294 (Fla. Ct. App. 2007) ("Unless the record discloses an exceptional circumstance of emergency, accident or other special necessity, or unless the parties have formally waived the requirement of sequestration on the record, the trial judge has no discretion to deny sequestration, and the failure to sequester deliberating jurors in a capital case is prejudicial error.").

[228] Ohio v. Sheppard, 135 N.E.2d 340, 345 (Oh. 1956) (declining to "presume a prejudice as a matter of law from the fact that some of the jurors made telephone calls to members of their immediate families").

[229] *See* Gabow v. Kentucky, 34 S.W.3d 63, 73 (Ky. 2000) ("The general rule is that a mere temporary separation of the jury is not grounds for reversal if it appears that no definite prejudice resulted and there was no opportunity to tamper with the jurors."); North Dakota v. Weisz, 654 N.W.2d 416, 419 (N.D. 2002) (requiring a showing of actual prejudice for sequestration violations and declining to adopt Nebraska's "rebuttable presumption of prejudice" approach); Simmons v. State, 805 So. 2d 452, 506 (Miss. 2001); Missouri v. Clay, 812 S.W.2d 872, 875 (Mo. 1991); Gonzales v. Tennessee, 593 S.W.2d 288, 291 (Tn. 1980) (reaffirming requirement that an improper "separation may be explained by the prosecution, showing that the juror had no communication with other persons, or that such communication was upon subjects foreign to the trial, and that, in fact, no impressions other than those drawn from the testimony, were made upon his mind . . . .") (quoting Hines v. Tennessee, 27. Tenn. 597, 602 (1848)).

[230] Louisiana v. Jones, 794 So. 2d 107, 120 (La. Ct. App. 2001) ("[U]pon a separation . . . a presumption of misconduct arises and reversible error will be presumed. [However, where] circumstances are such as to reasonably overcome the presumption of prejudice and where it affirmatively appears that no prejudice to the accused could have resulted, the presumption may be rebutted . . . ."); Nebraska v. Foster, 839 N.W.2d 783, 806 (Neb. 2013) (Failure to sequester a juror "creates a rebuttable presumption of prejudice; and places the burden upon the prosecution to show that no injury resulted.") (internal citations omitted); Johnson v. Oklahoma, 93 P.3d 41, 47 (Okla. Crim. App. 2004) ("[W]hen a violation of [the sequestration] statute occurs over defense objection prejudice is presumed and the burden falls to the State to prove otherwise."); Legare v. Georgia, 257 S.E.2d 247, 253 (Ga. 1979) ("[T]here arises a legal presumption that the defendant has been injured [by the

these jurisdictions, a mistrial is never warranted, absent prejudice to the defendant, when the separation is caused by some emergency. New York's statute should be similarly construed.

VI. THE CASE FOR AMENDMENT

Although case law in New York supports the notion that an unplanned separation of deliberating jurors does not warrant a mistrial or reversal on appeal absent a showing of prejudice by the defendant,[231] the Legislature should nevertheless amend CPL § 310.10(2). The statute, on its face, grants no discretion to trial courts to extend a recess in deliberations beyond the time specified in the statute and such courts are understandably reluctant to act in contravention of the statute's plain language.

Efforts have been made to amend CPL § 310.10(2) to permit judges, when appropriate, to adjourn deliberations for more than 24 hours. In 2016, the Advisory Committee on Criminal Law and Procedure issued a report recommending the amendment of CPL § 310.10 to permit separation of jurors for a longer period of time.[232] The proposed law "retain[ed] the twenty-four hour limit in most cases, but provid[ed], 'upon good cause shown, an additional period not to exceed 48 hours.' "[233] The Committee considered, but ultimately rejected, removing the time restraint altogether. The latest proposal, which was introduced in the New York State Assembly in 2017, authorized a separation for up to 72 hours. That proposal passed the Assembly on June 21, 2017, but on January 3, 2018, the Senate returned the bill to the Assembly without taking any action on it. The Assembly again passed the bill, but the Senate again took no action.[234]

Each attempt to amend the law has dealt solely with extending the acceptable length of any recess in deliberations without conferring any general authority on judges to recess deliberations when unforeseen circumstances arise that prevent

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improper separation of a jury] and it is incumbent upon the state to have rebutted that legal presumption . . . ."); Idaho v. Rodriguez, 460 P.2d 711, 714 (Idaho 1969); Harris v. State, 738 S.W. 2d 207, 222 (Tx. Ct. Crim. App. 1987).

[231] *See supra* notes 207–09.

[232] REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL LAW AND PROCEDURE TO THE CHIEF ADMINISTRATIVE JUDGE OF THE COURTS OF THE STATE OF NEW YORK 22 (2016).

[233] *Id.*

[234] For a complete history and text of this bill, see http://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A07448&term=2017 (last visited Aug. 26, 2018).

a deliberating juror from returning to court within the statutorily required time period. Accordingly, CPL § 310.10(2) should be amended as follows:

> At any time after the jury has been charged or commenced its deliberations, and after notice to the parties and affording such parties an opportunity to be heard on the record outside of the presence of the jury, the court may declare the deliberations to be in recess and may thereupon direct the jury to suspend its deliberations and to separate for a reasonable period of time to be specified by the court not to exceed forty-eight hours. However, in the case of a Saturday, Sunday, or holiday, or an unforeseen circumstance that makes it impractical to resume deliberations, such separation may extend beyond such forty-eight hour period. Before each recess, the court must admonish the jury as provided in § 270.40 of this chapter and direct it not to resume its deliberations until all twelve jurors have reassembled in the designated place at the termination of the declared recess.

The amendment would have several benefits. It would afford the approximately two-thirds of all trial judges in New York County Supreme Court who are designated as calendar judges one full day per week to handle the other cases pending before them.[235] That means that on the same day each week, a trial judge who is also a calendar judge would be able to preside over about fifty additional cases that are scheduled either for arraignment, for decision on a pre-trial motion, or for a guilty plea. Although it is not possible for a calendar judge to preside over the trial of every case pending before her, it is possible and strongly preferable to have the same judge preside over the case from arraignment to the start of the trial. A judge who presides over all pre-trial aspects of the case is naturally going to be better informed about the facts and circumstances of it, and thus be able to make far more informed decisions.

An alternative solution, namely assigning all pending cases to a handful of calendar judges to determine all pre-trial matters, thereby freeing up the remaining judges to handle only trials, is untenable. In New York County alone, there were 6,538 indictments filed in 2016.[236] Although this alternative solution would allow trial judges to try cases to verdict without interrupting jury deliberations for a calendar day, the resulting

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[235] *See supra* note 12 and accompanying text.

[236] STATE OF OUR JUDICIARY 2017: EXCELLENCE INITIATIVE YEAR ONE 10 (2017).

caseloads of the calendar judges would be unmanageable, making it difficult, if not impossible, for these judges to make informed decisions on these cases.

In addition to affording judges the express authority to recess deliberations to accommodate a calendar day, the proposed amendment would serve to dispel any doubt that judges have discretion to adjourn deliberations in the event that a juror does return to court. Delegating the length of an adjournment to the sound discretion of a trial judge in these unique and limited circumstances would not open the door to abuse or encourage deliberations to be unnecessarily extended because of lengthy recesses. Judges make decisions of equal or greater magnitude in their day-to-day responsibilities of presiding over criminal trials. There is no reason why the Legislature should not give them express—but limited—authority to handle a far more basic concern, namely the scheduling of jury deliberations. As with so many other judicial determinations made in the heat of trial, this one will be reviewable on appeal for abuse of discretion.

Creating express statutory authority for a judge to extend a recess in deliberations under very limited circumstances also would not cause unnecessary delays of trials. Trial judges are under significant pressure to expeditiously resolve cases so that other matters can be sent to them for trial. In New York County, court personnel, referred to as "expediters," continuously check the status of all trials to ensure that the cases are moving expeditiously and that judges who have recently resolved a case—through plea or trial—are quickly assigned another case to preside over.[237] Further, the New York State Unified Court System is committed to decreasing the time it takes to resolve criminal cases. This "Excellence Initiative," involves "a top-to-bottom examination of court operations focused on improving the courts' ability to ensure the just and timely resolution of all matters that come before them—our core obligation as the judicial branch of government."[238] The report of this initiative sets out detailed changes in the court system to ensure that cases are more expediently brought to a resolution. In light of this commitment, it would be difficult for anyone to argue that trial judges, even with unfettered discretion, would recess deliberations unnecessarily.

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[237] NEW YORK STATE UNIFIED COURT SYSTEM, http://www.nycourts.gov/courts/1jd/criminal/department.shtml#Case.

[238] *Id.*

Trial judges also have a responsibility to the sworn jurors to keep the case on schedule and to avoid unnecessary delay.[239] Before jury selection begins, the panel of prospective jurors is informed of the anticipated length of the trial. This allows the trial judge to excuse potential jurors who are unable to serve because of some legitimate scheduling concern. Recessing deliberations, or any other part of the trial unnecessarily, risks extending the case beyond the time in which the sworn jurors are available to serve. And if the trial is unnecessarily extended to a day in which one or more sworn jurors is no longer available, a mistrial may be required.[240]

In sum, depriving judges of express statutory authority to extend recesses in deliberations beyond 24 hours is an unnecessary and unworkable restraint on judicial discretion. Such a restraint does not ensure the integrity of deliberations, nor does it make it any less likely that jurors will engage in some form of misconduct or that others may attempt to influence them. This was conclusively demonstrated when the Office of Court Administration began collecting data when CPL § 310.10(2) was enacted in 1995 to permit jury separation in trials of certain lower level felonies.[241] The data included 935 cases where the jurors were permitted to separate. "[I]n no case were allegations raised that jurors were intimidated, tampered with or improperly contacted during separation."[242]

Further, the most important factor in assuring that a jury remains fair and impartial is the jury selection process. During that process, the parties select jurors who can not only fairly evaluate the evidence, but who can also follow the trial judge's instructions. Those instructions include not speaking to anyone about the trial, not doing any research about the case or the parties, and not going on the internet or social media to attempt to learn more about the case.[243] To posit that a recess that

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[239] *See* NYS UNITED COURT SYSTEM PETIT JUROR'S HANDBOOK, *available at* http://www.nyjuror.gov/pdfs/hb_Petit.pdf ("We are keenly aware that New Yorkers have busy lives and that you have many demands on your time. Knowing that, we have transformed the jury system, by increasing the jury pool and reducing the length of jury service . . . .").

[240] *See supra* text accompanying notes 51–53.

[241] HON. JONATHAN LIPPMAN, SEPARATION AND SEQUESTRATION OF DELIBERATING JURIES IN CRIMINAL TRIALS 5 (1999).

[242] *Id.* at 12.

[243] *Jury Admonitions in Preliminary Instructions*, NYCOURTS.GOV, http://www.nycourts.gov/judges/cji/1-General/CJI2d.Jury_Admonitions.pdf.

extends beyond the next business day would have any effect on jurors who have survived the selection process undermines the value of that process and the seriousness that sworn jurors place on their responsibility to decide a criminal case. It is a well-settled principle that trial jurors are presumed to follow a judge's instructions.[244] The same confidence that the system places in jurors abiding by a trial judge's admonitions during all recesses in the trial, should similarly be placed in their ability to abide by those instructions during an unexpected but limited extension of a particular recess.

CONCLUSION

Allowing defendants to move for and obtain mistrials based upon a delay in resuming jury deliberations does nothing to render the process fairer or to protect any right of a defendant. Granting these applications in the absence of prejudice to a defendant wastes scarce and valuable judicial resources, requires the state to unnecessarily retry a case, and makes witnesses again take time from their lives to testify in court. Indeed, in many cases, a defendant is afforded a tactical advantage by forcing the state to retry the case. There are of course occasions when the law accepts conferring a tactical advantage on a defendant as "a tolerable side effect of the protection of defendants' most basic rights,"[245] but there is no right of a defendant that is affected when a jury deliberation recess is extended beyond the period specified in CPL § 310.10(2).

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[244] People v. Baker, 14 N.Y.3d 266, 274, 926 N.E.2d 240, 245, 899 N.Y.S.2d 733, 738 (2010).

[245] People v. Rivera, 23 N.Y.3d 827, 838, 18 N.E.3d 367, 375, 993 N.Y.S.2d 656, 664 (2014) (Abdus-Salaam, J., dissenting).