Understanding New York's "Mode of Proceedings" Muddle

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INTRODUCTION

One of the more challenging areas of criminal law in New York State is the doctrine known as "mode of proceedings" error. Under the mode of proceedings rule, certain variances in fundamental procedure, usually occurring at trial, will result in reversal despite lack of preservation.[1] Because mode of proceedings error almost always arises as a result of errors that were not preserved at trial, many experienced trial attorneys are unfamiliar with it. It is also a vexing area for appellate practitioners. Decisions of the New York Court of Appeals have not always been clear in illuminating the rule's scope and application, greatly complicating the task of appellate counsel faced with unpreserved error.

Even though the doctrine was first articulated in 1858 in *Cancemi v. People*, [2] the muddle persists. Reversing the defendant's conviction by a jury of eleven persons, to which the defendant had consented,[3] the New York Court of Appeals stated that "changes in great and leading provisions as to the organization of the tribunals or the

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1. Examples of procedural errors that are considered fundamental, and that thus rise to the level of mode of proceedings error, include: responding to jury questions, *see infra* Part III.A, judicial absence from trial, *see infra* Part III.B, sufficiency of accusatory instruments, *see infra* Part III.H, and waiver of the twelve-person jury, *see infra* Part III.I. For further examples and discussion, see *infra* Part III.

2. 18 N.Y. 128, 137-38 (1858).

3. *Id*. at 130, 131.

mode of proceeding prescribed by the constitution and the laws" are not permitted.[4] The doctrine remained largely dormant for more than a century, when it was revived in *People v. Patterson*, a decision that rejected application of mode of proceedings on the facts presented.[5] In *Patterson,* the Court of Appeals described the doctrine thus: "[E]rror that would affect the organization of the court or the mode of proceedings prescribed by law" will result in reversal regardless of preservation at the trial-court level.[6] The court continued:

> [T]he purpose of this narrow, historical exception 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.[7]

Despite this formulation, mode of proceedings decisions have not particularly focused on constitutional issues. In part, as the Court of Appeals has observed, many "constitutional rights are waived if not preserved."[8] It has instead been applied more often in the case of variations from procedural statutes.[9] Additionally, the impact of the

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4. *Id*. at 137.

5. People v. Patterson, 347 N.E.2d 898, 902, 909 (N.Y. 1976), *aff'd*, 432 U.S. 197 (1977). In *People v. Agramonte*, 665 N.E.2d 164, 166 (N.Y. 1996), Chief Judge Kaye referred to "the seminal *Patterson* case." A Third Department decision has referred to mode of proceedings as "the *Patterson* rule." People v. Davis, 687 N.Y.S.2d 803, 807 (App. Div. 3d Dep't 1999).

6. *Patterson*, 347 N.E.2d at 902. Although the New York Reports varies from the wording of the North Eastern Reporter and states "proscribed by law," *Patterson*, 39 N.Y.2d 288, 295 (1976), most later decisions, consistent with the North Eastern Reporter, have used "mode of proceedings prescribed by law." *See, e.g.,* People v. Ahmed, 487 N.E.2d 894, 895 (N.Y. 1985).

7. *Patterson*, 347 N.E.2d at 903.

8. People v. Thomas, 407 N.E.2d 430, 433 (N.Y. 1980); *see also* People v. Kelly, 832 N.E.2d 1179, 1181 n.2 (N.Y. 2005); People v. Voliton, 630 N.E.2d 641, 643 (N.Y. 1994) ("We have generally applied the preservation rule to due process objections."). However, mode of proceedings applies to some violations of constitutional double jeopardy. People v. Williams, 925 N.E.2d 878, 892 (N.Y. 2010); *see infra* notes 138-40 and accompanying text.

9. *See, e.g.*, *Voliton*, 630 N.E.2d at 643.

common law upon the doctrine has also been emphasized by the Court of Appeals.[10]

I. THE PRESERVATION RULE AND ITS EXCEPTIONS

The preservation rule is a mainstay of both civil and criminal appellate review.[11] In order to raise a question of law for review on appeal, a contemporaneous objection must be made in the court below.[12] Failure to object or otherwise register a protest renders the issue unpreserved, allowing an intermediate appellate court to decline review of the issue.[13]

The preservation rule was discussed in *People v. Patterson* in the context of scope of jurisdiction of the Court of Appeals:

> A defendant cannot be permitted to sit idly by while error is committed, thereby allowing the error to pass into the record uncured, and yet claim the error on appeal. Were the rule otherwise, the State's fundamental interest in enforcing its criminal law could be frustrated by delay and waste of time and resources invited by a defendant.[14]

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10. *See* People v. Webb, 581 N.E.2d 509, 511 (N.Y. 1991); *see also infra* note 181 and accompanying text.

11. The rule applies to both the appellant and the respondent. *See* People v. Concepcion, 953 N.E.2d 779, 782-83 (N.Y. 2011); People v. LaFontaine, 705 N.E.2d 663, 665 (N.Y. 1998).

12. N.Y. CRIM. PROC. LAW § 470.05(2) (McKinney 2009). The preservation requirement also applies with federal habeas corpus proceedings from state court. *See* 28 U.S.C. § 2254(b)(1)(A) (2006); O'Sullivan v. Boerckel, 526 U.S. 838, 842-48 (1999); *see also* Richardson v. Greene 497 F.3d 212, 217 (2d Cir. 2007). But with one purported mode of proceedings error (judicial delegation), the absence of a contemporaneous objection did not preclude federal review, where the state court requirement of preservation was not firmly established. *See* Monroe v. Kuhlman, 433 F.3d 236, 240-45 (2d Cir. 2006).

13. *See* N.Y. CRIM. PROC. LAW § 470.05(2); People v. Thomas, 407 N.E.2d 430, 432 (N.Y. 1980); People v. Udzinski, 541 N.Y.S.2d 9, 11 (App. Div. 1989).

14. People v. Patterson, 347 N.E.2d 898, 902 (N.Y. 1976), *aff'd*, 432 U.S. 197 (1977). Similarly, in *People v. Becoats*, 2011 N.Y. Slip. Op. 07306, at*3, 2011 WL 4972341 (N.Y. Oct. 20, 2011), the court stated that "to allow an unpreserved claim of duplicitousness to be raised on appeal would open the door to abuse. . . . To expand the definition of 'mode of proceedings' error too freely would create many . . . anomalous results."

However, there are exceptions to the preservation rule. By statute, an intermediate appellate court is permitted review of unpreserved errors "[a]s a matter of discretion in the interest of justice."[15] The intermediate appellate court may "consider and determine any question of law or issue of fact involving error or defect in the criminal court proceedings which may have adversely affected the appellant."[16] Interest of justice jurisdiction is conferred exclusively on the intermediate appellate courts, as the Court of Appeals lacks such jurisdiction.[17]

Mode of proceedings error is another subset of exceptions to the preservation rule.[18] Within it, specific issues have been held to be reviewable on appeal despite lack of preservation.[19] It is intriguing that certain issues found unpreserved yet reversible have not been termed mode of proceedings errors.[20] One appellate court has observed, "[c]onsidering the scope and number of the truly fundamental errors to which the preservation doctrine does apply, one encounters difficulty in deriving from precedent a

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15. N.Y. CRIM. PROC. LAW § 470.15(3)(c) (McKinney 2009); *see* People v. Robinson, 326 N.E.2d 784, 786 (N.Y. 1975).

16. N.Y. CRIM. PROC. LAW § 470.15(1); People v. Kelly, 832 N.E.2d 1179, 1181 n.1 (N.Y. 2005). When the intermediate appellate court exercises its discretionary interest of justice jurisdiction, the ruling is generally beyond the review power of the Court of Appeals. People v. Turriago, 681 N.E.2d 350, 353-54 (N.Y. 1997); *see* N.Y. CRIM. PROC. LAW § 450.90(2)(a) (McKinney 2009).

17. *See* N.Y. CRIM. PROC. LAW § 470.35 (McKinney 2009). Trial courts also lack interest of justice jurisdiction. People v. Sinha, 922 N.Y.S.2d 275, 279 (App. Div. 2011).

18. *See* People v. Udzinski, 541 N.Y.S.2d 9, 13-14 (App. Div. 1989). Mode of proceedings is akin to the "interest of justice" exception only insofar as it deals with unpreserved error.

19. *See* Misicki v. Caradonna, 909 N.E.2d 1213, 1223 (N.Y. 2009) (Smith, J., dissenting). One of these is the "rare case" exception with a guilty plea: if the factual allocution raises a defense or denies an element of the crime, the defendant may raise the issue on appeal without having preserved it below. People v. Lopez, 525 N.E.2d 5, 6-7 (N.Y. 1988).

20. *See, e.g.*, People v. Hartson, 553 N.Y.S.2d 537, 539 (App. Div. 1990) (trial judge's spouse serving as a juror); *see also* People v. Shepherd, 500 N.E.2d 871, 872 (N.Y. 1986) (town court proceeding held outside of town). With sentencing, "'the essential nature' of the right to be sentenced as provided by law, though not formally raised at the trial level, preserves a departure therefrom for review" by the Court of Appeals. People v. Fuller, 441 N.E.2d 563, 565 (N.Y. 1982).

rigid standard by which to ascertain those errors to which the doctrine does not apply."[21] The same could well be said of mode of proceedings.

II. MODE OF PROCEEDINGS

A. *Basics of the Doctrine*

"Mode of proceedings" is an umbrella term for a loose grouping of various process-oriented errors. The doctrine is a subset of unpreserved error, which in turn is a small exception to the preservation rule.[22] Mode of proceedings has been mainly applied with issues arising at trial, but other jurisdictional issues have been recognized by appellate courts.[23] The doctrine is specific to New York and unrecognized in the courts of other states.[24] The concept of "structural" or "fundamental" error is perhaps its closest federal analogue.[25]

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21. *Udzinski*, 541 N.Y.S.2d at 13-14 (citations omitted).

22. *See supra* notes 18-19 and accompanying text.

23. *See infra* Part III.

24. *See* State v. Barksdale, 638 S.E.2d 579, 584 (N.C. Ct. App. 2007) (using the term "mode of proceedings proscribed by law" in referencing New York law); State v. Allocco, 644 A.2d 835, 837 (Vt. 1994) (using the term "mode of proceedings prescribed by law" while citing and distinguishing *People v. Coons*, 551 N.E.2d 587, 588 (N.Y. 1990), discussed *infra* Part III.F). A few older decisions used the phrase "mode of proceeding prescribed by law," but none with reference to criminal law. *See, e.g.,* Lybrand v. Forman, 67 So. 2d 4, 5 (Ala. 1953). The only federal decisions using the term "mode of proceedings proscribed by law" are from New York, typically in a habeas corpus posture. *See, e.g.*, Monroe v. Kuhlman, 433 F.3d 236, 239 (2d Cir. 2006).

25. *See* Arizona v. Fulminante, 499 U.S. 279, 310 (1999) ("Each of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself. 'Without these basic protections, a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair.'" (quoting Rose v. Clark, 478 U.S. 570, 577-78 (1986))); *see also Udzinski*, 541 N.Y.S.2d at 13 ("[S]uch an error in the Federal courts may be considered so fundamental as to be properly reviewable as a matter of discretion." (citations omitted)); 37 GEO. L.J. ANN. REV. CRIM. PROC. 849-50 (2008) ("'Structural errors'—defects that fundamentally undermine the reliability and fairness of the trial—can never be found to have been harmless."). In contrast, "plain error," which occurs where error was unpreserved, has a prejudice component: the error must affect

Where a mode of proceedings error occurs, the defendant need not show any specific prejudice from the procedural error:

> [C]ertain kinds of errors occurring during trial are intrinsically prejudicial because they either detract from the process or impair the defendant's ability to present a defense. In such instances, a so-called "per se" rule of reversal is applied. The use of the term "per se" in this context does not denote a complete absence of prejudice; rather, it represents a shorthand way of saying that errors within that class are prejudicial by their very nature and that, accordingly, nothing further need be shown to compel reversal.[26]

Thus, harmless error analysis is inapplicable with mode of proceedings error.[27] In many situations where a mode error has been found, it would indeed be difficult to demonstrate actual prejudice.[28] To require demonstrable prejudice where defense counsel placed no objection on the record in most mode situations would allow the fundamental procedural deviation to pass unchallenged. Yet, this is something that appellate courts frequently allow when applying harmless error analysis to non-fundamental errors (procedural and substantive), even when preservation has occurred.[29] Moreover, according to earlier decisions, a defendant cannot waive or even consent to a mode of proceedings error.[30] For these reasons, when

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substantial rights. FED. R. CRIM. P. 52(b). For a list of structural errors, see GORDON MEHLER, JOHN GLEESON & DAVID C. JAMES, FEDERAL CRIMINAL PRACTICE: A SECOND CIRCUIT HANDBOOK §§ 1-15 (11th ed. 2011).

26. People v. Jackson, 585 N.E.2d 795, 805 (N.Y. 1991) (Titone, J., dissenting).

27. People v. Mehmedi, 505 N.E.2d 610 (N.Y. 1987); People v. Miller, 901 N.Y.S.2d 444, 445 (App. Div. 2010).

28. *See* Owens v. United States, 483 F.3d 48, 64 (1st Cir. 2007) (recognizing, at the federal level, the difficulty of showing prejudice from structural error).

29. *See, e.g.*, People v. Hamlin, 525 N.E.2d 719, 721-23 (N.Y. 1988) (finding harmless error despite constitutional error of Confrontation Clause violation); People v. Crimmins, 326 N.E.2d 787, 791 (N.Y. 1975) (finding harmless error despite the constitutional error of improper prosecutorial statement).

30. *See* People v. Patterson, 347 N.E.2d 898, 902 (N.Y. 1976), *aff'd*, 432 U.S. 197 (1977); *see also* People v. Michael, 394 N.E.2d 1134, 1136-37 (N.Y. 1979). As discussed *infra* Part III.I, the Court of Appeals has more recently suggested that a defendant may waive or consent to certain changes in the mode of proceedings—or that certain variations in procedure no longer are mode

dealing with an unpreserved issue at the trial level, defense counsel on appeal may seek shelter under the mode of proceedings umbrella.

The mode doctrine is also important because the jurisdiction of the Court of Appeals is constitutionally limited to reviewing questions of law.[31] If an issue comes within the ambit of mode of proceedings, the Court of Appeals is presented with an error of law it may review.[32] In contrast, an intermediate appellate court's review of an unpreserved issue based on "interest of justice" jurisdiction[33] may bar further review of the issue by the Court of Appeals.[34] If an unpreserved issue comes within the area of mode of proceedings, the Court of Appeals may allow its review, even if the court ultimately holds that preservation was required.[35] For example, lack of subject-matter jurisdiction has been held to be a mode of proceedings issue, allowing review by the Court of Appeals, even though the court then held the particular issue was "the equivalent of an improper venue claim," not jurisdictional in nature, and therefore required preservation to challenge it on appeal.[36]

With some decisions, the mode doctrine may be read as a *sub silentio* means of addressing defense counsel's failure to preserve baseline errors.[37] Although mode of proceedings errors are generally judicial in nature, courts have also reviewed errors that the defense attorney could not

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violations and can be consented to. *See*, *e.g.,* People v. Gajadhar, 880 N.E.2d 863, 868 (N.Y. 2007) (allowing waiver of twelve-person jury). *But see* People v. Becoats, 2011 N.Y. Slip. Op. 07306, at *2, 2011 WL 4972341 (N.Y. Oct. 20, 2011) ("We said in *Patterson*: '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 prescribed by law.'" (citation omitted)).

31. N.Y. CONST. art. VI, § 3(a).

32. People v. Kelly, 832 N.E.2d 1179, 1181 (N.Y. 2005); *see* ARTHUR KARGER, THE POWERS OF THE NEW YORK COURT OF APPEALS § 21:11 (3d ed. 2005).

33. N.Y. CRIM. PROC. LAW § 470.15(3)(c) (McKinney 2009).

34. *See* People v. Cona, 399 N.E.2d 1167, 1169 (N.Y. 1979).

35. *See* People v. Wilson, 931 N.E.2d 69, 69-70 (N.Y. 2010).

36. *Id.* at 70; *see also* N.Y. CRIM. PROC. LAW § 470.35 (McKinney 2009); People v. Carvajal, 845 N.E.2d 1225, 1229 (N.Y. 2005).

37. However, the mode doctrine is plainly not intended as a backstop for addressing ineffectiveness issues.

reasonably have been expected to preserve.[38] In *Patterson*, the Court of Appeals allowed the defendant to raise the argument that he was deprived of a properly conducted trial, due to an illegal shift of the burden of proof, for the first time on appeal.[39] According to the court, "defendant's failure to object was excusable because the statutory practice had previously been deemed valid and had only been called into question by an intervening Supreme Court decision."[40] However, deviations from some procedures may not fall into the category of mode of proceedings error where "it is reasonable to require counsel to object."[41] Mode of proceedings errors may occur when an error in the judicial process is such that defense counsel cannot reasonably be expected to defend the client against such error.

Because mode of proceedings doctrine applies to certain procedural errors, those errors that "affect the substance, not the mode of proceedings, of the trial" fall outside the doctrine.[42] With these, preservation is required.[43] In one case, the Court of Appeals rejected applying mode of proceedings analysis to a suppression issue that was not raised in the lower court, styling it a substantive due

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38. *See* Misicki v. Caradonna, 909 N.E.2d 1213, 1223 (N.Y. 2009) (Smith, J., dissenting) ("[W]e review . . . claims where it is unreasonable to expect them to have been preserved below.").

39. People v. Thomas, 407 N.E.2d 430, 432 (N.Y. 1980) (discussing People v. Patterson, 347 N.E.2d 898 (N.Y. 1976), *aff'd*, 432 U.S. 197 (1977)).

40. *Id.* In *Thomas*, as in *Patterson*, an issue regarding improperly shifting the burden of proof was raised; specifically, a jury instruction that a person can be "presumed to intend the natural and probable consequences of his act[s]." *Id.* (internal quotation marks omitted). No mode error was found:

> We recognize that at trial the defendant did not have the benefit of the *Sandstrom* [*v. Montana*, 442 U.S. 510 (1979)] decision which was announced after the trial was concluded. But *Sandstrom* did not alter the law of this State. For more than a century, the charge condemned in *Sandstrom* has been held by this court, to be erroneous as a matter of State law.

Id. at 433 (citations omitted).

41. People v. Kisoon, 801 N.Y.S.2d 69, 71-72 (App. Div. 2005) (addressing the handling of jury notes), *aff'd*, 863 N.E.2d 990 (N.Y. 2007). See *infra* Part III.A for a more detailed discussion of jury notes as mode of proceedings error.

42. People v. Hawkins, 900 N.E.2d 946, 950 n.2 (N.Y. 2008).

43. *See id.* at 950 & n.2.

process argument.[44] But the dichotomy of process-procedure versus substantive law is not easily divided.

While addressing the issue of legal sufficiency of evidence presented at trial, the Court of Appeals in 1995 again attempted to explain the contours of the doctrine, describing a mode of proceedings issue as one that:

> [G]oes to the general and over-all *procedure* of the trial, forbidding alteration of mandated procedural, structural and process-oriented standards. The examples [of mode of proceedings errors]—changing of the burden of proof, . . . deviation from State constitutionally mandated requirements for an indictment—show that the claimed errors [of legal insufficiency] should not fall within that exception.[45]

As stated a decade later by Judge Rosenblatt, this is "a very narrow category of cases [with] errors that go to the essential validity of the process and are so fundamental that the entire trial is irreparably tainted."[46]

Although mode of proceedings is a criminal law issue, one dissenting opinion from the Court of Appeals has suggested that it be applied in a civil case.[47] One Appellate Division decision has applied it to a quasi-criminal area,

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44. People v. Voliton, 630 N.E.2d 641, 643 (N.Y. 1994). "Exceptions to the preservation rule have been limited to errors going to the very organization of the court or at such basic variance with the mode of procedure mandated by law that they impair the essential validity of the criminal proceedings" and do not include "due process objections." *Id.* The Appellate Division had exercised its interest of justice jurisdiction to dismiss two counts of assault in the second degree on suppression grounds. People v. Voliton, 593 N.Y.S.2d 822, 822 (App. Div. 1993), *aff'd*, 630 N.E.2d 641 (N.Y. 1994). Upon further appeal by the defendant, the Court of Appeals affirmed the conviction of two misdemeanor counts. *Voliton,* 630 N.E.2d at 643.

45. People v. Gray, 652 N.E.2d 919, 922 (N.Y. 1995).

46. People v. Kelly, 832 N.E.2d 1179, 1181 (N.Y. 2005) (citation omitted). The Court of Appeals has repeatedly emphasized the limited scope of the doctrine: "Errors within this tightly circumscribed class are immune from the requirement of preservation." *Id.*; *see also* People v. Becoats, 2011 N.Y. Slip. Op. 07306, at *3, 2011 WL 4972341 (N.Y. Oct. 20, 2011) ("Not every procedural misstep in a criminal case is a mode of proceedings error. That term is reserved for the most fundamental flaws.").

47. Misicki v. Caradonna, 909 N.E.2d 1213, 1223 (N.Y. 2009) (Smith, J., dissenting).

civil commitment.[48] In another quasi-criminal area, the transfer of a juvenile delinquency proceeding to Family Court, defects in pleadings, not raised at the trial level, were recognized as jurisdictional in nature and did not require preservation.[49]

Non-preservation of a "mode" issue has even been extended to cases where the error was not raised in the intermediate appellate court. As the Court of Appeals stated in 1979, "there exist certain rules of law, . . . which are so basic to the validity of a criminal proceeding that the failure to observe such a rule may be raised at any time during the appellate process."[50] In two cases where a mode issue was raised for the first time at the Court of Appeals, one was remitted to the Appellate Division to consider the issue;[51] in the other, the Court of Appeals reviewed the issue rather than remitting.[52]

B. Patterson*: Revival of Mode of Proceedings*

Before 1976, few decisions discussed mode of proceedings error. Then came *People v. Patterson*.[53] The specific issue in *Patterson*, an appeal of a murder conviction, was whether placing the burden of proof of an affirmative

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48. *See* State v. Muench, 925 N.Y.S.2d 291, 292-93 (App. Div. 2011); s*ee also* N.Y. MENTAL HYG. LAW §§ 10.05-10.08 (McKinney 2011) (setting out procedure for civil confinement of recidivistic sex offenders). However, the Court of Appeals has refused to apply the mode doctrine to a sex offender risk level reassessment hearing. *Compare* People v. Windham, 886 N.E.2d 179, 179-80 (N.Y. 2008), *with* People v. Samms, 731 N.E.2d 1118, 1120-22 (N.Y. 2000).

49. *See In re* Michael M., 821 N.E.2d 537, 542-43 (N.Y. 2004) (transfer of juvenile offender prosecution).

50. People v. Michael, 394 N.E.2d 1134, 1136 (N.Y. 1979) (dictum); *see infra* notes 138-40 and accompanying text.

51. People v. Caban, 927 N.E.2d 1050, 1053 (N.Y. 2010). On remittal, a mode error was found and the conviction was reversed. People v. Caban, 910 N.Y.S.2d 432, 433-34 (App. Div. 2010). Similarly, in People v. Correa, 897 N.Y.S.2d 14, 16-17 (App. Div. 1st Dep't 2009), *rev'd*, 933 N.E.2d 705 (N.Y. 2010), after briefs were filed, the First Department took the unusual step of requesting counsel to submit supplemental briefs on issues related to mode of proceedings. *See infra* Part III.D.

52. People v. Wilson, 931 N.E.2d 69-70 (N.Y. 2010).

53. 347 N.E.2d 898 (N.Y. 1976), *aff'd,* 432 U.S. 197 (1977).

defense (extreme emotional disturbance) on the defendant violated due process.[54] The issue was unpreserved at trial.[55]

In affirming the conviction, Judge Jasen noted that the case constituted "one very narrow exception to the requirement of a timely objection."[56] He continued, "[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 prescribed by law."[57] The majority opinion did not address mode of proceedings further, but the court found placing the burden of persuasion of the affirmative defense on the defendant to be constitutional.[58] Judge Jasen's re-recognition of mode of proceedings, although dictum, has resulted in a burgeoning line of cases.[59]

III. APPLICATION OF MODE OF PROCEEDINGS

Mode of proceedings can perhaps best be understood or delineated by examples in which courts have applied it, as well as examples in which it does not apply. The most important or recurring issues include (1) responding to jury questions;[60] (2) judicial absence from part of the trial, delegation of judicial responsibility, and communication with the jury by someone other than the judge;[61] (3) absence of defendant or defense counsel;[62] (4) errors in jury instructions, which courts have usually held require preservation;[63] (5) jurisdiction of the court;[64] (6) sufficiency of accusatory instruments;[65] and (7) the twelve-member jury.[66]

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54. *Id.* at 900.

55. *Id.* at 900-02.

56. *Id.* at 902.

57. *Id.*

58. *Id.* at 906-08.

59. *See infra* Part III.

60. *See* People v. O'Rama, 579 N.E.2d 189, 193 (N.Y. 1991).

61. *See* People v. Ahmed, 487 N.E.2d 894, 895 (N.Y. 1985).

62. *See* People v. Mehmedi, 505 N.E.2d 610, 611 (N.Y. 1987).

63. *See Patterson*, 347 N.E.2d at 902.

64. *See* People v. Correa, 933 N.E.2d 705, 710 (N.Y. 2010).

65. *See* People v. Casey, 740 N.E.2d 233, 235, 237 (N.Y. 2000); People v. Boston, 554 N.E.2d 64, 65, 66 (N.Y. 1990).

Additional mode of proceedings errors include conviction of a nonexistent crime,[67] as well as certain fundamental rights violations, such as double jeopardy.[68] The list is not exhaustive.[69]

A. *Responding to Jury Questions:* O'Rama

Mode of proceedings issues frequently arise when the trial judge responds to jury questions. The Appellate Division is divided on when to apply the doctrine, with some appellate decisions applying it and other decisions rejecting it. The New York Criminal Procedure Law requires that, when the jury submits a question, "[u]pon such a request, the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper."[70] This part of the trial has been recognized by the Court of Appeals as crucial: supplemental instructions "may well be determinative of the outcome of the case, coming as they do in response to questions raised by the jurors themselves."[71]

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66. *See* People v. Gajadhar, 880 N.E.2d 863, 868-70 (N.Y. 2007).

67. People v. Martinez, 611 N.E.2d 277, 278 (N.Y. 1993). However, conviction on two counts requiring inconsistent mental states does require preservation. People v. Carter, 860 N.E.2d 50, 50-51 (N.Y. 2006). *But see* People v. Lee, 348 N.E.2d 579, 581 (N.Y. 1976) (dismissing an inclusory concurrent count of which the defendant had been convicted); People v. Rodrigues, 902 N.Y.S.2d 750, 751 (App. Div. 2010) (citing *Lee* for the proposition that preservation is not required to review conviction of an inclusory concurrent count).

68. People v. Michael, 394 N.E.2d 1134, 1135-36 (N.Y. 1979).

69. For example, mode of proceedings has been raised but rejected where the claimed error was a duplicitous indictment. People v Becoats, 2011 N.Y. Slip. Op. 07306, at *2, 2011 WL 4972341 (N.Y. Oct. 20, 2011); *see also* N.Y. CRIM. PROC. LAW § 200.30(1) (McKinney 2007) ("Each count of an indictment may charge one offense only."). In *Becoats,* the defendants argued that a single count in the indictment for the robbery of a gun and the robbery of a pair of sneakers was duplicitous. 2011 N.Y. Slip. Op. 07306, at *2, 2011 WL 4972341. But the court explained: "They did not make this argument in the trial court, however, and we hold that we may not consider it." *Id.* Of the specific duplicitousness issue raised, the court stated: "We express no opinion about the argument's merit." *Id.* at *3.

70. N.Y. CRIM. PROC. LAW § 310.30 (McKinney 2002).

71. People v. Ciaccio, 391 N.E.2d 1347, 1350 (N.Y. 1979).

Noncompliance with section 310.30 of the Criminal Procedure Law constitutes error affecting the mode of proceedings.[72] But what constitutes noncompliance? The leading case is *People v. O'Rama*.[73] The trial judge's "core responsibility[74] under the statute" is to give "meaningful notice" to the attorneys of the jury's request, in order to allow counsel "to frame intelligent suggestions for the fairest and least prejudicial response—and to provide a meaningful response to the jury."[75] The *O'Rama* court set forth the steps that a judge must follow when a "substantive" written jury communication is received.[76] Those steps are (1) mark the communication as a court exhibit; (2) before the jury is recalled, read it into the record in the presence of counsel; (3) allow counsel the opportunity to suggest appropriate responses; (4) inform counsel of the substance of the intended responsive instruction; and (5) when the jury returns, read the communication in open court so that the individual jurors can correct any inaccuracies in the transcription of the inquiry and the rest of the panel can understand the court's response and its context.[77] Where a judge fails to notify counsel of the jury's written question or to allow counsel to assist in formulating the response, a mode of proceedings error results, and no objection is required to preserve the issue.[78]

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72. People v. O'Rama, 579 N.E.2d 189, 193 (N.Y. 1991). In federal court, where a deliberating jury requests further instructions, Rule 43 of the Federal Rules of Criminal Procedure applies. FED. R. CIV. P. 43(a) ("At trial, the witnesses' testimony must be taken in open court . . . ."). As stated by the Supreme Court, for "'orderly conduct of a trial by jury' . . . the jury's message should [be] answered in open court and [defense] counsel should [be] given an opportunity to be heard before the trial judge respond[s]." Rogers v. United States, 422 U.S. 35, 39 (1975) (quoting Shields v. United States, 273 U.S. 583, 588-89 (1927)). In some cases violation of this practice may be harmless error. *Id.* at 40.

73. 579 N.E.2d 189 (N.Y. 1991). One appellate decision has referred to this as "the *O'Rama* exception to the preservation requirement." People v. Neal, 701 N.Y.S.2d 393, 394 (App. Div. 2000).

74. The term "core responsibility" has been used repeatedly with an *O'Rama* error, but not with other mode errors.

75. People v. Kisoon, 863 N.E.2d 990, 992 (N.Y. 2007).

76. *O'Rama*, 579 N.E.2d at 192-93.

77. *Id.*

78. *Id.* at 193; *see also* People v. Tabb, 920 N.E.2d 90, 90 (N.Y. 2009).

Not every variance from the *O'Rama* protocol requires reversal. That decision noted that its intent was:

> [N]ot to mandate adherence to a rigid set of procedures, but rather to delineate a set of guidelines calculated to maximize participation by counsel at a time when counsel's input is most meaningful, i.e., before the court gives its formal response. Accordingly, where there exist unique articulable circumstances that make the foregoing steps impractical, modified procedures that are equally conducive to participation by defense counsel are permissible.[79]

Preservation was required where, for example, the judge read into the record the entire contents of notes requesting a readback of certain terms, and defense counsel was both given notice of the contents of the notes and had knowledge of the court's intended response.[80] Also, where the judge sought clarification of the note from jurors before notifying defense counsel, no error was found.[81] Similarly, no mode error occurred where Criminal Procedure Law section 310.30 was violated but the defendant was acquitted of the charges to which the jury questions were addressed.[82]

Where the jury submits more than one written question, adherence to the *O'Rama* protocol with only one of the notes does not suffice.[83] And, if the jury asks additional questions orally after the written question, and after counsel has received notice, the better course is for a judge not to engage in an oral dialogue but to require the jury to return with the question in writing, allowing the *O'Rama* procedure outlined above to take place.[84]

Where the trial judge instead engages in an oral dialogue, a mode of proceedings error is not automatic.

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79. *O'Rama*, 579 N.E.2d at 193; *see also* People v. Donoso, 908 N.Y.S.2d 667, 669-70 (App. Div. 2010) ("[N]ot all departures from the *O'Rama* procedure constitute mode of proceedings error requiring reversal despite the lack of preservation or prejudice to the defense.").

80. People v. Starling, 650 N.E.2d 387, 391 (N.Y. 1995).

81. People v. Ochoa, 925 N.E.2d 868, 872 (N.Y. 2010); People v. Lykes, 609 N.E.2d 132, 133 (N.Y. 1993).

82. People v. Skinner, 611 N.Y.S.2d 720, 722 (App. Div. 1994).

83. People v. Martin, 808 N.Y.S.2d 865, 866 (App. Div. 2006), *aff'd sub nom*. People v. Kisoon, 863 N.E.2d 990 (N.Y. 2007).

84. *See* People v. DeRosario, 611 N.E.2d 273, 275 (N.Y. 1993).

Rather, application of the doctrine depends upon what the oral question addresses. If the oral question follows the same topic as the written question, where the attorneys had input, the notice-and-opportunity requirement of *O'Rama* is satisfied.[85] But if the substantive scope of the oral question varies from the written question, with no opportunity for involvement by counsel, a mode of proceedings error occurs since, at that point, "any input defense counsel had proffered regarding the responses to the initial jury notes did not suffice to satisfy the statute as to the subsequent colloquies."[86]

B. *Judicial Delegation or Absence:* Ahmed

The Court of Appeals has found mode of proceedings error where the judge is absent during a portion of the trial. Judicial absence[87] or the delegation of judicial functions[88] "deprive[s] the defendant of his right to a trial by jury, an integral component of which is the supervision of a judge."[89] Such supervision by a trial judge is a fundamental right.[90]

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85. *See*, *e.g.*, People v. Jackson, 860 N.Y.S.2d 673, 675 (App. Div. 2008) ("[T]he . . . oral question concerned an identical issue that had been raised in the jury's written request.").

86. *DeRosario*, 611 N.E.2d at 275; *see also* People v. Jones, 719 N.Y.S.2d 426, 427 (App. Div. 2000); People v. Boyne, 579 N.Y.S.2d 338, 340-41 (App. Div. 1992).

87. People v. Toliver, 675 N.E.2d 463, 464 (N.Y. 1996); People v. Pinkney, 709 N.Y.S.2d 10, 12 (App. Div. 2000).

88. People v. Ahmed, 487 N.E.2d 894, 894-95 (1985).

89. *Id.* For example, in *People v. Stiggins*, 802 N.E.2d 1081, 1082 (N.Y. 2003), the Court of Appeals reversed the conviction where the judge "was unfamiliar with the mechanics of a jury trial" and "had to be guided by the prosecutor through every aspect of jury selection." In *People v. Brusie*, 897 N.Y.S.2d 319, 320-21 (App. Div. 2010), the county court judge erred by delegating a hearing on restitution to its court attorney. In *People v. Bayes*, 584 N.E.2d 643, 645 (N.Y. 1991), the judge permitted the attorneys to respond to jury questions. A mode error was found: "The court's informal handling constituted a surrender of its nondelegable judicial responsibility to supervise jury deliberation, which in effect deprived defendant of his fundamental right to trial by jury and thereby denied him a fair trial." *Id.*

90. *Toliver*, 675 N.E.2d at 464.

However, no such right has been recognized where the judge was present, but inattentive.[91]

In *People v. Ahmed*, due to "a very bad throat and very bad cold," the trial judge had his law secretary read requested instructions to the jury.[92] The judge was present for some of the instructions but absent for other requests.[93] The judge's absence, as well as the delegation of responsibility to the law secretary during deliberations, was reversible error, despite a lack of preservation.[94]

A judge's instruction that nonjudicial personnel inform a deadlocked jury to continue deliberating has been likened to giving an *Allen*[95] charge.[96] Such a delegation of duties at a "critical stage of the proceedings"[97] has been faulted as a mode of proceedings error.[98] A judge may not delegate the reading or explanation of the jury instructions to the attorneys.[99] But an instruction to the jury by nonjudicial personnel to cease deliberating for the evening—in effect, the opposite of an *Allen* charge—has been termed a "ministerial" action, and not error, much less a mode of

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91. People v. Degondea, 769 N.Y.S.2d 490, 501 (App. Div. 2003) (holding that no fundamental right of the defendant to a trial by jury is violated by judicial "somnolence" or inattention); *see also* People v. Tippins, 570 N.Y.S.2d 581, 582-83 (App. Div. 1991) (holding that sleeping defense counsel was not ineffective). While a juror who has not heard all the evidence is "grossly unqualified," People v. Simpkins, 792 N.Y.S.2d 170, 170 (App. Div. 2005), one difficulty with a participant allegedly sleeping is that it may not be clear on the appellate record. *See* People v. Fenderson, 611 N.Y.S.2d 220, 220 (App. Div. 1994).

92. *Ahmed*, 487 N.E.2d at 895.

93. *Id.*

94. *Id.*

95. Allen v. United States, 164 U.S. 492 (1896). An *Allen* charge is a supplemental jury instruction that urges a deadlocked jury to continue deliberating. *See* People v. Aponte, 759 N.Y.S.2d 486, 489 (App. Div. 2003).

96. *See* People v. Bonaparte, 574 N.E.2d 1027, 1030 (N.Y. 1991).

97. People v. Torres, 531 N.E.2d 635, 636 (N.Y. 1988).

98. *Id.*; People v. Johnson, 555 N.Y.S.2d 442, 442-43 (App. Div. 1990); People v. Cooper, 551 N.Y.S.2d 254, 255 (App. Div. 1990); *see also* People v. Ciaccio, 391 N.E.2d 1347, 1349-50 (N.Y. 1979) (finding error even where the court clerk was not instructed by the trial judge to communicate with jurors, and instead acted independently).

99. People v. Bayes, 584 N.E.2d 643, 645 (N.Y. 1991).

proceedings error.[100] Where a communication to the jury is "ministerial" in nature, the defendant does not need to be present.[101]

A judge's absence during the performance of a delegable duty, where the judge retains supervision and control of the proceedings, does not require reversal. In *People v. Hernandez*, the trial judge's absence during readback of testimony, while disfavored, was not error.[102] Similarly, where the judge permitted jurors to examine exhibits in his absence, the Court of Appeals found no mode error because the viewings did not implicate the substantive role of the judge in any way.[103]

C. *Absence of Defendant or Defense Counsel:* Mehmedi

A defendant has a due process[104] as well as statutory right[105] to be present at trial. When the judge responds to a jury note with instructions, the defendant's absence results in a mode of proceedings error and requires reversal.[106] In *People v. Mehmedi*, the jury, during deliberations, sent out a written question regarding the trial testimony.[107] Instead of having the jury return to the courtroom, the trial judge, after consulting with counsel, sent a note back to the jury.[108]

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100. People v. Bonaparte, 574 N.E.2d 1027, 1028-30 (N.Y. 1991); *see also* People v. Valle, 571 N.Y.S.2d 82, 83 (App. Div. 1991) (holding that court officer's reminder to jury of judge's "admonitions," which occurred outside the presence of the defendant with defendant's consent, was ministerial and thus not a mode error).

101. People v. Collins, 780 N.E.2d 499, 502 (N.Y. 2002); People v. Harris, 559 N.E.2d 660, 661-62 (N.Y. 1990); People v. Pichardo, 917 N.Y.S.2d 764, 766-68 (App. Div. 2010). What constitutes "ministerial" action can be subject to debate. *See Harris*, 559 N.E.2d at 662-63 (Titone, J., dissenting).

102. People v. Hernandez, 729 N.E.2d 691, 692 (N.Y. 2000).

103. People v. Monroe, 688 N.E.2d 491, 492 (N.Y. 1997).

104. Snyder v. Massachusetts, 291 U.S. 97, 105-06 (1934); People v. Ciaccio, 391 N.E.2d 1347, 1349 (N.Y. 1979).

105. N.Y. CRIM. PROC. LAW § 260.20 (McKinney 2002).

106. People v. Mehmedi, 505 N.E.2d 610, 610-11 (N.Y. 1987); *see also* People v. Wiemeier, 635 N.Y.S.2d 983, 985 (App. Div. 1995); People v. Jones, 553 N.Y.S.2d 37, 37 (App. Div. 1990); People v. Huarotte, 520 N.Y.S.2d 756, 758-60 (App. Div. 1987).

107. *Mehmedi*, 505 N.E.2d at 610.

108. *Id.*

Defense counsel objected to the note's wording but failed to object to the jury not being returned to the courtroom or to the defendant's absence.[109] By statute, however, the jury must be returned and the defendant must be present.[110] In *Mehmedi*, noncompliance with the statute was a mode of proceedings error; because the defendant was absent from a material part of his trial, harmless error analysis was inappropriate.[111]

The requirement that the defendant be present is broader than the requirement that the judge be present.[112] In *People v. Morton*, the court refused the defendant's request to be present while the jury viewed the crime scene.[113] The First Department ruled that the defendant had the right to see what the jury saw and to view the reactions of the individual jurors to the scene.[114] Unlike *Monroe*, where the Court of Appeals found no error because the absence of the judge during the jury's viewing of exhibits did not implicate the substantive role of the judge,[115] in *Morton*, the absence of the defendant during the jury's viewing of the scene violated a statutory right, affecting the mode of proceedings and requiring reversal.[116]

D. *Court Jurisdiction:* Correa

The subject-matter jurisdiction of a court is a fundamental issue, well within mode of proceedings.[117] The

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109. *Id.*

110. N.Y. CRIM. PROC. LAW § 310.30 (McKinney 2002).

111. *Mehmedi*, 505 N.E.2d at 611; *see also* People v. Vargas, 718 N.Y.S.2d 521, 522 (App. Div. 2000) (holding that defendant's right to be present during the provision of supplemental instructions to jury, a "material stage of the trial," makes harmless error analysis inappropriate).

112. *Compare* People v. Morton, 596 N.Y.S.2d 783, 788 (App. Div. 1st Dep't 1993), *with* People v. Monroe, 688 N.E.2d 491, 492 (N.Y. 1997).

113. *Morton*, 596 N.Y.S.2d at 785.

114. *Id.* at 788.

115. *Monroe*, 688 N.E.2d at 492.

116. *Morton*, 596 N.Y.S.2d at 788 (citing N.Y. CRIM. PROC. LAW § 270.50 (McKinney 2002)).

117. People v. Bradner, 13 N.E. 87, 87-88 (N.Y. 1887); *see also* People v. Shepherd, 500 N.E.2d 871, 872 (N.Y. 1986) (concerning geographical jurisdiction). In *Shepherd,* the town court could not conduct a hearing outside

Court of Appeals addressed this issue with the concept of "problem solving courts" promoted by former Chief Judge Judith S. Kaye.[118] Specifically, the issue arose with the jurisdiction of different courts in New York City: the Bronx Criminal Division ("BCD") of Supreme Court and the Integrated Domestic Violence Part ("IDV") of Supreme Court in Queens. In three Appellate Division decisions handed down close in time to each other, the First and Second Departments split on whether these courts, set up by the Unified Court System ("UCS") rather than by the state legislature, had jurisdiction to authorize transfer of cases from local criminal courts in New York City to Supreme Court for trial.[119]

None of the defendants had challenged jurisdiction at the trial level; after the filing of briefs in the First Department, the Appellate Division sua sponte requested the attorneys to brief additional issues relating to jurisdiction.[120] The Second Department found no mode of proceedings error with the courts set up by UCS.[121] The

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the town, though the prosecution consented to it: "[The] jurisdictional limitation . . . is not susceptible to waiver." *Id.*

118. *See Statewide Symposium Focuses on Problem-Solving Courts*, 1 PROBLEM SOLVING COURTS (N.Y.S. Office of Ct. Admin., New York, N.Y.), no. 1, at 1, *available at* http://www.courts.state.ny.us/courts/problem_solving/PSCNewsletter_07-08.pdf.

119. People v. Correa, 897 N.Y.S.2d 14, 17 (App. Div. 1st Dep't) (jurisdiction did not exist), *aff'd*, 933 N.E.2d 705 (N.Y. 2010); People v. Mack, 893 N.Y.S.2d 871, 871-72 (App. Div. 1st Dep't) (jurisdiction did not exist), *rev'd sub nom*. People v. Correa, 933 N.E.2d 705 (N.Y. 2010); People v. Fernandez, 897 N.Y.S.2d 158, 164, 166 (App. Div. 2d Dep't 2010) (jurisdiction did exist), *aff'd sub nom*. People v. Correa, 933 N.E.2d 705 (N.Y. 2010).

120. The First Department requested briefing on:

> (1) whether the establishment of the [Criminal Division of the Supreme Court in Bronx County] under Part 142 of the Rules of the Chief Administrator of the Courts is consistent with the constitution and statutes of the State of New York; and (2) whether the Supreme Court possesses jurisdiction over a criminal case absent the filing of an indictment or superior court information as specified in [Criminal Procedure Law section] 210.05.

Correa, 897 N.Y.S.2d at 16-17.

121. *Fernandez*, 897 N.Y.S.2d at 166.

First Department went the other way, with one justice dissenting strongly.[122]

At the Court of Appeals, Judge Graffeo wrote for a unanimous court on both the First and Second Department decisions.[123] She framed the issue:

> If Supreme Court—acting through the IDV Part or the BCD—did not possess the authority to conduct these proceedings, this would be a fundamental, nonwaivable defect in the mode of proceedings that could be raised by defendants on their direct appeal despite their failure to comply with preservation requirements.[124]

The Court of Appeals found that the courts were properly set up via administrative rule by the UCS and affirmed the convictions.[125]

The Court of Appeals addressed another transfer case in *People v. Wilson*, decided the same day as *People v. Correa*.[126] The defendant's misdemeanor case was transferred from New York City Criminal Court to Supreme Court, where she was tried and convicted based on a misdemeanor information rather than an indictment or superior court information.[127] Her contention that the trial court lacked subject-matter jurisdiction was considered on appeal, despite lack of preservation, but the conviction was affirmed: "Supreme Court possesses concurrent subject matter jurisdiction over the trial of unindicted misdemeanor offenses."[128] The defendant argued that when she was convicted, the court rules that created the Criminal Division of the Supreme Court in Bronx County were not yet in place.[129] The Court of Appeals found this to be "the

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122. *Correa*, 897 N.Y.S.2d at 26-34.

123. People v. Correa, 933 N.E.2d 705, 707, 718 (N.Y. 2010). Chief Judge Lippman, who was Chief Administrative Judge when the administrative rules were promulgated, did not participate. *Id.* at 718.

124. *Id.* at 710 (citations omitted).

125. *Id.* at 710-11.

126. People v. Wilson, 931 N.E.2d 69, 69-70 (N.Y. 2010).

127. *Id*.

128. *Id*.

129. *Id*. at 70.

equivalent of an improper venue claim, which is not jurisdictional in nature and is waived if not timely raised."[130]

One Appellate Division case seemingly diverges from *Correa* and *Wilson*. In *People v. Adams*, the defendant pleaded guilty to misdemeanor charges in county court by superior court information.[131] The case was removed to supreme court without authorization by the Chief Administrator.[132] The Fourth Department held that the county court judge, as Acting Supreme Court Justice, "had no authority to preside over sentencing, rendering the sentence illegal."[133] The case was remitted to county court for resentencing.[134] Decided fifteen days after *Correa* and *Wilson*, the *Adams* decision vacated and remitted for resentencing a conviction based on an unpreserved error, without terming it mode of proceedings error.[135] The Fourth Department has since distinguished *Adams*, finding subsequent transfer issues to be in the nature of venue objections that were unpreserved and hence waived.[136]

The New York court system has long been hobbled by artificial distinctions in the types of courts it has, although a proposed merger in the state court system has been regularly defeated.[137] Future decisions may focus on concerns addressed in *Correa* and *Wilson*, just as many appeals now address *O'Rama*-related issues.

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130. *Id*. (citation omitted).

131. People v. Adams, 906 N.Y.S.2d 832, 832 (App. Div. 4th Dep't 2010).

132. *Id*. at 832-33; *see also* N.Y. COMP. CODES R. & REGS. tit. 22, § 200.14 (1995) (permitting transfers of indictments between the county court and the supreme court "upon authorization by the Chief Administrator").

133. *Adams,* 906 N.Y.S.2d at 833.

134. *Id.*

135. *See id.*

136. People v. Ott, 921 N.Y.S.2d 450, 451-52 (App. Div. 4th Dep't 2011) (citing People v. Correa, 933 N.E.2d 705 (N.Y. 2010)); *see also* People v. Wilson*,* 931 N.E.2d 69, 70 (N.Y. 2010) (holding that transfer from New York City Criminal Court to Supreme Court was akin to an "improper venue claim" and was waived because not raised).

137. *See, e.g.*, Frank Lynn, *Court Merger Seen as Dead in Legislature*, N.Y. TIMES, June 8, 1987, at B1.

The Court of Appeals has also addressed mode of proceedings arguments in the context of double jeopardy.[138] In the more common situation of the successive prosecution form of double jeopardy, preservation is required and no mode of proceedings error occurs because it is not an error of the court lacking jurisdiction.[139] In the successive or increased punishment form of double jeopardy, mode of proceedings is violated when the trial court attempts to adjust a sentence once the defendant has attained a legitimate expectation of finality of the sentence.[140]

E. *Jury Instructions*

With faulty jury instructions, courts have usually rejected any mode of proceedings error and instead required preservation.[141] For example, instructing the jury before the court is statutorily required to do so has been rejected as a mode error.[142] The preservation requirement has also been required with the most basic of jury instructions, that of omitting an instruction on the presumption of innocence.[143]

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138. *See* People v. Williams, 925 N.E.2d 878, 892 (N.Y. 2010); s*ee also* People v. Michael, 394 N.E.2d 1134, 1137 (N.Y. 1979) ("The State's legitimate interests are not seriously touched by allowing a constitutional double jeopardy claim to be raised for the first time on appeal, since such a claim, even if successful, will not result in repeated proceedings, as it is the very essence of a successful double jeopardy defense that there are no further proceedings. Similarly, there will be no need for any additional factual findings in such cases, as such a defense is made out from the record of the prior proceedings and entails no factual inquiry. Finally, double jeopardy does not constitute the type of error which can be remedied so as to allow the trial to proceed in accordance with law if it is timely raised, for such a defense, if valid, is simply not correctable.").

139. People v. Biggs, 803 N.E.2d 370, 374 (N.Y. 2003).

140. *Williams*, 925 N.E.2d at 890-92.

141. People v. McKenzie, 490 N.E.2d 842, 843-44 (N.Y. 1986); People v. Hoyle, 820 N.Y.S.2d 527, 527 (App. Div. 2006); People v. Beaudoin, 603 N.Y.S.2d 926 927-28 (App. Div. 1993).

142. People v. Brown, 860 N.E.2d 55, 55 (N.Y. 2006). *But see* People v. Fujah, 582 N.Y.S.2d 497, 498 (App. Div. 1992) (holding that a mode error occurred, and the defendant was entitled to a new trial, when the court began charging the jury before summation).

143. People v. Creech, 458 N.E.2d 1249, 1250 (N.Y. 1983). Another rather basic issue, legal sufficiency of evidence presented at trial, also requires preservation. People v. Udzinski, 541 N.Y.S.2d 9, 13 (App. Div. 1989) ("The preservation doctrine has been extended so far as to preclude appellate review,

In *Patterson*, the Court of Appeals stated: "If the burden of proof was improperly placed upon the defendant, defendant was deprived of a properly conducted trial, the distribution of the burden of persuasion [of an affirmative defense] being just as significant as the proper composition of the jury."[144] On the facts presented, however, placing the burden on the defendant was found proper.[145] Thus, the mode language of *Patterson* is dictum. Yet nine years later, *Ahmed* included it in a list of mode errors.[146]

Accordingly, a jury instruction that expressly shifts the burden of proof may be one jury instruction that constitutes a mode of proceedings error. The Third Department held that it was mode of proceedings error when the trial court failed to instruct the jury on the elements of the charged crime and instead instructed the jury on elements of another crime.[147] However, incorrect jury instructions on the presumption of innocence,[148] jury instructions that are merely susceptible to an interpretation that the burden of proof is shifted,[149] jury instructions on credibility, identification, and acting in concert,[150] and the incorrect definition of an element,[151] all require preservation.

In one pre-*Patterson* case, the Court of Appeals, citing *Cancemi*, held that a judge's improper comment on the defendant's failure to testify required reversal despite a lack

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as a matter of law, of what could convincingly be said to be the most fundamental of all possible defects in a criminal proceeding, that is, the failure of the People to adduce legally sufficient evidence of the crime of which the defendant is convicted." (citations omitted)); *see also* People v. Gray, 652 N.E.2d 919, 923 (N.Y. 1995). Where there are omissions in the jury charge, an intermediate appellate court may exercise its interest of justice review. *See* People v. Cotterell, 779 N.Y.S.2d 500, 501 (App. Div. 2004).

144. People v. Patterson, 347 N.E.2d 898, 903 (N.Y. 1976), *aff'd,* 432 U.S. 197 (1977).

145. *Id.* at 908.

146. People v. Ahmed, 487 N.E.2d 894, 895 (N.Y. 1985).

147. People v. Rose, 879 N.Y.S.2d 852, 853 (App. Div. 3d Dep't 2009).

148. People v. Creech, 458 N.E.2d 1249, 1250 (N.Y. 1983).

149. People v. McKenzie, 490 N.E.2d 842, 843-44 (N.Y. 1986); People v. Beaudoin, 603 N.Y.S.2d 926, 927-28 (App. Div. 1993).

150. People v. Hoyle, 820 N.Y.S.2d 527, 527 (App. Div. 2006).

151. People v. Udzinski, 541 N.Y.S.2d 9, 13-14 (App. Div. 1989).

of preservation.[152] However, inquiry by the judge outside the jury's presence concerning the admissibility of evidence[153] and innocuous remarks by a judge other than the trial judge,[154] require preservation.

The inclusion of improper language on a verdict sheet may be a mode of proceedings error.[155] But, this does not apply to the addition of lesser counts to be considered by the jury in the alternative when the jury has not been orally charged with those lesser counts.[156]

Furthermore, rule violations that do not bear upon a constitutional or statutory right are not mode of proceedings errors, including granting the jury's note-taking request mid-trial,[157] delegation of ministerial tasks, such as the prosecutor's replaying of a videotape machine for the jurors in open court[158] and the unsupervised demonstration of a weapon's operation by nonjudicial personnel.[159]

The Court of Appeals also rejected mode of proceedings arguments in cases that challenged the constitutionality of

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152. People v. McLucas, 204 N.E.2d 846, 847-48 (N.Y. 1965) (citing Cancemi v. People, 18 N.Y. 128 (1858)). *But see Udzinski*, 541 N.Y.S.2d at 11-12 ("The preservation doctrine has been applied so as to preclude appellate review of a wide variety of arguments relating to errors which clearly affected fundamental rights.").

153. People v. Rivera, 739 N.Y.S.2d 566, 566 (App. Div. 2002).

154. People v. Henriquez, 625 N.Y.S.2d 526, 527 (App. Div. 1995).

155. People v. Miller, 901 N.Y.S.2d 444, 445 (App. Div. 2010); *see also* People v. Collins, 780 N.E.2d 499, 501-02 (N.Y. 2002) ("[S]ubmission of a verdict sheet that lists statutory elements without the defendant's consent, or the court's response to a jury's request for a clarification of testimony—affects the mode of proceedings prescribed by law." (citations omitted)); People v. Johnson, 930 N.Y.S.2d 362, 364 (2011) (holding that submission of annotated verdict sheet without defense counsel's consent was error).

156. *Collins*, 780 N.E.2d at 502.

157. People v. Canty, 916 N.Y.S.2d 80, 81 (App. Div. 2011) ("There was nothing even approaching a mode of proceedings error that 'went to the essential validity of the process and was so fundamental that the entire trial is irreparably tainted.'" (quoting People v. Brown, 860 N.E.2d 55, 55 (N.Y. 2006))); People v. Valiente, 765 N.E.2d 503, 504 (App. Div. 2003); *see also* N.Y. COMP. CODES R. & REGS. tit. 22, § 220.10 (2001).

158. People v. Mays, 925 N.Y.S.2d 758, 759 (App. Div. 2011); People v. Davis, 687 N.Y.S.2d 803, 806-07 (App. Div. 1999).

159. People v. Kelly, 832 N.E.2d 1179, 1181-82 (N.Y. 2005).

New York's discretionary persistent felony offender sentencing statute[160] and the mandatory persistent violent felony offender statute.[161] In *People v. Rosen*, the defense unsuccessfully argued that the defendant was entitled to have his previous convictions, which increased his potential sentencing exposure, placed before a jury, based on *Apprendi v. New Jersey*.[162] Although the issue of the constitutionality of New York's persistent felony offender statute appears settled, Chief Judge Lippman has argued that it unconstitutionally denies "a criminal defendant's right to have each and every element necessary to imposition of the authorized punishment proved to a jury beyond a reasonable doubt," thus violating the mode of proceedings prescribed by law.[163] The issue itself was rejected on the merits, in addition to being unpreserved.[164] Such an argument is particularly difficult to raise for the first time on appeal, as New York law requires that a constitutional challenge to a statute be on notice to the Attorney General, raised at the trial level.[165]

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160. People v. Rosen, 752 N.E.2d 844, 847 (N.Y. 2001); *see also* Portalatin v. Graham, 624 F.3d 69, 92-94 (2d Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1693 (2011); People v. Quinones, 906 N.E.2d 1033, 1040-42 (N.Y. 2009).

161. *See* People v. Battles, 942 N.E.2d 1026, 1028-29 (N.Y. 2010), *cert. denied*, No. 10-9465, 2011 WL 4530495 (U.S. Oct. 3, 2011).

162. *Rosen*, 752 N.E.2d at 846 (citing Apprendi v. New Jersey, 530 U.S. 466 (2000)).

163. *Battles*, 942 N.E.2d at 1034 (Lippman, C.J., dissenting) ("There can be no more pronounced a departure from the mode of proceedings prescribed by law than the denial of a criminal defendant's right to have each and every element necessary to imposition of the authorized punishment proved to a jury beyond a reasonable doubt."); *see also* People v. Fuller, 441 N.E.2d 563, 565 (N.Y. 1982) ("[T]he 'essential nature' of the right to be sentenced as provided by law, though not formally raised at the trial level, preserves a departure therefrom for review in [the Court of Appeals].").

164. *Battles*, 942 N.E.2d at 1028-29 (majority opinion).

165. N.Y. EXEC. LAW § 71 (McKinney 2010); N.Y. C.P.L.R. 1012(b) (McKinney Supp. 2011); *see also* Gardner v. Continuing Developmental Servs., Inc., 739 N.Y.S.2d 302, 302 (App. Div. 2002) (rejecting plaintiff's constitutional challenge to a section of the New York Labor Law because plaintiff raised the issue for the first time on appeal); People v. Baumann & Sons Buses, Inc., 846 N.E.2d 457, 460 (N.Y. 2006) (holding that a defendant may not claim for the first time on appeal that a statute is unconstitutionally vague, even if such a finding by the court would render the accusatory instrument facially insufficient and thus would not require preservation).

F. *Sequestration:* Coons *Error and* Webb *Waiver*

Changes in the law have brought into question some of the most seminal and important mode of proceedings decisions. One example is jury sequestration.[166] In a rather short decision in 1990,[167] *People v. Coons*, the Court of Appeals held that the sequestration rule contained in section 310.10 of the Criminal Procedure Law was violated where the trial judge "permitted the jurors to go to their homes for dinner, separately and unsupervised."[168] Such errors "need not be preserved and, even if acceded to, still present a question of law for this court to review."[169]

The next year, the holding in *Coons* was essentially neutralized in *People v. Webb*.[170] The trial judge had permitted jurors to go home overnight separately and unsupervised.[171] The Court of Appeals framed the issue as "whether a defendant may waive the sequestration requirement," which it stated had not been decided in *Coons*.[172] The defendant in *Coons*, unlike the defendant in *Webb*, "had not consented to the procedure."[173] Thus, the issue in *Webb* was different: "[W]hether the sequestration requirement in CPL 310.10 may be effectively waived when, as in the case before us, the defendant has been informed of his rights by counsel and expressly consents on the record in the presence of counsel to the departure from the statute."[174]

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166. Another, the state constitutional requirement of a twelve-person jury with an indictment, is discussed below. *See infra* Part III.I.

167. It may be fair to say that no decision on mode of proceedings has examined the issue at length. Perhaps the longest cited in this article, *People v. Udzinski*, 541 N.Y.S.2d 9 (App. Div. 1989), focused more on the preservation rule. *See supra* notes 151-52.

168. People v. Coons, 551 N.E.2d 587, 588 (N.Y. 1990) ("[A] deliberating jury '*must be continuously kept together under the supervision* of a court officer.'" (quoting N.Y. CRIM. PROC. LAW § 310.10 (McKinney 2002))).

169. *Id.* (citations omitted).

170. 581 N.E.2d 509, 510-12 (N.Y. 1991).

171. *Id.* at 510.

172. *Id.*

173. *Id.*

174. *Id.*

The Court of Appeals summarized the defense position in *Webb* as follows:

> [B]ecause the sequestration requirement has been held to be sufficiently linked to the mode of proceedings so as not to require preservation (*see, People v. Coons, supra*), it follows that the requirement is not waivable. The argument equates an error which does not require an objection for 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. In other words, what need not be preserved may not be waived.[175]

The *Webb* court pointed out that while waiver and preservation are often "inextricably intertwined," they are "separate concepts."[176] The court proceeded to "address the waivability of the claimed error as an issue that is separate and distinct from the question of preservation."[177] Distinguishing both judicial delegation in *Ahmed* and less-than-twelve jurors in *Cancemi* from *Webb*, Judge Hancock stated that "the sequestration provision does not implicate fundamental rights that are an integral part of the trial itself."[178] Both *Ahmed* and *Cancemi* had "involved the defendant's common-law and constitutionally based right to a jury trial."[179] In contrast, the sequestration requirement "is entirely statutory and reflects no established common-law right of the defendant. . . . 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."[180]

Webb made a seeming distinction between a right long recognized by tradition versus one that is entirely

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175. *Id*. at 510-11. The court concluded that this position "is contrary to our decisions." *Id.* at 511.

176. *Id.* at 511 (internal quotation marks omitted).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id*. The finding of waiver in *Webb* may have been influenced by a Second Department decision on jury sequestration that had distinguished *Coons* by applying waiver analysis, though it was not cited in *Webb*. People v. D'Alvia, 575 N.Y.S.2d 495, 501-03 (App. Div. 2d Dep't 1991). *D'Alvia* was decided on September 30, 1991, *id.* at 495, *Webb* on October 15, 1991. *Webb*, 581 N.E.2d at 509.

statutorily based. This insertion of common law[181] into mode of proceedings analysis implied that common-law or long-held rights were more important than statutes or constitutions in discerning what is truly "fundamental" so as to come within mode of proceedings.[182] Thus, there appears to be two layers of issues that may come within the doctrine.

The Court of Appeals' shift away from *Coons* error, and toward *Webb* waiver, is consistent with other caselaw that almost always treats jury-related procedural errors as not violating the mode of proceedings doctrine, absent some nexus with the defendant or the charged crime. For example, in an early case, the Court of Appeals distinguished *Cancemi* and held that when there was a formal irregularity during the process by which jurors were drawn, "any irregularity which would be ground of error . . . was merely formal, affecting no public interest, trenching upon no public policy" and could therefore be waived by the defendant.[183]

Appellate decisions have found that errors affecting the composition of the jury are outside the mode of proceedings doctrine. Examples not requiring reversal include excusing a juror who lacked statutorily-mandated property qualifications,[184] a clerk's error in counting peremptory challenges,[185] and improperly discharging a sworn juror.[186] The use by a judge of a pre-screening procedure for prospective jurors was likewise found not to violate the mode of proceedings by the First Department in *People v. Casanova*.[187]

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181. *See* People v. Michael, 394 N.E.2d 1134, 1136 (N.Y. 1979) ("[T]here exist certain rules of law, be they founded on the common law, prescribed by statute, or mandated by or [sic] Constitutions, which are so basic to the validity of a criminal proceeding that the failure to observe such a rule may be raised at any time during the appellate process.").

182. *See, e.g.*, People v. Becoats, 2011 N.Y. Slip. Op. 07306, at *3, 2011 WL 4972341 (N.Y. Oct. 20, 2011) ("That term [mode of proceedings] is reserved for the most fundamental flaws.").

183. Pierson v. People, 79 N.Y. 424, 432 (1880).

184. People v. Cosmo, 98 N.E. 408, 410-12 (N.Y. 1912).

185. People v. Mathis, 708 N.Y.S.2d 87, 88 (App. Div. 2000).

186. People v. Powell, 913 N.Y.S.2d 468, 469 (App. Div. 2010).

187. 875 N.Y.S.2d 31, 32-34 (App. Div. 1st Dep't 2009).

As *Casanova* and other cases suggest, even improper contact between the judge and jury is insufficient to violate the mode of proceedings prescribed by law. In a case involving dual juries, failing to seal the first jury's verdict until the second verdict was returned did not amount to a violation of mode of proceedings.[188] In camera questioning of jurors was held not to be mode error,[189] nor was the inclusion of the judge's spouse as a juror.[190] The failure to remove a seated juror during a mistrial inquiry was also held to require preservation.[191] And where the judge adequately, but not completely, admonished the jury before recessing for the night, preservation was required.[192] In all of these cases there were errors that affected the jury. However, with no nexus between the jury-related error and the defendant or the charged crime, the Court of Appeals seems unlikely to find a violation of the defendant's fundamental rights that would result in mode of proceedings error.

G. *Alternate Jurors:* Agramonte

Jury sequestration is closely entwined with what happens with alternate jurors, because by statute, alternate jurors are to be kept "separate and apart from the regular jurors" during deliberations.[193] An issue involving alternate jurors arose in *People v Agramonte.*[194] The trial court had permitted the alternate jurors to dine with regular jurors after deliberations had commenced.[195] In upholding the conviction, the Court of Appeals again supported the

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188. People v. Irizarry, 634 N.E.2d 179, 180-82 (N.Y. 1994).

189. People v. Rios, 587 N.Y.S.2d 688, 689 (App. Div. 1992).

190. People v. Hartson, 553 N.Y.S.2d 537, 538-39 (App. Div. 1990). Although not found to be a mode error, "this is one of those rare cases necessitating the exercise of the discretion entrusted to us to reverse the judgment of conviction in the interest of justice." *Id.* at 539 (citation omitted).

191. People v. Yong Yun Lee, 706 N.E.2d 1185, 1186 (N.Y. 1998).

192. People v. Edwards, 891 N.Y.S.2d 661, 662 (App. Div. 2010); *see also* People v. Williams, 846 N.Y.S.2d 620, 621 (App. Div. 2007) (citing N.Y. CRIM. PROC. LAW §§ 270.40, 310.10 (McKinney 2002)).

193. N.Y. CRIM. PROC. LAW § 270.30(1) (McKinney 2002).

194. 665 N.E.2d 164 (N.Y. 1996).

195. *Id*. at 165.

apparent "two layers of fundamental rights" error analysis for mode of proceedings cases,[196] italicizing the difference in the types of errors: "Only *fundamental* defects in judicial proceedings, however, fall within this very narrow category of so-called 'mode of proceedings' errors."[197] And quoting *Webb*: "*[T]he sequestration provision does not implicate fundamental rights that are an integral part of the trial itself*."[198]

As the court in *Agramonte* concluded, "[o]ur holding in [*Webb*] thus leads to the inescapable conclusion that violations of the sequestration provision do not fall within the 'one very narrow exception to the requirement of a timely objection.'"[199] Violation of the statutory "separate and apart" requirement for alternate jurors was not a mode of proceedings error, but one requiring preservation.[200]

Webb and *Agramonte* did not explicitly overrule *Coons* but effectively limited sequestration as a mode of proceedings error: *Coons* was last cited by the Court of Appeals in 1996 in *Agramonte*,[201] and by the Appellate Division in 1998, in a dissent.[202] Another reason for the decline of sequestration as a mode error may be the legislative amendment to the Criminal Procedure Law, as noted in *Agramonte*, "granting the trial court discretion to dispense with sequestration in certain classes of cases."[203]

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196. *See supra* notes 181-83 and accompanying text.

197. *Agramonte*, 665 N.E.2d at 166 (citations omitted).

198. *Id*. (quoting People v. Webb, 581 N.E.2d 509, 511 (N.Y. 1991)).

199. *Id*. (quoting People v. Patterson, 347 N.E.2d 898, 902 (1976), *aff'd*, 432 U.S. 197 (1977)).

200. *Id.* at 167.

201. *Id.* at 166-67.

202. People v. Anderson, 671 N.Y.S.2d 149, 151 (App. Div. 1998) (Ritter, J., dissenting). Other sequestration-related errors may arise that violate the mode doctrine, however.

203. *Agramonte*, 665 N.E.2d at 166 n. With N.Y. CRIM. PROC. LAW § 310.10(1) as currently written, "discretion to dispense with sequestration now may be used in any case, after notice to the parties and affording an opportunity to be heard on the record outside of the presence of the jury." N.Y. CRIM. PROC. LAW § 310.10 practice cmt. (McKinney 2002). The Practice Commentary further notes, "[t]he provisions of subdivision one need not be interpreted literally, as they are not deemed a fundamental aspect of the proper mode of judicial proceedings." *Id.*

H. *Accusatory Instruments:* Boston *and* Casey

Under the New York State Constitution, a defendant charged with a felony has the right to be prosecuted by indictment.[204] In 1974, the state constitution was amended so as to allow the waiver of indictment process, and article 195 of the Criminal Procedure Law, entitled "Waiver of Indictment," was thereafter enacted.[205] A superior court information is used when a defendant bypasses the grand jury process and waives indictment.[206] It is almost always employed only where there is an agreement for the defendant to plead guilty. Caselaw has required close adherence to article 195: in *People v. Boston,* the Court of Appeals recognized nonadherence to the waiver of indictment process as a mode of proceedings error.[207]

The inclusion of hearsay in a misdemeanor information is another mode of proceedings issue. With prosecutions of lesser charges, the accusatory instruments usually employed are either a misdemeanor complaint or a misdemeanor information. The requirements for these accusatory instruments are set forth in detail in the Criminal Procedure Law.[208] A misdemeanor complaint may commence a criminal proceeding but is normally insufficient

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204. N.Y. CONST. art. I, § 6.

205. *Id.*; 1974 N.Y. Sess. Laws 613, 614 (McKinney); *see* People v. Banville, 523 N.Y.S.2d 844, 847-48 (App. Div. 1988).

206. *See* N.Y. CRIM. PROC. LAW § 200.15 practice cmt. (McKinney 2007).

207. People v. Boston, 554 N.E.2d 64, 67 n.2 (N.Y. 1990); *see also* People v. Pierce, 930 N.E.2d 176, 183 (N.Y. 2010); People v. Feliz, 887 N.Y.S.2d 48, 49-50 (App. Div. 2009); People v. Martoken, 845 N.Y.S.2d 460, 461 (App. Div. 2007). For example, in *People v. Zanghi*, 588 N.E.2d 77, 78 (N.Y. 1991), where the defendant pleaded guilty via waiver of indictment to a higher charge than he had been charged with previously, the conviction was reversed:

> As a threshold matter, since an infringement of defendant's right to be prosecuted only by indictment implicates the jurisdiction of the court, the claim may be reviewed even though defendant did not object to being prosecuted on the information he now claims was defective and, in fact, consented to be prosecuted on it. Further, because it is jurisdictional, an infringement upon the right to be prosecuted by indictment is not waived by the entry of a guilty plea.

Id. (citations omitted).

208. *See* N.Y. CRIM. PROC. LAW §§ 100.10, 100.15, 100.30, 100.45 (McKinney 2004).

for trial;[209] in contrast, a misdemeanor information is a trial-ready instrument that must contain "non-hearsay allegations [that] establish, if true, every element of the offense charged and the defendant's commission thereof."[210]

In *People v. Casey*, the defendant failed to challenge the misdemeanor information that charged him with criminal contempt in the second degree at the trial level.[211] The information contained no non-hearsay allegation of defendant's physical receipt of a temporary order of protection.[212] He first raised the issue upon appeal, after being convicted at jury trial.[213] The Appellate Term affirmed the conviction, finding that by waiving the reading of his procedural rights, defendant had also waived the right to be prosecuted by information.[214] On further appeal, the Court of Appeals affirmed the conviction but under a different analysis.[215] Defendant had waived only a reading of the information, not the right to be charged by information.[216]

Writing for the court, Judge Levine made a clear distinction between those errors in an accusatory instrument that are jurisdictional in nature and

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209. *See* N.Y. CRIM. PROC. LAW § 170.10(4)(d) (McKinney 2007). If arraigned on a misdemeanor complaint, the judge must inform the defendant that he "may not be prosecuted thereon or required to enter a plea thereto unless he consents to the same, and that in the absence of such consent such misdemeanor complaint will for prosecution purposes have to be replaced and superseded by an information." *Id.* A defendant charged by misdemeanor complaint "may waive prosecution by information and consent to be prosecuted upon the misdemeanor complaint." N.Y. CRIM. PROC. LAW § 170.65(3) (McKinney 2007).

210. N.Y. CRIM. PROC. LAW § 100.40(1)(c); *see also* People v. Kalin, 906 N.E.2d 381, 382-83 (N.Y. 2009) ("The usual instrument filed to obtain jurisdiction over an accused for a misdemeanor offense is a misdemeanor complaint. . . . A misdemeanor complaint, however, may not serve as the basis for a prosecution unless the accused expressly waives the right to be prosecuted by a misdemeanor information. . . . In addition to the reasonable cause requirement, an information must also set forth 'nonhearsay allegations' which, if true, establish every element of the offense charged and the defendant's commission thereof." (internal citations omitted)).

211. People v. Casey, 698 N.Y.S.2d 404, 405 (App. Term 1999).

212. *Id.*

213. *Id.*

214. *Id*.

215. People v. Casey, 740 N.E.2d 233, 235 (N.Y. 2000).

216. *Id.*

"nonwaivable" and those that are pleading defects.[217] In the former category are those "fundamental" errors where an element is omitted because they "impair a defendant's basic rights to fair notice sufficient to enable preparation of a defense and to prevent double jeopardy."[218] According to the court, "[h]earsay pleading defects do not implicate any of those basic rights of an accused," and so "[t]he inclusion of hearsay allegations in a local court information cannot deprive the tribunal of subject-matter jurisdiction."[219] The court continued, "[p]leading deficiencies cannot be jurisdictional because a court must both have *and* exercise subject-matter jurisdiction in order even to rule on the sufficiency of a pleading."[220] In finding hearsay allegations in a misdemeanor information to not be a mode of proceedings error, the *Casey* court distinguished earlier decisions in which "there was a total absence of pleading of one of the elements of the crime."[221]

In a later appeal, *People v. Keizer*, the Court of Appeals summarized the holding in *Casey* by stating "hearsay defects did not fit within the narrow exceptions to the preservation rule created by this court's precedents: hearsay defects are neither subject-matter violations nor mode of proceedings errors, neither of which requires preservation."[222] In *Keizer*, the jurisdictional sufficiency of an accusatory instrument was challenged where a guilty plea had been entered.[223] The court wrote:

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217. *Id.* at 239-40.

218. *Id.* at 240.

219. *Id*.

220. *Id*. (citation omitted).

221. *Id*. at 237 (citing People v. Alejandro, 511 N.E.2d 71, 72-73 (N.Y. 1987)); *see also* People v. Jones, 878 N.E.2d 1016, 1018-19 (N.Y. 2007).

222. People v. Keizer, 790 N.E.2d 1149, 1154 (N.Y. 2003). The defendants in *Keizer* forfeited their claims of defective accusatory instruments by pleading guilty. *Id.* at 1152, 1155. A guilty plea to disorderly conduct, an offense not charged in the complaint, was valid. *Id.* at 1151-52. But the court in *Casey* noted that hearsay pleading defects in juvenile delinquency petitions are jurisdictional in nature. *Casey*, 740 N.E.2d at 240-41. A "removal order" in a juvenile offender prosecution, from criminal court to family court, which contained only hearsay allegations, was nonwaivable and could be raised on appeal, despite lack of preservation. *In re* Michael M., 821 N.E.2d 537, 538 (N.Y. 2004).

223. *Keizer*, 790 N.E.2d at 1151.

> The present case presents a variant of the question posed in *Casey* where we held that an objection to a purported hearsay defect in an accusatory instrument must be preserved for appeal purposes by raising the objection in the first instance at the trial court. In the present case, the question is whether a defendant's claim of a nonjurisdictional hearsay defect in the accusatory instrument raised at the trial court survives a guilty plea. We conclude that it does not.[224]

The distinguishing factor in *Keizer* was not that it was a guilty plea; in a later case, where a defendant pleaded guilty to a charge that was not in the indictment and not a lesser included offense, the plea was found jurisdictionally defective.[225]

I. *Waiver of Twelve-Person Jury:* Gajadhar

The "two levels of fundamental rights" for mode of proceedings analysis was further developed in *People v. Gajadhar*, which involved an eleven-member jury in a murder trial.[226] The first case to articulate mode of proceedings, *Cancemi v. People*, involved an attempted waiver of a jury of twelve.[227] However, in *Gajadhar* the Court of Appeals reached an outcome different from that in *Cancemi* because the state constitution had been amended during the intervening years.[228]

The New York State Constitution provides that "crimes prosecuted by indictment shall be tried by a jury composed of twelve persons, unless a jury trial has been waived as provided in section two of article one of this constitution."[229] That section of the constitution provides, in part:

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224. *Id.* at 1154.

225. People v. Castillo, 868 N.E.2d 185, 185-86 (N.Y. 2007).

226. 880 N.E.2d 863, 864 (N.Y. 2007).

227. 18 N.Y. 128, 131 (1858).

228. *Gajadhar*, 880 N.E.2d at 868-69.

229. N.Y. CONST. art. VI, § 18. A defendant charged with a misdemeanor has a right to a jury trial of six jurors, N.Y. CRIM. PROC. LAW § 360.10(1) (McKinney 2005), except where a defendant in New York City Criminal Court is charged by information and the highest charge is a class B misdemeanor. N.Y. CRIM. PROC. LAW § 340.40(2) (McKinney 2005).

> A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver.[230]

The defendant in *Gajadhar* was charged with seven felonies, including second degree murder.[231] Alternate jurors were dismissed at the beginning of deliberations, the defendant having informed the court that, should a regular juror become unavailable during deliberations, he would not consent to an alternate being substituted.[232] After deliberations began, one juror became ill.[233] According to Judge Graffeo, the parties were aware that due to the location of witnesses, obtaining a retrial would be "burdensome."[234] Opposing a mistrial, defendant asked that deliberations continue with the remaining eleven jurors, and executed a written waiver in open court.[235] The trial judge granted the waiver, despite the constitutional requirement of a twelve-person jury.[236] The trial judge acknowledged *Cancemi*, but noted that the state constitution's language had changed since 1858.[237] The defendant was convicted of second degree felony-murder and first degree robbery, receiving a prison sentence of twenty years to life.[238]

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230. N.Y. CONST. art. I, § 2; *see also* N.Y. CRIM. PROC. LAW § 320.10 (McKinney 2002). Consent must be in written form; oral consent, on the record, is insufficient and will result in mode of proceedings error. People v. Garbutt, 839 N.Y.S.2d 833, 834 (App. Div. 2007).

231. *Gajadhar*, 880 N.E.2d at 864-65.

232. *Id.* at 864. Under N.Y. CRIM. PROC. LAW § 270.35(1) (McKinney 2002), once jury deliberations have begun, substitution of an alternate juror requires a defendant's written consent in open court.

233. *Gajadhar*, 880 N.E.2d at 864.

234. *Id.*

235. *Id*.

236. People v. Gajadhar, 753 N.Y.S.2d 309, 311-12 (Sup. Ct. 2002).

237. *Id.* at 312-13.

238. *Gajadhar*, 880 N.E.2d at 864-65.

The conviction was affirmed both at the Appellate Division[239] and at the Court of Appeals.[240] "There is no doubt that *Cancemi* was decided correctly in 1858," wrote Judge Graffeo, noting that at that time jury waivers were permitted only in civil cases.[241] "Conversely, the constitution did not allow criminal defendants to waive the right to a jury trial, which meant that defendants could not consent to jury deliberations by less than twelve jurors."[242] Since then, amendments in 1938 to the state constitution "clearly dispelled the notion that a defendant cannot consent to an alteration of the common-law jury of twelve in a noncapital criminal case."[243]

While long-held rights had been given prominence in *Agramonte* for purposes of mode of proceedings analysis, this was downplayed by the majority in *Gajadhar*, which acknowledged the long history of a jury composed of twelve people, but commented on the talismanic quality of the number of jurors being twelve.[244]

In dissent, Judge Ciparick, joined by Chief Judge Kaye, argued for the continued vitality of the twelve-juror requirement.[245] While defendants may waive fundamental constitutional rights:

> [T]hese rights cannot be characterized as fundamental "to the organization of the tribunals or the mode of proceeding prescribed by the constitution and the laws." Because the right to be tried by 12 persons is fundamental to the mode of proceeding and not

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239. People v. Gajadhar, 828 N.Y.S.2d 346, 354 (App. Div. 2007).

240. *Gajadhar*, 880 N.E.2d at 870.

241. *Id.* at 868.

242. *Id*. (citation omitted).

243. *Id*.

244. *Id.* at 865. The court wrote:

> The number 12 has long been associated with trial by jury but no one knows why or when the common law settled on that figure. Some legal commentators speculate that the number has religious significance. It has also been said that a jury of 12 evolved from certain ancient practices, such as convening 12 individuals with knowledge of a disputed matter . . . . Regardless of origin, the number 12 was eventually regarded with "superstitious reverence."

Id. (citations omitted).

245. *Id.* at 870 (Ciparick, J., dissenting).

> personal to a defendant, it is distinguishable from the other rights that we have permitted a criminal defendant to waive.[246]

The dissent asserted that "[t]he right to be tried by a jury of 12—unless waived in favor of a bench trial—is inviolate and cannot be waived.[247]

The reasoning by the Court of Appeals in *Gajadhar* is inconsistent with its reasoning in *People v. Boston*. Although the New York Constitution was amended to allow for waiver of indictment, the court in *Boston* held that deviation from the statutory waiver procedures results in a mode of proceedings error.[248] By this reasoning, where the constitution is amended to allow a defendant to waive a "fundamental" common law right to which mode of proceedings analysis applies, and where the legislature has enacted a statute to govern such waiver, and where there is a deviation from that statutory mandate, reversal is required. The court came to the opposite conclusion in *Gajadhar*. Recognizing that the constitution had been amended to allow for waiver of jury, the court upheld conviction by an eleven-person jury,[249] despite the fact that the legislature had only passed statutes authorizing a bench trial[250] or the substitution of alternate jurors.[251] Furthermore, the constitution expressly grants the legislature authority to govern "the form, content, manner and time" of jury waiver,[252] but not waiver of indictment.[253] The Court of Appeals now deems it no mode of proceedings violation for a defendant to waive the fundamental right to a jury in situations outside the legislature's constitutionally delegated statutory mandate. This may augur another change in mode of proceedings doctrine.

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246. *Id*. at 872-73 (quoting Cancemi v. People, 18 N.Y. 128, 137 (1858)).

247. *Id.* at 873.

248. People v. Boston, 554 N.E.2d 64, 67 & n.2 (N.Y. 1990).

249. *Gajadhar*, 880 N.E.2d at 866-70.

250. *See* N.Y. CRIM. PROC. LAW § 320.10 (McKinney 2002).

251. *See id.* § 270.35(1).

252. N.Y. CONST. art. I, § 2.

253. *Id.* § 6.

CONCLUSION

Intermediate appellate courts have rejected applying mode of proceedings analysis to a number of issues. To the extent these have not been reached by the Court of Appeals, some issues may be found to violate the doctrine, or a different set of facts may come within it. With each area that the Court of Appeals has found a mode 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. Limiting mode of proceedings to procedural issues is not much of a limitation: a host of unpreserved procedural irregularities at trial or otherwise may be raised in the future for review by appellate courts. As there are probably thousands of procedural errors that could occur during the course of trial, only the imagination of appellate defense counsel limits the range of issues that could be raised under the mode of proceedings umbrella.

Mode of proceedings error is specific to New York criminal jurisprudence. It appears that the mode of proceedings revival, which began with *People v. Patterson* and continues to evolve, has proven itself a useful tool for the Court of Appeals, allowing that court to assert jurisdiction where a question of law has not been formally preserved. At the same time, appellate courts as well as appellate practitioners have had difficulty discerning whether a particular issue constitutes a mode of proceedings error. Guideposts in this area are difficult to ascertain. The Court of Appeals has repeatedly emphasized the narrowness of this exception to the preservation rule, and has restricted or eliminated issues that previously were found to be within the doctrine. Thus, application of mode of proceedings to certain issues—jury sequestration, for example—is no longer recognized. Even with these limitations, though, this area of appellate practice will continue to pose challenges for courts and appellate counsel.