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Volume 21

Number 1 *New York State Constitutional Decisions:*  
*2004 Compilation*

Article 3

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December 2014

# Appellate Division, First Department, People v. Kelly

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## Recommended Citation

Abrams, Hannah (2014) "Appellate Division, First Department, People v. Kelly," *Touro Law Review*: Vol. 21: No. 1, Article 3.  
Available at: <http://digitalcommons.tourolaw.edu/lawreview/vol21/iss1/3>

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Appellate Division, First Department, People v. Kelly

**Cover Page Footnote**

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**SUPREME COURT OF NEW YORK,  
APPELLATE DIVISION, FIRST DEPARTMENT**

People v. Kelly<sup>1</sup>  
(decided August 19, 2004)

Thomas Kelly was convicted of murder in the second degree and sentenced to an indeterminate term of 22 years to life imprisonment.<sup>2</sup> Post-sentencing, Kelly moved to vacate the conviction based on a court officer's unauthorized demonstration to a deliberating jury, "undertaken at the jury's request, of pulling a bayonet, the murder weapon, from its sheath."<sup>3</sup> The motion was denied after an evidentiary hearing where the court found that the defendant had waived any issue concerning the demonstration; he did not request a mistrial, but agreed to a curative instruction.<sup>4</sup> Kelly appealed both the judgment of conviction and the denial of his motion,<sup>5</sup> claiming a violation of the United States Constitution<sup>6</sup> and the New York State Constitution,<sup>7</sup> as well as New York's Criminal Procedure Law.<sup>8</sup>

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<sup>1</sup> 781 N.Y.S.2d 75 (N.Y. App. Div. 2004).

<sup>2</sup> *Id.* at 88.

<sup>3</sup> *Id.* at 78.

<sup>4</sup> *Id.* at 87.

<sup>5</sup> *Id.* at 78.

<sup>6</sup> U.S. CONST. amend. VI provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ; to be confronted with the witnesses against him . . . ."

<sup>7</sup> N.Y. CONST. art. 1, § 6 provides in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and . . . be confronted with the witnesses against him or her."

<sup>8</sup> N.Y. CRIM. PROC. LAW § 310.30 (McKinney 2004) provides in pertinent part:

He argued that the trial court committed two fundamental errors, so serious as to present an issue of law even without preservation.<sup>9</sup> First, the court officer's interaction with the jury "constituted a usurpation of a judicial function or delegation thereof, an error so serious that it cannot be waived without a waiver, in writing, signed personally by him,"<sup>10</sup> depriving him of the right to trial by jury, "an integral component of which is the supervision of a judge."<sup>11</sup> Then, through his demonstration to the jury, the court officer became an unsworn trial witness, thus violating Kelly's right to be present during a material stage of the trial.<sup>12</sup>

The trial court held these arguments to be without merit. The court officer's jury room demonstration fell within his ministerial duties and did not constitute an abrogation of judicial authority.<sup>13</sup> By settling upon an instruction to disregard the jury room demonstration, "it was the court and the parties who had the final say on the matter."<sup>14</sup>

Any claim that the jury room demonstration

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At any time during its deliberation, the jury may request the court for further instruction or information . . . with respect to any other matter pertinent to the jury's consideration of the case. Upon 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.

<sup>9</sup> *Kelly*, 781 N.Y.S.2d at 84.

<sup>10</sup> *Id.* at 83.

<sup>11</sup> *Id.* at 84.

<sup>12</sup> *Id.* at 83.

<sup>13</sup> *Id.* at 85.

<sup>14</sup> *Kelly*, 781 N.Y.S.2d at 86.

violated defendant's right to be present at a material stage of the trial was waived by his consent to the court's curative instruction . . . But, beyond that, a defendant does not have a right to be present at jury deliberations. Nor does the injection of extra-record material into jury deliberations convert those deliberations into a trial stage at which defendant must be present.<sup>15</sup>

Any resulting error should have been preserved for appeal, providing relief only if the defendant suffered harm.<sup>16</sup>

Since 1993, defendant had lived with Dawn Kaye, a drug user. In July of 1997, she ended their relationship, moved in with her father William Hageman, and worked as a prostitute to support her narcotics habit. Thomas Kelly attempted several times to reconcile with her, but was rejected.<sup>17</sup> On the evening of July 29, 1997, Kelly approached Kaye and her father outside a building in Manhattan's East Village.<sup>18</sup> After Kaye made it clear that she wanted no further involvement with Kelly, he attempted to denounce her to her father.<sup>19</sup> That failing to be effective, Kelly made a sudden move toward Hageman who fell to the ground while Kelly held onto a bayonet emerging from Hageman's chest.<sup>20</sup> This was the very same bayonet that Kelly had purchased, at Kaye's suggestion, to make her feel safe when she was alone in his apartment.<sup>21</sup> Kelly announced that he had killed Kaye's father and

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<sup>15</sup> *Id.* at 88.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 78.

<sup>18</sup> *Id.*

<sup>19</sup> *Kelly*, 781 N.Y.S.2d at 78.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 80.

fled.<sup>22</sup> Several witnesses confirmed the argument and assault.<sup>23</sup> Responding to a radio call of the stabbing, a police officer identified Kelly as matching the description of the perpetrator and arrested him, whereupon Kelly confessed to the stabbing.<sup>24</sup> Hageman died on the way to the hospital<sup>25</sup> and Kelly was charged with second-degree murder.

At trial, the parties agreed to allow trial exhibits into the jury room whenever the jurors requested them.<sup>26</sup> In response to a written request, a court officer brought the murder weapon, the bayonet and sheath, into the jury room during deliberations.<sup>27</sup> The court officer refused to allow the jurors to handle the exhibits, but agreed to remove the bayonet from its sheath and responded to jurors' questions regarding the demonstration.<sup>28</sup> Immediately thereafter, the officer reported the episode to the judge, who then notified counsel; both parties agreed with the court upon a curative instruction to disregard the demonstration; the jury was returned to the courtroom and instructed to disregard any demonstrations with evidence provided by court officers in the jury room.<sup>29</sup> Upon further deliberation, the jury returned a guilty verdict.<sup>30</sup>

Kelly was sentenced and moved to vacate the judgment

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<sup>22</sup> *Id.* at 78.

<sup>23</sup> *Id.* at 79.

<sup>24</sup> *Kelly*, 781 N.Y.S.2d at 79.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 81.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Kelly*, 781 N.Y.S.2d at 81.

<sup>30</sup> *Id.*

based on the jury room demonstration.<sup>31</sup> His motion was supported by the affidavits of two jurors who stated that the jury attempted to reenact the incident, wanting to test the plausibility of defendant's statements concerning the removal of the bayonet.<sup>32</sup> To do so, they requested that the bayonet and sheath be brought into the jury room, that the court officer place it into his waistband and pull the bayonet out by the handle.<sup>33</sup> Further, they asked several questions concerning the procedure and asked to handle the exhibits.<sup>34</sup> Both jurors indicated that the officer complied with all requests, stated that the bayonet came out of the sheath easily, and that the jurors did not handle the weapon.<sup>35</sup>

Kelly's trial attorney also supported the motion with an affirmation of the incident.<sup>36</sup> He further indicated that he discussed the event with the defendant and agreed to a curative instruction rather than requesting a mistrial.<sup>37</sup> In addition, Kelly submitted letters from one of the jurors stating his belief, based on subsequently acquired information, that the defendant had been convicted of the wrong charge.<sup>38</sup> He said the demonstration lent credence to Kelly's testimony but the majority had dismissed it as inconclusive.<sup>39</sup> An independent supervising court officer's affidavit described the jury-shepherding responsibilities of court

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<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Kelly*, 781 N.Y.S.2d at 81.

<sup>35</sup> *Id.* at 81-82.

<sup>36</sup> *Id.* at 82.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

officers: informing jurors that requests to the court must be in writing and that the jury not be alone with or handle any weapons exhibits.<sup>40</sup> One of their most important duties is to safeguard jurors.<sup>41</sup> After an evidentiary hearing, the motion was denied.<sup>42</sup>

On appeal, the defendant argued for a new trial, contending that the court officer usurped or was delegated judicial authority by his refusal to allow the jurors to handle the weapon and failure to advise them that their request had to be in writing.<sup>43</sup> Additionally, the jury room demonstration and conversation violated the defendant's right to be present at a material stage of the trial.<sup>44</sup> The defendant claimed that these violations were error as a matter of law.

Delegation of judicial responsibility to non-judicial personnel deprives a defendant of his right to trial by jury, of which judicial supervision is an integral part.<sup>45</sup> Judicial failure to retain control of jury deliberations "implicates the organization of the court and the prescribed mode of proceedings."<sup>46</sup> A defendant's right to be present at all material stages of a trial is a constitutional and statutory right.<sup>47</sup> Violation of any of these rights presents an issue of law subject to appellate review, regardless of

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<sup>39</sup> *Kelly*, 781 N.Y.S.2d at 82.

<sup>40</sup> *Id.* at 83.

<sup>41</sup> *Id.* at 85.

<sup>42</sup> *Id.* at 83.

<sup>43</sup> *Id.*

<sup>44</sup> *Kelly*, 781 N.Y.S.2d at 83.

<sup>45</sup> *Id.* at 83-84.

<sup>46</sup> *Id.* at 84.

<sup>47</sup> *Id.*



whether the infringement was preserved by objection.<sup>48</sup>

Nevertheless, the court found the defendant's arguments to be without merit.<sup>49</sup> "A delegation of judicial authority is a conscious abdication of judicial responsibility."<sup>50</sup> The judge was unaware of the jurors' requests to handle the weapon exhibit and thus could not instruct the court officer, who in this case was simply performing his job by a ministerial act.<sup>51</sup> There were neither legal instructions nor information conveyed to the jury through his refusal to allow juror handling of the bayonet and sheath.<sup>52</sup> "Rather, in refusing the request, the officer was merely fulfilling his ministerial duty of safeguarding the jury."<sup>53</sup> The court officer's lapse in assuring that the jury's request was in writing was a ministerial failure, not "an error affecting the mode of the proceedings so as to exempt it from ordinary preservation and waiver rules."<sup>54</sup> The officer's subsequent and immediate notification to the court of the incident was equivalent to asking the jury to put its request in writing.<sup>55</sup> All parties and the court were put on notice by the disclosure<sup>56</sup> and agreed on a limiting instruction to the jury to disregard the encounter.<sup>57</sup> The court and

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<sup>48</sup> *Id.*

<sup>49</sup> *Kelly*, 781 N.Y.S.2d at 84.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at 84-85.

<sup>52</sup> *Id.* at 85.

<sup>53</sup> *Id.*

<sup>54</sup> *Kelly*, 781 N.Y.S.2d at 85.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.* at 86.

the parties had the final word.<sup>58</sup>

Insofar as defendant's right to be present at a material stage of the trial was concerned, the court found that the incident complained of occurred during jury deliberations at which defendants do not have a right to be present.<sup>59</sup> Finally, the officer's response to jury questions regarding the bayonet and sheath provided extra-record information to which the defendant did not protest. Instead, he consented to a remedy – the limiting instruction. Protests must be submitted in a timely fashion along with a requested remedy.<sup>60</sup> To justify a new trial, there must be a resulting likelihood of prejudice.<sup>61</sup> The jury did not learn anything different than they would have if they performed the experiment themselves and the demonstration did not harm the defendant.<sup>62</sup> It “was not a factor in the jury's verdict.”<sup>63</sup> Defense counsel never argued for a new trial, but agreed to the curative instruction, and thus waived this right.<sup>64</sup> The court held the defendant had consented to a waiver of the demonstration and was now presenting a meritless argument for an alternative remedy – a new trial.<sup>65</sup> The trial court's conviction and sentence was affirmed.<sup>66</sup>

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<sup>58</sup> *Id.*

<sup>59</sup> *Kelly*, 781 N.Y.S.2d at 86.

<sup>60</sup> *Id.* at 87.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 88.

<sup>64</sup> *Kelly*, 781 N.Y.S.2d at 87.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 88.

In *Capital Traction Co. v. Hof*,<sup>67</sup> the United States Supreme Court defined trial by jury pursuant to common law and the Constitution as

a trial by jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside the verdict if in his opinion it is against the law or the evidence.<sup>68</sup>

Justice Cardozo discussed a defendant's right to be present at all stages of a trial as a due process and confrontation right in *Snyder v. Massachusetts*,<sup>69</sup> where the defendant was not present at a jury view of the crime scene. The Court said exclusion from trial proceedings must be determined in the totality of circumstances.<sup>70</sup> A view is not part of a trial<sup>71</sup> and due process considerations do not infer "in so many words that [the defendant] must be present every second or minute or even every hour of the trial."<sup>72</sup> However, the defendant has a privilege "to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."<sup>73</sup> If no

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<sup>67</sup> 174 U.S. 1 (1899) (holding the right to a trial by jury in a civil case was available to a passenger who sued a railroad for negligence where damages exceeded twenty dollars).

<sup>68</sup> *Id.* at 13-14.

<sup>69</sup> 291 U.S. 97, 102 (1934) (holding that defendant's absence during a jury view, attended by the court and counsel for both parties, did not deprive defendant of his constitutional right to be present during all material stages of a trial).

<sup>70</sup> *Id.* at 115.

<sup>71</sup> *Id.* at 113.

<sup>72</sup> *Id.* at 116.

<sup>73</sup> *Id.* at 105-06.

harm is suffered and no substantive right is implicated, the exclusion constitutes harmless error.<sup>74</sup> The same is true of misconduct by the jury.<sup>75</sup> By extension, this would apply to non-judicial court personnel.

A court officer's statements to individual jury members professing his thoughts as to the defendant's guilt led the Supreme Court, in *Parker v. Gladden*, to reverse a second-degree murder conviction and remand for a new trial.<sup>76</sup> "[T]he unauthorized communication was prejudicial"<sup>77</sup> and violated the defendant's Sixth amendment right to a trial by an impartial jury and right to confront and cross-examine witnesses, fundamental components of a fair trial.<sup>78</sup>

The Second Circuit, in *Freeman v. United States*, indicated, "it is the duty of a trial judge to be present during all the stages of a criminal trial. His absence during the examination of a witness, during the argument of counsel, or at the handing in of a verdict, has been held to constitute reversible error."<sup>79</sup> Thus, the presence of a judge, the same judge throughout the trial, is required to assure a fair trial. Nonetheless, the Second Circuit found that a trial where an absent judge provided instructions via telephone regarding a jury request for display of exhibits during deliberations

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<sup>74</sup> *Snyder*, 291 U.S. at 118.

<sup>75</sup> *Id.*

<sup>76</sup> 385 U.S. 363, 363, 366 (1966).

<sup>77</sup> *Id.* at 364.

<sup>78</sup> *Id.* at 365.

<sup>79</sup> 227 F. 732, 759 (2d Cir. 1915) (holding that substitution of judges during the course of a trial constituted reversible error and reversing defendant's conviction of criminal charges).

was valid as consented to by counsel for both parties.<sup>80</sup> The error was harmless and consent was sufficient since no substantial rights were involved.<sup>81</sup>

Looking at the ministerial duties of a court officer, the New York Court of Appeals found, in *People v. Bonaparte*, that “the supervisory role of the court officer with respect to a deliberating jury will often require the officer to speak to the jurors about a variety of . . . matters.”<sup>82</sup> This might include “determining who to contact to secure whatever personal belongings the jurors might need for an overnight stay or enforcing the court’s instructions not to discuss the case among themselves or others during periods of sequestration.”<sup>83</sup> In this case, the court officer’s communication with the jury fell within the scope of his ministerial duties; at the court’s direction, he told the jurors to stop deliberating for the evening.<sup>84</sup> These actions in no way implicated the defendant’s constitutional right to trial by jury even though the instructions to cease deliberation were not delivered by a judge. No improper delegation of judicial authority occurred because the officer did not instruct the jury as to the manner or subject of deliberation; neither the judge’s nor the defendant’s presence was required.<sup>85</sup>

State law requires the personal presence of the accused

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<sup>80</sup> *Rice v. United States*, 35 F.2d 689, 696 (2d Cir. 1929) (holding that physical absence of the judge, who provided telephone instructions in response to a jury request during deliberations, was not reversible error).

<sup>81</sup> *Id.*

<sup>82</sup> 574 N.E.2d 1027, 1029 (N.Y. 1991).

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 1030.

<sup>85</sup> *Id.*

whenever information or instruction is provided to a deliberating jury.<sup>86</sup> The Court of Appeals held the defendant's statutory and constitutional right to be present at a material stage of his trial was not abrogated when only the judge and counsel for the parties briefly met with the jury to clarify a request.<sup>87</sup> A criminal defendant has an absolute right to be present with counsel "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."<sup>88</sup> This includes the right to be present during the court's instructions to the jury where the applicable principles of law are communicated, and instructions responding to the jury's requests.<sup>89</sup> Here, the communication was simply a clarification of a readback request;<sup>90</sup> the court did not provide any information or instructions to the jury.<sup>91</sup> The defendant's presence was unnecessary, and thus not constitutionally required.<sup>92</sup>

In *People v. Ahmed*, the judge's absence and delegation of judicial authority to his law secretary left two jury requests unanswered when the jury delivered its guilty verdict.<sup>93</sup> Even though he consented to the delegation, the defendant was deprived of his right to a trial by jury.<sup>94</sup> Supervision by the presiding judge is a vital part of the constitutional guarantee of trial by jury, which

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<sup>86</sup> N.Y. CRIM. PROC. LAW § 310.30 (McKinney 2004).

<sup>87</sup> *People v. Harris*, 559 N.E.2d 660, 661 (N.Y. 1990).

<sup>88</sup> *Id.* (quoting *Snyder*, 291 U.S. at 105-106).

<sup>89</sup> *Id.* at 661-62.

<sup>90</sup> *Id.* at 662.

<sup>91</sup> *Id.*

<sup>92</sup> *Harris*, 559 N.E.2d at 662.

<sup>93</sup> 487 N.E.2d 894 (N.Y. 1985).

cannot be waived.<sup>95</sup> It is the judge's duty to be present and maintain control throughout the trial.<sup>96</sup> Delegation of judicial authority for nonministerial matters is a constitutional violation.

Where a court officer exceeds his ministerial duties, he usurps judicial authority and the defendant is deprived of his constitutional right to a jury trial.<sup>97</sup> In *People v. Khalek*, after the court ordered the jury to cease deliberations for the evening, several jurors told a court officer that they had reached a verdict.<sup>98</sup> Instead of informing the judge, he told them they would not be permitted to deliver the verdict until the following morning.<sup>99</sup> Outside the scope of the officer's duties, his remarks were not a repetition of the court's directive,<sup>100</sup> but rather an appropriation of authority, presenting an error of law.<sup>101</sup>

A defendant's opportunity to defend against a criminal charge in *People v. Ciaccio* was extinguished when a court clerk made an unauthorized statement to a deadlocked jury.<sup>102</sup> Representing that he was speaking for the court, the clerk impressed upon the jury the need to keep deliberating.<sup>103</sup> Neither defendant nor his counsel was aware that this took place<sup>104</sup> and,

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<sup>94</sup> *Id.* at 894.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 896-97 (citing *Freeman*, 227 F. at 743-44 and distinguishing *Rice*, 35 F.2d 689).

<sup>97</sup> *People v. Khalek*, 689 N.E.2d 914, 915 (N.Y. 1997).

<sup>98</sup> *Id.* at 914-15.

<sup>99</sup> *Id.* at 915.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> 391 N.E.2d 1347, 1349 (N.Y. 1979).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

further, the jury had no idea that the judge was unaware of the communication.<sup>105</sup> Defining the defendant's right of presence, the court said that it includes "all proceedings . . . impaneling the jury, receiving evidence, the summations of counsel, receiving the verdict and . . . all proceedings dealing with the court's charge, admonishments, and instructions to the jury," where the court is required to state the law.<sup>106</sup> If supplemental instructions are necessary, "the presence of the defendant and his counsel is constitutionally required."<sup>107</sup>

Reversible error was again found in *People v. Mehmedi* when a deliberating jury requested information and the court reconvened, with neither the defendant nor the jury returned to the courtroom, to write a response.<sup>108</sup> State law requires that "the court *must* return the jury to the courtroom . . . after proper notice to counsel 'and in the presence of the defendant,' give such requested information or instructions as the court deems proper."<sup>109</sup> Absent such action, a defendant suffers violation of his constitutional rights, an error so fundamental that it presents a question of law absent objection.<sup>110</sup>

While the defendant and counsel were absent, in *People v. Van*, the court responded to a jury request for a document not

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<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 1349-50.

<sup>107</sup> *Ciaccio*, 391 N.E.2d at 1350.

<sup>108</sup> 505 N.E.2d 610, 610 (N.Y. 1987).

<sup>109</sup> *Id.* at 610-11. See N.Y. CRIM. PROC. LAW § 310.30 (McKinney 2004).

<sup>110</sup> *Id.* at 611.



admitted as evidence and later advised the parties of the request.<sup>111</sup> All agreed to inform the jury that the relevant testimony could be reread, and it was.<sup>112</sup> Defendant did not object at the time, but claimed, on appeal, that he was absent at a material stage of the trial.<sup>113</sup> The court held that review was waived.<sup>114</sup> “[T]he jury’s request, coupled with the court’s response, raised no issues affecting any ‘substantial right’ of defendant, and the communication between court and jury outside of defendant’s presence was not such ‘a material part of the trial’ requiring reversal.”<sup>115</sup>

Courts have grappled with the inextricably intertwined issues of the judge’s absence and the defendant’s absence in determining whether a defendant has been denied his federal and state constitutional right to a trial by jury. In each instance, the courts have analyzed the circumstances in their totality. Where a judge is absent and a court officer interacts with a deliberating jury, courts have had to determine the extent of the encounter and whether it falls within the scope of the officer’s ministerial duties or whether the matter is material to the issues at trial. Where the defendant is absent, the courts have had to analyze the situation to determine whether any substantive rights were at stake and whether the defendant was harmed. By delineating these matters, the courts have determined where the dividing lines exist between

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<sup>111</sup> 565 N.Y.S.2d 91, 91 (N.Y. App. Div. 1990).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

a denial of rights and a harmless error. In *Kelly*, the court concluded that the performance of an essentially ministerial function did not warrant the presence of the judge and/or the defendant, if the defendant was not prejudiced by the absence. This reasoning is in line with interpretation of both federal and state constitutional provisions in the courts of New York State and the federal courts.

In conclusion, both the United States and New York State Constitutions guarantee a criminal defendant the right to a proper trial by jury where all participants – judge, jury, counsel, and defendant – are present for all matters materially and substantially related to the charge. New York Criminal Procedure Law has refined this guarantee and delineated the conduct necessary to provide a proper jury trial and the courts have been left to determine the extent to which these rules are flexible. New York and federal courts have construed minor infractions, not infringing upon any substantial right of the defendant, as waivable. “There is danger that the criminal law will be brought into contempt . . . if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free.”<sup>116</sup> *Kelly* conforms to this view.

*Hannah Abrams*

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<sup>116</sup> *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

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