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DEFENDANTS' RIGHT TO BE PRESENT IN NEW YORK: A "CONSTATUTORY" RIGHT

INTRODUCTION

Imagine, in the time of King Arthur, there existed a brave knight named Sir Phillip Helmsley. He possessed a razor sharp sword of hardened, exotic steel which struck fear in the hearts of those forced to face him in battle.

One twi-night, he left the watering hole and passed by two drunkards who derided him for no reason. Who were they to question his power? His eyes filled with fury and theirs with utter terror. Without so much as a word, he calmly withdrew his sword from its sheath and buried it deep within the one named Owens who fell dead to the earth with a shriek and a gasp. The other ran as fast as he possibly could -- to the constable.

The hue and cry went out for Sir Helmsley who took refuge. Had they found him, he would have had to endure the agonizing fire ordeal.¹ He would have to hold in his bare and tender flesh, chunks of glowing ore.² Because he failed to surrender himself he was considered an outlaw³ -- he was reviled. The hero of the kingdom could now be killed on sight.⁴ However, regardless of his outlawry status he could not be deemed guilty of any crime.⁵ Representation by barrister was forbidden⁶ and the trial by ordeal could not commence in his absence.⁷ Was his presence at trial necessary?

Flash forward seven hundred years to the early morning hours of January 27, 1989. Donald Favor accosted a young girl, held a

1. See *infra* note 33.

2. See *infra* note 33.

3. See *infra* text accompanying note 39.

4. See *infra* text accompanying note 39.

5. See *infra* note 39.

6. See *infra* text accompanying note 51.

7. See *infra* text accompanying note 33.

knife to her throat, forced her down a driveway and brutally raped her.⁸

The victim, though horribly shaken, managed to describe her assailant to the police who arrested the perpetrator.⁹ Shortly after the arrest, the victim identified Favor in a lineup.¹⁰ He was indicted for five crimes, including two violent rapes perpetrated upon two different individuals.¹¹ Favor was convicted of one of the rapes based on the testimony of one of the victims and shortly thereafter, plead guilty to the other violent crimes.¹²

Before jury selection, the court held an *in camera Sandoval* hearing¹³ with defense counsel and the prosecutor to determine which, if any, of Favor's prior convictions would be cross-examinable if he took the stand.¹⁴ Favor was not present at this proceeding, however, he was present in the courtroom when the judge read into the record, the results of the prior conference held in chambers.¹⁵ The prosecutor was only permitted to ask whether defendant had been convicted of a misdemeanor.¹⁶ Defense counsel neither objected to defendant's absence at the hearing, nor requested review of the extremely favorable ruling.¹⁷

Donald Favor, a confessed rapist, was convicted at trial.¹⁸ The Appellate Division, Fourth Department, affirmed the guilty

8. *People v. Favor*, 82 N.Y.2d 254, 269, 624 N.E.2d 631, 640, 604 N.Y.S.2d 494, 503 (1993) (Bellacosa, J., dissenting).

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *People v. Sandoval*, 34 N.Y.2d 371, 374, 314 N.E.2d 413, 416, 357 N.Y.S.2d 849, 853 (1974) (holding that "in the exercise of . . . discretion a Trial Judge may . . . make an advance ruling as to the use by the prosecutor of prior convictions or proof of the prior commission of specific criminal, vicious or immoral acts for the purpose of impeaching a defendant's credibility").

14. *Favor*, 82 N.Y.2d at 269, 624 N.E.2d at 640, 604 N.Y.S.2d at 503 (Bellacosa, J., dissenting).

15. *Id.* (Bellacosa, J., dissenting).

16. *Id.* (Bellacosa, J., dissenting).

17. *Id.* at 270, 624 N.E.2d at 640, 604 N.Y.S.2d at 503 (Bellacosa, J., dissenting).

18. *Id.* at 259, 624 N.E.2d at 633, 604 N.Y.S.2d at 496.

verdict.¹⁹ The New York Court of Appeals reversed the conviction and automatically granted defendant a new trial.²⁰ The reversal was based on a court of appeals holding, decided three years after defendant was originally convicted, which demanded a defendant's presence at *Sandoval* hearings.²¹ Was Favor's presence at the *Sandoval* hearing really necessary?

This Comment focuses on a criminal defendant's right to be present pursuant to the New York State Constitution as interpreted by the New York Court of Appeals. More specifically, this Comment will discuss whether a defendant's right to be present in New York is constitutionally based pursuant to the State Constitution as it is applied to various criminal proceedings. To this end, it will prove helpful to analyze and distinguish cases where the court has accepted a defendant's New York State statutory claim of the right to be present²² — rather

19. *People v. Favor*, 172 A.D.2d 1052, 571 N.Y.S.2d 408 (4th Dep't 1991), *rev'd*, 82 N.Y.2d 254, 624 N.E.2d 631, 604 N.Y.S.2d 494 (1993).

20. *Favor*, 82 N.Y.2d at 268, 624 N.E.2d at 640, 604 N.Y.S.2d at 503.

21. *Id.* at 267, 624 N.E.2d at 639, 604 N.Y.S.2d at 502. *See People v. Dokes*, 79 N.Y.2d 656, 595 N.E.2d 836, 584 N.Y.S.2d 761 (1992) (demanding defendant's presence at *Sandoval* hearings).

22. N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1993). Section 260.20 provides:

A defendant must be personally present during the trial of an indictment; provided, however, that a defendant who conducts himself in so disorderly and disruptive a manner that his trial cannot be carried on with him in the courtroom may be removed from the courtroom if, after he has been warned by the court that he will be removed if he continues such conduct, he continues to engage in such conduct.

Id. (amending N.Y. CRIM. PROC. LAW 789 § 1 (1971)). The 1971 amendment inserted:

[P]rovided, however, that a defendant who conducts himself in so disorderly and disruptive a manner that his trial cannot be carried on with him in the courtroom may be removed from the courtroom if, after he has been warned by the court that he will be removed if he continues such conduct, he continues to engage in such conduct.

Id. (amending N.Y. CRIM. PROC. LAW 996 § 1 (1970)). *See Maurer v. People*, 43 N.Y. 1 (1870) (relying on 2 REV. STAT. 759, § 13 Edmonds' Edition providing in pertinent part that "no person indicted for any felony can be tried, unless he be personally present during such trial").

than accepting, rejecting, or glossing over New York State constitutional arguments. At times, statutory and constitutional assertions of the right to be present seem to be interchangeable because both afford the criminal defendant due process.²³ Even more confusing is the fact that the origins of both the statutory and constitutional rights are identical.²⁴

Further, the United States Supreme Court's interpretation of the right to be present²⁵ is relevant only so far as New York State

Besides a New York defendant's right to be present at trial, various codifications aim to help the defendant by requiring his presence at other times. For example: N.Y. CRIM. PROC. LAW §§ 600.20, 340.20, 220.50 (McKinney 1993) (permitting corporate defendants to appear by counsel); N.Y. CRIM. PROC. LAW § 440.40 (McKinney 1993) (requiring presence of defendant at People's motion to set aside sentence); N.Y. CRIM. PROC. LAW § 440.30 (McKinney 1993) (demanding defendant's presence at motion to vacate judgment and to set aside sentence); N.Y. CRIM. PROC. LAW § 380.40 (McKinney 1993) (demanding presence of defendant at sentencing); N.Y. CRIM. PROC. LAW § 340.50 (McKinney 1993) (requiring defendant's presence at trial); N.Y. CRIM. PROC. LAW § 340.20 (McKinney 1993) (demanding defendant's presence at plea to information in local criminal courts); N.Y. CRIM. PROC. LAW § 310.40 (McKinney 1993) (directing defendant's presence at rendition of verdict); N.Y. CRIM. PROC. LAW § 310.30 (McKinney 1993) (requiring defendant's presence during jury deliberation where a request for information is made); N.Y. CRIM. PROC. LAW § 220.50 (McKinney 1993) (requiring defendant's presence at a plea to an indictment); N.Y. CRIM. PROC. LAW § 210.10 (McKinney 1993) (requiring presence of defendant at arraignment upon indictment); N.Y. CRIM. PROC. LAW § 170.10 (McKinney 1993) (directing defendant's presence at arraignment upon information, simplified traffic information, prosecutor's information, or misdemeanor complaint).

23. See N.Y. CRIM. PROC. LAW § 260.20 practice commentary (McKinney 1993); see also *infra* note 63 (referring to the blurred line between constitutional and statutory arguments for the right to be present).

24. See *infra* text accompanying notes 31-61.

25. See *Snyder v. Massachusetts*, 291 U.S. 97 (1934) (requiring defendant's presence "whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge"). But see *Blackmer v. United States*, 284 U.S. 421 (1932) (holding that due process does not require that the defendant be present at a criminal contempt hearing); *Gaines v. Washington*, 277 U.S. 81 (1928) (stating that a defendant cannot claim he was not present to hear evidence after the conviction was affirmed by the state supreme court); *Diaz v. United States*, 223 U.S. 442 (1912) (finding that "where the offense is not capital and the accused is not in

has adopted the Court's rationale,²⁶ and as a frame of reference for determining when the right may be successfully asserted federally, *vis a vis*, in New York.

Part I will discuss the origins of a criminal defendant's right to be present under the New York State Constitution, and why the right has been deemed fundamental.²⁷ Part II will examine instances where the right has been applied.²⁸ Part III will explore whether the right is constitutionally or statutorily based, and why, if at all, the basis makes a difference.²⁹ Part IV will touch upon how a defendant can voluntarily or involuntarily waive or forfeit his or her right to be present.³⁰ Finally, this Comment will conclude that the right to be present in New York is in a state of flux, progressing from a "constatutory" right to an absolute statutory right.

I. ORIGINS OF THE RIGHT TO BE PRESENT

The requirement that a criminal defendant be personally present during a felony trial has ancient roots. The Ancient Hebrews brought the accused before the tribunal upon rendition of the verdict.³¹ The defendant's presence was necessary at each step of the proceeding which was to result in his condemnation or exculpation, otherwise, the tribunal could render no verdict.³²

custody, the prevailing rule has been, that if, after the trial has begun in his presence he voluntarily absents himself . . . [it] operates as a waiver of his right to be present . . ."); *Schwab v. Berggren*, 143 U.S. 442 (1892) (holding that a defendant does not have a right to be present when an appellate court affirms his sentence).

26. *See, e.g.*, *People v. Dokes*, 79 N.Y.2d 656, 559 N.E.2d 836, 584 N.Y.S.2d 761 (1992) (employing *Snyder* rationale in determining whether the right to be present is applicable in a *Sandoval* hearing).

27. *See infra* notes 31-61 and accompanying text.

28. *See infra* notes 62-92 and accompanying text.

29. *See infra* notes 93-284 and accompanying text.

30. *See infra* notes 285-99 and accompanying text.

31. *See* SAMUEL MENDELSON, *THE CRIMINAL JURISPRUDENCE OF THE ANCIENT HEBREWS* 148 (1961).

32. Gullie B. Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases*, 16 COLUM. L. REV. 18, 18-19 (1916).

In the twelfth and early thirteenth centuries, English methods of trial by battle or ordeal dictated that the defendant be present.³³ Society perceived criminal matters not as offenses against the state, but as offenses against the individual.³⁴ The method used for adjudicating a defendant's guilt or innocence demonstrated the reason why his presence was necessary as "it [was] evident that neither could a trial be had nor a verdict reached without the actual presence of the accused. This resulted from the nature of the trial, which was a combat, and every combat presupposed the presence of two combatants, of whom the accused was one."³⁵ Ranging back to the middle ages, the root of a defendant's compulsory attendance, was a crude sense of justice.³⁶ As a matter of right, it was necessary that the defendant be present, for it was unfair that he be condemned in his absence.³⁷

The jury system gradually developed in England and the presence of the defendant was absolutely necessary so that the judge, who was a private arbitrator, first, could decide the dispute, second, could have power over the defendant, and finally, so that the defendant could choose whether to "wage battle" or defend himself with the help of "oath with helpers."³⁸ However, if the defendant failed to surrender himself, he was

33. *Id.* at 18. Trial by ordeal emerged in Saxon and old English law. It was one of the most ancient species of trials which presupposed that supernatural intervention would rescue an innocent person from the danger of physical harm to which he was exposed -- fire ordeal or water deal. Fire ordeal was confined to persons of higher rank and forced such persons to either hold in hand, pieces of red-hot iron or walk barefoot and blindfolded over nine red-hot plowshares, laid lengthwise at unequal distances. Hot-water ordeal was performed by putting one's arm in boiling water and escaping unhurt while cold-water ordeal was performed by throwing the accused in a river or pond and if he sunk he was acquitted and if he floated without swimming it was deemed evidence of his guilt.

34. See *People v. Epps*, 37 N.Y.2d 343, 348, 334 N.E.2d 566, 570, 372 N.Y.S.2d 606, 611 (1975).

35. See Goldin, *supra* note 32, at 19. In England by 1219, the clergy had succeeded in having trial by ordeal abolished, leaving only trial by battle. See 1 LUKE OWEN PIKE, A HISTORY OF CRIME IN ENGLAND 204 (1983).

36. Goldin, *supra* note 32, at 19-20.

37. Goldin, *supra* note 32, at 20.

38. Goldin, *supra* note 32, at 19 (citation omitted).

considered an outlaw, "a person who was beyond the pale of all law and who could be dealt with summarily in any fashion by any person who chanced to meet him."³⁹

The advent of the common law courts brought with it the concept of jurisdiction and the right of the accused to be present. This was necessary to "prevent [the evil of] secret trials in which the accused was often arrested and executed without a hearing and without any knowledge as to who were his accusers, or the evidence upon which they relied."⁴⁰ Furthermore, without the defendant's presence at every step of the trial, the court lacked the jurisdiction to entertain the prosecution.⁴¹ Lord Hale proclaimed that, "[i]n a case of a felony or treason the verdict must be given in open court, and no privy verdict can be given."⁴² A verdict so rendered could be characterized as a default judgment, which was repugnant at common law.⁴³ At early common law, the judgment was handed down immediately upon the return of the verdict, and therefore, the defendant's presence was once again required.⁴⁴

As early as 1828, New York State had squarely recognized that a defendant had the right to be present at the rendition of the verdict. In *People v. Perkins*,⁴⁵ the Supreme Court of the State of New York found that although many of the ancient forms of trial were no longer used, the prisoner had a fundamental right to be present when the verdict was received so that he could poll the jury.⁴⁶ The right to poll the jury was an ancient one with a basis

39. Goldin, *supra* note 32, at 20 (stating that if defendant failed to surrender himself and thus, became an "outlaw," he was not deemed guilty because of this failure) (citing POLLACK & MATTLAND, *THE HISTORY OF ENGLISH LAW* 580 (2d ed. 1968) and MELVILLE M. BIGELOW, *HISTORY OF PROCEDURE IN ENGLAND* 348 (1880)).

40. *People v. Thorn*, 156 N.Y. 286, 297, 50 N.E. 947, 951 (1898); N.Y. CRIM. PROC. LAW § 260.20 practice commentary (McKinney 1993).

41. Goldin, *supra* note 32, at 20.

42. Goldin, *supra* note 32, at 21 (citations omitted).

43. Goldin, *supra* note 32, at 21.

44. Goldin, *supra* note 32, at 23.

45. 1 Wend. 91 (N.Y. Sup. Ct. 1828).

46. *Id.* at 92. In *Perkins*, the defendant was tried for perpetrating a capital crime. The statute protected defendant's fundamental right to be present when

in the belief that certain emotions overcome the jury when it faces the defendant upon relating its verdict.⁴⁷

So, a defendant's right to be present has been deemed fundamental at least insofar as it assists in protecting the sanctity of other fundamental rights. Further, a defendant's compulsory attendance at the verdict demonstrates a mistrust for juries who tend to arrive at verdicts based on emotions or gut instinct, instead of upon the law.

In 1878, the New York Court of Appeals held in *Hinman v. People*,⁴⁸ that, in a felony case, the defendant had to be present at the giving of the verdict, because "[r]eceiving the verdict was one, if [sic] the most important of the proceedings during the trial. It must be received by the court before which the trial was had, and if not the verdict is a nullity. . . ."⁴⁹ *Hinman* stands for the proposition that the presence of the accused was not one of mere form even though the previous judicial and state procedural abuses had been dispensed with.⁵⁰

such a decision of great magnitude was rendered, i.e., determining whether he would live or die or even be placed in jail. *Id.*

By finding, through statutory interpretation, that defendant had a fundamental right to be present at the verdict in order to alleviate past abuses, the statute afforded the identical safeguards as would the Due Process Clause. The statute was merely the vehicle used to assert the due process claim. It is unclear whether any criminal defendant in New York had put forth a constitutional right to be present claim by 1828. Rather, both the statute and New York's Due Process Clause seemed to have as their bases "a rather sound conception of justice" which required defendant's presence at the rendition of the verdict. *See Goldin, supra* note 32, at 19.

So, the right to be present is fundamental in nature because it stems from a primitive sense of fairness. *See Goldin, supra* note 32, at 19. One cannot say with precision which clause and section of the constitution renders a right fundamental, but it makes no difference. It is fundamental because the people and law makers sensed that it was unfair to try a defendant or render a verdict in his absence.

47. *Goldin, supra* note 32, at 23. Such a right helped to ensure that the majority of the jury did not intimidate the lone dissenter. *Goldin, supra* note 32, at 23.

48. 13 Hun. 266 (N.Y. 1878).

49. *Id.* at 268.

50. *But see Commonwealth v. McCarthy*, 40 N.E. 766 (Mass. 1895). In *McCarthy*, the court stated, in dictum, that "[t]his final act of the jury [was]

A much more important reason for defendant's compulsory attendance came to the forefront. In relatively recent times criminal defendants had not been permitted to retain attorneys nor request that one be appointed. Therefore, "[a]s no counsel was allowed in that country (England) in those days to represent a prisoner, and protect him, and he could only defend himself, the courts then held that he must be in court whenever any step was taken in his cause, however insignificant or unimportant."⁵¹

The presence of the accused, who could have no counsel at his side, was clearly fundamental, and manifested a mistrust, if not a hatred for the prosecution by those invoking such a right. The overzealous prosecutor would stop at nothing to convict the helpless defendant who was hardly indoctrinated with the subtleties of the arcane rules of evidence. Given the judicial abuses of entertaining secret trials, the defendant had to be given this right because his life or liberty was at stake. Those who found or created a right to be present, in statute or from the New York State Constitution, must have mistrusted the establishment.⁵² The United States had revolted against the

nothing more than a formal announcement of the result of a trial which, up to that point, ha[d] proceeded with unquestionable regularity. There [was] no very important reason for requiring the defendant's presence then." *Id.* at 767, construed in *Goldin*, *supra* note 32, at 24.

51. *Goldin*, *supra* note 32, at 20. (citations omitted). See 3 WILLIAM BLACKSTONE, COMMENTARY ON THE LAWS OF ENGLAND 25 (John L. Wendell ed. 1847) (explaining that "[f]ormerly every suitor was obliged to appear in person, to prosecute or defend his suit . . .").

52. See *People v. Wilkes*, 14 N.Y. Pr. 105 (1850). In *Wilkes*, the defendant was convicted of libeling the late attorney general of the state. *Id.* The defendant hired an attorney who fell ill and sent another attorney who was completely unprepared to act in his stead. *Id.* at 106. The court denied the postponement and rendered a verdict in the defendant's absence. *Id.* The court strictly adhered to the statute which prohibited the trial of any defendant unless he was personally present or duly authorized an attorney to appear for that purpose. *Id.* at 107. The court found that this provision was "not satisfied with an implied authority." *Id.* A general attorney would not be sufficient, for there must be a "distinct and express authority over and above any general authority as attorney or counsel in the cause. . . ." *Id.*

Aside from the fact that this was the first case to sanction, although in dictum, a defendant's right to waive his right to be present, it more

Crown because of such abuses. Moreover, a criminal defendant's right to be present has been concretized and is "found" in the statutes or constitutions of many of the states and in the New York State Constitution in article I, section 6.⁵³ Clearly, a defendant's right to be present cannot be found explicitly in the language of article I, section 6, however, defense attorneys, in an attempt to give the court something to hang its proverbial hat on, have pigeon-holed their claim of a denial of the right to be present in this section.⁵⁴

Defendants who claimed a deprivation of the right to be present, pursuant to article I, section 6 of the New York Constitution, based their claims on a breach of the basic right to confront adverse witnesses. In *People v. Thorn*,⁵⁵ the defendant, in an attempt to obtain a reversal of his murder conviction, claimed that his absence from the jury's inspection of the crime scene, violated New York's Confrontation Clause.⁵⁶ The defendant claimed that the viewing of the crime scene was part of the trial, therefore, his absence was error, meriting reversal and a new trial.⁵⁷ In claiming that the inspection was part of the trial, the defendant asserted that:

[T]he view of the jurors [could not] be considered an idle ceremony, but must be deemed to have been made for a purpose, and, taking place under an order of the court, [was] a part of the trial; that the jurors in making such inspection necessarily made use of their sense of sight, and, although no word may [have

importantly explained how this common law right was codified. *Id.* This statute treated the common law right as a narrow one, which "seemed to authorize the trial of the defendant in his absence, *if he had once appeared.*" *Id.*

53. N.Y. CONST. art. I, § 6. This provision provides in relevant part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature of the cause of the accusation and be confronted with the witnesses against him." *Id.*

54. *See, e.g.,* *People v. Epps*, 37 N.Y.2d 343, 334 N.E.2d 566, 372 N.Y.S.2d 606 (1975).

55. 156 N.Y. 286, 50 N.E. 947 (1898).

56. *Id.* at 290, 50 N.E. at 948.

57. *Id.*

been] spoken, they [drew] conclusions from the silent, inanimate objects which they [saw]; that these objects [were] mute witnesses with which the defendant must [have been] confronted.⁵⁸

The New York Court of Appeals rejected the defendant's contention and held that the purpose of the jury's investigation of a crime scene was not to take in evidence, but rather, to better understand the evidence presented by witnesses before them.⁵⁹ The court reasoned that:

If seeing is the taking of evidence, it would follow in every case that a juror who had seen and was familiar with the locality would be incompetent to sit as a juror, for he would have taken testimony in the absence of the accused, with which he had never been confronted, or had an opportunity to explain.⁶⁰

It matters not that defendant's claim was rejected in *Thorn*. Although, after *Thorn*, criminal defendants did not enjoy a right to be present when the jury viewed a crime scene, *Thorn*'s holding stood for the proposition that defendants have a constitutional right to be present during the "trial." However, to be imbued with this constitutional protection, a defendant first had to prove that the proceeding or location from which he was absent, was, as a matter of law, part of the "trial."⁶¹ A multitude of applications of this right to be present in various criminal proceedings in New York will be discussed in Part II.

II. APPLICATIONS OF THE RIGHT TO BE PRESENT

Defendants in New York State have argued that their right to be present has been abridged in a variety of contexts. In many cases, the New York Court of Appeals has found the right to be

58. *Id.* The defendant's position was argued and adopted in *People v. Palmer*, 43 Hun. 397, 401 (1887).

59. *Thorn*, 156 N.Y. at 298, 50 N.E. at 951.

60. *Id.* at 297-98, 50 N.E. at 951.

61. *See id.* at 289, 50 N.E. at 948.

constitutionally imbedded,⁶² merely statutory in nature,⁶³ or nonexistent in either legal framework.⁶⁴ Some of these cases

62. See *People v. Turaine*, 78 N.Y.2d 871, 577 N.E.2d 55, 573 N.Y.S.2d 64 (1991). In *Turaine*, the court held that the defendant's New York State constitutional right to be present was infringed when the court entertained a hearing, in defendant's absence, to determine whether he intimidated a witness to prevent the witness from testifying. *Id.* at 872, 577 N.E.2d at 56, 573 N.Y.S.2d at 65. The court found that "[p]roceedings where testimony is received are material stages of the trial because defendant's presence is necessary so that he or she may confront adverse witnesses and advise counsel of any inconsistencies, errors or falsehoods in their testimony." *Id.*; *People v. Darby*, 75 N.Y.2d 449, 553 N.E.2d 974, 554 N.Y.S.2d 426 (1990) (holding that it was fundamentally unfair to exclude the defendant's counsel from *voir dire* hearing after four witnesses testified as to possible taint of impaneled jury); *People v. Ciaccio*, 47 N.Y.2d 431, 391 N.E.2d 1347, 418 N.Y.S.2d 371 (1979). In *Ciaccio*, the New York Court of Appeals found a violation of defendant's constitutional right to be present when the court clerk entered the jury room during deliberations and told jurors, in defendant's absence, that the "[j]udge had stated that a lot of time and money [were] invested in the case and they should keep on deliberating." *Id.* at 435-36, 391 N.E.2d at 1349, 418 N.Y.S.2d at 373. The court reasoned that this type of supplemental instruction may have been dispositive of the matter and, therefore, the presence of both the defendant and his counsel were constitutionally required. *Id.* at 436-37, 391 N.E.2d at 1350, 418 N.Y.S.2d at 373.

63. See, e.g., *People v. Mehmedi*, 69 N.Y.2d 759, 505 N.E.2d 610, 513 N.Y.S.2d 100 (1987). The *Mehmedi* court held, *inter alia*, that defendant's statutory right to be present, under Criminal Procedure Law § 310.30, was violated when the court and defense counsel responded to a jury question during deliberations in the defendant's absence. *Id.* at 759, 505 N.E.2d at 610-11, 513 N.Y.S.2d 100-01. Criminal Procedure Law § 310.30 provides in pertinent part:

At any time during its deliberation, the jury may request the court for further instruction or information. . . . 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. . . .

N.Y. CRIM. PROC. LAW § 310.30 (McKinney 1993). The court found that this was a material part of defendant's trial such that he had to be present and harmless error analysis was inapplicable. *Mehmedi*, 69 N.Y.2d at 760, 505 N.E.2d at 610-11, 513 N.Y.S.2d at 100.

Mehmedi illustrates the blurred analysis with respect to whether the court of appeals vindicated the defendant's statutory or constitutional right to be present. The court held that the trial judge violated defendant's right to be

present under Criminal Procedure Law § 310.30 but then explained, in the same paragraph, that the right is fundamental and harmless error analysis was inappropriate. *Id.* at 760, 505 N.E.2d at 11, 513 N.Y.S.2d at 101. Clearly, the court of appeals found that denial of defendant's right to be present during jury instruction was a *per se* constitutional error; *see also* *People v. Anderson*, 16 N.Y.2d 282, 213 N.E.2d 445, 266 N.Y.S.2d 110 (1965). Defendant's statutory right to be present pursuant to Code of Criminal Procedure § 356, which provided that, "at a trial for a felony 'the defendant must be personally present,'" was violated when defendant was absent from a motion to suppress. *Id.* at 286-86, 213 N.E.2d at 446, 266 N.Y.S.2d at 111-12; CODE OF CRIM. PROC. § 356 (McKinney 1958) (current version at N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1993)). The court found that because the motion to suppress took place before trial it did not constitute the taking of evidence "during trial." *Mehmedi*, 69 N.Y.2d at 286-87, 213 N.E.2d at 447, 266 N.Y.S.2d at 112-13. The court reasoned that such analysis ignores the purposes of the right to be present because the evidence elicited at a suppression hearing "may spell the difference between conviction or acquittal." *Id.* at 287, 213 N.E.2d at 447, 266 N.Y.S.2d at 113 (quoting *People v. Lombardi*, 18 A.D.2d 177, 180, 239 N.Y.S.2d 161, 164 (2d Dep't), *aff'd*, 13 N.Y.2d 1014, 195 N.E.2d 306, 245 N.Y.S.2d 595 (1963)). This precious right is not lost or any less important merely because the Legislature enacted § 813-d which requires that a "motion to suppress be made and a hearing held in advance of the actual trial." *Anderson*, 16 N.Y.2d at 286, 213 N.E.2d at 447, 266 N.Y.S.2d at 112.

This case, as well as the landmark cases of *People ex rel. Bartlam v. Murphy*, 9 N.Y.2d 550, 175 N.E.2d 336, 215 N.Y.S.2d 753 (1961) and *People ex rel. Lupo v. Fay*, 13 N.Y.2d 253, 196 N.E.2d 56, 246 N.Y.S.2d 399 (1963) are really due process cases argued by defense counsel under the aegis of § 356, an earlier codified version of the right to be present. In *Lupo*, the court of appeals adopted the test elucidated, ironically, by its former Chief Judge, Justice Cardozo, in the Supreme Court case of *Snyder v. Massachusetts*, 291 U.S. 97 (1934). The *Lupo* court held:

Due process . . . mandates the presence of a defendant . . . to the extent only that his presence [be] necessary for a fair and just hearing of his cause and he must be deemed to have the absolute right to hear everything . . . so that his may be the opportunity to confront his accusers and advise with his counsel.

13 N.Y.2d at 256, 196 N.E.2d at 58, 246 N.Y.S.2d at 401 (citing *Snyder v. Massachusetts*, 291 U.S. 97 (1934)). In other words, the *Lupo* court did not pass on the defendant's claimed deprivation of the right to be present by merely stating that (1) defendant had a statutory right to be present during the trial, (2) defendant was absent during argument by his counsel for a mistrial, and (3) therefore defendant's statutory right to be present was violated. The court conducted an entire *Snyder* due process analysis to see if defendant's

presence could have contributed to the fairness of the proceeding in any way. *Id.* at 256-57, 196 N.E.2d at 58-59, 246 N.Y.S.2d at 401-02. By adopting the *Snyder* constitutional analysis to construe the "required presence" statute, the court of appeals constructed a statutory right that had constitutional underpinnings.

64. *See, e.g.*, *People v. Aguilera*, 82 N.Y.2d 23, 623 N.E.2d 519, 603 N.Y.S.2d 392 (1993). Defendant's right to be present at trial was not violated when the trial court spoke to a sworn juror immediately prior to deliberations regarding her anxiety about her health and having to deliberate late into the night. *Id.* at 29, 623 N.E.2d at 522, 603 N.Y.S.2d at 395. The court found that the record was devoid of evidence that defendant's presence might have had an effect on his opportunity to defend against the charges. *Id.* at 34, 623 N.E.2d at 525, 603 N.Y.S.2d at 398; *see also* *People v. Torres*, 80 N.Y.2d 944, 605 N.E.2d 354, 590 N.Y.S.2d 867 (1992). In *Torres*, The defendant's right to be present at all material stages of the trial was not violated when trial court questioned a juror, in defendant's absence, about whether she knew defendant. *Id.* at 945, 605 N.E.2d at 355, 590 N.Y.S.2d at 868. The court reasoned that the inquiry was limited to only one question and one answer, off the record, and resulted in the dismissal of the juror, with the consent of both parties. *Id.* Although left unsaid, the court probably focused on the subject matter of the conversation instead of its mere duration; *People v. Nacey*, 78 N.Y.2d 990, 580 N.E.2d 751, 575 N.Y.S.2d 265 (1991) (holding that defendant's right to be present was not abridged when a court officer, at the judge's instruction, undertook the mere ministerial duty of telling the jury to discontinue deliberations for the evening); *People v. Bonaparte*, 78 N.Y.2d 26, 574 N.E.2d 1027, 571 N.Y.S.2d 421 (1991) (same). These decisions are consistent with the body of case law dealing with a defendant's right to be present during a judge's dialogue with the jury dealing with matters wholly unrelated to the merits. *See* *People v. Harris*, 76 N.Y.2d 810, 559 N.E.2d 660, 559 N.Y.S.2d 966 (1990) (holding that when a jury requests additional information the court should reconvene prior to discussion between judge and jury); *People v. Rodriguez*, 76 N.Y.2d 918, 564 N.E.2d 658, 563 N.Y.S.2d 98 (1990) (concluding defendant's right to be present does not attach at a colloquy between his attorney and the trial judge to determine sufficiency of read-back testimony because his absence did not affect his ability to defend himself against the charges); *People v. Mullen*, 44 N.Y.2d 1, 374 N.E.2d 369, 403 N.Y.S.2d 470 (1978) (finding that defendant's statutory right to be present was not infringed when defendant was absent from the in-chambers questioning of a seated juror for possible disqualification because the inquiry was not part of formal jury selection and defendant's presence would be superfluous); *People ex rel. Lupo v. Fay*, 13 N.Y.2d 253, 196 N.E.2d 56, 246 N.Y.S.2d 399 (1963) (concluding that defendant's absence from mistrial hearing where the judge told the jury to continue deliberating although the jurors had complained of fatigue was not violative of his statutory right to be

were also brought under New York State statutes requiring a defendant's presence at various criminal proceedings. Examples of which are discussed below.

In 1990, the New York Court of Appeals held, in *People v. Harris*,⁶⁵ that defendant's constitutional and statutory right to be present was not abridged when, in defendant's absence, the trial judge went to the door of the jury room and requested clarification of a read back request.⁶⁶ The court found the judge's communication with the jury to be purely ministerial and that the jury was given no information or instruction in defendant's absence.⁶⁷

However, in 1990, the court in *People v. Cain*,⁶⁸ held that the defendant's statutory and constitutional rights to be present were violated when supplemental instructions were given to a single juror before the trial had ended in the defendant's absence.⁶⁹

In *People v. Brooks*,⁷⁰ the court ruled that the lower court erred in not determining whether the defendant's absence from court for thirty-seven minutes on the third day of trial was deliberate.⁷¹ The lower court committed reversible error in proceeding with the jury charge before making this determination, as the defendant did not waive his right to be present.⁷²

The following year, the court decided *People v. Velasco*,⁷³ in which it held that neither the defendant's statutory nor constitutional right to be present was violated when a pre-charge conference concerning only issues of law and procedure took

present because such prejudice would not have had a substantial relationship to his opportunity to defend against the charge).

65. 76 N.Y.2d 810, 559 N.E.2d 660, 559 N.Y.S.2d 966 (1990).

66. *Id.* at 812, 559 N.E.2d at 662, 559 N.Y.S.2d at 968.

67. *Id.* (citing N.Y. CRIM. PROC. LAW § 310.30 (McKinney 1993)).

68. 76 N.Y.2d 119, 556 N.E.2d 141, 556 N.Y.S.2d 848 (1990).

69. *Id.* at 124, 556 N.E.2d at 143, 556 N.Y.S.2d at 850.

70. 75 N.Y.2d 898, 553 N.E.2d 1328, 554 N.Y.S.2d 818, *amended by*, 76 N.Y.2d 746, 557 N.E.2d 777, 558 N.Y.S.2d 484 (1990).

71. *Id.* at 899, 553 N.E.2d at 1329, 554 N.Y.S.2d at 819.

72. *Id.*

73. 77 N.Y.2d 469, 570 N.E.2d 1070, 568 N.Y.S.2d 721 (1991).

place in his absence.⁷⁴ The court also held that a side-bar *voir dire* dealing with purely judicially-decided juror disqualifications and a conference in the robing room touching on mere procedural advisements conducted outside the defendant's presence did not violate his right to be present.⁷⁵

The New York Court of Appeals, in 1992 decided *People v. Morales*.⁷⁶ The court held that a defendant did not have a right to be present during a competency hearing because the purpose of the hearing was limited to whether the child-witness understood the nature of the oath.⁷⁷

In the 1992 decision, *People v. Sloan*,⁷⁸ the court of appeals found that the defendant had a constitutional and statutory right to be present during side-bar questioning of prospective jurors regarding their ability to weigh facts presented and testimony elicited at trial in a dispassionate manner in the face of pre-trial publicity.⁷⁹

Along the same lines, in the 1992 decision of *People v. Antommarchi*,⁸⁰ the court held that the defendant was denied his statutory and constitutional right to be present, when the judge questioned prospective jurors about their ability to impartially hear and objectively weigh evidence at a material stage of the proceedings.⁸¹ Similarly, the court in *People v. Dokes*,⁸² held that defendant's presence was required at *Sandoval* hearings.⁸³

In *People v. Mitchell*,⁸⁴ the court held that the rule announced in *Antommarchi* should be limited to prospective application,⁸⁵

74. *Id.* at 472, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722.

75. *Id.* at 472-73, 570 N.E.2d at 1071-72, 568 N.Y.S.2d at 722-23.

76. 80 N.Y.2d 450, 606 N.E.2d 953, 591 N.Y.S.2d 825 (1992).

77. *Id.* at 455, 606 N.E.2d at 957, 591 N.Y.S.2d at 829.

78. 79 N.Y.2d at 386, 592 N.E.2d 784, 570 N.Y.S.2d 176 (1992).

79. *Id.* at 392, 592 N.E.2d at 786-87, 583 N.Y.S.2d at 178-79.

80. 80 N.Y.2d 247, 604 N.E.2d 95, 590 N.Y.S.2d 33 (1992).

81. *Id.* at 250, 604 N.E.2d at 97, 590 N.Y.S.2d at 35.

82. 79 N.Y.2d 656, 595 N.E.2d 836, 584 N.Y.S.2d 761 (1992).

83. *Id.* at 662, 595 N.E.2d at 840, 584 N.Y.S.2d at 765. For an explanation of *Dokes* and its progeny of *People v. Favor*, 82 N.Y.2d 254, 624 N.E.2d 631, 604 N.Y.S.2d 494 (1993), see *infra* notes 259-84 and accompanying text.

84. 80 N.Y.2d 519, 606 N.E.2d 1381, 591 N.Y.S.2d 990 (1992).

pursuant to the factors set forth in *People v. Pepper*.⁸⁶ The purpose of conferring on defendants a right to be present on defendants at *voir dire* proceedings, where juror biases and hostilities are examined, is "not to cure any constitutional infirmity inherent in the former practices, but rather to permit a defendant a more active role in the examination and selection of potential jurors."⁸⁷

Finally, in 1993, *People v. Favor*⁸⁸ was handed down by the New York Court of Appeals. The court held that the *Dokes* rule, mandating defendants' right to be present at *Sandoval* hearings, should be applied retroactively under a *Pepper* balancing.⁸⁹ The court reasoned that it should be applied retroactively because the appellate courts were in disagreement as to whether the defendant should be present at this stage and whether the burden on the administration of justice would be minimal.⁹⁰

The analyses in these cases, however, were at times, unclear as to whether the cases were determined based upon the defendant's constitutional or statutory right to be present. For example, in *People v. Murphy*,⁹¹ the court prefaced its analysis by stating that "[a] defendant in a felony case has an absolute constitutional and statutory right to be present at all stages of the trial" ⁹² This

85. *Id.* at 528, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995.

86. 53 N.Y.2d 213, 423 N.E.2d 366, 440 N.Y.S.2d 889, *cert. denied*, 454 U.S. 967 (1981). The *Pepper* test was created by the New York Court of Appeals to determine whether a new holding should be applied retroactively through an evaluation of the following factors: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Id.* at 220, 423 N.E.2d at 369, 440 N.Y.S.2d at 892.

87. *Mitchell*, 80 N.Y.2d at 528; 606 N.E.2d 1386, 591 N.Y.S.2d at 995.

88. 82 N.Y.2d 254, 624 N.E.2d 631, 604 N.Y.S.2d 494 (1993).

89. *Id.* at 265, 624 N.E.2d at 637, 604 N.Y.S.2d at 500.

90. *Id.* at 265-66, 624 N.E.2d at 638, 604 N.Y.S.2d at 501.

91. 9 N.Y.2d 550, 175 N.E.2d 336, 215 N.Y.S.2d 753 (1961).

92. *Id.* at 553, 175 N.E.2d at 337, 215 N.Y.S.2d at 755 (citing *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934)). In *Murphy*, the court held that defendant's New York State constitutional right to be present was abridged when the jury returned from deliberations for additional instructions which led to a lengthy instruction-related discussion between judge and jury outside the

analytical distinction is the true crux of this Comment and will be discussed in Part III.

III. WHETHER THE RIGHT TO BE PRESENT IS CONSTITUTIONALLY OR STATUTORILY BASED

A criminal attorney worth her weight will always put forth a federal and state constitutional argument as well as a statutory argument (if available) in her client's defense. New York defendants claiming a violation of their right to be present, can argue this deprivation by way of a three-pronged attack.

First, the defendant can argue that he was denied his right to be present under the United States Constitution, because the New York Court of Appeals in *People v. Morales*,⁹³ adopted the United States Constitutional "due process" standard as enunciated in *Snyder v. Massachusetts*.⁹⁴ Second, defendant can assert that his right to be present was infringed under the New York State Constitution's Due Process Clause.⁹⁵ Third, the defendant can put forth a claim under the New York State codified version of the right to be present.⁹⁶

In *Snyder*, the Supreme Court held, that "in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge."⁹⁷ Such right extends through the Sixth Amendment's Confrontation Clause

presence of the defendant. *Id.* at 552, 175 N.E.2d at 337, 215 N.Y.S.2d at 754. The court reasoned that defendant's presence was necessary for the "fulness of his opportunity to defend against the charge." *Id.* at 553, 175 N.E.2d at 337, 215 N.Y.S.2d at 755.

93. 80 N.Y.2d 450, 453-55, 606 N.E.2d 953, 956-57, 591 N.Y.S.2d 821, 828-29 (1992).

94. 291 U.S. 97 (1934). *Snyder* was recently cited with approval in *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). *See supra* notes 25 and 63 (containing miscellaneous New York holdings adopting the *Snyder* analysis).

95. N.Y. CONST. art. I, § 6 (McKinney 1982). *See supra* note 53.

96. N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1993). *See supra* note 22.

97. *Snyder*, 291 U.S. at 105-06.

and is bolstered by the Fourteenth Amendment's Due Process Clause.⁹⁸

Furthermore, even if a defendant is not denied the right to be present during cross-examination or is not otherwise confronting witnesses, his defense is made easier if he must be present at the impaneling of the jury and during summation by counsel.⁹⁹ His presence is mandated because if present, he is able to give advice to or make suggestions to counsel with respect to matters of which he has particular knowledge.¹⁰⁰

The Court emphatically concluded, however, that "[n]owhere in the decisions of this [C]ourt is there a dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence when presence would be useless, or the benefit but a shadow."¹⁰¹ The Due Process Clause only protects a defendant's right to be present "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."¹⁰²

New York has adopted *Snyder's* due process analysis when passing on deprivations of the right to be present pigeon-holed in the Federal and State Constitutions or in Criminal Procedure Law section 260.20. The fact that the New York Court of Appeals has adopted *Snyder* is important when determining whether the right is constitutionally based in a given proceeding. If the court, in employing *Snyder*, determines that a defendant has the right to be present in a given proceeding, it will be argued in this Comment that the right in that proceeding is constitutionally based *even if*

98. *Id.*

99. *Id.* at 106. The right to be present, rooted largely in the Sixth Amendment's Confrontation Clause, is also protected by the Fifth and Fourteenth Amendments' Due Process Clauses in certain circumstances "when the defendant is not confronting witnesses or evidence against him." *See, e.g., United States v. Gagnon*, 470 U.S. 522 (1985).

100. *Snyder*, 291 U.S. at 106.

101. *Id.* at 106-07.

102. *Id.* at 107-08. The "benefit but a shadow" language is a harmless error test. The Supreme Court must have foreseen that without such limiting language, prisoners would seek reversal of their convictions based on their absence from the most inconsequential of proceedings or from proceedings where their presence would have been useless to the defense against the charges. *Id.* at 106-07.

the court ultimately confines the right to statute or even if the defendant claims a violation of his *statutory* right to be present only. The significance of whether the right is constitutionally or statutorily based will be discussed below.

Article I, section 6 of the New York State Constitution protects a defendant's ability to cross-examine and confront witnesses.¹⁰³ Section 6 also houses a defendant's right to be present, generally, through its due process clause, regardless of whether he or she was deprived of the right to cross-examine or otherwise confront an adverse witness.¹⁰⁴

The New York State constitutional challenge to the deprivation of the right, seems to parallel, analytically, the *Snyder* federal constitutional challenge.¹⁰⁵ So, pursuant to *Snyder* and article I,

103. N.Y. CONST. art. I, § 6.

104. *See, e.g.*, *People v. Corley*, 67 N.Y.2d 105, 491 N.E.2d 1090, 500 N.Y.S.2d 633 (1986) (affirming conviction where defendant claimed his right to be present was abridged when he was absent from the sentencing proceedings). The point in which the defendant rises to be sentenced is clearly not a point where confrontation would be of use. Rather, defendant has a general due process right to be present founded upon fundamental fairness; *see also Snyder*, 291 U.S. at 107. The *Snyder* Court stated:

Confusion will result . . . if the privilege of presence be identified with the privilege of confrontation, which is limited to the stages of the trial when there are witnesses to be questioned. . . . [D]efense may be made easier if the accused is permitted to be present at the examination of jurors or the summing up of counsel. . . .

Id. at 106-07.

The Supreme Court clearly distinguished between the right to be present for confrontation purposes and the right to be present as a matter of due process. The New York Court of Appeals implicitly make this same distinction when deciding that the right to be present attached at a proceeding having nothing to do with the right to confront witnesses. *See Corley*, 67 N.Y.2d at 105, 491 N.E.2d at 1090, 500 N.Y.S.2d at 633; *see also People v. Ciaccio*, 47 N.Y.2d 431, 391 N.E.2d 1347, 418 N.Y.S.2d 371 (1979) (holding New York constitutional right to be present was violated when the court clerk had *ex parte* communication with jury without notifying defendant).

105. *See, e.g.*, *People v. Antommarchi*, 80 N.Y.2d 247, 604 N.E.2d 95, 590 N.Y.S.2d 33 (1992). In *Antommarchi*, the defendant claimed he was denied his constitutional right to be present under both the United States Constitution's Sixth and Fourteenth Amendments and under the New York State Constitution article I, section 6. *Id.* at 249, 604 N.E.2d at 96, 590 N.Y.S.2d at 34; *see also* text accompanying Part I and notes 31-61 (tracing the

section 6, defendants have been held to have a due process right to be present during: (1) instructions to the jury "where the court is required to state the fundamental legal principles applicable to criminal cases generally, as well as the material legal principles applicable to a particular case and the application of the law to the facts,"¹⁰⁶ (2) impaneling the jury,¹⁰⁷ (3) receiving evidence,¹⁰⁸ (4) summations of counsel,¹⁰⁹ (5) receiving the verdict,¹¹⁰ and (6) during the "court's instructions in response to the jury's questions about the evidence."¹¹¹

New York Criminal Procedure Law section 260.20 protects a defendant's right to be "present during the trial of an indictment."¹¹² Therefore, in order to determine whether there was a statutory deprivation of that right, the court must first determine whether the defendant was denied that right during a proceeding that is considered to be part of the "trial," as opposed to a proceeding merely deemed "ancillary" to the trial.¹¹³ If a proceeding or stage is deemed part of the "trial," the statutory right to be present is considered absolute unless the defendant

right to be present from ancient times to present day; the purposes for the right are identical for the Federal and the New York State Constitutions).

106. *People v. Ciaccio*, 47 N.Y.2d 431, 436, 391 N.E.2d 1347, 1350, 418 N.Y.S.2d 371, 373 (1979).

107. *See, e.g., People v. Mullen*, 44 N.Y.2d 1, 4, 374 N.E.2d 369, 370, 403 N.Y.S.2d 470, 472 (1978); *Maurer v. People*, 43 N.Y. 1 (1870).

108. *Mullen*, 44 N.Y.2d at 4, 374 N.E.2d at 370, 403 N.Y.S.2d at 472.

109. *Id.*

110. *Id.*

111. *People v. Harris*, 76 N.Y.2d 810, 812, 559 N.E.2d 660, 662, 559 N.Y.S.2d 966, 968 (1990). *See, e.g., People v. Mehmedi*, 69 N.Y.2d 759, 505 N.E.2d 610, 513 N.Y.S.2d 100 (1987).

112. N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1993).

113. *See* N.Y. CRIM. PROC. LAW § 260.20 practice commentary (McKinney 1993); *see also Mullen*, 44 N.Y.2d at 4, 374 N.E.2d at 370, 403 N.Y.S.2d at 472 ("Of critical importance to the interpretation of [§ 260.20] is the meaning of the word 'trial.'"). The court then went on to list the proceedings that were previously deemed part of the "trial" and ascertained whether the in-chamber questioning of a juror regarding potential bias was part of the "trial." *Id.*

waives or forfeits the right.¹¹⁴ Since the right is absolute, it automatically attaches regardless of whether a defendant's presence could contribute to the fairness of the proceeding.¹¹⁵

The statutory right to be present gives greater protection to the defendant than does the constitutional right because if a proceeding is deemed part of the "trial," the right is absolute and the defendant need not prove that his presence is necessary under *Snyder's* rigorous "due process" standard.¹¹⁶

Hence, in 1992, the court of appeals held, in *People v. Morales*,¹¹⁷ that "[t]o the extent there is a concern about secret trials, defendant's presence serves a symbolic function, and thus the [statutory] right does not rest exclusively on defendant's potential contribution to the proceedings. Indeed, a defendant's appearance at rendition of the verdict could serve little practical function."¹¹⁸

Stages during which the court of appeals has found the statutory right to be absolute include the impaneling of the jury, the introduction of evidence, summations by counsel, the reception of the verdict, the questioning of jurors regarding their ability to remain objective,¹¹⁹ and during *Sandoval* hearings.¹²⁰

On the other hand, there are proceedings where the right to be present does not attach absolutely. These stages are considered "ancillary" to the trial and as such, only attach if the defendant proves that his attendance will contribute to the fairness of the

114. See N.Y. CRIM. PROC. LAW § 260.20 practice commentary; see also *infra* notes 285-99 and accompanying text (discussing when the statutory or constitutional right to be present can be waived or forfeited).

115. See N.Y. CRIM. PROC. LAW § 260.20 practice commentary. For an opinion different from the practice commentary, see *infra* note 121.

116. *Id.* See *People v. Mitchell*, 80 N.Y.2d 519, 526, 606 N.E.2d 1381, 1384, 591 N.Y.S.2d 990, 993 (1992) (noting that "although [§ 260.20] has underlying due process concerns, its protective scope is broader than the constitutional rights it encompasses") (citations omitted).

117. 80 N.Y.2d 450, 606 N.E.2d 953, 591 N.Y.S.2d 825 (1992).

118. *Id.* at 456, 606 N.E.2d at 957, 591 N.Y.S.2d at 829.

119. See *People v. Antommarchi*, 80 N.Y.2d 247, 251, 604 N.E.2d 95, 97, 590 N.Y.S.2d 33, 35 (1992).

120. See *People v. Dokes*, 79 N.Y.2d 656, 662, 595 N.E.2d 836, 840, 584 N.Y.S.2d 761, 765 (1992).

proceeding.¹²¹ In other words, the defendant must meet *Snyder's* constitutional standard.

Stages where the defendant was forced to prove that his attendance would contribute to the fairness of the proceeding include competency hearings,¹²² side-bar conferences dealing with matters of substantive or procedural law,¹²³ read-back request colloquies,¹²⁴ and side-bar *voir dire* conferences concerning jurors' general ability to serve.¹²⁵

However, just because the New York Court of Appeals has deemed the right absolute when construing the statute, does not mean that the right is not constitutionally based, as well. A defendant might argue that he or she was deprived of the absolute statutory right to be present instead of the constitutional right, especially when the statute specifically covers a certain

121. See N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1993) practice commentary. Professor Preiser believes that the right will attach in an ancillary proceeding only "upon a showing that the defendant's potential contribution could have influenced the *outcome* of the proceeding." *Id.* (emphasis added). However, it is analytically questionable whether defendant's contribution must influence the *outcome* or just the *fairness* of the proceeding. To force a defendant to prove that his presence would have influenced the proceeding's outcome would burden him with an almost insurmountable obstacle. *Id.* For instance, it would be impossible for the defendant to prove that his presence during summation would influence the "outcome of the proceeding." In the case of summation, the defendant would have to prove that his presence influenced the outcome of the trial itself. Of course, the question of whether a defendant's presence at summation is mandated has already been answered by § 260.20 — making a defendant's presence absolute. However, presence at summation is not absolute because defendant's presence influences the outcome of the proceeding; the right to be present is absolute because it lends to the *fairness* of the trial. Such a conclusion is borne out by thousands of years of abuses. *Id.* See *supra* text accompanying notes 31-61. The purpose of defendant's presence is "to prevent the ancient evil of secret trials." *People v. Thorn*, 156 N.Y. 287, 297, 50 N.E. 947, 951 (1898).

122. See *People v. Morales*, 80 N.Y.2d 450, 606 N.E.2d 953, 591 N.Y.S.2d 825 (1992).

123. See *People v. Velasco*, 77 N.Y.2d 469, 570 N.E.2d 1070, 568 N.Y.S.2d 721 (1991).

124. See *People v. Harris*, 76 N.Y.2d 810, 559 N.E.2d 660, 559 N.Y.S.2d 966 (1990).

125. See *Velasco*, 77 N.Y.2d 469, 570 N.E.2d 1070, 568 N.Y.S.2d 721.

proceeding. At the same time, some proceedings may only afford defendant a statutory right to be present. However, the fact that the right might merely be statutory is of no moment because, the statute is clearly a codification of those due process concerns and breaches exhibited in times gone by.¹²⁶

Whether the right to be present at a given proceeding is statutorily or constitutionally based is important only when a defendant claims the right should be applied retroactively.¹²⁷ This is so, because if the right is based only in state statute, retroactivity questions are governed by the New York State three part balancing test.¹²⁸ If, however, the right is grounded in federal constitutional principles, the hard and fast federal rule would govern retroactivity issues.¹²⁹ With this as a backdrop, one can explore categorically where the right to be present in New York State is constitutionally or statutorily based.

In 1990, the New York Court of Appeals held in *People v. Harris*,¹³⁰ that defendant's constitutional and statutory right to be present was not abridged when, in defendant's absence, the trial judge went to the door of the jury room and asked for clarification of a read-back request.¹³¹

The deliberating jury asked "to hear the testimony about [complainant] from the second time Judy Flint knock[ed] on the door until [complainant] arrive[d] at her neighbor's."¹³² The

126. See generally *supra* notes 31-61 and accompanying text; see New York v. Epps, 37 N.Y.2d 343, 348, 334 N.E.2d 566, 570, 372 N.Y.S.2d 606, 610 (1975).

127. See *People v. Mitchell*, 80 N.Y.2d 519, 525, 606 N.E.2d 1381, 1384, 591 N.Y.S.2d 990, 993 (1992) (holding that "[i]f no Federal Constitutional principles are involved . . . the question of retroactivity is one of State law").

128. *Id.* at 525-26, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993. In New York, the court determines "the retroactive effect of a new rule by evaluating three factors: (1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the new administration of justice of retroactive application." *Id.*

129. See *Griffith v. Kentucky*, 479 U.S. 314 (1987) (holding that the new constitutional rules shall be applied retroactively on all pending direct review cases).

130. 76 N.Y.2d 810, 559 N.E.2d 660, 559 N.Y.S.2d 966 (1990).

131. *Id.* at 811, 559 N.E.2d at 661, 559 N.Y.S.2d at 967.

132. *Id.*

judge brought both the prosecutor and defense counsel into the jury room to make sure that the jurors wanted to hear the testimony of the victim [complainant] and not the testimony of another witness.¹³³ Although this conversation with the jury in defendant's absence was not transcribed, the judge promptly put the communication on the record when he brought the defendant and jury back into the courtroom to respond to the request.¹³⁴

The court held that section 310.30 of the Criminal Procedure Law¹³⁵ was not violated because the jury was given no "information or instruction" within the meaning of the statute.¹³⁶ In other words, no "information or instruction was imparted" because the judge was merely trying to understand which testimony the jury wanted read back — testimony *about* the victim from other witnesses or testimony *from* the victim, herself.¹³⁷

Since this communication was not "information or instructions," the defendant's right to be present was not absolute and the inquiry defaulted to the *Snyder* "due process" analysis.¹³⁸

133. *Id.*

134. *Id.*

135. N.Y. CRIM. PROC. LAW § 310.30 (McKinney 1993). Section 310.30 provides:

At anytime during its deliberation, the jury may request the court for further instruction or information with respect to the law, with respect to the content or substance of any trial evidence, or with respect to any other matter pertinent to the jury's consideration of the case. 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. With the consent of the parties and upon the request of the jury for further instruction with respect to a statute, the court may also give to the jury copies of the text of any statute which, in its discretion, the court deems proper.

Id.

136. *Harris*, 76 N.Y.2d at 812, 559 N.E.2d at 662, 559 N.Y.S.2d at 968.

137. *Id.*

138. *Id.* Pursuant to *Snyder*, a criminal defendant "has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fulness [sic] of his

Finding that this communication was only “ministerial” in nature, the court reasoned that Harris’ constitutional rights were not abridged because the “communication was wholly unrelated to the substantive legal or factual issues of the trial[]” such that his presence could have borne any relation to his opportunity to defend against the charge.¹³⁹ Therefore, defendant had no constitutional or statutory right to be present when the trial judge clarified a read-back request.¹⁴⁰

The only dissenter, Judge Titone, stated that the trial judge’s clarification of the read-back request was more than a ministerial act because he had to employ a “high degree of judicial sensitivity and knowledge” so as not to “make remarks which might convey potentially prejudicial material.”¹⁴¹

Judge Titone further found that the majority’s distinction between giving “information or instructions” and the mere clarification of a jury’s request to be unworkable because it “makes the determination as to whether the defendant’s presence is required turn upon the court’s prescience as to what might, or might not, have to be said to the jurors in order to obtain the needed clarification.”¹⁴²

Judge Titone concluded that defendant’s presence would have contributed to the fairness of the proceeding because, having heard the testimony and witnessed the jurors’ responses, he may have found intricacies in the read-back request that the judge missed, and therefore could have made suggestions to narrow the inquiry.¹⁴³

The *Harris* court chipped away at defendants’ right to be present. According to Criminal Procedure Law section

opportunity to defend against the charge.” *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934).

139. *Harris*, 76 N.Y.2d at 812, 559 N.E.2d at 663, 559 N.Y.S.2d at 969.

140. *Id.*

141. *Id.* at 814, 559 N.E.2d at 662, 559 N.Y.S.2d at 968 (Titone, J., dissenting).

142. *Id.* at 815, 559 N.E.2d at 664, 559 N.Y.S.2d at 970 (Titone, J., dissenting).

143. *Id.* at 814, 559 N.E.2d at 663, 559 N.Y.S.2d at 969 (Titone, J., dissenting).

310.30,¹⁴⁴ the defendant must be present when the judge complies with the deliberating jury's request for further information or instruction. In *Harris*, this statute was violated on its face. The jury asked for more information and the judge gave it in defendant's absence. It was not for the court to determine what constituted "information or instructions" because the Legislature had already mandated defendant's presence when *any* information or instruction request by the jury was complied with by the judge. The court transformed the "information or instruction" language into a factual question in order to limit the purview of the statutory right. The court, *sua sponte*, defaulted a statutorily-established core proceeding — i.e., a judge's compliance with a jury's request for further information or instruction — to an ancillary proceeding such that defendant's presence would only be necessary if *Snyder* was met. In so doing, the right to be present during the giving of jury instructions was stripped of its constitutional protection, relegated to statutory protection, and ultimately divested of that as well.

Regardless of whether one finds Judge Titone's dissent and the above position persuasive, *Harris* is probably an aberration because the right to be present at the giving of jury instructions, is generally constitutionally and statutorily imbedded in New York.¹⁴⁵

In the 1991 case of *People v. Velasco*,¹⁴⁶ the New York Court of Appeals held that neither defendant's statutory nor constitutional right to be present was violated when a pre-charge conference, a side-bar *voir dire*, and a conference in the robing room took place in his absence.¹⁴⁷

The court found that defendant's statutory right to be present "during the trial of an indictment" attached during the "impaneling of the jury, the introduction of evidence, the

144. See N.Y. CRIM. PROC. LAW § 310.30.

145. *Harris*, 76 N.Y.2d at 815, 559 N.E.2d at 664, 559 N.Y.S.2d at 970 (Titone, J., dissenting). See, e.g., *People v. Ciaccio*, 47 N.Y.2d 431 (1979).

146. 77 N.Y.2d 469, 570 N.E.2d 1070, 568 N.Y.S.2d 721 (1991).

147. *Id.* at 472-73, 570 N.E.2d at 1071-72, 568 N.Y.S.2d at 722-23.

summations of counsel, and the court's charge to the jury."¹⁴⁸ Defendant's New York State constitutional right required his presence at trial "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."¹⁴⁹ The court then held that neither the statutory nor the constitutional right to be present applied at the pre-charge conference.¹⁵⁰ The conference was attended by prosecution and defense counsel and dealt with a stipulation regarding the contents of a medical record, the scheduling of the rest of the trial, and the content of the jury instructions.¹⁵¹ As such, the conference only involved questions of law or procedure and defendant failed to show that if present, his potential contribution could have influenced the outcome of the proceeding.¹⁵²

The court then found that the defendant's presence was not required at the side-bar *voir dire* for similar reasons.¹⁵³ In open court before the defendant, the judge asked prospective jurors general questions dealing with their ability to serve including physical impairments, family obligations, and work commitments.¹⁵⁴ If a juror wanted to answer specific questions, the judge directed him or her to approach the bench for further discussion outside the hearing of defendant and the venire.¹⁵⁵

The court concluded that defendant's presence during the bench discussions would have been "useless, or the benefit but a shadow"¹⁵⁶ because the "determination that a prospective juror was disqualified before *voir dire* was a matter for the court and defendant had no constitutional or statutory right to personally participate in the discussions leading to the court's ruling."¹⁵⁷

148. *Id.* at 472, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722 (citing *People v. Mullen*, 44 N.Y.2d 1, 374 N.E.2d 369, 403 N.Y.S.2d 470 (1978)).

149. *Id.* (adopting *Snyder v. Massachusetts*, 291 U.S. 97, 108 (1934)).

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 472-73, 570 N.E.2d at 1071-72, 568 N.Y.S.2d at 722-23.

154. *Id.* at 472-73, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722.

155. *Id.*

156. *Id.* at 473, 570 N.E.2d at 1071-72, 568 N.Y.S.2d at 722-23 (quoting *Snyder*, 291 U.S. at 106-07).

157. *Id.* at 473, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722.

Finally, the court rejected defendant's claim that his right to be present during impaneling of the jury was violated when he was absent from the robing room where the prosecution and defense counsel offered their legal grounds for their challenges for cause and peremptory challenges.¹⁵⁸ The court found this argument unavailing because defendant had the opportunity to consult with counsel before the challenges were made, he was present during the actual *voir dire* when these challenges were effectuated in open court, and the robing room discussion "was a mere preliminary advisement of the court" instead of a material part of the trial.¹⁵⁹ Thus, defendant had neither a constitutional nor statutory right to be present at a pre-charge conference dealing with purely procedural questions, at side-bar *voir dire* of prospective jurors relating only to grounds for juror disqualification by the court, or at a robing room conference centering around the legal bases for challenges of jurors.

The court denied defendant his right to be present in the above situations because he could have contributed very little to the fairness of the proceedings. The pre-charge and robing-room conferences dealt only with discussions of arcane legal principles, clearly outside of defendant's knowledge.¹⁶⁰ Furthermore, the defendant's ability to observe the jurors' demeanor would have been useless to the proceeding because the jurors who approached only spoke to the judge about physical impairments, familial obligations, and work commitments — things that they would not lie about and things far removed from the issues at trial.

The court of appeals probably believed, as a matter of policy, that it would impose a hardship on the state, and a windfall to the defendant, to escape guilt, based on a statute whose purpose stems from past abuses which are absent from current judicial proceedings.¹⁶¹

In the 1992 case of *People v. Morales*,¹⁶² the court found that the defendant did not have a right to be present during a

158. *Id.* at 473, 570 N.E.2d at 1072, 568 N.Y.S.2d at 723.

159. *Id.*

160. *Id.* at 472-73, 570 N.E.2d at 1071-72, 568 N.Y.S.2d at 722-27.

161. See Goldin, *supra* note 32, at 23 n.23, 24.

162. 80 N.Y.2d 450, 606 N.E.2d 953, 591 N.Y.S.2d 825 (1992).

competency hearing.¹⁶³ The trial judge in *Morales*, excluded defendant from a competency hearing so as not to distract the child-witness who was allegedly raped by the defendant. The hearing's purpose was limited to whether the child understood the nature of the oath.¹⁶⁴ However, when the trial judge asked the witness why she was in court, she answered "[b]ecause [the defendant] . . . did fresh things to me."¹⁶⁵

The court struck down the defendant's claim that such an answer was the taking or eliciting of substantive testimony so as to make the hearing a material part of the trial.¹⁶⁶ The court reasoned that this "brief statement -- which was not in response to a question designed to elicit substantive testimony -- could [not] have borne a 'substantial relationship' to the opportunity to defend at trial."¹⁶⁷

Additionally, the court concluded that if defendant had special knowledge about the child-witness' testimonial capacity, which could have had a bearing on the fairness of the hearing, he could have informed defense counsel, who could have raised these issues during the hearing or during cross-examination.¹⁶⁸ Thus, defendant had neither a constitutional nor a statutory right to be present when the trial court examined a child-witness to determine whether she was competent to testify.

Interestingly, the court of appeals found that the 1987 United States Supreme Court case of *Kentucky v. Stincer*,¹⁶⁹ was

163. *Id.*

164. *Id.* at 451, 606 N.E.2d at 954, 591 N.Y.S.2d at 826. This hearing was mandated under Criminal Procedure Law § 60.20(2) because the witness was only nine years old. Section 60.20 provides in relevant part that "[a] child less than twelve years old may not testify under oath unless the court is satisfied that he understands the nature of an oath." N.Y. CRIM. PROC. LAW § 60.20(2) (McKinney 1994).

165. 80 N.Y.2d at 452, 606 N.E.2d at 954, 591 N.Y.S.2d at 827.

166. *Id.* at 454, 606 N.E.2d at 956, 591 N.Y.S.2d at 828 (citation omitted).

167. *Id.* (quoting *Kentucky v. Stincer*, 482 U.S. 730, 746 (1987)).

168. *Id.* at 455, 606 N.E.2d at 956, 591 N.Y.S.2d at 828.

169. 482 U.S. 730 (1987). The facts in *Stincer* were identical to *Morales* except that two witnesses instead of one were examined *in camera* to determine their competency. *Id.* at 732. The Court held that defendant's due process

dispositive of defendant's *federal* claims. The *Snyder-Stincer* analysis was not applied by the court to resolve defendant's *state* constitutional claims which were never discussed. The court's discussion of defendant's right to be present under New York law at competency hearings was limited to whether Criminal Procedure Law section 260.20 applied.¹⁷⁰ Pursuant to a Criminal Procedure Law section 260.20 analysis, a competency hearing was not a core part of the trial because trial issues were not broached at this stage, the hearing could take place pretrial, and the only purpose of the hearing was to determine whether the child-witness understood the difference between the truth and a lie.¹⁷¹

Thus, a competency hearing was deemed an "ancillary" proceeding at which defendant had little if anything to offer to its fairness.¹⁷² Therefore, a defendant's right to be present at competency hearings is statutorily based and only protected if defendant can show that he knew particular information about the child-witness' truthfulness that would assist the judge or his counsel in arriving at a fair competency determination.¹⁷³ Given the fact that cross-examination may reveal errors made during the hearing, and that courts are generally reluctant to apply the right in this context, defendants have no right to be present at competency hearings.

The 1990 case of *People v. Cain*¹⁷⁴ presented the issue of whether the defendant had a right to be present when post-verdict, supplemental instructions were given to a single juror.¹⁷⁵

rights were not violated by his absence because questioning was limited to whether each witness understood the nature of the oath and no substantive testimony was given by the girls. *Id.* at 745-46. Further, defendant's presence would not have ensured the reliability of the determination because no evidence was presented to show defendant knew certain background facts about the children such that he could assist the judge in asking more focused questions about their ability to understand the oath. *Id.* at 747.

170. *Morales*, 80 N.Y.2d at 455, 606 N.E.2d at 957, 591 N.Y.S.2d at 829.

171. *Id.* at 453, 606 N.E.2d at 955, 591 N.Y.S.2d at 827.

172. *Id.* at 457, 606 N.E.2d at 958, 591 N.Y.S.2d at 830.

173. *Stincer*, 482 U.S. at 747.

174. 76 N.Y.2d 119, 556 N.E.2d 141, 556 N.Y.S.2d 848 (1990).

175. *Id.* at 119, 556 N.E.2d at 142, 556 N.Y.S.2d at 849.

Upon the rendition of the verdict, juror number seven equivocated when he was polled by defense counsel and then asked to speak with the trial judge in private.¹⁷⁶ After *in camera* discussions, all jurors, including juror number seven responded affirmatively to the clerk's question, "[i]s this your verdict?"¹⁷⁷

The judge then sent the entire jury back to the jury room so the judge could examine written questions tendered by juror number seven.¹⁷⁸ The judge found the questions unintelligible and the prosecutor and defense counsel agreed that the juror did not understand the theory of "acting in concert."¹⁷⁹

While in chambers with juror number seven, and in defendant's absence, the judge repeated the initial jury instructions, examples, and discussed some of the juror's specific factual findings.¹⁸⁰ The judge clarified the juror's confusion and thereafter accepted the jury's verdict as recorded over defense counsel's objection based on an inability to question the juror at the colloquy.¹⁸¹

The court found that defendant's statutory right to be present was violated because the trial had not ended as a matter of law, and jury instructions were given in his absence.¹⁸² As such, defendant's presence was absolutely mandated, because the supplemental jury instructions had been deemed a material part of the trial.¹⁸³

Defendant's constitutional right was abridged when supplemental instructions were given, post-verdict, after the jury was polled.¹⁸⁴ The instruction might have been dispositive of the

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 123, 556 N.E.2d at 142, 556 N.Y.S.2d at 850.

180. *Id.* at 123, 556 N.E.2d at 143, 556 N.Y.S.2d at 850.

181. *Id.* at 124, 556 N.E.2d at 143-44, 556 N.Y.S.2d at 850-51.

182. *Id.*

183. *People v. Mehmedi*, 69 N.Y.2d 759, 505 N.E.2d 610, 513 N.Y.S.2d 100 (1987) (giving, in accused's absence, answers to jury questions violates defendant's right to be present at a material part of the trial); *People v. Mullen*, 44 N.Y.2d 1, 376 N.E.2d 369, 403 N.Y.S.2d 470 (1978) (impaneling the jury is deemed a material part of the trial requiring defendant's presence).

184. *Cain*, 76 N.Y.2d at 122-23, 556 N.E.2d at 142, 556 N.Y.S.2d at 849.

outcome of the case because they were given in response to questions particularly chosen and asked by one of the jurors.¹⁸⁵ While in chambers, juror number seven demonstrated a lack of understanding of the legal principles involved, and he received an explanation of mental culpability.¹⁸⁶ The juror attempted to speak about factual conclusions and the substance of the jury's deliberations, but was cut short by the judge.¹⁸⁷ This information, dealt directly with defendant's guilt. Not only could defendant have observed juror number seven's demeanor, but he could have also observed defense counsel's reaction when the judge attended and entertained an objectionable colloquy. Consequently, as a matter of fairness, defendant's presence was mandated. Therefore, defendant's right to be present when the jury or juror is charged or given additional instructions is statutorily and constitutionally based.

Another material stage of the trial in which the defendant's presence is required is the *voir dire*. In the 1992 case, *People v. Sloan*,¹⁸⁸ the New York Court of Appeals addressed the issue of whether a defendant had a right to be present during questioning relating to jurors' reactions to pretrial publicity concerning the crime at issue and their feelings about the prosecution's key witness, a famous television newscaster.¹⁸⁹

While in the process of robbing the Racing Club Restaurant in New York City, the defendant was challenged by John Roland, a local television personality, who attempted to disarm him.¹⁹⁰ During the struggle, Roland was struck in the head with the pistol and was declared a city hero based on his courage in the face of danger.¹⁹¹

Before formal *voir dire* and in defendant's absence, the trial judge questioned each of the ninety venire-persons as to how the

185. *Id.* at 123-24, 556 N.E.2d at 143, 556 N.Y.S.2d at 850 (citing *People v. Ciaccio*, 47 N.Y.2d 431, 391 N.E.2d 137, 418 N.Y.S.2d 371 (1979)).

186. *Id.* at 122-23, 556 N.E.2d at 142, 556 N.Y.S.2d at 849.

187. *Id.* at 123, 556 N.E.2d at 142, 556 N.Y.S.2d at 849.

188. 79 N.Y.2d 386, 592 N.E.2d 784, 583 N.Y.S.2d 176 (1992).

189. *Id.* at 390, 592 N.E.2d at 785, 583 N.Y.S.2d at 177.

190. *Id.*

191. *Id.*

extensive pretrial publicity, especially that covering Roland, would affect their ability to issue a fair verdict.¹⁹²

While the questions posed by the trial judge to prospective jurors in *Velasco* only dealt with qualifications of jurors in the general sense,¹⁹³ the questioning in *Sloan* delved into jurors' personal feelings and attitudes toward individuals who would play a major role in that very case.¹⁹⁴ The court found that the defendant's presence during such questioning could have a "substantial effect on [his] ability to defend against the charges."¹⁹⁵ Defendant's presence would enable him to observe the demeanor, biases, and hostilities of prospective jurors, thereby enabling defense counsel to exercise challenges for cause and peremptory challenges wisely.¹⁹⁶ Thus, the court found that defendant's presence was constitutionally mandated.¹⁹⁷

Further, the court stated that the defendant had a statutory right to be present because Criminal Procedure Law, section 260.20, requires his presence during the impaneling of the jury.¹⁹⁸

Therefore, the court held that defendant had a constitutional and statutory right to be present during side-bar questioning of prospective jurors regarding their ability to weigh the facts presented and testimony elicited at trial in a dispassionate manner in the face of pre-trial publicity.¹⁹⁹

However, the court did not discuss, in detail, defendant's statutory right to be present during the questioning of prospective jurors,²⁰⁰ but instead, assumed the right to be absolute, and focused on his constitutional right to be present. Clearly, the

192. *Id.* at 390-91, 592 N.E.2d at 785-86, 583 N.Y.S.2d at 177.

193. *See supra* text accompanying notes 146-61.

194. *Sloan*, 79 N.Y.2d at 392, 592 N.E.2d at 786-87, 583 N.Y.S.2d at 178-79.

195. *Id.* at 392, 592 N.E.2d at 786, 583 N.Y.S.2d at 178.

196. *Id.* at 392, 592 N.E.2d at 787, 583 N.Y.S.2d at 179.

197. *Id.* at 393, 592 N.E.2d at 787, 583 N.Y.S.2d at 179.

198. *Id.* at 391, 592 N.E.2d at 786, 583 N.Y.S.2d at 178. *See People v. Mullen*, 44 N.Y.2d 1, 4, 374 N.E.2d 369, 370, 403 N.Y.S.2d 470, 472 (1978) (impaneling of jury is an important trial proceeding making defendant's presence essential).

199. *Sloan*, 79 N.Y.2d at 393, 592 N.E.2d at 787, 583 N.Y.S.2d at 179.

200. *Id.* at 391-92, 592 N.E.2d at 786, 583 N.Y.S.2d at 178.

court was interested in distinguishing the *non-existent* right in *Velasco*²⁰¹ from the federal and New York constitutionally based right in the instant matter.

In 1992, the New York Court of Appeals held in *People v. Antommarchi*,²⁰² that the defendant was denied his statutory and constitutional right to be present during a material stage of the proceedings when the judge questioned prospective jurors about their ability to weigh evidence objectively and to hear testimony impartially in defendant's absence.²⁰³

In *Antommarchi*, the defendant was present when the court began to question prospective jurors from a questionnaire but was not present when several jurors were invited to approach the bench and speak with the judge about private biases.²⁰⁴ The discussions dealt with (1) whether certain jurors could assess the evidence dispassionately in light of the fact they had, themselves, been victims of crimes, (2) whether defendant was guilty merely because he had been charged with a crime, and (3) whether at least one juror could impartially analyze the testimony of police officers in spite of her numerous friendships with other officers.²⁰⁵

The court held that if the defendant was present he could have assisted in assessing the juror's "facial expressions, demeanor and other subliminal responses"²⁰⁶ and therefore reversed his conviction even though defense counsel failed to object when defendant was excluded from the side-bar discussions.²⁰⁷ Thus, the court held that defendant's presence was constitutionally mandated.

201. See *supra* text accompanying notes 146-61.

202. 80 N.Y.2d 247, 604 N.E.2d 95, 590 N.Y.S.2d 33 (1992).

203. *Id.* at 250, 604 N.E.2d at 97, 590 N.Y.S.2d at 35.

204. *Id.* at 250, 604 N.E.2d at 96-97, 590 N.Y.S.2d at 34-35.

205. *Id.* at 250, 604 N.E.2d at 97, 590 N.Y.S.2d at 35.

206. *Id.* (quoting *Sloan*, 79 N.Y.2d at 392, 592 N.E.2d at 787, 583 N.Y.S.2d at 179).

207. *Id.* See *People v. Dokes*, 79 N.Y.2d 656, 595 N.E.2d 836, 584 N.Y.S.2d 761 (1992) (holding that the fundamental nature of the right to be present allows defendant to raise a deprivation claim even though defense counsel made no objection during trial).

Furthermore, defendant, Antommarchi, had a statutory right to be present under *Sloan*, because the questioning of prospective jurors was a material part of the trial.²⁰⁸ Interestingly, *Sloan* had been decided six months earlier and had vindicated defendant's right to be present on nearly identical facts, yet the Appellate Division, First Department, which decided *Sloan*, still affirmed defendant's conviction in *Antommarchi*.

In the 1992 case of *People v. Mitchell*,²⁰⁹ the New York Court of Appeals was faced with the task of deciding whether the right to be present at side-bar *voir dire* proceedings concerning potential biases and other sensitive matters, should be applied retroactively or prospectively only.²¹⁰ The court held that the rule announced in *Antommarchi* should be limited to prospective application pursuant to the test developed in *People v. Pepper*.²¹¹

In deciding that *Pepper* would apply, the court rejected the competing view elucidated in *Griffith v. Kentucky*.²¹² In *Griffith*, the United States Supreme Court held that "a new [federal] constitutional rule is to be applied retroactively to all cases pending on direct review."²¹³

The *Mitchell* court turned *Antommarchi* on its head and ruled that defendants' right to be present at the questioning of prospective jurors was only *statutorily-based*.²¹⁴ Even though *Sloan* and *Antommarchi* both focused on defendant's constitutional right to be present and down-played the attendant statutory right, the court found that the statute's purview was

208. *Antommarchi*, 80 N.Y.2d at 250, 604 N.E.2d at 97, 590 N.Y.S.2d at 35.

209. 80 N.Y.2d 519, 606 N.E.2d 1381, 591 N.Y.S.2d 990 (1992).

210. *Id.* at 524, 606 N.E.2d at 1383, 591 N.Y.S.2d at 992.

211. 53 N.Y.2d 213, 423 N.E.2d 366, 440 N.Y.S.2d 889 (1981). The *Pepper* test enables courts to determine whether new rules should be applied retroactively through an evaluation of the following factors: "(1) the purpose to be served by the new rule, (2) the extent of reliance on the old rule, and (3) the effect on the administration of justice of retroactive application." *Mitchell*, 80 N.Y.2d at 525-26, 606 N.E.2d at 1384, 591 N.Y.S.2d at 993.

212. 479 U.S. 314 (1987).

213. *Id.* at 322-23.

214. *Mitchell*, 80 N.Y.2d at 526-27, 606 N.E.2d at 1384-85, 591 N.Y.S.2d at 993-94.

broader than both the Federal and New York State Constitutions.²¹⁵

Further, and more important, the court reasoned that the *Antommarchi* court's analysis proceeded in a general rather than fact-specific manner.²¹⁶ It involved none of the balancing process employed in constitutional determinations, but rather was based on a violation of Criminal Procedure Law section 260.20.²¹⁷ The *Antommarchi* court "did not evaluate the facts in light of the entire record nor did [it] make a determination that defendant's ability to defend against the charges had been substantially impaired."²¹⁸

Moreover, even if a constitutional analysis were employed in *Antommarchi*, the court explained, the right to be present at sidebar conferences is not constitutionally required because "exclusion from [side-bar conferences], which are not constitutionally required, would not substantially affect the ability to defend against the charge" and therefore, "defendant's presence is not essential to a fair trial."²¹⁹

Because the *Antommarchi* rule was not based on federal constitutional law, the court was free to apply New York's rule retroactively.²²⁰ Under the New York *Pepper* test, the first inquiry deals with the purpose of the new rule.²²¹ The court decided that the purpose of conferring on a defendant a right to be present at *voir dire* proceedings where jurors' biases and hostilities are examined, is "not to cure any constitutional infirmity inherent in the former practices, but rather to permit a defendant a more active role in the examination and selection of potential jurors."²²²

215. *Id.*

216. *Id.* at 527, 606 N.E.2d at 1385, 591 N.Y.S.2d at 994

217. *Id.*

218. *Id.*

219. *Id.* (citing *United States v. Washington*, 705 F.2d 489, 498 n.5 (D.C. Cir. 1983)).

220. *Id.*

221. *Pepper*, 53 N.Y.2d at 220, 423 N.E.2d at 369, 440 N.Y.S.2d at 892.

222. *Mitchell*, 80 N.Y.2d at 528, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995.

Under the second prong, the court ruled that *Antommarchi* should be applied prospectively because courts have relied significantly on the previous practice of examining prospective jurors without the defendant being present in order to speed up jury selection, prevent jurors from being embarrassed, and to promote juror openness.²²³ Third, the court found that the prospective application was necessary because a different application would delay countless pending depositions, which would substantially interfere with the dispensation of justice.²²⁴ The court found retroactive application unnecessary since no rule required defendants' presence nor called for automatic reversal in his absence, when potential jurors were asked about their biases and hostilities prior to the 1992 *Antommarchi* decision.²²⁵ Therefore, defendant has only a statutory right to be present at side-bar *voir dire* proceedings dealing with jurors' biases and hostilities and this right will only be applied prospectively.²²⁶

This decision is analytically flawed. First, the rule as announced in *Antommarchi* is clearly constitutionally based. In *Antommarchi*, the court made more of defendant's due process right to be present than of his statutory right to be present.²²⁷ More importantly, *Antommarchi* relied heavily on *Sloan*, which explicitly held that defendant had a constitutional right to be present at side-bar *voir dire* proceedings dealing with juror hostilities and biases.²²⁸ As was discussed above, the court in *Sloan* distinguished *Velasco*²²⁹ from the case before it and focused on the fact that the right was constitutionally based:

223. *Id.*

224. *Id.* at 529, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995.

225. *Id.*

226. *Id.*

227. *People v. Antommarchi*, 80 N.Y.2d 247, 250, 604 N.E.2d 95, 97, 590 N.Y.S.2d 33, 35 (1992). The court mentioned the statutory right parenthetically, while elaborating on the constitutional right in a whole paragraph. *Id.*

228. *Id.* (citing *People v. Sloan*, 79 N.Y.2d 386, 392, 592 N.E.2d 784, 787, 583 N.Y.S.2d 176, 179 (1992)).

229. *See supra* text accompanying notes 188-201.

[D]efendants' presence [at the side-bar *voir dire*] . . . could have had a substantial effect on their ability to defend against the charges . . . [because the questioning] delved into attitudes and feelings concerning some of the events and witnesses involved in the very case to be heard Defendants' presence at the questioning on such matters and the resultant *opportunity for them to assess the jurors' facial expressions, demeanor and other subliminal responses* as well as the manner and tone of their verbal replies so as to detect any indication of bias or hostility, could have been critical in making proper determinations in the important and sensitive matters.²³⁰

Antommarchi was decided on the same constitutional due process grounds as was demonstrated by the explicit reference to and the quotation of *Sloan's* due process analysis language: "[D]efendants are entitled to hear questions intended to search out a prospective juror's bias, hostility or predisposition to believe or discredit the testimony of potential witnesses and the venire person's answers so that they *have the opportunity to assess the juror's 'facial expressions, demeanor and other subliminal responses.'*"²³¹

Further, the *Antommarchi* court neither had to "evaluate the facts in light of the entire record nor . . . make a determination that defendant's ability to defend against the charges had been substantially impaired"²³² because *Sloan* was factually and legally on all fours with *Antommarchi*. It seems as though the court in *Antommarchi* decided that it was unnecessary to again set forth an entire constitutional due process analysis for the same factual situation because *Sloan* was decided only six months earlier.²³³ In other words, it seems as though the court felt the

230. *Sloan*, 79 N.Y.2d at 392, 592 N.E.2d at 786-87, 583 N.Y.S.2d 178-79 (emphasis added).

231. *Antommarchi*, 80 N.Y.2d at 250, 604 N.E.2d at 97, 590 N.Y.S.2d at 35 (quoting *Sloan*, 79 N.Y.2d at 392, 592 N.E.2d at 787, 583 N.Y.S.2d at 179) (emphasis added).

232. *Mitchell*, 80 N.Y.2d at 527, 606 N.E.2d at 1385, 591 N.Y.S.2d at 994.

233. *Sloan* dealt with the questioning of prospective jurors about their ability to weigh impartially the testimony of a widely known news reporter. 79 N.Y.2d at 390, 592 N.E.2d at 785, 583 N.Y.S.2d at 177. *Antommarchi* dealt

right to be present at *voir dire* proceedings was so obviously rooted in the constitution that the unanimous court found it useless and the benefit but a shadow to rehash what had been deemed a foregone conclusion in the previous term.

The *Mitchell* court also cited to *United States v. Washington*²³⁴ where the United States Court of Appeals for the District of Columbia held that the defendant had a statutory right to be present during a bench portion of *voir dire*.²³⁵ The *Mitchell* court relied on *Washington* when it stated that “[a]lthough presence at side-bar conferences would enable defendant to glean information from jurors’ responses and demeanor essential to the exercise of peremptory challenges, exclusion from those proceedings, *which are not constitutionally required*, would not substantially affect the ability to defend against the charge.”²³⁶

What did New York’s Court of Appeals mean? Did it mean that defendant’s presence was not required because the ability to exercise peremptory challenges was not based in the Federal Constitution? Or did it mean that defendant’s presence was not required because the right to be present during the exercise of peremptory challenges was not based in the Federal Constitution?²³⁷

with the questioning of prospective jurors regarding their ability to objectively consider the testimony of police officers. 80 N.Y.2d at 250, 604 N.E.2d at 97, 590 N.Y.S.2d at 35. This factual distinction is irrelevant when the real issue in both cases is whether defendant’s presence was constitutionally required when jurors’ biases were examined. In each case and in any case the court or counsel examines jurors’ biases and hostilities. Defendants must be present during juror questioning regardless of whether the biases stem from police officers or from reporters. As such, it was unnecessary, in *Antommarchi*, to factually analyze whether jurors would be able or unable to objectively weigh testimony from police officers as compared to testimony from reporters.

234. 705 F.2d 489 (D.C. Cir. 1983).

235. *Id.* at 497.

236. *Mitchell*, 80 N.Y.2d at 527, 606 N.E.2d at 1385, 591 N.Y.S.2d at 994 (emphasis added).

237. See *People v. Ciaccio*, 47 N.Y.2d 431, 436, 391 N.E.2d 1347, 1349, 418 N.Y.S.2d 371, 373 (1979); *People v. Mullen*, 44 N.Y.2d 1, 4, 374 N.E.2d 369, 370, 403 N.Y.S.2d 470, 472 (1978); *Maurer v. People*, 43 N.Y. 1, 3 (1870).

It matters not, because the Federal Constitution, as construed under *Snyder* and its New York progeny, does not distinguish between peremptory challenges and challenges for cause. Both are subsumed within the proceeding entitled "impaneling of the jury."²³⁸ Thus, the defendant's presence is constitutionally mandated because his contribution could lend to the fairness of the proceeding.²³⁹ While *United States v. Washington* is not the constitutional baseline in New York, *Snyder* is.

Finally, *Mitchell* introduces the counterintuitive notion that a right can be fundamental and statutory, simultaneously.²⁴⁰ Clearly, the "defendant's right to be present is considered to be a fundamental right."²⁴¹ Since this right is fundamental, a defendant's claim is preserved for appeal even in the absence of an objection.²⁴² In *Mitchell*, the right to be present was relegated to statutory protection, the violation nevertheless merited reversal without regard to whether an objection was made.²⁴³

However, in New York State, when a defendant fails to object to a violation of a statutory right, that right is waived and therefore is not preserved for appeal.²⁴⁴ So, for instance, when a defendant fails to object to a prosecutor's non-compliance with the New York speedy trial statute, defendant effectively waives

238. See *Ciaccio*, 47 N.Y.2d at 436, 391 N.E.2d at 1349, 418 N.Y.S.2d at 373; *Mullen*, 44 N.Y.2d at 4, 374 N.E.2d at 370, 403 N.Y.S.2d at 472; *Maurer*, 43 N.Y. at 3.

239. See *Mullen*, 44 N.Y.2d at 4, 374 N.E.2d at 370, 403 N.Y.S.2d at 472; *Maurer*, 43 N.Y. at 3.

240. *Mitchell*, 80 N.Y.2d at 526-27, 606 N.E.2d at 1384-85, 591 N.Y.S.2d at 993-94.

241. N.Y. CRIM. PROC. LAW § 260.20 practice commentary (McKinney 1993) (citing *People v. Parker*, 57 N.Y.2d 136, 440 N.E.2d 1313, 454 N.Y.S.2d 967 (1982)).

242. *Antommarchi*, 80 N.Y.2d at 520, 604 N.E.2d at 1397, 590 N.Y.S.2d at 35 (citation omitted).

243. *Mitchell*, 80 N.Y.2d at 527, 606 N.E.2d at 1385, 591 N.Y.S.2d at 994.

244. See, e.g., *People v. Suarez*, 55 N.Y.2d 940, 43 N.E.2d 245, 49 N.Y.S.2d 176 (1982).

his statutory speedy trial right when he pleads guilty.²⁴⁵ Conversely, a claim of a constitutional violation need not be raised during trial and will still be preserved for appellate review.²⁴⁶

Since it is unlikely that *Dokes* or *Mitchell* will be overturned, the court has created an analytical aberration -- a "constatutory" right. This right is firmly rooted in the constitution, yet arbitrarily found to be statutorily-based so that courts can achieve three purposes: (1) prevent time consuming and burdensome retroactivity litigation, (2) phase out the use of a right whose purpose is thought to be lacking in today's judicial proceedings,²⁴⁷ and (3) interpret the State Constitution without federal intervention.²⁴⁸

By deeming the right to be present as statutory in the context of *voir dire* proceedings, the court has prevented a myriad of criminal appeals. As mentioned above, if a right is not rooted in the Federal Constitution, questions of retroactivity will be

245. See *id.* at 941, 434 N.E.2d at 245, 449 N.Y.S.2d at 176; see also *People v. Dodson*, 48 N.Y.2d 36, 39, 396 N.E.2d 194, 195, 421 N.Y.S.2d 47, 48 (1979) (citation omitted).

246. See *People v. Fuller*, 57 N.Y.2d 152, 159 n.7, 411 N.E.2d 563, 566 n.7, 455 N.Y.S.2d 253, 256 n.7 (1982) (holding a claim based on New York constitutional speedy trial right is not waived even if the delay occurred before the onset of criminal proceedings); see also *People v. Michael*, 48 N.Y.2d 1, 7, 394 N.E.2d 1134, 1137, 420 N.Y.S.2d 371, 374 (1979) (concluding claim of constitutional double jeopardy is preserved, indefinitely, for appellate review).

247. See *supra* text accompanying note 89; see also *supra* text accompanying note 37.

248. Case law in this area demonstrates that the Federal and New York State Constitutions' due process clauses parallel each other. For example, when a defendant argued that his due process rights under *Snyder* were violated, the New York Court of Appeals parenthetically cited to article I, section 6 of the New York Constitution. See, e.g., *Ciccio*, 47 N.Y.2d at 436, 391 N.E.2d at 1349, 418 N.Y.S.2d at 373. As such, in order to escape federal constitutional tenets, the court has, and will gradually continue to confine aspects of the right to be present to statute even though the right stemmed from due process concerns. While in statutory form, the court and the legislature have more power to control the scope of the right without federal constitutional cases indirectly enlarging its purview in New York.

decided under New York's *Pepper* test.²⁴⁹ Under the third factor, the effect on the administration of justice of retroactive application, would be burdensome to say the least. Since "the *voir dire* process is involved in every jury trial [then] most if not all of the judgments of conviction in the cases currently on appeal [would] present an *Antommarchi* question."²⁵⁰ Courts would be required to hold hearings to "reconstruct a record of conversations and questions, which, at the time, none of the participants objected to or deemed of particular significance. Conceivably, new trials would be required in all of the substantial number of cases in which no record of the *voir dire* was made."²⁵¹

Mitchell conserved precious judicial resources, but was this a bootstrapping argument? Under the first prong of the *Pepper* test, the court found the "purpose of the rule [was] not to cure any constitutional infirmity inherent in former practices. . . ." ²⁵² However, *Antommarchi*, backed by *Sloan*, did cure a constitutional infirmity. Defendants are now allowed to be present while jurors are questioned about their biases and hostilities.²⁵³ The constitution requires the defendant's presence because it contributes to the fairness of the proceeding.²⁵⁴ It makes no difference that defendants are no longer tried by walking on hot plowshares.²⁵⁵ Presently, it has been deemed an unconstitutional abuse to question jurors about their ability to be impartial in the defendant's absence. As construed, the

249. See *supra* notes 86 and 211 and accompanying text.

250. *Mitchell*, 80 N.Y.S.2d at 529, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995.

251. *Id.*

252. *Id.* at 528, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995.

253. See *Antommarchi*, 80 N.Y.S.2d at 250, 604 N.E.2d at 97, 540 N.Y.S.2d at 35.

254. *Id.* See *Sloan*, 79 N.Y.S.2d at 392, 592 N.E.2d at 786-87, 583 N.Y.S.2d at 178-79. In *Sloan*, the court stated that defendant's presence while jurors are questioned is "critical in making proper determinations in the important and sensitive matters relating to challenges for cause and peremptories." *Id.*

255. See *supra* note 33.

constitution never before prohibited defendant's exclusion from *voir dire*. Such exclusion was the constitutional infirmity.

Under the second prong of the *Pepper* test, the *Mitchell* court held that courts have "substantially relied on the prior practice . . . [of] examin[ing] prospective jurors in defendants' absence."²⁵⁶ However, the *Mitchell* court noted that some courts will allow a defendant to attend the bench *voir dire* if he formally protests exclusion.²⁵⁷ Therefore, there was not substantial reliance on the former practice -- some judges permitted a defendant's presence while others excluded him. It appears that *Antommarchi* vested in defendant, a mere statutory right to be present at side-bar *voir dire* in order to apply *Pepper*. Under *Pepper*, the right was found to apply prospectively, only for the purpose of expediting the administration of justice.²⁵⁸

Finally, in the 1993 case of *People v. Favor*,²⁵⁹ the court of appeals wrestled with the issue of whether a defendant's right to be present at a *Sandoval* hearing²⁶⁰ should be applied retroactively or prospectively.²⁶¹ In *People v. Dokes*,²⁶² the court found that the right to be present extended to *Sandoval* hearings as long as defendant's presence would not be "superfluous."²⁶³ Further, defendant did not need to raise an objection of denial of his right to be present in order to preserve the record for appeal.²⁶⁴

In the *Favor* case, defendant was absent from an *in camera* conference held to determine whether he would be subject to

256. *Mitchell*, 80 N.Y.2d at 528, 606 N.E.2d at 1386, 591 N.Y.S.2d at 995.

257. *Id.*

258. *Id.*

259. 82 N.Y.2d 254, 624 N.E.2d 631, 604 N.Y.S.2d 494 (1993).

260. *See People v. Sandoval*, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974) (holding that a trial judge may, in his discretion, make an advance ruling as to the prosecutor's use of prior criminal convictions or prior immoral acts in order to impeach the defendant witness' credibility).

261. *Favor*, 82 N.Y.2d at 258-59, 624 N.E.2d at 633, 604 N.Y.S.2d at 496.

262. 79 N.Y.2d 656, 595 N.E.2d 836, 584 N.Y.S.2d 761 (1992).

263. *Id.* at 662, 595 N.E.2d at 840, 584 N.Y.S.2d at 765.

264. *Id.*

cross-examination for his prior convictions and bad acts in the event he chose to testify.²⁶⁵ The court found this exclusion to be a clear violation of the *Dokes* rule because defendant was denied the opportunity to meaningfully participate in the colloquy, the results of which were not wholly favorable to him.²⁶⁶

Before deciding whether defendant's right to be present was violated, the court first had to determine whether *Dokes* would apply prospectively or retroactively.²⁶⁷ Rejecting defendant's argument that his right to be present at the *Sandoval* hearing was rooted in the United States Constitution, the court applied the *Pepper* test²⁶⁸ to determine whether a "new rule of *state law* need not automatically be applied to all cases currently in the direct appellate pipeline."²⁶⁹ Even though *Dokes* referred to due process notions, the court found that *Dokes* was ultimately decided under Criminal Procedure Law section 260.20.²⁷⁰

Contrary to what the court said in *Favor*, *Dokes* unquestionably was a due process decision. The *Dokes* court did not speak to the right applying, absolutely, regardless of the contribution that defendant could offer to the proceeding.²⁷¹ Conversely, the entire *Dokes* decision speaks of the necessity of defendant's presence, noting, for instance, "defendant alone may be able to inform his attorney of inconsistencies, errors and falsities in the testimony of the officers or other witnesses."²⁷² The court emphatically concluded that a "key factor" in determining

265. *Favor*, 82 N.Y.2d at 259, 624 N.E.2d at 633, 604 N.Y.S.2d at 496.

266. *Id.* at 267, 624 N.E.2d at 639, 604 N.Y.S.2d at 502.

267. *Id.* at 262, 624 N.E.2d at 636, 604 N.Y.S.2d at 499.

268. *Id.* at 262, 624 N.E.2d at 635-36, 604 N.Y.S.2d at 498-99. *See supra* notes 86 and 211 for the three prong *Pepper* test.

269. *Favor*, 82 N.Y.2d at 262, 624 N.E.2d at 635, 604 N.Y.S.2d at 498 (citing *People v. Mitchell*, 80 N.Y.2d 519, 606 N.E.2d 1381, 591 N.Y.S.2d 990 (1992)).

270. *Id.* (citing *People v. Dokes*, 79 N.Y.2d 656, 659, 595 N.E.2d 836, 838, 584 N.Y.S.2d 761, 763 (1992)). *See* N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1993) (conferring on defendants a right to be "personally present during the trial of an indictment. . .").

271. *See* N.Y. CRIM. PROC. LAW § 260.20 practice commentary (McKinney 1993).

272. *Dokes*, 79 N.Y.2d at 659, 595 N.E.2d at 838, 584 N.Y.S.2d at 763.

whether a defendant has a right to be present during a particular proceeding was “whether the proceeding involved factual matters about which defendant might have peculiar knowledge that would be useful in advancing the defendant’s or countering the People’s position.”²⁷³ This is the *Snyder* analysis -- defendant’s knowledge could help him defend against the charges by advancing his position.²⁷⁴

Applying *Snyder* to the facts in *Dokes*, the court concluded that “[t]he [trial] court’s ruling on the permissible scope of cross-examination about [defendant’s seven prior charges could be] the pivotal factor in the defendant’s determination whether to testify. . . . [So] it cannot be said on this record that defendant’s presence ‘would have been useless, or the benefit of a shadow.’”²⁷⁵ The only mention of the statute comes at the very end -- “since the *contention* concerns the right conferred by CPL 260, defendant’s failure to object is not fatal to his claim.”²⁷⁶

Does that mean that because defendant pigeon-holed his claim in the statute, the court would limit its review to whether the deprivation fell within the statute’s purview? -- Or, does that mean that the right is only statutory in nature? Given the extensiveness of the due process analysis it is not unreasonable to conclude that the former applies -- that the court limited review to the statute because the contention was confined therein.

Regardless of whether one finds the foregoing persuasive, *Favor* found the rule, as announced in *Dokes*, to be merely statutory in nature. Since state courts are permitted under Supreme Court precedent to determine the retroactivity of their own decisions,²⁷⁷ and *Dokes* rendered the right to be present

273. *Id.* at 660, 595 N.E.2d at 839, 584 N.Y.S.2d at 764. The “key factor” was drawn from *People v. Anderson*, 16 N.Y.2d 282, 213 N.E.2d 445, 266 N.Y.S.2d 110 (1965) and *People v. Turaine*, 78 N.Y.2d 871, 577 N.E.2d 55, 573 N.Y.S.2d 64 (1991) -- both of which are due process decisions.

274. *Snyder*, 291 U.S. at 105-06.

275. *Dokes*, 79 N.Y.2d at 662, 595 N.E.2d at 838, 584 N.Y.S.2d at 763 (citations omitted).

276. *Id.*

277. *Favor*, 82 N.Y.2d at 261-62, 624 N.E.2d at 635, 604 N.Y.S.2d at 498 (citing *American Trucking Assn’s v. Smith*, 496 U.S. 167, 177 (1990)).

merely statutory in nature, it is subject to balancing under *Pepper*.²⁷⁸

Under *Pepper*, the right to be present in the context of a *Sandoval* hearing was to be applied retroactively.²⁷⁹ The purpose of the *Dokes* rule, in applying the first prong of the test, was “to enable the defendant to contribute his or her peculiar knowledge of the relevant facts” to the *Sandoval* hearing in order to make the determination more accurate.²⁸⁰

The second prong under *Pepper*, the extent of prior reliance on the old rule, which excluded defendants from *Sandoval* hearings, similarly called for retroactive application.²⁸¹ This was due to the fact that there was no consistent rule from the various appellate division departments “approving the defendant’s exclusion from a *Sandoval* hearing.”²⁸²

The third and final *Pepper* factor, the impact of the new rule on the administration of justice, “does not furnish a sound basis for withholding application of *Dokes* to all cases currently pending on direct appeal . . . [because] there is simply no indication in the parties’ submissions that retroactive application of *Dokes* could lead to wholesale reversals.”²⁸³

Favor differs from *Mitchell*, which limited the rule requiring a defendant’s presence during side-bar *voir dire* conferences to prospective application, because in *Mitchell*, defendant’s exclusion was nearly universal and effectuation of the new rule

Mitchell expanded on this concept where the New York Court of Appeals concluded “[t]he Supreme Court has no concern with the uniformity of our law and if only a local question is presented, the ‘state courts generally have the authority to determine the retroactivity of their own decisions.’” *People v. Mitchell*, 80 N.Y.2d 519, 526, 606 N.E.2d 1381, 1384 591 N.Y.S.2d 990, 993 (1992) (quoting *American Trucking Assn’s*, 496 U.S. at 177).

278. *Favor*, 82 N.Y.2d at 262-63, 624 N.E.2d at 635-36, 604 N.Y.S.2d at 498-99.

279. *Id.* at 265, 624 N.E.2d at 637, 604 N.Y.S.2d at 500.

280. *Id.*

281. *Id.* at 265, 624 N.E.2d at 638, 604 N.Y.S.2d at 501.

282. *Id.*

283. *Id.* at 266, 624 N.E.2d at 638, 604 N.Y.S.2d at 501.

would have required a reconstruction hearing.²⁸⁴ As such, the rule requiring a defendant's presence at *Sandoval* proceedings was found to be merely statutory in nature but would be applied in a retroactive fashion.

IV. DEFENDANT CAN VOLUNTARILY OR INVOLUNTARILY WAIVE OR FORFEIT THE RIGHT TO BE PRESENT

Although a New York State criminal defendant has a constitutional and statutory right to be present at the beginning and during the trial, this right can be waived or forfeited by a defendant who purposefully absents himself from a known proceeding.

In the seminal case of *People v. Parker*,²⁸⁵ the New York Court of Appeals held that a defendant had to be expressly warned of the consequences of the failure to return to court before his absence would constitute a waiver of the right to be present.²⁸⁶ *Parker* was distinguished in *People v. Sanchez*,²⁸⁷ where the court held that an express warning was not constitutionally required.²⁸⁸ The *Sanchez* court adopted the United States Supreme Court's test as enunciated in *Taylor v. United States*:²⁸⁹

[I]f a defendant at liberty remains away during his trial the court may proceed provided it is clearly established that his absence is voluntary. He must be aware of the processes taking place, of

284. *Id.* *Favor's* ruling of retroactivity under *Pepper's* third prong gives credence to the bootstrapping argument offered earlier. See *supra* text accompanying note 252. If the burden on the administration of justice is negligible, the court is unlikely to limit a new rule to prospective application. It appears however, if the burden is likely to be high, the court will limit application regardless of the strength of the other two prongs.

285. 57 N.Y.2d 136, 440 N.E.2d 1313, 454 N.Y.S.2d 967 (1982).

286. *Id.* at 141, 440 N.E.2d at 1316, 454 N.Y.S.2d at 970.

287. 65 N.Y.2d 436, 482 N.E.2d 56, 492 N.Y.S.2d 577 (1985).

288. *Id.* at 440, 482 N.E.2d at 57, 492 N.Y.S.2d at 578.

289. 414 U.S. 17 (1973).

his right and of his obligation to be present, and he must have no sound reason for remaining away.²⁹⁰

Further, the *Sanchez* court adopted the rationale underlying the test enunciated in *Diaz v. United States*:²⁹¹

The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of courts and juries and turn them into a solemn farce. . . . Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong.²⁹²

The real issue in these cases, however, is forfeiture. *Forfeiture* of the right to be present “occurs by operation of law and as a matter of public policy,” while a *waiver* can only be found to exist after an “evaluation of defendant’s state of mind.”²⁹³ The key to determining whether a defendant effectively *forfeited* his right to be present is whether he “unambiguously indicate[d] a defiance of the processes of law.”²⁹⁴

Thus, the New York rule, as enunciated in *Sanchez*, provides that if a defendant deliberately absents himself before or during trial, or at the time of sentencing, he *forfeits* his right to be present regardless of whether the court expressly warns him of the ramifications of his failure to appear, and regardless of whether he is cognizant that the trial or other proceeding will continue in his absence.²⁹⁵

In *People v. Smith*,²⁹⁶ the judge considered and reviewed the record to assess defendant’s actions in absenting himself.²⁹⁷ No

290. *Sanchez*, 65 N.Y.2d at 443, 482 N.E.2d at 59, 492 N.Y.S.2d at 580 (quoting *Taylor*, 414 U.S. at 19-20).

291. 223 U.S. 442 (1912).

292. *Sanchez*, 65 N.Y.2d at 443, 482 N.E.2d at 59, 492 N.Y.S.2d at 580 (quoting *Diaz*, 223 U.S. at 458).

293. *Id.* at 443-44 n.*, 482 N.E.2d at 59 n.*, 492 N.Y.S.2d at 580 n.* (citations omitted).

294. *Id.* at 444, 482 N.E.2d at 59, 492 N.Y.S.2d at 580.

295. *Id.* at 443-44, 482 N.E.2d at 59-60, 492 N.Y.S.2d at 580-81.

296. 68 N.Y.2d 725, 497 N.E.2d 685, 506 N.Y.S.2d 318 (1986).

forfeiture was found because the defendant did not leave the courtroom after the trial had begun, nor did he hide once informed that his trial was to commence.²⁹⁸ Rather, the defendant merely failed to appear after being informed several days earlier about the date of trial.²⁹⁹

CONCLUSION

In times gone by, a defendant's right to be present was necessary to "prevent [the evil of] secret trials in which the accused was often arrested and executed without a hearing and without any knowledge as to who were his accusers, or the evidence upon which they relied."³⁰⁰ Of course, as centuries passed, the purposes for defendant's presence changed. In ancient times the defendant's presence was necessary for the rendition of the verdict. In the middle ages, the defendant's presence was required because otherwise he could not endure the physical trials by ordeal.

As the common law developed in England, courts could not obtain jurisdiction over a defendant unless he was present at trial. Moreover, defendant was not entitled to counsel, so regardless of how insignificant a trial step was, his presence was mandated.

Presently in New York, the right to be present has been found in the New York State Constitution, and codified in the laws of New York.³⁰¹ A defendant's right to be present is required at *Sandoval* hearings, *voir dire* conferences dealing with juror biases or hostilities, summations, taking of evidence, rendition and recordation of the verdict, instructions to the jury, and a myriad of other trial stages where the defendant could aid in his defense. Defendant's presence is not required where his contribution to the fairness of the proceeding would be minimal. Therefore, his presence would be useless at discussions between the court and

297. *Id.* at 726-27, 497 N.E.2d at 685, 506 N.Y.S.2d 318-19.

298. *Id.*

299. *Id.*

300. *People v. Thorn*, 156 N.Y. 286, 296, 50 N.E. 947, 951 (1898).

301. N.Y. CONST. art. 1, § 6.

counsel dealing only with matters of substantive law or procedure.

The trend in New York has been to transform, a defendant's constitutional right to be present, into a mere statutory right rooted in due process.³⁰² Such a "constatutory" transformation is an analytical anomaly. In many instances, the New York Court of Appeals has clearly found the right to be constitutionally based, and then in one quick sentence, confines the right to statute.

The court of appeals has done so for many important reasons. First, the court wants to be free to interpret its constitution as it sees fit. Because the right can be "found" in the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, it is not surprising that there has been much litigation concerning the scope of the right for defendants accused of federal crimes.³⁰³ New York defendants have adopted the federal arguments and have incorporated them into New York State Constitutional due process arguments.³⁰⁴

However, once the court of appeals confines the right in a given situation to statute -- a statute which at first blush seems to give heightened protection to the defendant -- the New York courts are immunized from the influences of federal case law. Although federal due process cases interpreting the right to be present are highly persuasive authority for state courts interpreting state due process arguments, federal cases are not binding on New York State courts when they are passing on a New York statutory right.³⁰⁵ However, the right retains its

302. See *supra* note 63 (listing New York cases that the decided whether or not a defendant has a right to be present based upon a statutory claim).

303. See *supra* note 25 (listing cases involving the Supreme Court's interpretation of the right to be present).

304. See, e.g., *People v. Morales*, 80 N.Y.2d 450, 606 N.E.2d 953, 591 N.Y.S.2d 825 (1992) (holding that the New York Court of Appeals has adopted the Supreme Court's due process analysis set forth in *Snyder*); see also *People v. Ciaccio*, 47 N.Y.2d 431, 91 N.E.2d 1347, 418 N.Y.S.2d 371 (1979); *Lupo v. Fay*, 13 N.Y.2d 253, 196 N.E.2d 56, 246 N.Y.S.2d 399 (1963); *People ex. rel. Bartlam v. Murphy*, 9 N.Y.2d 550, 175 N.E.2d 336, 215 N.Y.S.2d 753 (1961).

305. See, e.g., *People v. Mitchell*, 80 N.Y.2d 519, 606 N.E.2d 1381, 591 N.Y.S.2d 990 (1992).

fundamental nature even though it now rests in statute and courts will continue to employ a due process analysis to gauge its purview.

Inextricably connected with the court's confinement of the right to statute, is the court's interest in the administration of justice.³⁰⁶ Finding the right to be merely statutory in nature, immunizes the right from automatic retroactive application under federal law.³⁰⁷ If the burden on the administration of justice is heavy, the court is extremely interested in limiting the right to prospective application.

Aside from confining the right to be present to statute in order to maintain state sovereignty, the court has relegated the right to statute because its importance has faded over time.³⁰⁸ Clearly in Sir Helmsley's narrative,³⁰⁹ his presence at trial was mandatory because without it, he would forever be an outlaw while having never been found guilty. Further, no one else could endure his fire ordeal which was his punishment for murder.

The *Favor* case³¹⁰ was very different from the Helmsley hypothetical. Favor had an attorney who could represent him during the *Sandoval* hearing at which life or death was not the immediate issue.

In other contexts outside the *Sandoval* situation, the court of appeals indicates that a defendant's presence serves only a symbolic function as the Helmsley abuses have all but disappeared from our system. As a result, the right can be

306. See *People v. Pepper*, 53 N.Y.2d 213, 423 N.E.2d 366, 440 N.Y.S.2d 889 (1981) (stating that the third prong of the test that decides whether a new rule should be applied retroactively is the effect on the administration of justice of retroactive application); see also *supra* notes 86 and 211 (stating the three prongs of the *Pepper* test).

307. *Mitchell*, 80 N.Y.2d at 527, 606 N.E.2d at 1385, 591 N.Y.S.2d at 994.

308. See *Morales*, 80 N.Y.2d at 456, 606 N.E.2d at 957, 591 N.Y.S.2d at 829; see also *Harris*, 76 N.Y.2d at 812, 559 N.E.2d at 662, 559 N.Y.S.2d at 968.

309. See *supra* introduction.

310. See *supra* text accompanying notes 8-21; see also *supra* text accompanying notes 259-84.

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regulated by statute and still afford defendant the necessary fairness.

So where does this leave the right to be present in New York? The right is left in a state of flux — it is a due process right under a statutory aegis. It is a constatutory right whose purview will invariably be decreased. A defendant's presence will always contribute to the fairness of a certain, limited number of proceedings, while in other proceedings, his presence will be deemed useless; a benefit, but a shadow. As more proceedings fall under the protection of the statute, less room will be left for the creation of constitutional arguments. Nevertheless, the right to be present will remain vital even in the absence of past criminal justice system abuses.

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