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REPORT ON LEGISLATION BY THE CRIMINAL COURTS COMMITTEE AND THE CRIMINAL JUSTICE OPERATIONS COMMITTEE

A.7751 **M. of A. Weprin**
S.6351 **Sen. Bailey**

AN ACT to amend the criminal procedure law, in relation to jury deliberation requirements (Office of Court Administration (Internal # 54 - 2019))

THIS BILL IS APPROVED

This report is respectfully submitted by the New York City Bar Association's (the "City Bar") Criminal Courts Committee and Criminal Justice Operations Committee. The City Bar is an organization of over 24,000 lawyers and judges dedicated to improving the administration of justice. The City Bar submits this report in support of the proposed amendment to New York Criminal Procedure Law § 310.10(2) to afford judges greater statutory authority to manage deliberations.

I. BACKGROUND

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

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

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

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

required since the statute which governs recesses in deliberations has no express authority for a judge to separate a deliberating jury for a longer period, even in emergency situations.

Depriving judges of much-needed statutory authority to extend recesses in deliberations under limited circumstances is an unnecessary restraint on judicial discretion. Although case law in New York supports the notion that an unplanned, extended separation of deliberating jurors does not warrant a mistrial or reversal on appeal absent a showing of prejudice by the defendant, courts are understandably reluctant to act in contravention of the statute's plain language. However, such a restraint does nothing to protect the rights of a criminal defendant. Consequently, this report supports an amendment to CPL § 310.10(2) to give judges express statutory authority to extend recesses in deliberations beyond the current "24-hour" period. This report proceeds as follows: Part II reviews the adoption and evolution of CPL § 310.10(2); Part III reviews the requirements of CPL § 310.10(2) in its current form; Part IV reviews prior attempts to amend the law; and Part V supports legislation pending to amend CPL § 310.10(2).[4]

II. ADOPTION AND EVOLUTION OF CPL § 310.10(2)

Until 1995, New York law required juries to be sequestered from the time they began deliberations until they reached a verdict.[5] If no verdict was reached before the end of a court day, jurors were taken to hotels and returned to court the next morning to continue their deliberations. In 1995, the mandatory sequestration rule was relaxed with the enactment of CPL § 310.10(2).[6] The initial version of CPL § 310.10(2) did not apply to the most serious cases, including murder and other violent felonies.[7] The purpose of limiting this exception to mandatory sequestration to less serious cases was to permit the Office of Court Administration, at the direction of the Legislature, to study the effects of the now authorized separations. Between July 5, 1995 and February 14, 1997, the Office of Court Administration collected data from all criminal trials in which the jury deliberated, regardless of whether the jury was sequestered.[8] Juries separated during deliberations in 688 cases and only one mistrial was granted for reasons relating to the jury's separation during deliberations.[9] Further, there was no appreciable difference between the time a separated jury deliberated and the time a sequestered

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[4] *See, e.g.*, Michael Pasinkoff, *Resolving the Conflict Between the Temporarily Unavailable Juror and New York's Mandatory Limit on the Separation of Jurors During Deliberations*, 92 St. John's L. Rev. 187 (2018)

[5] 1970 N.Y. Laws 2281 (enacted as N.Y. CRIM. PROC. LAW § 310.10).

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

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

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

[9] *Id*. at 5–6.

jury deliberated.[10] The study ultimately concluded that the "experiment permitting deliberating juries in criminal trials to separate [had] been successful."[11] Jurors no longer had to bear the burden of sequestration, and "[t]he predicted negative impact—more mistrials and increased costs—simply did not occur."[12] Accordingly, in 2001, CPL 310.10(2) was subsequently amended to apply to all cases, providing, in relevant part:

> At any time after the jury has been charged or commenced its deliberations, and after notice to the parties and affording such parties an opportunity to be heard on the record outside of the presence of the jury, the court may declare the deliberations to be in recess and may thereupon direct the jury to suspend its deliberations and to separate for a reasonable period of time to be specified by the court, not to exceed twenty-four hours, except that in the case of a Saturday, Sunday or holiday, such separation may extend beyond such twenty-four hour period. Before each recess, the court must admonish the jury as provided in § 270.40 of this chapter and direct it not to resume its deliberations until all twelve jurors have reassembled in the designated place at the termination of the declared recess.[13]

III. REQUIREMENTS OF CPL § 310.10(2)

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

The statute does not control until the jury begins deliberations, even if all the evidence has been submitted, the parties have delivered summations, and the court has given most, but not all, of its final instructions. Until deliberations have begun, recesses are controlled by CPL §

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[10] *See generally id.*

[11] *Id.* at 16.

[12] *Id.*

[13] N.Y. CRIM. PROC. LAW § 310.10(2). This statutory provision is a limited exception to the mandatory sequestration provision of CPL § 310.10(1), which is still in effect. Under CPL § 310.10(1), a jury, once deliberations begin, must, "except as otherwise provided in [CPL § 310.10(2)] be continuously kept together under the supervision of a court officer or court officers." During each of the recesses, the trial court is required to give to the jury certain instructions designed to ensure that it does not resume deliberations until all twelve jurors are back in the jury room, and that it is not improperly exposed to any information about the case that was not presented in court. *Id.* §§ 310.10(2); 270.40.

270.45, which grants the judge unfettered discretion and sets no time limit. Thus, a trial judge who is otherwise prepared to charge a jury on a Monday morning, but who anticipates juror unavailability on Tuesday, can delay the charge and the start of deliberations until Wednesday morning—after the potential scheduling issue has passed.

The plain language of CPL 310.10(2) does not grant judges any express authority to react to unexpected, yet temporary instances of juror unavailability.[14] Consequently, the statute in its current form creates a variety of problems the most pressing of which are mistrials that occur when a juror becomes temporarily unavailable during deliberations. The statutory mandate has other consequences, such as assigning another judge to cover a trial judge's calendar day, scheduling jury deliberations during a calendar day (when responding to jury notes can be difficult and time consuming),[15] and ordering jurors to appear in court even when they have a serious personal emergency.[16]

IV. PRIOR ATTEMPTS TO AMEND CPL § 310.10(2)

Efforts have been made to amend CPL § 310.10(2) to permit judges, when appropriate, to adjourn deliberations for more than 24 hours. In 2016, the Advisory Committee on Criminal Law and Procedure issued a report recommending the amendment of CPL § 310.10 to permit separation of jurors for a longer period of time.[17] The proposed law "retain[ed] the twenty-four hour limit in most cases, but provid[ed], 'upon good cause shown, an additional period not to exceed 48 hours.'"[18] The Committee considered, but ultimately rejected, removing the time restraint altogether. This proposal was introduced in the New York State Legislature in 2017 as A.7448/S.6562 and authorized a separation for up to 72 hours. That proposal passed the Assembly on June 21, 2017 and again on March 22, 2018. The Codes Committee in the Senate unanimoulsy voted to move the bill to the Senate Floor. However, the bill was never called for a floor vote before the Senate.

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[14] At least one trial judge has held that the statute is not violated when deliberations do not resume within the statutory period because of the unforeseen absence of a juror due to illness or other exigency. In *People v. Taylor*, 32 Misc. 3d 546, 548, 926 N.Y.S.2d 815, 817 (Sup. Ct. 2011), a juror was temporarily hospitalized during deliberations. The following day, the juror contacted the court and stated that "he was anxious to return to continue deliberations." Id. at 817. The trial judge denied the defendant's application for a mistrial, holding that the restrictions of CPL § 310.10(2) were only meant to limit planned adjournments, "not to require a mistrial when an unavoidable event or other emergency occurs." Id. at 554, N.Y.S.2d at 821. However, the defendant was ultimately acquitted and thus no appellate court had the opportunity to review the trial judge's analysis.

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

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

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

[18] *Id*

V. SUPPORT FOR LEGISLATION AMENDING CPL 310.10(2)

The City Bar supports the approach of the proposed legislation, which would amend CPL § 310.10(2) to read as follows:

> At any time after the jury has been charged or commenced its deliberations, and after notice to the parties and affording such parties an opportunity to be heard on the record outside of the presence of the jury, the court may declare the deliberations to be in recess and may thereupon direct the jury to suspend its deliberations and to separate for a reasonable period of time to be specified by the court not lasting beyond close of business on the second day following such recess, or for good cause shown, beyond close of business on the third day following such recess of jury deliberations unless the defendant consents to a longer period of suspension and separation. For the purposes of this section, where a day referred to in this subdivision falls on a Saturday, Sunday or holiday, such day shall mean the next day thereafter during which the courthouse is open for the conduct of trials. Before each recess, the court must admonish the jury as provided in § 270.40 of this chapter and direct it not to resume its deliberations until all twelve jurors have reassembled in the designated place at the termination of the declared recess.

The amendment would have several benefits. The proposed amendment would serve to dispel any doubt that judges have discretion to adjourn deliberations in the event that a juror becomes temporarily unavailable during deliberations. Thus, a recess in deliberations could be extended should a juror become ill or have some unexpected personal emergency. A recess in deliberations could also be extended should an impending weather event make it unlikely that all jurors will be able to return to court on the next business day. More importantly, the proposed amendment only requires good cause to be shown if a recess in deliberations needs to be extended beyond the second business day. Consequently, there would be no need to litigate whether the cause of a juror's temporary unavailability constitutes good cause to extend a recess in deliberations unless the recess were extended beyond the second business day. In the event that a longer recess is needed, there is a workable body of case law defining "good cause" for courts to use to determine if a particular circumstance justifies an extended deliberation recess.[19]

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

This amendment would also have a positive fiscal impact at no cost since judges would no longer be required to declare mistrials should a deliberating juror become temporarily unavailable. In terms of utilization of scarce public resources, a mistrial is costly as public funds support the judiciary, the prosecutor's office and, in many instances, the criminal defense provider. All of these resources are unnecessarily wasted when a mistrial is declared simply because of temporary juror unavailability.

Delegating the length of an adjournment to the sound discretion of a trial judge in these unique and limited circumstances would not open the door to abuse or encourage deliberations to be unnecessarily extended because of lengthy recesses. Judges make decisions of equal or greater magnitude in their day-to-day responsibilities of presiding over criminal trials. There is no reason why the Legislature should not give them express—but limited—authority to handle a far more basic concern, namely the scheduling of jury deliberations. As with so many other judicial determinations made in the heat of trial, this one will also be reviewable on appeal for abuse of discretion.

The proposed amendment would also not deprive a defendant of his right to consent to substitution of an alternate juror. Thus, if a deliberating juror became temporarily unavailable, a defendant would still have the option to consent to substitute the alternate juror for the temporariliy unavailable juror or even consent to be tried by an 11 person jury.[20] The proposed amendment would also not limit a defendant's ability to move for a mistrial when a deliberating juror becomes grossly unqualified because of improper exposure to prejudicial information.

Creating express statutory authority for a judge to extend a recess in deliberations under very limited circumstances also would not cause unnecessary delays of trials. Trial judges are under significant pressure to expeditiously resolve cases so that other matters can be sent to them for trial. The New York State Unified Court System is committed to decreasing the time it takes to resolve criminal cases. Chief Judge Janet DiFiore's Excellence Initiative, involves "a top-to-bottom examination of court operations focused on improving the courts' ability to ensure the just and timely resolution of all matters that come before them—[a] core obligation [of] the judicial branch of government."[21] The report of this initiative sets out detailed changes in the court system to ensure that cases are more expediently brought to a resolution. In light of this commitment, it would be difficult for anyone to argue that trial judges, even with unfettered discretion, would recess deliberations unnecessarily.

Trial judges also have a responsibility to the sworn jurors to keep the case on schedule and to avoid unnecessary delay.[22] Before jury selection begins, the panel of prospective jurors is informed of the anticipated length of the trial. This allows the trial judge to excuse potential jurors who are unable to serve because of some legitimate scheduling concern. Prolonged or

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

[21] *Id.*

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

unnecessary recessing of deliberations, or any other part of the trial, would risk extending the case beyond the time in which the sworn jurors are available to serve. And if the trial is unnecessarily extended to a day in which one or more sworn jurors is no longer available, a mistrial may be required.

In sum, depriving judges of express statutory authority to extend recesses in deliberations beyond 24 hours is an unnecessary and unworkable restraint on judicial discretion. Such a restraint does not ensure the integrity of deliberations, nor does it make it any less likely that jurors will engage in some form of misconduct or that others may attempt to influence them. This was conclusively demonstrated when the Office of Court Administration began collecting data when CPL § 310.10(2) was enacted in 1995 to permit jury separation in trials of certain lower level felonies.[23] The data included 935 cases where the jurors were permitted to separate. "[I]n no case were allegations raised that jurors were intimidated, tampered with or improperly contacted during separation."[24]

Further, the most important factor in assuring that a jury remains fair and impartial is the jury selection process. During that process, the parties select jurors who can not only fairly evaluate the evidence, but who can also follow the trial judge's instructions. Those instructions include not speaking to anyone about the trial, not doing any research about the case or the parties, and not going on the internet or social media to attempt to learn more about the case.[25] To posit that a recess that extends beyond the next business day would have any effect on jurors who have survived the selection process undermines the value of that process and the seriousness that sworn jurors place on their responsibility to decide a criminal case. It is a well-settled principle that trial jurors are presumed to follow a judge's instructions.[26] The same confidence that the system places in jurors abiding by a trial judge's admonitions during all recesses in the trial, should similarly be placed in their ability to abide by those instructions during an unexpected but limited extension of a particular recess.

VI. CONCLUSION

We urge the state legislature to support the proposed amendment to CPL § 310.10(2). The statute in its current form is a needless restraint on judicial discretion and does nothing to protect a defendant's right to a fair trial.

Criminal Courts Committee
Kerry Ward, Chair

Criminal Justice Operations Committee
Sarah Berger, Chair

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

[24] *Id.* at 12.

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

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