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APPELLATE REVIEW OF UNPRESERVED QUESTIONS IN CRIMINAL CASES: AN ATTEMPT TO DEFINE THE "INTEREST OF JUSTICE"

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I. INTRODUCTION

As a general rule, an appellate court can consider a claim on appeal only if the appellant properly preserved it in the court below. A claim or issue is preserved if it was presented to the lower court at the proper time and with sufficient specificity so that the trial court had an opportunity to correct the alleged error at the time it was made. Preservation is thus accomplished by a simple, timely on-the-record "objection" along with a brief explanation of its basis. Ordinarily, a court will not grant relief on a claim that is presented for the first time on appeal.

Preservation serves important purposes. A timely and specific objection alerts the trial court and the adversary to the alleged error, giving both an opportunity to correct the problem

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or take ameliorative action, thus potentially obviating the need to raise the issue on appeal. It thus encourages truth-seeking, the efficient resolution of the case, and the conservation of appellate resources. Preservation also discourages gamesmanship by preventing a party from saving a "trump card" argument until appeal.

However, preservation is not without its costs, particularly to a criminal defendant. When an attorney unwittingly fails to preserve an argument, his or her client may serve a potentially lengthy sentence even though an otherwise viable claim for a new trial may appear on the record.

In recognition of this dilemma, some legislatures and courts have crafted a narrow exception to the preservation requirement. In limited circumstances, an appellate court may consider an unpreserved question even though no objection or other protest was made to the trial court. This article will consider the approaches taken by the federal courts and New York state in this area. On their face, the approaches seem very different. The federal rule is detailed, specific, and structured. New York, on the other hand, simply directs its intermediate appellate courts to consider unpreserved questions if doing so is "in the interest of justice." Despite these apparent differences, the rules are actually quite similar in practice.

In the federal system, the Court of Appeals or Supreme Court can notice an unpreserved issue if it constitutes a "plain error." Decades of Supreme Court precedent have resulted in a four-part test to determine whether an error qualifies as "plain." Ultimately, however, the plain error rule is unsatisfactory for two reasons. First, one aspect of the test boils down to whether the defendant can show prejudice by the failure to preserve the claim. In other words, the defendant must demonstrate a successful appellate claim in order to overcome the preservation hurdle. Thus, preservation is fairly meaningless. If the defendant has a winning argument on the merits, the court will dispense with preservation. If, on the other hand, the defendant's claim would fail anyway, the court will apply preservation to bar the claim. The result, either way, is that the court is looking beyond the failure to preserve and analyzing the merits of the claim, creating exactly the type of inefficiency that preservation is designed to avoid.

Second, the federal rule is problematic because it provides discretion to the appellate court to determine, notwithstanding the presence of a prejudicial error, whether a "miscarriage of justice" would result if the plain error rule was not applied. Yet, the courts have not provided a workable definition of "miscarriage of justice," except most agree that the plain error rule should be used to free an innocent person.

New York has a similarly unworkable rule. In New York, only intermediate appellate courts—typically, the Appellate Division of the Supreme Court—can decide unpreserved questions. Statutory authority provides that they may do so only in the "interest of justice." No further guidance or explanation about this ambiguous term is provided by statutes or case law. The result is a hodgepodge of cases that seem to suggest that an appellate court will exercise its interest-of-justice jurisdiction only if the defendant has a winning claim on the merits. Otherwise, it will find the issue to be unpreserved and will decline to exercise its interest-of-justice authority to review the claim. Thus, as with the federal plain error rule, New York's preservation doctrine is essentially a meaningless smokescreen.

In this article, I will propose a new way of looking at these preservation exceptions in criminal cases. I suggest a number of substantive factors to aid courts in deciding whether the interest of justice warrants appellate review. I also encourage courts to be more explicit in explaining why they are or are not granting exceptions to preservation on a case-by-case basis.

I will proceed as follows: In Part II, I will discuss the competing policies between preservation and defendants' due process rights. In Part III, I will compare and contrast the federal and New York exceptions to preservation, noting the flaws in each test. In Part IV, I will demonstrate why a factors test would better serve the goals of preservation while providing for needed exceptions. I will also outline a workable factors test for courts to apply.

II. THE PRESERVATION DOCTRINE

A. The Rule

Except in rare instances when they exercise original

jurisdiction[1] or when the law provides for a de novo trial,[2] appellate courts exist solely to determine whether trial courts committed reversible errors in proceedings below.[3] An appeal is not a do-over of the original proceeding.[4] Rather, an appellant—the party prosecuting the appeal—must assert various claims of error. These are specific points in the proceeding below in which someone is alleged to have committed a mistake. Perhaps the trial judge erroneously admitted a piece of evidence. The prosecutor made an inappropriate remark in summation. Defense counsel improvidently conceded a point. Or, the jury found the defendant guilty when it should have acquitted. These are all examples of claims that can, and typically are, raised in an average criminal appeal.

Applying the appropriate standard of review, the appellate court determines whether it agrees with the appellant that there was error. However, not all error warrants reversal. The second step of the appellate court's inquiry is to determine whether a particular error amounts to reversible error. Some errors are "harmless" and do not require reversal.[5]

In conducting its review, an appellate court is ordinarily limited to the record below: the papers submitted to the clerk and the minutes of any proceedings before the trial judge. An appellate court cannot, and will not, take testimony anew or consider other new evidence.

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1. *See e.g.* U.S. Const. art. III, § 2, cl. 2 (providing that Supreme Court has original jurisdiction over "cases affecting ambassadors, other public ministers and consuls," and "those in which a state shall be party") (available in electronic form at http://press-pubs.uchicago.edu/founders/tocs/toc.html).

2. *See e.g.* Va. Code Ann. §§ 16.1–136 (providing for de novo hearings in criminal appeals) (Westlaw 2010).

3. *See generally* Richard V. Campbell, *Extent to Which Courts of Review Will Consider Questions Not Properly Raised and Preserved—Part 1*, 7 Wis. L. Rev. 91, 93 (1931); David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. Crim. L. & Criminology 518 (1990) (tracking the history of appellate review and explaining why the Supreme Court has not recognized a constitutional right to appellate review, even in criminal cases).

4. *See People v. Jones*, 440 N.Y.S.2d 248, 254 (App. Div. 2d Dept. 1981) ("an appeal . . . is not intended as a duplication of trial-level proceedings").

5. *See e.g.* N.Y. Crim. Proc. Law § 470.05(1) (providing that "[a]n appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties"); *People v. Crimmins*, 326 N.E.2d 787, 789 (N.Y. 1975) (discussing harmless error tests in New York); *see generally* Sam Kamin, *Harmless Error and the Rights/Remedies Split*, 88 Va. L. Rev. 1 (2002).

The preservation doctrine is a natural outgrowth of these fundamental principles of appellate practice. Briefly stated, a claim is "preserved" if it was first presented to the trial court, at some readily identifiable portion of the record, with sufficient specificity, at a time when the error could have been corrected.[6] If, however, a claim was never presented to the court below, an objection was made but it was untimely, the objection was "off-the-record," or the objection lacked specificity, the claim is said to be "unpreserved." With rare exception—discussed in Part III—an appellate court will not consider unpreserved issues on appeal.[7] The forfeited issue is simply passed over, its merits never addressed.

During a trial, a claim is preserved if a timely objection was made and either the basis is stated on the record or is fairly obvious from the context.[8] For example, if a party believes a particular question by an adversary calls for inadmissible hearsay, the party must object and state, briefly, the reasons for the objection, unless it is clear that hearsay is the ground of the protest.[9] Thus, preservation in this instance can be accomplished simply by two words, "Objection. Hearsay."[10] The court rules on the objection, either sustaining or overruling it. Some jurisdictions have now eliminated the requirement that a party must "take an exception" to the court's ruling.[11] Rather, the objection itself preserves the issue for appeal, assuming it was overruled. Of course, if it was sustained, there is nothing to appeal from since the party obtained exactly what it wanted: a legal ruling in its favor.

A party may argue on appeal that there was error notwithstanding the sustained objection, because the proverbial bell could not be "unrung" by the court's ruling.[12] The party

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6. *See Jones*, 440 N.Y.S. at 254.

7. Campbell, *supra* n. 3, at 92 (noting that "[i]f a party expects to rely on a contention in the highest court of review, he should preserve it").

8. Fred Warren Bennett, *Preserving Issues for Appeal: How to Make a Record at Trial*, 18 Am. J. Trial Advoc. 87, 95–100 (Summer 1994).

9. *Id.* at 100.

10. *Id.* at 99.

11. 75A Am. Jur. 2d *Trial* § 1227 (Westlaw/Thomson Reuters 2010).

12. *Corwin v. Dickey*, 373 S.E.2d 149, 151 (N.C. App. 1988) (ordering a new trial because "we do not believe the trial court's sustaining plaintiffs' objections to those remarks was sufficient to remove the effects of these highly prejudicial statements");

may assert that the question itself was so egregious that it warranted either a cautionary instruction or even a mistrial. Here, too, these alleged errors—the absence of a curative instruction or a mistrial—must be preserved. To preserve the claim for appeal, counsel must have asked the trial court to issue a curative instruction or to declare a mistrial, notwithstanding the sustained objection.[13] The failure to do so forfeits the claim on appeal. Stated simply, a party must continue protesting and asking for relief from the trial court until it obtains a negative ruling. An overruled objection, a refusal to issue a curative instruction, or a denial of a motion for mistrial are all negative rulings that indicate the issue has been fully preserved.

B. Reasons for the Rule

Several reasons are offered for the preservation doctrine, which has been characterized as going "to the heart of the common law tradition and the adversary system,"[14] as "a natural and familiar outgrowth of our adversarial system of justice,"[15] and as a doctrine that serves "a legitimate State purpose."[16] Without it, "the State's fundamental interest in enforcing its criminal law could be frustrated by delay and waste of time and resources invited by a defendant."[17]

People v. Fletcher, 509 N.E.2d 625, 629 (Ill. App. 1st Dist. 1987) ("Further, the prosecutor's persistence in making the improper remarks eliminated the salutary effect of the trial judge's sustaining of the defense objections. . . . 'The fact that the court sustained objections to the prejudicial statements did not cure the errors in the case. . . . Driving a nail into a board and then pulling the nail out does not remove the hole.'" (citations omitted)).

13. *People v. D'Alessandro*, 591 N.Y.S.2d 1001, 1004 (App. Div., 1st Dept. 1992) (pointing out that "[m]ost of the prosecutor's remarks complained of by the defense were followed by sustained objections or sustained objections accompanied by curative instructions," that the defense "never protested the adequacy of the relief accorded by the Judge and neither objected to the curative instructions nor requested additional instructions," and that its "motion for a mistrial . . . was largely expressed in general terms").

14. *Pfeifer v. Jones & Laughlin Steel Corp.*, 678 F.2d 453, 457 n. 1 (3d Cir. 1982), *vacated on other grounds*, 462 U.S. 523 (1983).

15. *Jones*, 440 N.Y.S.2d at 254.

16. *People v. Patterson*, 347 N.E.2d 898, 902 (N.Y. 1976) (noting importance of "[s]trict adherence to the requirement that complaint be made in time to permit a correction").

17. *Id.*

1. An Opportunity for the Adversary and Trial Court to Correct the Defect or Problem in the First Instance[18]

A timely objection—in other words, made at the time of the alleged error—alerts one's adversary and the trial court to the party's complaint. If the adversary persists in its course of action by, for example, continuing to introduce evidence that might be inadmissible, the adversary cannot complain later of being surprised when the issue is raised on appeal. On the other hand, the objection also gives the adversary an opportunity to withdraw the evidence or limit any unfair prejudice. Either way, the necessity of an appeal is obviated. The party has gotten exactly what it wanted: the evidence is not offered.

A timely objection also alerts the trial court to the potential legal problem with allowing the evidence. A trial judge, not wanting to be reversed, might then limit the evidence, issue a curative instruction, or take some other action that addresses the objecting party's concerns.[19]

In the context of claims of legal insufficiency, preservation furthers the truth-seeking purpose of a trial.[20] Consider: If the prosecution fails to adduce legally sufficient evidence by, for example, omitting proof of an element, the defendant's timely and specific motion for a trial order of dismissal will alert the prosecution to the infirmity. Obviously if there is no proof for the element, the charge is dismissed. On the other hand, if the omission was accidental, the objection enables the prosecution to petition to reopen its case, cure the defect, and further the goal of seeking the truth of the accusation.[21]

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18. *See Pfeifer*, 678 F.2d at 457 n. 1; *People v. Hawkins*, 900 N.E.2d 946, 950 (N.Y. 2008); *People v. Gray*, 652 N.E.2d 919, 922 (N.Y. 1995); *People v. Robinson*, 326 N.E.2d 784, 786 (N.Y. 1975); *Jones*, 440 N.Y.S.2d at 254; Campbell, *supra* n. 3, at 91; Joe Ivy Gillespie, Student Author, *Appellate Review in a Criminal Case of Errors Made Below Not Properly Raised and Preserved*, 23 Miss. L.J. 42, 43 (1951); Robert J. Martineau, *Considering New Issues on Appeal: The General Rule and the Gorilla Rule*, 40 Vand. L. Rev. 1023, 1029–30 (1987).

19. *Pfeifer*, 678 F.2d at 457 n. 1.

20. *Hawkins*, 900 N.E.2d at 950.

21. *See e.g. People v. Whipple*, 760 N.E.2d 337 (N.Y. 2001) (holding, in DWI prosecution, that it was not error to allow the People to reopen their case and clarify that the parking lot in fact had four or more spaces—a requirement to show that the crime was committed in public, rather than on private property—when the People had neglected to adduce proof at trial that the parking lot had four or more parking spaces).

2. Fairness to the Trial Court[22]

At the heart of an appellant's brief is a claim (or several) that some sort of error was committed at the trial level. Usually the source of the error is the trial judge. For example, he or she wrongly sat a biased juror for cause, failed to dismiss a legally insufficient case after the prosecution's case-in-chief, erroneously admitted evidence, gave incorrect instructions to the jury, or did not follow the proper procedure at sentencing. Reversals are embarrassing for a trial judge; they signify that he or she committed an error. Preservation ensures that the trial judge was at least presented with an opportunity to correct the error. A trial court that persists with an erroneous decision cannot later claim unfair surprise.

3. Preventing Intentional Sandbagging—the Ace in the Hole[23]

Without a preservation rule, a trial attorney might intentionally keep quiet about an error with the hope of using it, in the event of a loss at trial, as a basis for reversal on appeal. For example, if the judge fails to charge the jury on an essential element of the crime, the defense attorney might keep silent and simply make his usual arguments (on the other elements) to the jury. If he wins an acquittal, double jeopardy applies and retrial is impossible. If his client is convicted, he has an automatic winning claim on appeal. For claims where retrial is possible, such a strategy, absent a requirement of preservation, "would make litigation practically interminable,"[24] ensuring a successful appeal, reversal, and new trial in every case, only to be followed by another round of the same.

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22. *See Jones*, 440 N.Y.S.2d at 254; Campbell, *supra* n. 3, at 93; Gillespie, *supra* n. 18, at 43.

23. *See Patterson*, 347 N.E.2d at 902; *Jones*, 440 N.Y.S.2d at 254; Campbell, *supra* n. 3, at 92–93; Gillespie, *supra* n. 18, at 43; Martineau, *supra* n. 18, at 1030; Paul T. Wangerin, *"Plain Error" and "Fundamental Fairness": Toward a Definition of Exceptions to the Rules of Procedural Default*, 29 DePaul L. Rev. 753, 754 (1979).

24. Campbell, *supra* n. 3, at 93.

4. Efficiency[25]

Appellate courts are overburdened with too many cases and too few judges and staff to dispose of them.[26] Preservation promotes efficiency by requiring assertions of error to be made, in the first instance, at the trial level. If the trial court agrees with the argument, the court can correct the error or ameliorate whatever harm was done. This obviates the need to take an appeal at all. If, on the other hand, the trial court does not reverse its course, the appellate court nevertheless benefits from a fully fleshed out record. Preservation ensures that appellate courts deal with only the most serious issues: those that the appellant thought important enough to raise at trial and about which there was some disagreement.

4. Developing a Record[27]

When an objection is lodged, the adversary is alerted to a potential issue for appeal in the event he wins at trial. The objection allows him to build a proper factual and legal record in support of the disputed action. This benefits not just the adversary (the future appellee) but also the appellant and appellate court, who are then cognizant of the particular grounds for the disputed evidence. Absent an objection, a party may not fully develop the record, because "[c]ompetent trial counsel always are conscious of hazards of trying to prove that which

25. *See Jones*, 440 N.Y.S.2d at 254; Martineau, *supra* n. 18, at 1032.

26. Dione Christopher Greene, Student Author, *The Federal Courts of Appeals, Unpublished Decisions, and the "No-Citation Rule"*, 81 Ind. L.J. 1503, 1505–06 (2006) (explaining five factors that contribute to the overburdening of the federal courts of appeals: caseload expansion caused by population growth; new statutory rights; retention of diversity jurisdiction; crime; and miscellaneous factors such as free legal services and more lawyers in general, and noting in addition that consequences include an expansion in judicial staff); *Expedited Appeals in Selected State Appellate Courts—Preface*, 4 J. App. Prac. & Process 191, 191–93 (2002) (detailing approaches used to combat the "caseload crisis" in appellate courts, and characterizing crisis as equally significant in state and federal appellate courts); *but see* Thomas E. Baker, *Applied Freakonomics: Explaining the "Crisis of Volume"*, 8 J. App. Prac. & Process 101, 102 (2006) (acknowledging "doomsday clamor" prevalent between 1960 and 1989, but pointing out that federal courts of appeals were not "hopelessly backlogged" in 2005, and that there was by then no "panicky sense of being overwhelmed").

27. *See Jones*, 440 N.Y.S.2d at 254; Martineau, *supra* n. 18, at 1031.

does not have to be proven and of appearing to waste the court's time in so doing."[28]

For states that require preservation, the rule can have a significant impact for prisoners who seek federal habeas corpus review.[29] If a state appellate court finds a claim to be unpreserved, that finding serves as a procedural bar to habeas relief, unless the defendant can show cause and prejudice for the failure to object.[30] The procedural bar thus prevents the federal court from analyzing the merits of the petitioner's claim.[31]

C. Reasons for Failure to Comply with Preservation

Despite the clarity of the preservation doctrine and the strong policy reasons underlying it, unpreserved claims are routinely raised in appellate proceedings. There are three reasons for this phenomenon. First, defendants are typically represented by new attorneys at the appellate level. While combing through and scrutinizing the record, these appellate specialists are more likely to uncover claims of error. These points may have been missed by their trial counterparts during the "heat of the battle" of the trial. Second, trial counsel may have simply been ignorant about the law.[32] Third, sometimes the law changes between the trial and appeal, and counsel seeks to apply the new law retroactively.[33]

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28. Martineau, *supra* n. 18, at 1031.

29. *See generally* 28 U.S.C. § 2254 (available at http://uscode.house.gov).

30. *See e.g. Richardson v. Greene*, 497 F.3d 212 (2d Cir. 2007) (finding New York's preservation rule an independent and adequate bar to relief).

31. *Coleman v. Thompson*, 501 U.S. 722, 729–30.

32. *See e.g.* Wangerin, *supra* n. 23, at 753:

> Ignorance in this context needs little elucidation. Ignorance of a procedural rule that requires defense counsel to raise certain defenses before trial may result, for example, in an objection or motion being made too late to be effective. Or, during the trial itself, counsel may either fail to notice an error made by opposing counsel or may be unaware of the ramifications of the error. Consequently, counsel may fail to make a timely objection to the error.

(footnote omitted).

33. Recently, for example, the New York Court of Appeals overruled decades of its own precedent and declared "depraved indifference" to be a culpable mental state. *See People v. Feingold*, 852 N.E.2d 1163 (N.Y. 2006). Previously, in *People v. Register*, 457 N.E.2d 704 (N.Y. 1983), which was overruled by *Feingold*, the Court of Appeals held that the phrase "under circumstances evincing a depraved indifference to human life" referred only to the attendant circumstances of the defendant's crime (usually murder) and not to

Sometimes trial attorneys do not raise claims for strategic reasons. These can be divided into two categories: appellate and trial. The appellate strategy is the "ace-in-the-hole" approach I mentioned earlier. The trial attorney deliberately chooses not raise a winning argument or objection because he wants to keep it in reserve (for appeal) in case he does not win at trial. The trial attorney's focus is on the appeal. In contrast, some strategic decisions contemplate not making objections or raising claims during the trial in the hopes that allowing the error to go forward will help to win an acquittal on the merits at the trial level. For example, counsel may not object to certain questions on direct examination of a prosecution witness in the hopes that the questions will "open up fertile ground for cross-examination."[34]

Another strategic consideration is to avoid appearing obstinate or annoying, particularly in front of a jury, by objecting too often.[35] As a result, a defense attorney may forego making certain, minor, but sustainable, objections in order to appear reasonable and give particular emphasis to the objections he does make.

III. THE FEDERAL AND NEW YORK APPROACHES TO UNPRESERVED QUESTIONS ON APPEAL

Although the general rule is to require preservation, there are exceptions. Sometimes courts will review unpreserved claims. The Federal Rules of Criminal Procedure and the New York State Criminal Procedure Law are examples of two very different ways of approaching the question of whether to grant an exception to the preservation rule.

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his mental state. *Id.* at 278. The Court of Appeals has now held that this change in the law could be applied retroactively to cases in the direct appeal pipeline, *see People v. Jean-Baptiste*, 901 N.E.2d 192 (N.Y. 2008), but not to cases on collateral review where the conviction had become final, *see Policano v. Herbert*, 859 N.E.2d 484 (N.Y. 2006).

In general, cases pending on direct appeal will get the benefit of new decisions issued since the time of trial. *See e.g. Griffith v. Ky.*, 479 U.S. 314 (1987). However, cases that have become final and are now in "collateral review" will be determined under the old law unless certain exceptions are met. *See e.g. Teague v. Lane*, 489 U.S. 288 (1989).

34. Wangerin, *supra* n. 23, at 754.

35. *Id.*

A. The Federal Rule: "Plain Error"

The federal courts have an escape valve in Federal Rule of Criminal Procedure 52(b) that allows appellate courts to consider unpreserved claims. The rule states very simply that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention."[36] When adopted in 1944, this was meant to be a "restatement of existing law."[37]

The plain error rule was first recognized by the Supreme Court in 1896, when in *Wiborg v. United States*[38] a private vessel's captain and mates were found guilty of launching a private military expedition against Cuba. The Court affirmed the captain's conviction. However, it reversed the convictions of the mates, finding there was no evidence that they had knowledge of the military nature of their voyage when they left the United States. Although this argument was not raised at trial, the Court noted that it had the power to reverse the conviction nonetheless: "[I]f a plain error was committed in a matter so absolutely vital to defendants, we feel ourselves at liberty to correct it."[39]

Citing *Wiborg*, the Supreme Court later reversed the conviction in *Clyatt v. United States*[40] even though no motion was made for a directed verdict of acquittal.[41] In support of its plain error review, the Court noted that it had a duty to hold the Government to proving all of the elements of a crime, if only to ensure public confidence in the justice system.[42]

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36. Fed. R. Crim. P. 52(b) (available at http://uscode.house.gov).

37. *Id.*, advisory comm. nn. (1944). Note that in 2002, a minor technical amendment was made to the rule, which formerly stated that a "plain error *or defect*" (emphasis added) could be noticed even though no objection was made at trial. There was confusion in the lower courts about whether this was meant to be a disjunctive rule. Some courts held that the rule applied to both "plain errors" and "defects" in the trial court proceedings. The Supreme Court clarified that this was not the case. *See U.S. v. Olano*, 507 U.S. 725, 732 (1993) (indicating that it is "surely wrong" to read Rule 52(b) in the disjunctive). The rule was amended in 2002 to clarify this ambiguity by striking the words "or defect" from the text. *See* Fed. R. Crim. P. 52(b), advisory comm. nn. (2002).

38. 163 U.S. 632 (1896).

39. *Id.* at 658.

40. 197 U.S. 207 (1905).

41. *Id.* at 221–22.

42. *Id.* at 222 ("Only in the exact administration of the law will justice in the long run be done, and the confidence of the public in such administration be maintained").

In *United States v. Atkinson*,[43] a civil case, the Supreme Court began to add some detail to the plain error rule, noting that "[t]he verdict of the jury will not ordinarily be set aside for error not brought to the attention of the trial court."[44] The reasons for this general rule are "fairness to the court and to the parties" and the "public interest" in bringing case to a swift end after the parties have had a fair opportunity to present their claims of law and fact.[45] But while the Court declined to consider the claim as plain error in *Atkinson*, it made an important comment about when plain error should be recognized:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.[46]

Without stating why, the Court summarily concluded that "no such case is presented here."[47]

Thus, *Atkinson*'s dictum introduced a number of important points about plain error review. First, it is to be exercised only in exceptional circumstances; it is the exception, not the rule. Second, such exceptional circumstances are more likely to be found in criminal cases, where the issue is a defendant's life or liberty. Third, there is a public interest component to the analysis. Plain errors affect the "fairness, integrity, or public reputation of judicial proceedings" and thus, in the "public interest," appellate courts "may" notice the errors. Fourth, plain error can be recognized even on a court's own motion.

As noted in its Advisory Committee notes, Rule 52(b) was designed to be a codification or restatement of this existing law. Yet, the rule contains no discussion of *Atkinson*'s "exceptional circumstances" or other criteria for the exercise of appellate court discretion. Thus, the plain error rule continued to be

43. 297 U.S. 157 (1936).
44. *Id.* at 159.
45. *Id.*
46. *Id.*
47. *Id.*

fleshed out by judicial decision. In *United States v. Frady*,[48] a prisoner brought a collateral attack against his conviction for murder, claiming error in the trial court's jury instructions after having made no objection to those instructions at trial. The Supreme Court considered whether Rule 52(b)'s plain error rule or the established "cause and actual prejudice"[49] test of habeas law should be used, and concluded that Rule 52(b) should not be used to review these unpreserved claims: Rule 52(b) "was intended for use on direct appeal," and it is "out of place" for collateral attacks after a judgment has become final.[50]

In passing, the *Frady* Court made a number of comments about Rule 52(b)'s application on direct appeal: It was intended to ensure that litigants have "a means for the prompt redress of miscarriages of justice," and it applies only when the error was "so 'plain'" that the trial court and prosecutor "were derelict in countenancing it, even absent the defendant's timely assistance in detecting it."[51] It also reflects a "careful balancing" between the Court's intention of "encourag[ing] all trial participants to seek a fair and accurate trial the first time around" and the Court's "insistence that obvious injustice be promptly redressed."[52] However, plain error is to be used "sparingly," only when a "miscarriage of justice would otherwise result."[53]

In dissent, Justice Brennan wrote about Rule 52(b) as a "fundamental" part of the court system's obligation to correct substantial miscarriages of justice.[54] The rule "mitigates the harsh impact of the adversarial system" by recognizing that the defendant is at the mercy of his trial attorney and must rely on him or her to make proper objections.[55] It also ensures that

48. 456 U.S. 152 (1982).

49. See, for example, *Wainwright v. Sykes*, 433 U.S. 72 (1977), in which the Court held that a federal court can grant habeas relief to a state prisoner whose claim is procedurally defaulted (by, for example, failing to comply with a state's contemporaneous objection or preservation rule) only if he can demonstrate "cause" for the default and "prejudice" thereby. *See also e.g. Coleman*, 501 U.S. at 729–32.

50. *Frady*, 456 U.S. at 164 (noting "society's legitimate interest in the finality of the judgment" once it "has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal").

51. *Id.* at 163.

52. *Id.*

53. *Id.* at n. 14.

54. *Id.* at 179.

55. *Id.* at 180.

prosecutors take seriously their obligations to ensure defendants receive fair trials, by requiring them to intervene to protect defendants from the mistakes of their counsel.[56] Accordingly, he would have applied plain error to the defendant's claim.

Without providing a clear test for plain error, the Court continued to apply Rule 52(b) in specific cases. In *United States v. Young*,[57] the purported error concerned certain statements by the prosecutor during his rebuttal argument to which no objection was made at trial. On appeal, the Government claimed that the prosecutor's remarks were an "invited response" to defense counsel's own closing argument. Because there was no objection at trial, the issue was not whether there was error by the prosecutor in making the argument and by the court in not correcting it,[58] but whether there was "plain error" under Rule 52(b). The Court quoted language from both *Frady* and *Atkinson* indicating that the rule should be used "sparingly" and only for particularly serious errors, and that it should not be subject to "unwarranted extension."[59] The entire record must be reviewed so that any errors can be viewed in their proper context, because a plain error analysis is not a "quest for error."[60] Applying these general principles to the prosecutorial misconduct in the defendant's trial, the Court concluded that the Government's argument, "although inappropriate," did not "undermine the fundamental fairness of the trial and contribute to a miscarriage of justice."[61] One of the reasons for this conclusion was the "overwhelming evidence" of the defendant's guilt.[62]

Finally, in 1992, the Supreme Court provided what purported to be a workable definition and rule for plain error analysis. *United States v. Olano*[63] involved an acknowledged violation of Federal Rule of Criminal Procedure 24(c), which requires the discharge of alternate jurors once deliberations have begun. At trial, no objection was made when the trial court

56. *Id.*

57. 470 U.S. 1 (1985).

58. In fact, the Court concluded that both errors were present. *Id.* at 14.

59. *Id.* at 15 (quoting *Frady*).

60. *Id.* at 16 (quoting *Johnson v. U.S.*, 318 U.S. 189, 202 (1943) (Frankfurter, J., concurring)).

61. *Id.*

62. *Id.* at 19.

63. 507 U.S. 725 (1993).

permitted the alternate jurors to sit in the jury room during deliberations but admonished them not to participate. The issue, then, was whether this was plain error.

For the first time, the Court announced a rule by which to determine whether a case satisfies the plain error rule. The Court initially noted that the authority of an appellate court to notice unpreserved error is "circumscribed" and that ultimately the decision of whether to correct an alleged error is within the discretion of the court.[64]

Next, the Court announced a four-part rule for determining the existence of plain error.[65] First, there must be an error. An error occurs when a legal rule has been violated and the defendant did not waive the rule through an intentional relinquishment of a known right.[66] Second, the error must be "plain," meaning "clear" or "obvious" under current law.[67] Third, the plain error must affect "substantial rights," which means that the error must have been prejudicial: "It must have affected the outcome of the district court proceedings."[68] A court applying the *Olano* rule conducts the same type of analysis as if an objection had been made and it was applying the harmless error rule of Rule 52(a) to determine whether the error was prejudicial.[69]

Thus, if the first three requirements are met, a reviewing court moves to the fourth and discretionary part of the test. An appellate court is not bound to correct every plain error. Rather, the *Olano* Court held, in language borrowed from *Young* and

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64. *Id.* at 732.

65. The Court noted that the first three parts of the rule act as "limitations on appellate authority under Rule 52(b)." *Id.* at 734.

66. *Id.* at 733–34. Waiver is distinguished from forfeiture. Forfeiture is the "failure to make the timely assertion of a right." The failure to object does not, by itself, turn an error into a non-error. In contrast, most legal rights can be intentionally, knowingly, and voluntarily waived. Waiver can cure many legal errors. *Id.*

67. *Id.* at 734.

68. *Id.*

69. *Id.* at 734–35. (explaining that difference between Rule 52(a) analysis, which occurs only if the error was preserved, and analysis under Rule 52(b), when there was no objection, is in burden of proof: government burden of showing that harmless error applies under Rule 52(a) and defendant burden of showing that his substantial rights were affected under Rule 52(b)). The *Olano* Court did not address whether there is some class of errors so fundamental that a defendant need not show that a different outcome would have occurred but for the error. *Id.* at 735.

Frady, that it should correct errors only "in those circumstances in which a miscarriage of justice would otherwise result."[70] Although the *Olano* Court explicitly identified only cases in which the error caused the conviction of an innocent defendant as those in which a court of appeals "should no doubt correct a plain forfeited error,"[71] actual innocence is not the only reason for a court to exercise its discretionary authority under Rule 52(b).[72] Quoting *Atkinson*, the *Olano* Court held that an appellate court should use its discretion when the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[73] An error may meet this standard "independent of the defendant's innocence."[74]

Applying this four-part test in *Olano*, the Court found that there was unquestionably an error: Rule 24(c) requires the discharge of alternate jurors after the jury has begun its deliberations, and waiver could not apply because the Government conceded the plain error. The key inquiry was whether the error affected the defendant's substantial rights. But there was no evidence of prejudice,[75] and a violation of Rule 24(c) is not of such a magnitude that affects substantial rights "independent of its prejudicial impact."[76] Because substantial rights were not affected, the Court declined to address whether, if the error was prejudicial, the Court of Appeals should have exercised its discretion under the fourth prong of the test to correct the error.[77]

In *Johnson v. United States*,[78] the Court answered a number of questions left open by *Olano*. The defendant in *Johnson* was convicted of perjury before a grand jury, the issue being whether

70. *Id.* at 736 (quoting *Young*, 470 U.S. at 15, and *Frady*, 456 U.S. at 163 n. 14).

71. *Id.*

72. *Id.* (stating that "we have never held that a Rule 52(b) remedy is *only* warranted in cases of actual innocence") (emphasis in original).

73. *Id.* (quoting *Atkinson*, 297 U.S. at 160).

74. *Id.* at 736–37.

75. Prejudice probably could have been shown if the alternates participated in the deliberations, either verbally or with their "body language," or the alternates' mere presence in the jury room may have had a "chilling effect" on the regular jurors. *See id.* at 739. But the Court held that neither showing was made in *Olano*. *See id.* at 739–40.

76. *Id.* at 738.

77. *Id.* at 741.

78. 520 U.S. 461 (1997).

those lies were material. Consistent with the law and practice at the time, the trial judge decided the issue of materiality, rather than submitting it to the jury to decide. Presumably because the law was settled at the time of trial, defense counsel did not object to the trial judge's instruction.[79] After the conviction, but before Johnson's appeal, the Supreme Court decided *United States v. Gaudin*,[80] in which it declared unconstitutional the practice of not submitting the materiality element to the jury.

Initially, the *Johnson* Court rejected the defendant's argument that the error was "structural" and not subject to plain error analysis under Rule 52(b). Rather, it noted that Rule 52(b) and *Olano*'s carefully constructed rule govern the analysis of unpreserved claims on direct appeal in the federal courts, while the cases cited by the defendant concerning structural error arose from state prosecutions, either on certiorari to the state courts or on federal habeas corpus.[81]

The *Johnson* Court then applied the *Olano* test: First, there was error because *Gaudin* requires submission of the materiality element to the jury. A new rule, such as the one announced in *Gaudin*, applies to all cases in the direct appeal pipeline.[82] The Court had a more difficult time with the second prong—whether the error was plain. The question was whether this is to be analyzed under the law current at the time of the appeal or the law that existed at the time of trial. The *Johnson* Court held that "in a case such as this—where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that an error be 'plain' at the time of appellate consideration."[83] To hold otherwise would require defense counsel to make "a long and virtually useless laundry list of objections to rulings that were plainly supported by existing precedent."[84] Finding the existence of error that was also plain, the Court then turned to the question of whether it affected substantial rights, again rejecting the defendant's argument that this was a "structural error" and therefore immune from a

79. *Id.* at 463.
80. 515 U.S. 506 (1995).
81. *Johnson*, 520 U.S. at 466.
82. *Griffith v. Ky.*, 479 U.S. 314 (1987).
83. *Johnson*, 520 U.S. at 468.
84. *Id.*

"substantial rights" analysis.[85] It analogized the error to the giving of incorrect jury instructions, not the denial of a structural right like the right to be free from self-incrimination or to receive a reasonable doubt instruction.[86]

Nevertheless, the *Johnson* Court declined to go further in its substantial rights and prejudice analysis. Instead, it found that the error in question did not warrant discretionary relief under the fourth prong of *Olano*. Here, the evidence of the defendant's guilt was overwhelming and the question of materiality was "essentially uncontroverted at trial."[87] The Court went on:

> On this record there is no basis for concluding that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" Indeed, it would be the reversal of a conviction such as this which would have that effect. "Reversal for error, regardless of its effect on the judgment, encourages litigants to abuse the judicial process and bestirs the public to ridicule it."[88]

Johnson thus provides several important clarifications to the *Olano* rule. First, following *Griffith*, a step one "error" is found if the law subsequently changes while the case is in the direct appeal pipeline, even if the trial court correctly applied the law that existed at the time of trial. Second, an error is "plain" even if it only becomes so as a result of a subsequent, post-trial change in the law. Third, "structural errors," for which no "substantial rights" analysis must be undertaken, are extremely limited in number. Fourth, courts undertaking a plain error analysis can skip over the third step of *Olano* and decide that, even if there was a violation of substantial rights, it should not exercise its discretion under the fourth step of the test. Regarding that discretion, when the evidence of a defendant's guilt is overwhelming, technical errors affecting undisputed elements of a crime should not result in reversal.

There appears to be a narrow category of cases in which courts will reverse despite the lack of contemporaneous

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85. Recall that the defendant in *Olano* made a similar argument. *See Olano*, 507 U.S. at 737–40 (discussing whether *Olano* involved an error that could be presumed to affect substantial rights absent a showing of prejudice).

86. *See Johnson*, 520 U.S. at 469.

87. *Id.* at 470.

88. *Id.* (quoting Roger J. Traynor, *The Riddle of Harmless Error* 50 (Ohio St. U. Press 1970)).

objection, but without conducting a plain error analysis. *Nguyen v. United States*[89] was such an anomalous case. Because the defendants were convicted in Guam, their appeal was heard by the Ninth Circuit, where their panel, composed of the chief judge of the Ninth Circuit, a senior judge of the Ninth Circuit, and the chief judge of the District Court for the Northern Mariana Islands,[90] unanimously affirmed the convictions.[91]

On certiorari, the defendants challenged the judgment because of the Article IV judge on their panel,[92] even though defense counsel knew for approximately a week before oral arguments that he would be included on the panel and did not object. The Supreme Court ordered a new appeal, but decided not to use Rule 52(b) to do so. The Court held that plain error was not appropriate because using it in such a case would

> incorrectly suggest that some action (or inaction) on petitioners' part could create authority Congress has quite specifically withheld. Even if the parties had *expressly* stipulated to the participation of a non-Article III judge in the consideration of their appeals, no matter how distinguished and well qualified the judge might be, such a stipulation would not have cured the plain defect in the composition of the panel.[93]

Moreover, because the error involved enforcement of a statute that "embodies a strong policy concerning the proper administration of judicial process"—the composition of appellate panels—assessment of prejudice was improper.[94]

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89. 539 U.S. 69 (2003).

90. The chief judge of the Ninth Circuit had invited the Northern Mariana judge to sit by designation, apparently not realizing that he was not an Article III judge but instead held office pursuant to Article IV. *Id.* at 72–73.

91. 284 F.3d 1086 (9th Cir. 2002).

92. *Nguyen*, 539 U.S. 73–74.

93. *Id.* at 80–81 (emphasis in original; citation omitted). The dissent criticized the majority's failure to undertake a Rule 52(b) analysis, distinguishing cases in which the Court had, in the past, reversed judgments of improperly composed Court of Appeals panels. *See id.* at 86.

94. *Id.* at 81 (citing *Glidden Co. v. Zdanok*, 370 U.S. 530, 536 (1962)).

B. The New York Rule: "Interest of Justice"

1. New York's System of Appellate Courts[95]

New York has a two-tiered appellate process, involving both intermediate courts and the Court of Appeals, which is the state's highest court. The first step is an intermediate appellate court, to which there is an automatic right to an appeal. Felony appeals are heard in the Supreme Court's Appellate Division, which is administratively divided into four departments. Depending on where they originate geographically, misdemeanor appeals are heard in either a county court or in the Appellate Term of the Supreme Court.

There is no appeal as of right to the Court of Appeals[96] except in death penalty cases, and outside that single class of cases, the Court of Appeals is limited to hearing questions of law.[97] It cannot consider questions of fact and, unlike the intermediate appellate courts, it does not have interest-of-justice

95. Readers already familiar with appellate practice in New York may wish to proceed directly to section III(B)(2), *infra*.

96. A losing party in an intermediate appellate court can, however, seek leave from either a judge of the Court of Appeals or a justice of the Appellate Division to appeal to the Court of Appeals. *See* N.Y. Crim. Proc. L. § 450.90 (Westlaw 2010) (outlining appeals process and referring to the certificate granting leave to appeal described in N.Y. Crim. Proc. L. § 460.20). An applicant can seek leave only once, from either the Court of Appeals or the Appellate Division, but not both. *See* N.Y. Crim. Proc. L. §§ 460.15–460.25 (Westlaw 2010). Leave to appeal is rarely granted. *See* New York City Bar, *Report of the Criminal Justice Operations Committee of the Association of the Bar of the City of New York Concerning Criminal Leave Application Procedures in the Court of Appeals*, http://www. nycbar. org /pdf/report uploads/20071837- Report onCrimialLeaveApplication Procedures.pdf at § 2 (noting that, on average, only about two percent of applications are granted) (accessed Jan. 21, 2011; copy on file with Journal of Appellate Practice and Process). Although this is not stated in any statute, the Court of Appeals has said it looks for cases of statewide importance. For example, cases raising a split in the Departments of the Appellate Division or otherwise showing a conflict in the law are more likely to receive a grant of leave. *See* Stuart M. Cohen, Clerk of Court, N.Y. Ct. of App., *Criminal Jurisdiction and Practice Outline*, http://www.nycourts.gov/ctapps/forms/claoutline.htm at § VIII(B) (giving examples) (accessed Jan. 21, 2011; copy on file with Journal of Appellate Practice and Process).

97. New York's death penalty law, while still on the books, is not enforced because of *People v. LaValle*, 817 N.E.2d 341 (N.Y. 2004) (holding death penalty statute unconstitutional). Nevertheless, capital cases bypass the intermediate appellate courts altogether. Review is directly from the trial court to the Court of Appeals. Accordingly, the Court of Appeals has jurisdiction, in capital cases, to reverse on the law, on the facts, or in the interest of justice. *See* N.Y. Crim. Proc. Law § 450.70 (Westlaw 2010).

jurisdiction. The intermediate appellate courts, on the other hand, have authority to reverse or modify convictions on the law, on the facts, or "[a]s a matter of discretion in the interest of justice.[98]

A question of law is presented only if it was properly preserved by a contemporaneous protest at the trial court level.[99] Apart from the mode-of-proceedings errors, which never require preservation,[100] the Court of Appeals has no jurisdiction to consider unpreserved questions. This is codified in both the state Constitution[101] and by statute.[102]

2. Application of the New York Rule

Like the federal courts, New York places great emphasis on preservation. It is the general rule; unpreserved claims are only rarely considered by the courts in New York.[103]

Nevertheless, New York courts have recognized a category of errors—dubbed "mode of proceedings" errors—that are so serious that preservation is not required and they may be raised at any time, including on appeal.[104] These include violation of protection from double jeopardy,[105] deprivation of the right to be present at important court proceedings,[106] and improper delegation of a judicial duty to a court officer.[107] These examples are categorical in nature. A defendant raising one of

98. N.Y. Crim. Proc. L. § 470.15(3)(a)–(c) (Westlaw 2010).

99. N.Y. Crim. Proc. L. § 470.05(2) (Westlaw 2009).

100. See Subsection III(B)(2), *infra*.

101. *See* N.Y. Const. art. VI, § 3(a).

102. *See* N.Y. Crim. Proc. L. § 470.35 (Westlaw 2010).

103. *See e.g.* Thomas R. Newman & Steven J. Ahmuty, Jr., *Threshold Issues: Objections, Harmless Error, Review Guides*, N.Y.L.J. at 3 (Jan. 6, 2009) (declaring that "[w]ith certain limited exceptions, issues raised for the first time on appeal will not be considered as grounds for a reversal or modification").

104. *Patterson*, 347 N.E.2d at 902 ("There is one very narrow exception to the requirement of a timely objection. A defendant in a criminal case cannot waive, or even consent to, error that would affect the organization of the court or the mode of proceedings prescribed by law.").

105. *E.g. People v. Williams*, 925 N.E.2d 878 (N.Y. 2010).

106. *E.g. People v. Dokes*, 595 N.E.2d 836 (N.Y. 1992).

107. *E.g. People v. Pizarro*, 594 N.Y.S.2d 159, 159 (App. Div., 1st Dept. 1993) (noting that "appellate review of a trial court's improper use of a court clerk 'to instruct' the jury foreperson concerning the verdict sheet would not be precluded by a defendant's failure to object thereto," but declining to undertake review in the absence of a proper record).

these claims need not demonstrate that his specific circumstance warrants reversal. It is sufficient that he raises the claim itself. Apart from mode-of-proceedings errors, a party raising an unpreserved question on appeal has only one other alternative: to plead for the intermediate appellate court to reverse or modify "in the interest of justice."[108]

The intermediate appellate courts in New York, then, have greater jurisdiction and power than the state's highest court. They can reverse or modify a judgment "[u]pon the law," "[u]pon the facts," or "[a]s a matter of discretion in the interest of justice," or on any combination of grounds.[109] Modifications or reversals on unpreserved questions specifically fall under the "as a matter of discretion in the interest of justice" prong:

> The kinds of determinations of reversal or modification deemed to be made as a matter of discretion in the interest of justice include, but are not limited to, the following:
>
> (a) That an error or defect occurred at a trial resulting in a judgment, which error or defect was not duly protested at trial as prescribed in [CPL § 470.05(2)] so as to present a question of law, deprived the defendant of a fair trial; and
>
> (b) That a sentence, though legal, was unduly harsh or severe.[110]

Thus, the only qualification is that the unpreserved error must have resulted in an unfair trial. Otherwise, like its federal counterpart, CPL § 470.15 provides no guidance regarding when an unpreserved issue should be considered "as a matter of discretion in the interest of justice." "Interest of justice" is not defined anywhere in the statute.

Unlike federal Rule 52(b), which had life breathed into it by *Olano*'s four-part test, there is no corresponding test at the state level. Decisions reversing or modifying in the interest of justice confirm this standardless rule. Only rarely does an

108. N.Y. Crim. Proc. L. § 470.15(6).
109. N.Y. Crim. Proc. L. § 470.15(3).
110. N.Y. Crim. Proc. L. § 470.15(6).

intermediate appellate court explain why it is flexing its interest-of-justice muscle; it simply says that it is doing so. For a classic example of this conclusory assertion of power, in *People v. Friedman*,[111] the Second Department used this language in its holding:

> The defendant correctly contends that his conviction . . . must be vacated. The evidence was legally insufficient to establish his guilt as the People failed to prove beyond a reasonable doubt that the defendant possessed "a written instrument which has been falsely made, completed or altered" . . . . *Although this issue is unpreserved, we reach it in the exercise of our discretion in the interest of justice.*[112]

The last sentence of this paragraph is the sole discussion of why the court was reversing despite the lack of preservation.[113] The court's lone citation, to *People v. Lowery*,[114] is not helpful to discerning a meaning for "interest of justice." Like *Friedman*, *Lowery* involved a reversal because of legally insufficient evidence. And in *Friedman*, as in *Lowery*, the claim was not preserved. The *Friedman* court's only response was, "Although unpreserved, we reach this issue in the interest of justice (see, CPL 470.15 [6] [a])."[115] Other similar cases are equally unhelpful in providing a standard or test for the exercise of discretion.[116] In much the same way, cases in which a court does not exercise its discretionary authority are usually met with a simple declaration that "we decline to review [the claim] in the interest of justice."[117]

Rarely, however, a court will give reasons for its decision on the interest-of-justice question. Like the federal courts, New York's intermediate appellate courts will decide unpreserved issues if doing so will exonerate an innocent person. In *People v. Ramos*,[118] for example, the trial judge stated on the record that

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111. 789 N.Y.S.2d 250 (App. Div. 2d Dept. 2005).

112. *Id.* at 250 (citation omitted; emphasis added).

113. *Id.*

114. 680 N.Y.S.2d 253 (App. Div. 2d Dept. 1998).

115. *Id.* at 253.

116. *See e.g. People v. Dunbar*, 713 N.Y.S.2d 437 (App. Div. 4th Dept. 2000); *People v. Butler*, 711 N.Y.S.2d 525 (App. Div. 3d Dept. 2000).

117. *See e.g. People v. Valdivia*, 885 N.Y.S.2d 490 (App. Div. 1st Dept. 2009).

118. 308 N.Y.S.2d 195 (App. Div. 1st Dept. 1970).

he believed the jury's guilty verdict was erroneous and the defendant was in fact innocent.[119] Nevertheless, he did not state his reasons on the record or set aside the verdict.[120] The lack of a record was particularly problematic for the appellate court since, without the judge's stated reasons, there was nothing to review. The Appellate Division therefore turned to its interest-of-justice power, describing it as "broad" and stated that it should be exercised "in accordance with the conscience of the court and with due regard to the interests of the defendant and those of society."[121] The court stated that it had to look not only at the facts of the particular case but also to its "duty to correct any situation which casts a doubt upon the proper functioning of the courts in the administration of justice"[122]—a statement remarkably similar to that in *Olano* and other cases talking about the fourth step of the federal plain error rule. Applying these principles to *Ramos*, the First Department found that allowing the guilty verdict to stand would cast such a "doubt" on the justice system because of the inconsistency between the jury's verdict and the trial court's statements of the defendant's innocence.[123] In the absence of "clear and convincing evidence" of guilt that could remove this doubt, reversal was required.[124]

Similarly, in *People v. Kidd*,[125] the defendant was convicted of robbery in the second degree. The evidence against the accused was sparse: testimony of a single witness (the victim) who had only a "fleeting" opportunity to observe the defendant during the crime, but who identified the defendant on the street a few days after the incident.[126] There was some alibi evidence and the defendant had only a minor criminal record.

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119. *Id.* at 196.

120. *Id.* at 197.

121. *Id.* at 198.

122. *Id.*

123. *Id.* at 198–99. This doubt was "accentuated" by the trial court's encouragement to the defendant to seek a pardon or other remedy from the governor. *Id.*

124. *Id.* at 199. A dissenting judge would have held that the lack of record evidence prohibited the exercise of discretion. *Id.* (McNally, J., dissenting). The dissent criticized the majority for "speculat[ing], assum[ing] and decid[ing] the issue in a vacuum," *id.*, asserted that the case turned on questions of credibility, and noted that the jury's verdict implied a credibility finding in favor of the People's witnesses that should not have been disturbed, *id.* at 199–200.

125. 431 N.Y.S.2d 542 (App. Div. 1st Dept. 1980).

126. *Id.* at 543.

Nevertheless, the court found the evidence of guilt legally sufficient.[127] Moreover, the court held that the verdict was not against the weight of the evidence.[128] Still, the court reversed the conviction on interest-of-justice grounds. Whatever the meaning of its interest-of-justice jurisdiction, "[W]e think we do not overstep the line when we exercise our 'interest of justice' powers on the basis of so fundamental a consideration as guilt or innocence." After quoting from *People v. Ramos*, the First Department held, "[O]n balance we are left with a very disturbing feeling that guilt has not been satisfactorily established; that there is a grave risk that an innocent man has been convicted; and that we should therefore not let this conviction stand."[129]

At least one case seemed to hold that a cumulative effect from multiple errors can warrant interest-of-justice reversal even if, in isolation, single errors were not prejudicial. In *People v. Langford*,[130] the appellate court pointed to a number of errors: prosecutorial misconduct during cross-examination and summation; an incomplete charge to the jury on alibi; a close question on identity evidence; and insufficient evidence that the victim sustained a "physical injury," as required for a conviction.[131] Regarding preservation, the court stated that

> [w]hile many of the errors complained of were not objected

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127. *Id.* at 543–44. There was no question that a robbery was committed. When viewed in the light most favorable to the prosecution, the People's evidence—the complainant's testimony—made out a prima facie case for robbery in the second degree.

128. *Id.* at 545. I find this conclusion troublesome. Weight-of-the-evidence analysis requires an intermediate appellate court to

> determine whether an acquittal would not have been unreasonable. If so, the court must weigh conflicting testimony, review any rational inferences that may be drawn from the evidence and evaluate the strength of such conclusions. Based on the weight of the credible evidence, the court then decides whether the jury was justified in finding the defendant guilty beyond a reasonable doubt. . . . Essentially, the court sits as a thirteenth juror and decides which facts were proven at trial.

People v. Danielson, 9 N.Y.3d 342, 348 (N.Y. 2007) (citations omitted). *Kidd* does not explain why the verdict was not against the weight of the evidence—after all, the court's characterization of the evidence of identity as "troublesome" is the classic case for weight of the evidence reversal—other than to say, "[W]e cannot say the verdict is against the weight of the evidence in the accepted legal sense." *Kidd*, 431 N.Y.S.2d at 545.

129. *Kidd*, 431 N.Y.S.2d at 545.

130. 545 N.Y.S.2d 610 (App. Div. 2d Dept. 1989).

131. *Id.* at 610–12.

> to at trial, we nevertheless feel compelled, under the circumstances of this case, to reach them in the interest of justice and to reverse the judgment of conviction. . . . The cumulative harmful effect of the various errors cannot be doubted.[132]

Interest-of-justice power is also used by intermediate appellate courts to reduce otherwise lawful sentences that they deem excessive.[133] Nevertheless, a defendant's voluntary, knowing, and intelligent waiver of the right to appeal will foreclose an interest-of-justice review of his or her sentence on excessiveness grounds.[134]

On the other hand, some decisions explain why the courts are not exercising their interest-of-justice jurisdiction. The typical reason is the overwhelming evidence of the defendant's guilt,[135] but even here, the explanation is often sparse. For example, in *Belgrave*, one of the issues was a purported error in the verdict sheet.[136] The Second Department, in affirming, simply held that:

> the defendant's contention that the verdict sheet submitted to the jury was not proper is not preserved for appellate review as a matter of law since the defendant failed to object to its submission . . . . *We decline to exercise our interest of justice jurisdiction to review the defendant's claim given the overwhelming evidence of the defendant's guilt.*[137]

Some opinions answer the interest-of-justice question by looking to see if the error affected the fairness of the defendant's trial.[138] They do so, however, by looking at the error in the context of the weight of evidence against the defendant,[139] and here, too, the analysis can be conclusory. But a 1973 decision

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132. *Id.* at 610, 611 (citation omitted).

133. *See e.g. People v. Perino*, 907 N.Y.S.2d 173 (App. Div. 1st Dept. 2010). This power is specifically codified in N.Y. Crim. Proc. L. § 470.15(6)(b) (referring to a sentence that is "unduly harsh or severe").

134. *People v. Lopez*, 844 N.E.2d 1145 (N.Y. 2006).

135. *See e.g. People v. Belgrave*, 580 N.Y.S.2d 481 (App. Div. 2d Dept. 1992).

136. *Id.* at 738.

137. *Id.* (citations omitted; emphasis added).

138. *See e.g. People v. King*, 482 N.Y.S.2d 924, 925 (App. Div. 3d Dept. 1984) (noting that court will address interest-of-justice question "only where error is so egregious that it deprives defendant of a fair trial").

139. *See e.g. id.* (itemizing evidence of defendant's fraud against insurer).

from the First Department noted how important the weight of the evidence is in assessing whether to reverse in the interest of justice. At issue in *People v. Cornish*[140] was whether the prosecutor improperly cross-examined the defendant. During the examination, the trial judge asked defense counsel if he wanted to object. Defense counsel declined. After first noting the overwhelming evidence of guilt, the appellate court went on:

> [N]ot only was there no objection, but the court invited objection from defense counsel and the invitation was refused. We are asked to reverse nevertheless in "the interests of justice". This naturally raises the question of just what are the interests of justice in such a situation. If justice is more interested in a technically perfect trial than in one in which a proper result is reached, then the interests of justice would indicate a reversal. Here we have no way of knowing what prompted counsel to allow the improper testimony to pass without objection. He might well, in the absence of any other viable contention, have hoped to capitalize on the District Attorney's overzealousness to obtain a sympathetic response from the jury. But, whatever may be the reason, we cannot see that an appellate court is required to overlook the omission where guilt is clear.[141]

Some decisions employ a harmless error framework when analyzing a preservation question. In *People v. Elcock*,[142] the appellate court gave two reasons for not reversing in the interest of justice. Although the trial court did not give an alibi charge to the jury, this purported error was unpreserved because defense counsel did not request an alibi charge. The court found no reason to exercise its discretion to reach the issue in the interest of justice. First, there was "strong evidence of the defendant's guilt."[143] Second, "the trial court's instructions, when taken as a whole, properly instructed the jury that the People bore the burden of proof as to the complicity of the defendant in the charged crimes."[144] Thus, the court implied that the jury charge cured any possible prejudice to the defendant.

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140. 349 N.Y.S.2d 694 (App. Div. 1st Dept. 1973).

141. *Id.* at 695–96.

142. 516 N.Y.S.2d 19 (App. Div. 2d Dept.).

143. *Id.* at 20.

144. *Id.*

Secondary authorities provide little help in articulating a standard in this area. One encyclopedia provides a list of instances in which intermediate appellate courts have reviewed unpreserved questions[145] but does not synthesize a workable rule, other than to state that courts will not reverse in the interest of justice if the evidence was overwhelming[146] but will exercise their discretionary jurisdiction if the cumulative effect of the errors deprived the defendant of a fair trial.[147]

Commentators emphasize how rarely an intermediate appellate court will review an unpreserved question. One veteran appellate practitioner opined, "Experience also indicates that the Appellate Divisions do not frequently exercise this discretionary power."[148] Another team of experts said that a court will only "rarely" exercise its interest-of-justice jurisdiction.[149] "[I]t all depends on the facts of the case and how sympathetic the court feels toward the appellant's position."[150]

C. Comparing the Two Rules

At first blush, the federal and New York courts would seem to take radically different positions in the handling of unpreserved questions. New York's rule is discretionary and fact-specific in every case. There is no standard other than the "interest of justice." This "standard" gives no guidance to the courts that have to apply it on a daily basis. Worse, since only the intermediate appellate courts have this discretion, there is no guidance from the State's highest court, the Court of Appeals, let alone a check from that court on the improper exercise of interest-of-justice discretion. Finally, the Appellate Division and other intermediate appellate courts have not given detailed treatment to the question. As I have demonstrated above, there are a few basic principles that can be cherry-picked from isolated statements in a handful of decisions: Discretion should

145. 34B *N.Y.Jur.2d Criminal Law: Procedure* § 3589 (Westlaw 2010).

146. *Id.* at n. 17.

147. *Id.* at n. 18.

148. Norman A. Olch, *Appellate Court Consideration of Unpreserved Error and Matters Not in the Record*, 242 N.Y.L.J. 1 (Aug. 31, 2009).

149. Newman & Ahmuty, *supra* n. 103, at 3.

150. *Id.*

be exercised to free the innocent; it should not be used to let defendants off on technical errors where the evidence of guilt is overwhelming; the cumulative effect of numerous unpreserved errors on the fairness of a defendant's trial weighs in favor of reversal; excessive sentences can be reduced without a showing of abuse of discretion; and the whole record must be examined to place errors in their proper context. For those who prefer definite legal rules to give guidance in future cases, the New York standard fails. For those who prefer an escape-valve to strict preservation rules and trust courts to exercise their discretion in an appropriate manner, the interest-of-justice standard is a perfect rule precisely because it is standardless.

Those who eschew the rudderless interest-of-justice rule and prefer something more definitive may be tempted to replace it with something like the federal "plain error" rule because it *seems* to provide a structured way of tempering the harshness of the preservation rule. However, at its core, plain error is nothing more than a dressed up version of New York's interest-of-justice rule. There are four hurdles for an appellant to leap over before a court will reverse on an unpreserved issue: (1) error that is (2) plain, (3) affects substantial rights, and would result in (4) a miscarriage of justice if not corrected. The first requirement—the presence of error—is in both rules, although arguably a New York court could reverse if justice required it, even though there was no error at all.[151] The third requirement, affecting "substantial right" is also present in New York. In the Criminal Procedure Law, immediately preceding the general rule of preservation is the following: "An appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties."[152] This rule essentially states New York's adherence to the principle of harmless error. Errors that do not affect the substantial rights of the parties are those upon which the outcome did not turn.[153]

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151. I am hard pressed to imagine a situation in which, limited by the record from the court of first instance, an intermediate appellate court would reverse a lawful and proper conviction without finding some error below.

152. N.Y. Crim. Proc. L. § 470.05(1). The preservation rule is contained in N.Y. Crim. Proc. Law § 470.05(2).

153. *See Crimmins*, 326 N.E.2d at 794–95.

Only prejudicial or harmful errors can result in reversal or modification.[154]

The fourth requirement of *Olano*'s plain error formulation is markedly similar in language, purpose, and effect to interest-of-justice. It focuses on whether the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Moreover, it is discretionary with the appellate court.[155] That leaves the requirement of plainness as the sole difference between the jurisdictions' tests.

Arguably, the plainness requirement of the federal rule would add some value to New York's standard. Errors predicated on finite or nuanced interpretations of the law are not "plain." This addresses the fairness concern of preservation. If error was obvious to the judge and adversary at the time it was made, they are in a harder position to complain when the issue is raised on appeal. On the other hand, when the issue requires a nuanced interpretation of the law, it is not in the "interest of justice" to excuse preservation, since the adversary and court cannot be faulted for not anticipating an error that is not clear.

III. TOWARDS A WORKABLE STANDARD

A. Formulating a Standard

When I first began examining this issue, I tried to identify the crux of the problem and create a solution around it. At their core, plain error and interest-of-justice jurisdiction exist as safety valves to prevent the unjust conviction of criminal defendants. In turn, these doctrines are necessary because some defense attorneys—either out of ignorance or strategy—do not adequately or properly preserve claims on the record.

Thus, my initial thought was to treat unpreserved questions for what they really are: masked ineffective-assistance-of counsel claims. Under federal law, a defendant has been deprived of his constitutional right to counsel if he can prove that his attorney's performance was "deficient" and that he

154. *Id.* at 795 (finding that "the nonconstitutional errors which occurred on this defendant's second trial were harmless").

155. Presumably if the Court of Appeals improvidently exercises its discretion in a case, the Supreme Court could reverse, but my research has not revealed any such case.

suffered prejudice as a result.[156] In assessing whether representation was deficient, courts consider whether the attorney's performance was "reasonable considering all the circumstances"[157] or whether the conduct was "outside the wide range of professionally competent assistance."[158] In particular,

> [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy.[159]

Applying this standard to unpreserved questions, we can conclude that an attorney's performance with respect to preservation will be ineffective only if a reasonable attorney would have made an objection and there is no legitimate, strategic explanation for the failure to preserve the claim.

In turn, a defendant would have to show prejudice: that the failure to object had an "effect on the judgment."[160] In explaining the reason for requiring prejudice, the *Strickland* Court noted:

> Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined

156. *See Strickland v. Wash.*, 466 U.S. 668, 682 (1984).

157. *Id.* at 688.

158. *Id.* at 690.

159. *Id.* at 689 (internal citations and quotation marks omitted).

160. *Id.* at 691.

> with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.[161]

Prejudice requires more than a showing that the error had some "conceivable effect" on the verdict, because "[v]irtually every act or omission of counsel would meet the test," yet not every error is so severe that it undermines the judgment itself.[162] Instead, the test is whether there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[163] Thus, in the preservation context, a defendant would have to show that the unpreserved claim was nevertheless meritorious to the extent that there was a "reasonable possibility" that preservation would have led either to correction at the trial level or a win on appeal.

At first blush, the *Strickland* test seems like an ideal structure for evaluating unpreserved questions. It focuses on the reasonableness of counsel's conduct at trial. A trial attorney is not held to the impossible standard of predicting, in the heat of battle, every conceivable legal issue that could provide for appellate relief after conviction. Instead, he or she is faulted only for ignoring obvious errors that a reasonable attorney would have objected to under the circumstances. Likewise, not every error would result in a reversal, but only those where there is a reasonable probability that there would have been a different outcome. Importantly, the *Strickland* standard does not fault a trial attorney for strategic decisions that, in hindsight, may have been better made; stated another way, if failure of preservation is on account of a tactical decision, the defendant is not rewarded for his or his attorney's gamesmanship.

In addition, the *Strickland* test is a workable and familiar rule for courts. Appellate courts could, in theory, simply decline

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161. *Id.* at 693.

162. *Id.*

163. *Id.* at 694.

to review any unpreserved question. The failure to make a proper objection would then become a claim in and of itself. If, in not objecting, the defense attorney provided ineffective assistance of counsel, his or her client—on appeal—would get the same appellate relief available had the claim been properly preserved but only if the defendant could satisfy the *Strickland* test first.

While attractive, this *Strickland* approach to handling unpreserved questions is ultimately problematic because of several practical concerns. In New York, courts are loath to review ineffective-assistance claims on direct appeal because they typically involve matters outside the record. For example, counsel's strategy for not making an objection will ordinarily not appear on the record. Thus, the defendant would have to proceed by way of a post-judgment motion to vacate the judgment. This is problematic because there is no right to appointed counsel to help defendants litigate such motions.[164] There are also several procedural bars that may prevent the trial court from granting relief.[165] It would also be an inefficient course of action, as the appellate process would become bifurcated and prolonged.

B. A Proposal

I propose that appellate courts continue to exercise their discretion to review unpreserved questions. The federal plain error rule provides a useful framework, but I suggest omitting the requirement that the error affect the substantial rights of the aggrieved party, because this is nothing more than a statement of the harmless error rule. Thus, an appellate court should review an unpreserved question if: (1) there was, in fact, an error; (2) the error is "plain;" and (3) the interests of justice would be served by appellate review.

The third prong of the rule should be further defined. The after-the-fact, case-by-case approach to interest-of-justice review provides no guidance to courts and litigants. Either the

164. *People v. Richardson*, 603 N.Y.S.2d 700 (S. Ct. Kings County 1993).

165. *See e.g.* N.Y. Crim. Proc. L. §§ 440.10, 440.30 (Westlaw 2010).

Legislature or the courts themselves should identify the factors that should be used to determine if the interests of justice warrant review.

C. Factors Potentially Affecting the "Interest of Justice"

As a starting point, I propose the following factors for courts to use: (1) the likelihood of the defendant's innocence; (2) the strength of the evidence against the defendant; (3) whether the failure to object appears to have been a tactical decision by the defense; (4) the public policy interests, if any, at stake in the claim; (5) whether the claim is legal or factual in nature; (6) the remedies available to the aggrieved party had the claim been raised in the first instance; and (7) whether the adversary has been deprived of an opportunity to make a complete record. If, in weighing these factors, the court finds that the strong public policy interests contained in the preservation rule should be tempered because of the unique circumstances of the case, then it should review the claim. These seven factors would help a court to make this balancing between the competing interests of efficiency, which is promoted by a strict adherence to the preservation rule, and fairness, which is furthered by liberally excusing preservation. As a factors test, it still has aspects of a backward-looking, case-by-case rule; however, it also provides parties and the courts a common language to work from. It has the added benefit of familiarity: These are many of the factors that courts have been using, except stated in one rule. The remainder of this discussion will assess the role and importance of each.

1. An Innocent Person Would Otherwise Be Convicted.

This is the most persuasive reason to review an unpreserved question: to free an innocent person from punishment. Most frequently this reason will be cited in the context of a legal sufficiency claim, where the defendant claims that the government failed to prove its case beyond a reasonable doubt.

To what extent does this factor mean an appellate court should always review unpreserved legal sufficiency claims? If a defendant asserts that the government did not prove an element

of the crime, does not this automatically mean that there is potentially an innocent person in prison? At least one jurisdiction adopts this view and therefore does not require preservation of legal sufficiency claims.[166] Perhaps the preservation requirement makes sense only when the allegedly missing element is technical and could, in all likelihood, have been easily proved if brought to the attention of the trial court and prosecutor.[167] On the other hand, there is a good argument that such a case is against the interest of justice because a defendant would be punished on legally insufficient evidence. In balancing the equities, is preservation really necessary to ensure that prosecutors know the elements of the crime and present evidence on each element?[168]

2. Overwhelming Evidence of Guilt Is Absent.

At the heart of our notion of justice is the concept of retribution and just deserts for criminals. Thus, if there is overwhelming evidence of guilt, a person should be found guilty and technical errors should be ignored. Of course, errors not affecting the substantial rights of a party would be ignored under the harmless error doctrine, but the preservation stage of the analysis provides an opportunity to take a shortcut through the analysis. Arguably, there are some errors that, although they do not go to the guilt or innocence of the accused, raise serious questions that might shake the public's confidence in the justice system. Some Fourth Amendment claims may fall into this category, for example: Although the exclusionary rule[169]

166. *See e.g. Rankin v. State*, 46 S.W.3d 899, 901 (Tex. Crim. App. 2001) (quoting *McFarland v. State*, 930 S.W.2d 99, 100 (Tex. Crim. App. 1996)); *Ward v. State*, 188 S.W.3d 874, 876 n. 3 (Tex. App.–Amarillo 2006) (characterizing state's argument of waiver as "unavailing").

167. *See e.g. Whipple*, 760 N.E.2d at 337.

168. These issues concerning preservation and legal sufficiency are beyond the scope of this article; I intend to pursue them in a future article.

169. *See e.g. Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (extending reach of exclusionary rule to states by holding that "all evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in a state court"); *Weeks v. U.S*, 232 U.S. 383 (1914) (pointing out that "[t]he tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts").

rewards defendants by suppressing evidence, suppression serves the greater public interest in deterring police from committing future violations of the Constitution.[170] The courts' failing at least to review a potentially egregious Fourth Amendment claim might send a bad message to police and to the public.

3. The Absence of Preservation Did Not Result From a Tactical Decision by the Defendant's Attorney.

Here, courts would benefit from the equitable maxims, one of which is the unclean hands doctrine:[171] A party should not benefit from his own wrongdoing.[172] Thus, if there is a probability that an objection was not made due to a tactical decision by the defense attorney, a defendant should not be permitted to change course on appeal and argue that the objection should have been made.[173] This leads to the question of whether, in a given case, the appellate court is able to discern that this is in fact what occurred.

In some situations, it should be obvious why a defense attorney might not object at trial. For example, let us assume that a defendant is charged with murder. At trial, his defense attorney does not object when the prosecution asks to have the jury charged on the lesser-included offense of voluntary manslaughter. The jury finds the defendant guilty of voluntary manslaughter and the defendant appeals, claiming that the jury should not have been charged on the lesser crime. There is an obvious tactical reason why the trial attorney did not object: The lesser charge gave the opportunity for a compromise verdict. In such an obvious case of tactics, the appellate court should not review the claim on appeal. If the defendant is adamant that this was not strategy by his counsel, he can present

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170. *See Elkins v. U.S.*, 364 U.S. 206, 217 (1960) (recognizing, in case addressing issue left open in *Weeks*, that purpose of exclusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it").

171. *See e.g. Gutierrez v. Gonzales*, 458 F.3d 688, 693 (7th Cir. 2006).

172. *Id.* (asserting that "[w]hile the government has not raised the issue of 'unclean hands,' the undisputed fact that Gutierrez is in violation of the law is at least relevant to our determination of whether the government committed affirmative misconduct in finding out about him").

173. Of course, this does not prevent a post-conviction motion to vacate for ineffective assistance of counsel where the reasons for the lack of objection could be fleshed out.

this claim in a post-conviction motion to vacate and the issue can be sorted out at the trial level.

4. The Claim Raises Significant Public Policy Concerns.

Sometimes defendants will raise novel claims that implicate significant policy interests. For example, some defendants recently challenged on appeal the jurisdiction of New York's felony trial court to hear misdemeanor cases that had been administratively transferred to it as part of a pilot program designed to merge some trial courts. The defendants did not object at trial, but the appellate courts nevertheless entertained the issue. While the appellate courts did not do so in the interest of justice—they excused preservation because the claim was a "mode of proceedings" error that went to the jurisdiction of the trial court—the example illustrates an instance in which a timely objection would have done little to affect the outcome, and hearing the case on appeal would permit the resolution of important public policy issues.[174]

5. The Question Raised Is Purely Legal.

A factor related to the fourth consideration requires examination of the nature of the claim being raised. There are some types of claims for which a timely objection would have done little to change the lawyer's strategy or flesh out the record. An appellate court's consideration of a purely legal issue—such as a challenge to the subject matter jurisdiction of the trial court—would typically not be helped by preservation.

6. The Trial Court or the Opposing Party Probably Would Not Have Changed Course If an Objection Had Been Made.

One of the policy reasons behind preservation is fairness to the adversary and trial court. There are some cases in which the adversary or the court would have changed course if presented with a timely objection. For example, in a recent New York case, a trial judge excused a group of jurors who had raised their

174. The Court of Appeals ultimately concluded that the judicial transfer orders were valid. *See People v. Correa*, 933 N.E.2d 705 (N.Y. 2010).

hands when asked if they would be unable to serve on a long trial. On appeal, the defendant claimed that the trial court committed reversible error by not questioning jurors individually. The Appellate Division refused to address the merits of the defendant's argument because a timely objection would have been likely just to cause the trial court to conduct individual inquiries of the prospective jurors.[175] In other words, a defendant should not be rewarded for sitting on his claim until the case goes up on appeal.

7. Reviewing the Claim for the First Time on Appeal Would Not Deprive the Opposing Party of the Opportunity to Make a Proper Record.

Similar to the sixth principle, the seventh is based on fairness to the adversary. A timely objection allows the record to be built. Usually, it is the party making the unpreserved claim on appeal that is harmed by the failure to make a record. However, sometimes that party's position is clear from the record, but the adversary has been deprived of the opportunity to make a record that rebuts the claim. In such a case, the appellate court should give careful thought to the parties' positions before moving beyond preservation.

V. CONCLUSION

Ultimately, preservation is a threshold question. Reviewing an unpreserved question is different from granting appellate relief on the question: When a court reviews for plain error or in the interest of justice, it does not agree to enter a finding in the appellant's favor, but simply agrees to conduct an analysis of the substance of the appellant's claim. An appellate court can excuse preservation and still find against the appellant. In fact, courts should avoid what seems to have been the norm in New York—finding that interest-of-justice review is warranted whenever the appellant has a winning claim on the merits and is not warranted when the appellant has a losing claim. Such a

175. *People v. Casanova*, 875 N.Y.S.2d 31, 34 (App. Div. 1st Dept. 2009) (noting that "the applicable statutes, rules and case law give the trial court discretion on the matter of excusing jurors").

bootstrapping analysis conflates the threshold question with the substance of the issue.

Courts should also consider giving greater guidance to the appellate bar on when unpreserved claims are likely to be reviewed. I suggest a factors test, although one could easily craft a rule that carves out specific categories of claims for review and excludes others.[176] The point is to give some explanation of why a court is exercising its discretionary authority to waive preservation in particular cases so that lawyers will know when to raise such issues on appeal.

176. New York's mode-of-proceedings category in effect does this.