

A SUFFICIENCY-OF-THE-EVIDENCE EXCEPTION TO THE NEW YORK APPELLATE PRESERVATION RULE

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Appellate procedure gets little attention. Politicians have never heard of it, law school barely mentions it, and lawyers prefer search-and-seizure doctrine to the dry intricacies of appellate rules. This is unfortunate. Since 1970, over two million people have been convicted of a crime in New York.¹ This number continues to climb. In this massive system of convictions, an appeal is often the last chance to correct an error that will have a life-changing impact on the accused. But while the New York State Constitution and Criminal Procedure Law establish a right to appeal,² that right is burdened with procedural hurdles. “Preservation” is perhaps the biggest one.

New York preservation rules generally require that parties cannot argue a point on appeal that they did not raise at trial.³ This doctrine creates a “speak now or forever hold your peace” mandate—if defense counsel does not speak up, his client loses the claim forever. As the Appellate Divisions annually reject thousands of criminal appeals on preservation grounds, preservation often means the difference between liberty and prison. Given these stakes, preservation rules must be fair. When it comes to “sufficiency of the evidence” appeals, they are not.

Under the state and federal due process clauses, the government cannot incarcerate someone without proof of guilt beyond a reasonable doubt.⁴ A violation of this “sufficiency of the evidence” rule (“sufficiency”) is “the most fundamental of all possible defects in a criminal proceeding.”⁵ Recognizing as much, the New York legislature has expressly guaranteed appellants the right to argue that the “evidence adduced at a trial . . . was not legally sufficient to establish the defendant’s guilt of an offense of which he was convicted[.]”⁶

Sufficiency arguments come in many different forms, ranging from categorical arguments about the Penal Law’s scope (e.g., a

¹ ASS’N OF THE BAR OF THE CITY OF N.Y., THE CRIMINAL JUSTICE OPERATIONS COMM., THE CORR. & CMTY. REENTRY COMM., & THE CRIMINAL ADVOCACY COMM., REPORT ON LEGISLATION BY THE CRIMINAL COURTS COMMITTEE 2 (2015), <http://www2.nycbar.org/pdf/report/uploads/20072824-ReportonA.7030S.5169reSealingMisdemeanorFelonyRecords.pdf> [<http://perma.cc/42K3-8SVQJ>].

² N.Y. CONST., art. XI, § 4, art. VI, § 4(k); N.Y. CRIM. PROC. LAW § 450.10 (McKinney 2015); *People v. Ventura*, 17 N.Y.3d 675, 681 (2011); *People v. Callahan*, 80 N.Y.2d 273, 284 (1992); *People v. Pollenz*, 67 N.Y.2d 264 (1986).

³ See CRIM. PROC. § 470.05(2); see also *People v. Gray*, 86 N.Y.2d 10 (1995).

⁴ See U.S. CONST. amends. V, XIV; see also N.Y. CONST. art. I, § 6; *Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (citing *In re Winship*, 397 U.S. 358 (1970)); CRIM. PROC. § 70.20.

⁵ *People v. Udzenski*, 146 A.D.2d 245, 250 (2d Dep’t 1989).

⁶ CRIM. PROC. § 470.15(4)(b).

disorderly-conduct defendant concedes that he yelled in a subway but argues that the disorderly conduct statute does not cover a mere rant),⁷ to fact-specific arguments (e.g., the government failed to prove physical injury in an assault case).⁸ In some cases, the sufficiency argument will amount to a claim of actual innocence—that is, the evidence affirmatively proves that the defendant did not commit the charged offense.⁹ The United States Supreme Court has referred to these actual-innocence errors as a manifest injustice, and has ordered federal habeas courts to review those errors despite counsel’s failure to object at trial.¹⁰

To win a sufficiency argument, the defendant must establish that, even when the facts are viewed in a “light most favorable” to the government, no rational juror could find guilt beyond a reasonable doubt.¹¹ If the court finds insufficient evidence, the accused is pronounced “not guilty” and the case is dismissed.

But under *People v. Gray*, the government *can* incarcerate an innocent defendant *regardless of* the weakness of the government’s proof. *Gray* held that if the defendant fails to “preserve” a sufficiency argument, the claim is not reviewable on appeal.¹²

People v. Finch recently challenged *Gray*’s logic.¹³ *Finch* suggested that where the record conclusively establishes a sufficiency defect—that is, the government could not possibly have “cured” the error—preservation should not apply.¹⁴ In those cases, *Finch* explained, counsel’s omission did not “prejudice” the government, and applying preservation would “raise the *disturbing possibility* that factually innocent defendants will suffer criminal punishment for no good reason.”¹⁵

This article argues that the Court of Appeals should expressly overrule *Gray* and hold, as *Finch* strongly suggests, that preservation does not apply to sufficiency appeals when the record affirmatively establishes an incurable sufficiency defect.¹⁶ To justify that theory, this article explains *Gray*’s rationales and then attempts to dismantle them.

⁷ *People v. Gonzalez*, 25 N.Y.3d 1100, 1101 (2015).

⁸ See *In re Phillip A.*, 49 N.Y.2d 198 (1980).

⁹ See *People v. Hamilton*, 115 A.D.3d 12, 28 (2d Dep’t 2014).

¹⁰ *Dretke v. Haley*, 541 U.S. 386, 388 (2004) (citing *Murray v. Carrier*, 477 U.S. 478 (1986)).

¹¹ See *People v. Williams*, 84 N.Y.2d 925, 926 (1994).

¹² *People v. Gray*, 86 N.Y.2d 10, 19 (1995).

¹³ *People v. Finch*, 23 N.Y.3d 408 (2014).

¹⁴ See *id.*

¹⁵ *Id.* at 413-15 (emphasis added).

¹⁶ See *id.*

Part I explains *Gray*'s analysis and *Finch*'s counter-arguments. Part II attacks *Gray*'s theory that preservation is a state constitutional rule. Part III argues that preservation is not a jurisdictional rule, and is thus subject to exceptions when the interests underlying the doctrine do not apply. From that premise, Part IV proposes a sufficiency exception to the preservation rule because affirming a baseless conviction on preservation grounds offends basic justice and advances no state interests. Finally, Part V contends that the state and federal due process clauses require a sufficiency exception to the preservation rule.

I. THE PRESERVATION DOCTRINE: FROM GRAY TO FINCH

Under *Gray*, preservation compliance typically involves the utterance of a few short sentences at the end of the government's case-in-chief.¹⁷ For instance, a defense attorney might object that, (1) "the government failed to prove serious injury (an element of some assault prosecutions) because the injuries were too minor;" (2) "the government failed to prove that the defendant was the person who committed the robbery;" or (3) "the government failed to disprove self-defense beyond a reasonable doubt where video evidence shows that the defendant was attacked with a knife." In turn, the trial judge usually denies the motion without explanation, or utters a few sentences about the motion's problems.

Gray offered several justifications for this sufficiency preservation rule:

- **Constitutional Argument:** "Under article VI, § 3 of the New York State Constitution, the Court of Appeals, with limited exceptions, is empowered to consider only 'questions of law.'"¹⁸
- **Curing:** A sufficiency objection might provide the government the opportunity to cure the sufficiency defect "before a verdict is reached and a cure is no longer possible."¹⁹
- **Efficiency and Finality:** Sufficiency objections allow the court to dismiss the case at the earliest possible point, thus saving resources and bringing the case to a swift resolution.²⁰

¹⁷ See *People v. Gray*, 86 N.Y.2d 10, 19 (1995).

¹⁸ *Id.* at 20 (quoting N.Y. CONST. art. VI, § 3).

¹⁹ *Id.* at 20-21.

²⁰ See *People v. Hawkins*, 11 N.Y.3d 484, 492 (2008) ("A defendant's motion for a trial order of dismissal that specifies the alleged infirmity helps to assure that legally insufficient charges will not be submitted for the jury's consideration, and serves the overall interest in an efficient, effective justice system."); see also *Gray*, 86 N.Y.2d at 21.

- **Guidance:** Sufficiency motions trigger lower-court rulings, which in turn provide guidance to the appellate courts.²¹
- **Alternative Remedies:** Even if preservation is required, defendants can still argue sufficiency-of-the-evidence claims before the Appellate Division (not the Court of Appeals, though) by requesting “interest-of-justice” review.²² Under interest-of-justice review, an appellate court has unfettered and unreviewable discretion to review sufficiency claims that were not raised below.²³

The Court of Appeals has extended *Gray* to attacks on the facial constitutionality of a statute.²⁴ So, if New York decides to ban birth control, a New Yorker can serve time for violating that unconstitutional ban if he or she is unfortunate enough to be saddled with a lawyer who slept through a first-year constitutional law class.

People v. Finch has called *Gray* into question.²⁵ In *Finch*, the police arrested Mr. Finch for an alleged trespass into a public-housing complex.²⁶ The defendant physically challenged the arrest and was charged with resisting arrest.²⁷ On appeal, Mr. Finch argued that the arresting officer lacked probable cause of trespass (a necessary element of the resisting arrest charge) because the officer knew that a tenant had invited Mr. Finch to the complex.²⁸ Further, while housing management had told the officer that Mr. Finch was no longer welcome, Mr. Finch contended that there was no evidence that management had the contractual authority to override a tenant’s invitation.²⁹ During arraignment, the lower court ruled that management had the authority to override a tenant’s invitation, thus defeating Mr. Finch’s probable cause theory.³⁰ In turn, Mr. Finch did not advance that same argument during his trial, and a jury convicted him.³¹

²¹ *Hawkins*, 11 N.Y.3d at 493 (“[The Court of Appeals’] second level of [appellate] review—‘to authoritatively declare and settle the law uniformly throughout the state’—is best accomplished when the Court determines legal issues of statewide significance that have first been considered by both the trial and the intermediate appellate court.” (quoting *Reed v. McCord*, 160 N.Y. 330, 335 (1899))).

²² *Gray*, 86 N.Y.2d at 22 (citing N.Y. CRIM. PROC. LAW § 470.15(3)).

²³ See CRIM. PROC. § 470.15(6)(a); see also *People v. Belge*, 41 N.Y.2d 60, 61-62 (1976).

²⁴ See *People v. Baumann & Sons Buses, Inc.*, 6 N.Y.3d 404 (2006).

²⁵ See *People v. Finch*, 23 N.Y.3d 408 (2014).

²⁶ *Id.* at 410-11.

²⁷ *Id.* at 412.

²⁸ *Id.*

²⁹ *Id.* at 417.

³⁰ *Id.* at 412.

³¹ *Id.*

In attacking preservation, the *Finch* dissent advanced a “timing” point, arguing that a defendant cannot “preserve” a sufficiency claim by challenging the validity of the government’s theory before trial.³² Instead, a mid-trial sufficiency motion is required—even if the pre-trial court already rejected the argument.³³

The *Finch* majority rejected this repetition rule, relying heavily on a “futility” theory:

Having received an adverse ruling [before trial], defendant did not specifically urge the same theory again in support of his motion to dismiss for insufficiency of the evidence at trial. But he did not have to; once is enough[.] . . . As a general matter, a lawyer is not required, in order to preserve a point, to repeat an argument that the court has definitively rejected. When a court rules, a litigant is entitled to take the court at its word. Contrary to what the dissent appears to suggest, a defendant is not required to repeat an argument whenever there is a new proceeding or a new judge.³⁴

Thus, *Finch* did not reject *Gray*’s preservation command. Instead, *Finch* held that *Gray*’s preservation command was satisfied because the defendant raised the sufficiency theory “at the earliest possible moment—at arraignment.”³⁵ But while the majority reaffirmed *Gray*, it also advanced arguments that threaten to overrule *Gray*, at least when the record affirmatively establishes an “incurable” sufficiency defect:

[Our reaffirmation of *Gray*] does not imply, however, that a specific objection in a trial motion to dismiss *is always* necessary where, as is true in this case, such a requirement will not significantly advance the purposes for which the preservation rule was designed. There will be cases, of which this is one, where the lack of a specific motion has *caused no prejudice* to the People and no interference with the swift and orderly course of justice. Insistence on specificity in a dismissal motion is amply justified where the People *might have cured* the problem if their attention had been called to it. . . . [W]hile the rule of *Gray* is generally a sound one, an overbroad application of it would raise the *disturbing possibility* that factually innocent defendants will suffer criminal punishment for no good reason. . . . The dissent responds by saying, essentially, that procedural rules do sometimes require us to uphold convictions of people who may be innocent[.] . . . True enough; but procedural rules should be so de-

³² *Id.* at 422-27 (Abdus-Salaam, J., dissenting).

³³ *Id.*

³⁴ *Id.* at 412-13 (citing *People v. Mahboubian*, 74 N.Y.2d 174, 188 (1989)).

³⁵ *Id.* at 412.

signed as to keep unjust results to a minimum. We think our interpretation of *Gray* serves that end better than the dissent's.³⁶

Finch explained that *Gray* could have been rooted in a “curing” rationale because if the *Gray* defendants had raised a sufficiency argument (the *Gray* defendants claimed that the government failed to prove knowledge of the weight of the narcotics), “the People might have reopened their case to supply the missing proof.”³⁷ On the other hand, if the record affirmatively indicates an incurable defect in the government’s case, applying preservation would require an appellate court to “uphold[] the conviction of an innocent man, without significantly advancing any valid purpose.”³⁸

In applying the “curing” principle, *Finch* held that the record affirmatively established an incurable sufficiency defect: the absence of probable cause.³⁹ Accordingly, the objection omission did not “prejudice” the government and the claim was reviewable.⁴⁰

To get a better sense of *Finch*’s “curing” rationale, consider an endangerment-of-the-welfare-of-a-child prosecution: the government’s theory is that the defendant served liquor to a “child less than seventeen years old.”⁴¹ The defendant argues, for the first time on appeal, that the government failed to prove that the child was under seventeen. Under these circumstances, trial counsel’s objection omission may have prejudiced the government. The government could have, if placed on notice of the age problem, cured that problem by presenting a birth certificate or calling a witness. On the other hand, if the complainant testified that she was twenty-one at the time of the offense, and there was no indication that the government could have somehow rehabilitated that testimony, the defect is incurable—the government simply has no case.

Finch relied heavily on a “futility” approach and expressly reaffirmed *Gray*. So, while *Finch* referred to the affirmance of convictions of factually innocent defendants as a “disturbing

³⁶ *Id.* at 414-16 (emphasis added).

³⁷ *Id.* at 415.

³⁸ *Id.*

³⁹ *Id.* at 417-18 (“But in light of the undisputed fact, reflected in a video recording, that [the tenant] enthusiastically espoused defendant’s cause in [the arresting officer’s] presence, we do not see how a jury could find, beyond a reasonable doubt, that [the arresting officer] did not know . . . that defendant was present with [the tenant’s] consent.”); *id.* at 414-15.

⁴⁰ *Id.* at 414-16; see also *People v. McLean*, 15 N.Y.3d 117, 121 (2010) (applying a curing approach to right-to-counsel suppression claims and holding that a defendant may only argue, for the first time on appeal, that his statements were secured in violation of his right to counsel if the record “irrefutably” proves the violation).

⁴¹ N.Y. PENAL LAW § 260.10(1) (McKinney 2015).

possibility,”⁴² and advanced arguments that justify overruling *Gray* when the objection omission worked no prejudice, *Finch* left *Gray* intact.

About a year after *Finch*, the Court of Appeals had the opportunity to adopt a curing approach to sufficiency appeals but passed it up. In *People v. Jorgensen*, the defendant was “convicted of manslaughter for reckless conduct that she engaged in while pregnant that caused injury to the fetus *in utero* where the child was born alive but died as a result of that injury days later”⁴³ The defendant then argued, for the first time on appeal, that the reckless manslaughter statute does not apply to a pregnant woman who injures an unborn fetus *in utero*, thus rendering the manslaughter evidence insufficient.⁴⁴

Jorgensen is a classic example of an “incurable” sufficiency defect. The defendant’s argument hinged on an interpretation of the Penal Law and rested on uncontested facts. Thus, the failure to object did not prejudice the government because the defect was incurable.⁴⁵ As Ms. Jorgensen’s appellate counsel explained during oral argument: “If you believed all of everything that the prosecutor offered in this case, no question about it, everything that’s to be believed, the argument remains the same. There’s nothing that . . . an objection can cure at this point.”⁴⁶ Chief Judge Lippman later asked the prosecution during oral argument if preservation applies when “it’s impossible to commit the crime [under the statute.]”⁴⁷ The Court, however, reached the merits without discussing preservation, thus leaving this preservation question open.

The Court of Appeals should overrule *Gray* and hold, as *Finch* strongly suggests, that preservation does not apply to sufficiency appeals when the record affirmatively indicates an incurable sufficiency defect.⁴⁸

⁴² *Finch*, 23 N.Y.3d.at 415.

⁴³ *People v. Jorgensen*, No. 179, 2015 WL 6180890 (N.Y. Oct. 22, 2015).

⁴⁴ See Brief for Defendant-Appellant at 70-84, *People v. Jorgensen*, No. 179, 2015 WL 6180890 (N.Y. Oct. 22, 2015) (“Defendant-Appellant Was Convicted of a Crime That Was Not Legally Possible for Her to Commit under New York Law”).

⁴⁵ *Id.* at 70-72; see also Transcript of Oral Argument at 7-9, *People v. Jorgensen*, No. 179, 2015 WL 6180890 (N.Y. Oct. 22, 2015).

⁴⁶ Transcript of Oral Argument at 9, *People v. Jorgensen*, No. 179, 2015 WL 6180890 (N.Y. Oct. 22, 2015).

⁴⁷ *Id.*

⁴⁸ See *People v. Finch*, 23 N.Y.3d 408, 413-14 (2014).

II. THE PRESERVATION RULE IS A STATUTORY RULE, NOT A CONSTITUTIONAL RULE

Gray argues that the preservation rule is a state constitutional rule: “The preservation rule is necessary for several reasons. Under article VI, § 3 of the New York Constitution, the Court of Appeals, with limited exceptions, is empowered to consider only ‘questions of law.’”⁴⁹

It is unclear why *Gray* considered the preservation rule’s “nature” to be relevant. After all, courts must enforce the rule regardless of its constitutional character. *Gray* also did not even suggest that the preservation rule is a constitutional rule in the *Appellate Divisions*, so *Gray*’s constitutional theory is irrelevant to sufficiency review in those intermediate appellate courts. Ultimately, it seems like the Court was suggesting that constitutional rules are more “important” than statutory ones, and thus preservation is “very important”—so important that there is not even an exception for defendants convicted on insufficient evidence.

Gray’s constitutional analysis is wrong; preservation is a statutory rule and nothing more. The Court’s constitutional theory goes something like this: article VI, § 3(a) says that the “jurisdiction of the court of appeals shall be limited to the review of *questions of law*” and “question of law” is statutorily defined as a “preserved” claim.⁵⁰ Thus, the theory goes, article VI, § 3(a)’s “question of law” provision means “*preserved* question of law.”⁵¹ This argument misreads the Constitution.

Article VI, § 3’s “question of law” provision says nothing about preservation, objections, or anything of the kind; the provision only says “questions of law.” If the “question of law” requirement

⁴⁹ *People v. Gray*, 86 N.Y.2d 10, 20 (1995) (quoting N.Y. CONST. art. XI, § 3(a); citing *People v. Belge*, 41 N.Y.2d 60 (1976)).

⁵⁰ See *Misicki v. Caradonna*, 12 N.Y.3d 511, 524 (2009) (Grafteo, J., dissenting) (“I view the preservation requirement as a constitutional limitation on this Court’s jurisdiction.” (citing N.Y. CONST. art. VI, § 3(a))); see also *People v. Payne*, 3 N.Y.3d 266, 274 (2004) (Read, J., dissenting) (“Preservation is not simply a ‘formality’ Under the State Constitution, this Court, with limited exceptions not applicable here, can consider only ‘questions of law.’ . . . Generally, a question of law is an issue that was preserved by a sufficiently specific and timely objection at trial” (first quoting N.Y. CONST. art. XI, § 3(a); second quoting N.Y. CRIM. PROC. LAW § 470.35 (McKinney 2015)); and then citing *Gray*, 86 N.Y.2d at 20)); see also *People v. Knowles*, 88 N.Y.2d 763, 768 n.1 (1996).

⁵¹ See *Hecker v. State*, 20 N.Y.3d 1087, 1088 (2013) (Smith, J., concurring) (“The underlying assumption seems to be that unpreserved questions of law are not questions of law at all”).

had something to do with preservation, the constitutional framers would have said so.

Indeed, nothing about the phrase “question of law” suggests a preservation rule. A question being a “question of law” hinges on the *substance* of the question, not the *procedural history* of that question’s litigation. Consider the following question: Does the Fourth Amendment permit warrantless searches of homes? This is a “question of law” since it goes to the boundaries of a constitutional right. If suppression counsel fails to argue that the Fourth Amendment prohibits warrantless home searches, this question is *still* a “question of law,” albeit an unpreserved one.⁵²

New York Criminal Procedure Law (“C.P.L.”) § 470.05(2), which the Court seems to have relied upon to interpret article VI, § 3(a) as establishing a constitutional preservation rule, is irrelevant. That statute says:

For purposes of appeal, a *question of law* with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a *protest* thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same.⁵³

Even if that statute defined “question of law” to mean “preserved question of law” (it does not), a statute cannot define the meaning of a constitutional provision.⁵⁴ Congress cannot, for instance, say that the Second Amendment’s right “to keep and bear arms” means “the right to keep a handgun but not bullets.” That rule could only come from a constitutional amendment.

Nothing in article VI, § 3’s purpose suggests that “question of law” has anything to do with “preservation.”⁵⁵ The 1894 framers created article VI, § 3 to establish the Court of Appeals as the State’s High Court for the same reason that legislatures have always created high courts: to authoritatively resolve questions of statewide significance (in contrast to everyday factual questions such as, “Was the light green?”).⁵⁶ The Constitutional Convention floor debates hammer this message home:

1894 CONSTITUTIONAL CONVENTION MEMBER CHOATE:

⁵² See *People v. Riley*, 19 N.Y.3d 944, 947-49 (2012) (Pigott, J., dissenting).

⁵³ CRIM. PROC. § 470.05(2) (emphasis added).

⁵⁴ See *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

⁵⁵ N.Y. CONST. art. VI, § 3(a).

⁵⁶ See *Reed v. McCord*, 160 N.Y. 330, 335 (1899) (explaining that the Court of Appeals was established to “authoritatively declare and settle the law uniformly throughout the state.”).

[New York Law] should be the same for the whole State; [] should be a consistent and harmonious system; [and] should be declared clearly and authoritatively by some supreme power, in order not merely that litigants may have their right, but that the whole people may know what is the *law*, by which their contracts and conduct shall be regulated, and by the observance of which they may, if possible, keep out of litigation. *It is this necessity alone which justifies the existence of a Court of Appeals . . .*⁵⁷

This history indicates that the “question of law” provision distinguishes between “legal” questions and “factual” questions. Thus, Constitutional Convention Member Choate could, without contradiction from any convention members, explain that the “cardinal virtue” of article VI of the State Constitution was its “making the Court of Appeals strictly a court of law and not of fact.”⁵⁸

Instead of being a constitutional rule, preservation is a statutory rule, stemming from C.P.L. § 470.05(2).⁵⁹ That statute establishes two distinct standards. First, the question must be a “question of law” and not a “question of fact.”⁶⁰ Second, the appellant must have “protested” “below.”⁶¹ Thus, when analyzing preservation, the *only* relevant legislative authority is C.P.L. § 470.05. Article VI, § 3(a)’s “question of law” mandate is irrelevant.⁶²

The preservation rule’s statutory versus constitutional character may be academic since courts must enforce the rule regardless of its constitutional character. Still, the Court of Appeals seems to think character matters, so it is important to get this right.

III. PRESERVATION IS NOT “JURISDICTIONAL”

The Court of Appeals has also suggested, without offering any analysis, that the preservation rule is “jurisdictional.”⁶³ Judge Read

⁵⁷ 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK 464 (Hon. William H. Steele reviser, The Albany Co. Printers, 1900) (1894) (emphasis added).

⁵⁸ *Id.*

⁵⁹ See CRIM. PROC. § 470.05(2).

⁶⁰ *Id.*

⁶¹ See *id.*

⁶² See *id.*

⁶³ *E.g.*, *Bezio v. Dorsey*, 21 N.Y.3d 93, 98 (2013) (“The threshold issue here is a jurisdictional question—whether the inmate’s claim that the force-feeding order violated his constitutional right to refuse medical treatment was preserved for review.”); *People v. Umali*, 10 N.Y.3d 417, 423 n.2 (2008) (“To the extent defendant relies on a theory of judicial estoppel because the People did not raise preservation in the courts below, we note that estoppel does not vest jurisdiction in this Court where it does not otherwise exist.”); *People v. Turriago*, 90 N.Y.2d 77, 80 (1997) (“We conclude that the first argument, having not been preserved, is beyond the jurisdiction of this Court.

and Judge Graffeo have more forcefully expressed this view in concurring and dissenting opinions.⁶⁴ By definition, jurisdictional rules are categorical barriers to appellate review that permit no exceptions.⁶⁵ Thus, if the preservation rule is “jurisdictional,” a sufficiency exception is dead on arrival.

Contrary to the Court of Appeals’ conclusory analysis, preservation is not jurisdictional. Instead, it is a “prudential” rule that, like mootness,⁶⁶ statute of limitations defenses,⁶⁷ and pleading rules,⁶⁸ is subject to policy and fairness exceptions.

Courts “loosely use[]” the “jurisdictional” label, thus prompting high courts to demand discipline in its use.⁶⁹ Parsing the distinction between jurisdictional and non-jurisdictional rules is difficult. It is perhaps most useful to consider what jurisdictional does *not* mean. Jurisdictional does not mean “threshold,” nor does it refer to a mere element of a cause of action or appeal.⁷⁰ Instead, the label “refers to objections that are ‘fundamental to the power of adjudication of a court’ ‘Lack of jurisdiction’ . . . [means] that the matter before the court was not the kind of matter on which the court had power to rule.”⁷¹ Put another way, a jurisdictional rule goes to “a court’s *competence* to entertain an action.”⁷²

The “jurisdictional” label has drastic practical significance.⁷³ A

Unlike the trial courts and the Appellate Division, this Court’s jurisdiction is limited to issues of law and, with extremely limited exceptions (none of which is applicable here), issues that have not been preserved in the trial court are beyond our power of review.”).

⁶⁴ *Misicki v. Caradonna*, 12 N.Y.3d 511, 524 (2009) (Graffeo, J., dissenting) (“I view the preservation requirement as a constitutional limitation on this Court’s jurisdiction.” (citing N.Y. CONST. art VI, § 3(a))); *see also* *People v. Payne*, 3 N.Y.3d 266, 274-75 (2004) (Read, J., dissenting).

⁶⁵ *See, e.g.,* *Bowles v. Russell*, 551 U.S. 205, 214 (2007); *Adams v. Robertson*, 520 U.S. 83, 89-91 (1997); *Schacht v. United States*, 398 U.S. 58, 64 (1970); *Fleishman v. Cont’l Cas. Co.*, 698 F.3d 598, 608-09 (7th Cir. 2012); *Misicki*, 12 N.Y.3d at 525 (Smith, J., dissenting); *see also* Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 490, 490 n.472 (1996).

⁶⁶ *U.S. Parole Comm’n v. Geraghty*, 445 U.S. 388, 400 (1980) (noting the “flexible” character of the mootness doctrine).

⁶⁷ *See* *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1934 (2013).

⁶⁸ *See* *Manhattan Telecomms. Corp. v. H & A Locksmith, Inc.*, 21 N.Y.3d 200, 203-04 (2013).

⁶⁹ *See id.* at 203 (“[T]he word ‘jurisdiction’ is often loosely used.”) (citing *Lacks v. Lacks*, 41 N.Y.2d 71, 74-75 (1976)).

⁷⁰ *Id.*

⁷¹ *Id.* (internal citations omitted).

⁷² *Lacks*, 41 N.Y.2d at 75 (citing *Thrasher v. U.S. Liab. Ins. Co.*, 19 N.Y.2d 159, 166 (1967)) (emphasis added).

⁷³ *Gonzalez v. Thaler*, 132 S. Ct. 641, 648 (2012) (citing *Henderson v. Shinseki*, 562 U.S. 428, 435) (2011)).

party cannot waive a jurisdictional objection and courts *must* consider jurisdictional problems *sua sponte*.⁷⁴ “Many months of work on the part of the attorneys and the court may be wasted,” as parties may brief and argue an issue only to later find out that the appellate court lacks jurisdiction.⁷⁵

On the other hand, if a rule is non-jurisdictional, courts have discretion to ignore it for good reasons, e.g., fairness and sound judicial administration.⁷⁶ For instance, the statute of limitations defense is non-jurisdictional, so courts can create exceptions to the statute of limitations bar when fairness supports doing so (e.g., the doctrine of equitable tolling).⁷⁷ On the other hand, the mandate that a defendant must file a notice of appeal within a prescribed period is jurisdictional and is thus not subject to fairness exceptions.⁷⁸

It is simple for the Legislature to expressly say that a rule is jurisdictional. Thus, the Court of Appeals has looked for an “express statutory limitation on the courts’ subject matter jurisdiction.”⁷⁹ The United States Supreme Court has similarly adopted a “readily administrable bright line” inquiry: is there a “clear indication” that the legislature intended the rule to be jurisdictional?⁸⁰ This simple approach, which requires the Legislature to expressly declare a rule jurisdictional, prevents needless judicial guesswork.⁸¹

The United States Supreme Court and the federal circuit courts have found preservation to be non-jurisdictional.⁸² Textual

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ See, e.g., *Misicki v. Caradonna*, 12 N.Y.3d 511, 525 (2009) (Smith, J., dissenting); see also *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006); *Simcusi v. Saeli*, 44 N.Y.2d 442, 448-49 (1978).

⁷⁷ *Saeli*, 44 N.Y.2d at 448-49.

⁷⁸ See *People v. Thomas*, 47 N.Y.2d 37, 43 (1979).

⁷⁹ *Fry v. Vill. of Tarrytown*, 89 N.Y.2d 714, 719, 721 (1997), *superseded by statute*, N.Y. C.P.L.R. 2001 (McKinney 2007), *as recognized in* *Ruffin v. Lion Corp.*, 15 N.Y.3d 578, 581 (2010).

⁸⁰ *Henderson v. Shinseki*, 562 U.S. 428, 429 (2011) (internal quotations omitted) (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 515-16 (2006)).

⁸¹ *Id.*

⁸² See *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) (explaining that the rule against not considering “claims that were not raised or addressed below” is prudential in federal courts (citing *Carlson v. Greene*, 446 U.S. 14, 17 n.2 (1980) (“This question [raised on appeal] was presented in the petition for certiorari, but *not* in either the District Court or the Court of Appeals. However, respondent does not object to its decision by this Court. Though we do not normally decide issues not presented below, we are not precluded from doing so Here, the issue is squarely presented and fully briefed. It is an important, recurring issue and is properly raised in another petition for certiorari being held pending disposition of this case We conclude that the interests of judicial administration will be served by addressing the issue on its

analysis, legislative history, precedent, and common sense establish that the New York Court of Appeals should join this unanimous federal view.

A. *Textual Analysis*

The statutory text establishes that preservation is not jurisdictional. C.P.L. § 470.05(2) (the criminal-appellate preservation statute) and the criminal-appellate jurisdictional statutes contain no “express statutory limitation on the courts’ subject matter jurisdiction.”⁸³ If the Legislature had wanted to render preservation jurisdictional, it could easily have said so by declaring that, (1) the appellate courts *shall not* review unpreserved claims; (2) the appellate court may not consider an unpreserved claim;⁸⁴ or, more bluntly, (3) that preservation is jurisdictional.⁸⁵ The Legislature said none of these things. Under *Fry* and Supreme Court precedent, the absence of such an “express statutory limitation on the courts’ subject matter jurisdiction” essentially ends the inquiry; the rule is non-jurisdictional.⁸⁶ But there is more.

B. *Legislative History of the Preservation Doctrine*

The legislative history hammers home the point. When the Legislature drafted C.P.L. § 470.05(2), the appellate courts had already developed a non-jurisdictional practice—that is, the courts

merits.” (emphasis added) (internal citations omitted)))); *see also* *Vento v. Dir. of Virgin Is. Bureau of Internal Revenue*, 715 F.3d 455, 470 (3d Cir. 2013); *Starship Enter. of Atlanta, Inc. v. Coweta Cty.*, 708 F.3d 1243, 1254 (11th Cir. 2013); *United States v. Wimbley*, 553 F.3d 455, 460 (6th Cir. 2009); *United States v. Covarrubia-Mendiola*, 241 F. App’x 569, 575 (10th Cir. 2007); *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006); *In re Sheridan*, 362 F.3d 96, 105 (1st Cir. 2004); *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 338 n.5 (5th Cir. 2004); *Kingman Park Civic Ass’n v. Williams*, 348 F.3d 1033, 1039 (D.C. Cir. 2003); *Amos v. Md. Dep’t of Pub. Safety and Corr. Servs.*, 178 F.3d 212, 215 n.2 (4th Cir. 1999); *Scott v. Ross*, 140 F.3d 1275, 1283-84 (9th Cir. 1998). *But see* *Fleishman v. Cont’l Cas. Co.*, 698 F.3d 598, 608 (7th Cir. 2012).

⁸³ *See* *Fry v. Vill. of Tarrytown*, 89 N.Y.2d 714, 719 (1997); *see also* N.Y. CRIM. PROC. LAW §§ 450.10-90, 470.05-60 (McKinney 2015).

⁸⁴ *Cf.* *United States v. Robinson*, 361 U.S. 220, 224 (1960).

⁸⁵ *See id.* (demonstrating that the express wording and plain meaning of a statute can specify its jurisdictional nature); *see also* *DaimlerChrysler Corp. v. Spitzer*, 7 N.Y.3d 653, 660 (2006).

⁸⁶ *See Fry*, 89 N.Y.2d at 719, 721; *see also* *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011); *Lacks v. Lacks*, 41 N.Y.2d 71, 75-76 (1976) (“Not even the catchall word ‘jurisdiction’ appears in the statute, much less an explicit limitation on the court’s competence to entertain the action. In no way do these limitations on the cause of action circumscribe the power of the court in the sense of competence to adjudicate causes in the matrimonial categories. That a court has no ‘right’ to adjudicate erroneously is no circumscription of its power to decide, rightly or wrongly.”).

had reviewed unpreserved claims when the error was incurable and dispositive. As far back as 1870, *Levin v. Russell* explained that it was well-settled law that unpreserved claims could be raised on appeal if they would have been “decisive of the case, and could not have been obviated [if brought to the victor’s attention below].”⁸⁷ In 1919, *Wright v. Wright* again repeated that rule, holding that the Court properly considered respondent’s unpreserved argument because the argument “appeared upon the face of the record and . . . could not have been avoided if brought to the attention of the appellant in the courts below.”⁸⁸ Fifty years later, and two years before the enactment of C.P.L. § 470.05(2), *Telaro v. Telaro* discussed the “liberalizing” preservation rule:

[T]he general rule concerning questions raised neither at the trial nor at previous stages of appeal is far less restrictive than some case language would indicate. Thus, it has been said: ‘*if a conclusive question is presented on appeal, it does not matter that the question is a new one not previously suggested. No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court.*’ Of course, where new contentions could have been obviated or cured by factual showings or legal countersteps, they may not be raised on appeal. But contentions which could not have been so obviated or cured below may be raised on appeal for the first time. There are some exceptions to this *liberalizing rule*, none relevant to this case: they include concessions made by counsel, new questions on motions for reargument, and most constitutional questions.⁸⁹

When the Legislature adopted the first preservation statute in 1946,⁹⁰ and the modern C.P.L. in 1970, it acted against the backdrop of *Levin*, *Wright*, and *Telaro*, which all treated preservation as non-jurisdictional.⁹¹ Nothing in the text or legislative history of the 1946 and 1970 statutes demonstrates an intent to nullify the Court of Appeals’ non-jurisdictional approach.⁹² Accordingly, the Legisla-

⁸⁷ *Levin v. Russell*, 42 N.Y. 251, 255-56 (1870); *see also* *People v. Bradner*, 107 N.Y. 1, 4-5 (1887) (“The principal questions presented on this appeal . . . are questions raised on the record alone, and which were not, in any way, called to the attention of the trial court. If the record discloses upon its face . . . some other defect in the proceedings, *which could not be waived or cured and is fundamental*, it would, as we conceive, be the duty of an appellate tribunal to reverse the proceedings and conviction, although the question had not been formally raised in the court below, and was not presented by any ruling or exception on the trial.”) (emphasis added).

⁸⁸ *Wright v. Wright*, 226 N.Y. 578, 578-79 (1919) (per curiam).

⁸⁹ *Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969) (emphasis added).

⁹⁰ N.Y. CODE CRIM. PROC. § 420-a (McKinney 1946) (former code).

⁹¹ *See Levin*, 42 N.Y. 251; *see also Wright*, 226 N.Y. 578; *Telaro*, 25 N.Y.2d 433.

⁹² STATE OF N. Y., TWELFTH ANNUAL REPORT OF THE JUDICIAL COUNCIL OF NEW

ture should be “regarded as having legislated in the light of and as having accepted”⁹³ *Levin, Wright, and Telaro’s* non-jurisdictional interpretation of the preservation requirement.⁹⁴

C. *The Preservation Rule is a Prudential Claim-Processing Rule*

“Among the types of rules that should not be described as jurisdictional are . . . ‘claim-processing rules.’ These are rules that seek to promote the *orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.*”⁹⁵ This claim-processing label perfectly describes preservation. Preservation rules require litigants to say “X” to access an appellate court—that is, “take certain procedural steps at certain specified times.”⁹⁶ In this sense, the rule is similar to non-jurisdictional statute of limitations rules, which require litigants to assert a claim in a timely fashion.⁹⁷

Indeed, claim-processing rules, like preservation, do not go to a court’s “competence” to entertain an appeal. The Appellate Division’s duty is to ensure the accuracy of convictions; the Court of Appeals’ duty is to resolve questions of statewide importance.⁹⁸ It is unclear why—and no New York Court has ever attempted to explain why—an appellate court is incompetent to consider an argument because counsel failed to utter a few words below.

D. *Erecting a Jurisdictional Bar to Appellate Review Is Bad Policy*

Treating preservation as a categorical bar to appellate review, even when “common sense and practical necessity” support review,⁹⁹ is bad policy. As Judge Smith’s *Misicki* dissent observed, a jurisdictional label would require the Court of Appeals to overrule

YORK 51-52 (1946); STATE OF N.Y. TEMP. COMM’N. ON REVISION OF THE PENAL LAW & CRIMINAL CODE, PROPOSED N.Y. CRIMINAL PROCEDURE LAW 322-23 (1967).

⁹³ *Orinoco Realty Co. v. Bandler*, 233 N.Y. 24, 30 (1922).

⁹⁴ See, e.g., *Fry v. Vill. of Tarrytown*, 89 N.Y.2d 714, 720-21 (1997) (“Since defects in commencement [of a civil action] were waivable in the past, the same result should obtain under the new system, especially given the complete absence of any legislative design, much less an unequivocal legislative expression, to transform commencement from a procedural step in the prosecution of an action into an unwaivable limitation on the court’s subject matter jurisdiction.”).

⁹⁵ *Henderson v. Shinseki*, 562 U.S. 428, 435 (2011) (emphasis added).

⁹⁶ *Id.*

⁹⁷ See *People v. Mills*, 1 N.Y.3d 269, 274 (2003) (“New York courts have long recognized that the statute of limitations defense is *not* jurisdictional and can be forfeited or waived by a defendant.”) (emphasis added).

⁹⁸ See N.Y. CONST. art. VI.

⁹⁹ See, e.g., *Misicki v. Caradonna*, 12 N.Y.3d 511, 525 (2009) (Smith, J., dissenting).

numerous cases reviewing unpreserved claims.¹⁰⁰

- Claims alleging that the court failed to inform defense counsel of the contents of a jury note;¹⁰¹
- Defects in accusatory instruments;¹⁰²
- Questions of statutory interpretation;¹⁰³
- Ineffective assistance of counsel claims;¹⁰⁴
- Illegal sentence claims;¹⁰⁵
- Right-to-counsel violations during interrogation.¹⁰⁶

If preservation rules were “truly jurisdictional,”¹⁰⁷ these well-established exceptions would be “incomprehensible.”¹⁰⁸

A jurisdictional theory also forces appellate courts to accept ridiculous legal premises. Suppose, for instance, that the government argued at trial that a warrantless search performed by a civilian satisfied the Fourth Amendment because there were exigent circumstances. The government did not, however, press the more basic (and correct) argument: the Fourth Amendment does not apply to searches performed by non-state actors. Under a jurisdictional approach, an appellate court would lack the power to consider the threshold state-action question. In turn, the appellate court would have to consider what ultimately amounts to a fictional constitutional question (exigency). Appellate courts should not be

¹⁰⁰ *Id.*

¹⁰¹ See *People v. Silva*, 24 N.Y.3d 294, 299 (2014).

¹⁰² See generally *People v. Dumay*, 23 N.Y.3d 518 (2014).

¹⁰³ See, e.g., *Richardson v. Fiedler*, 67 N.Y.2d 246, 250 (1986) (“The argument raises solely a question of statutory interpretation, however, which we may address even though it was not presented below.”); *Am. Sugar Ref. Co. of N.Y. v. Waterfront Comm’n of N.Y. Harbor*, 55 N.Y.2d 11, 25 (1982) (“Threshold questions concerning the interpretation of [statutory] provisions . . . may be made to us not having been advanced below Were the [appellate argument] a new one, it would nonetheless be proper for us to consider it because it is not a contention that could have been ‘obviated or cured by factual showings or legal countersteps,’ turning as it does on legislative intent.” (quoting *Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969))).

¹⁰⁴ *People v. Lewis*, 2 N.Y.3d 224, 232 (2004).

¹⁰⁵ *People v. Santiago*, 22 N.Y.3d 900, 903 (2013) (“[There is a] narrow exception to [the] preservation rule permitting appellate review when a sentence’s illegality is readily discernible from the trial record.”) (citations omitted).

¹⁰⁶ See generally *People v. McLean*, 15 N.Y.3d 117 (2010).

¹⁰⁷ *Misicki v. Caradonna*, 12 N.Y.3d 511, 525 (2009) (Smith, J., dissenting).

¹⁰⁸ See *id.* at 525-26 (Smith, J., dissenting); Pushaw, Jr., *supra* note 65, at 490 n.472 (“Until 1964, however, the [Supreme] Court treated mootness not as an Article III requirement but as an equitable determination. Indeed, it has long decided several types of moot cases—for example, those ‘capable of repetition, yet evading review.’ These exceptions are incomprehensible if federal courts lack Article III jurisdiction to resolve moot cases at all. Thus, mootness is, and always has been, a matter of discretion.”).

forced to get the law wrong because the parties are inept.¹⁰⁹ The fundamental goal of our appellate system, like that of any judicial body, is to dole out accurate justice—not to host a moot court.¹¹⁰

IV. THE INSUFFICIENCY EXCEPTION

As preservation is not jurisdictional, it is subject to exceptions when the policy interests underlying the rule do not apply. Affirming baseless convictions on preservation grounds undermines simple justice and advances no meaningful state interests. Accordingly, the Court of Appeals should adopt a sufficiency exception.

A. *Precedent Supports a Sufficiency Exception*

When *Finch* announced a curing approach to preservation of sufficiency claims, it did not articulate a novel theory.¹¹¹ Instead, it affirmed an approach dating back as far as 1870.¹¹² As explained above, *Levin v. Russell* referred to the “curing” rule as “well settled law.”¹¹³ Almost a century later, *Telaro* explained that this long-acknowledged, liberalizing rule is simple justice because baseless judgments should never stand.¹¹⁴ And while *Telaro* noted that the curing rule does not apply to “most constitutional questions,”¹¹⁵ *People v. Rodriguez y Paz* implicitly rejected that bizarre limitation as it reviewed a constitutional “question of law which could not have been obviated by an evidentiary showing at [the] hearing [be-

¹⁰⁹ *Misicki*, 12 N.Y.3d at 525 (Smith, J., dissenting) (“‘[Appellate] judges [do not] sit as automatons, merely to register their reactions to the arguments which counsel had made below. The fortunes of litigation might then turn, not on the merits of a case, but on the skill or prescience of counsel in the court of first instance.’” (quoting ARTHUR KARGER, *THE POWERS OF THE NEW YORK COURT OF APPEALS* § 17:1, at 591-92 (3d ed., rev. 2005))).

¹¹⁰ See *Dretke v. Haley*, 541 U.S. 386, 396 (2004) (Stevens, J., dissenting) (stating that Texas “conceded” that the defendant’s sentence was illegal but argued procedural default in the Supreme Court; the majority’s refusal to review a conceded sentencing error indicated that the “unending search for symmetry in the law can cause judges to forget about justice” and that “[t]his should be a simple case”).

¹¹¹ See generally *People v. Finch*, 23 N.Y.3d 408 (2014).

¹¹² See generally *id.*

¹¹³ See *Levin v. Russel*, 42 N.Y. 251, 255-56 (1870) (“It is the well settled law that objections to testimony without assigning any ground therefor will be disregarded, unless it clearly appears that the objection, if properly made, would have been decisive of the case, and could not have been obviated.”); see also *Wright v. Wright*, 226 N.Y. 578, 578, 579 (1919).

¹¹⁴ See *Silverman v. Benmor Coats, Inc.*, 61 N.Y.2d 299, 314 (1984) (Kaye, J., dissenting) (noting that the “curing” test “has long been acknowledged by this Court.” (citing *Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969))).

¹¹⁵ *Telaro*, 25 N.Y.2d at 439.

low.]”¹¹⁶ The Court continues to apply this curing approach to right-to-counsel violations and illegal-sentence violations, holding that even if counsel did not raise those claims below, the defendant can raise them on appeal if the record conclusively reveals an incurable violation.¹¹⁷

The Court of Appeals has never overruled this longstanding “curing” approach. When, for example, Judge Smith advanced this curing approach in his *Misicki* dissent (five years before *Finch*), the majority and concurrences did not challenge the dissent on prece-dential grounds.¹¹⁸

Nor should *Gray* be read as overruling, *sub silentio*, the long-standing curing rule. *Gray* held preservation applicable to sufficiency claims, but in doing so, it relied on a curing rationale: “A timely objection alerts all parties to alleged deficiencies in the evidence and advances the truth-seeking purpose of the trial.”¹¹⁹ Indeed, as *Finch* explained, *Gray*’s holding is consistent with a curing approach because *Gray* held that “the defendant’s knowledge of the weight of drugs” argument was unpreserved.¹²⁰ If counsel had placed the government on notice of the knowledge defect, the government could have potentially cured the defect at trial.¹²¹

The federal circuit courts agree with this curing approach as they have held that unpreserved arguments are reviewable if the parties had a full opportunity to debate the relevant facts below.¹²² The Florida Supreme Court has also expressly applied the curing

¹¹⁶ *People v. Rodriguez y Paz*, 58 N.Y.2d 327, 336-37 (1983).

¹¹⁷ See generally *People v. McLean*, 15 N.Y.3d 117 (2010); *People v. Santiago*, 22 N.Y.3d 900, 903 (2013).

¹¹⁸ *Misicki v. Caradonna*, 12 N.Y.3d 511, 519-20 (2009); *id.* at 524 (Grafteo, J., dissenting).

¹¹⁹ *People v. Gray*, 86 N.Y.2d 10, 21 (1995).

¹²⁰ *People v. Finch*, 23 N.Y.3d 408, 414-15 (2014) (“Insistence on specificity in a dismissal motion is amply justified where the People might have cured the problem if their attention had been called to it. This may well have been true in *Gray* itself; if the defendant there had flagged the knowledge-of-narcotic-weight issue, the People might have reopened their case to supply the missing proof.”).

¹²¹ *Id.*

¹²² See *Vento v. Dir. of Virgin Is. Bureau of Internal Revenue*, 715 F.3d 455, 470 (3d Cir. 2013); *Starship Enters. of Atlanta, Inc. v. Coweta Cty.*, 708 F.3d 1243, 1254 (11th Cir. 2013); *United States v. Wimbley*, 553 F.3d 455, 460 (6th Cir. 2009); *United States v. Covarrubia-Mendiola*, 241 F. App’x 569, 575 (10th Cir. 2007); *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006); *In re Sheridan*, 362 F.3d 96, 105 (1st Cir. 2004); *Freudensprung v. Offshore Tech. Servs., Inc.*, 379 F.3d 327, 338 n.5 (5th Cir. 2004); *Kingman Park Civic Ass’n v. Williams*, 348 F.3d 1033, 1039 (D.C. Cir. 2003); *Amos v. Md. Dep’t of Public Safety and Corr. Servs.*, 178 F.3d 212, 215 n.2 (4th Cir. 1999); *Scott v. Ross*, 140 F.3d 1275, 1283-84 (9th Cir. 1998). But see *Fleishman v. Cont’l Cas. Co.*, 698 F.3d 598, 608 (7th Cir. 2012).

approach to insufficiency appeals, holding that unpreserved sufficiency claims are reviewable if the appellant argues that no “crime was committed at all.”¹²³ Under this approach, preservation applies to technical deficiencies—i.e., the “usual failure-of-evidence case,”¹²⁴ but does not apply when, as in *Finch*, “the facts affirmatively proven by the State simply do not constitute the charged offense as a matter of law.”¹²⁵ In such cases, Florida requires appellate review because “[there is] no error more fundamental than the conviction of a defendant in the absence of a prima facie showing of the essential elements of the crime charged.”¹²⁶ Under Florida’s approach, for example, a defendant must raise a challenge to the value of stolen items in a larceny case (a defect that is potentially curable),¹²⁷ but need not argue that undisputed evidence failed to prove that a kidnapping occurred (a defect that is not curable).¹²⁸

A sufficiency exception for incurable errors also flows *a fortiori* from the Court of Appeals’ “preservation-exceptions” jurisprudence. It is a cruel joke to hold that far less-substantial errors (e.g., the court’s failure to respond to a jury note,¹²⁹ and the prosecutor’s failure to allege the essential elements in a misdemeanor complaint¹³⁰) are immune from preservation, while insufficiency errors—i.e., “the most fundamental of all possible defects in a criminal proceeding”—require preservation.¹³¹ Further, if an attack on the *length* of a sentence need not be preserved (e.g., an argument that the sentence exceeded the maximum),¹³² an attack on the government’s constitutional authority to impose *any sentence at all* should not have to be preserved either. A curing approach nullifies these current anomalies in our appellate jurisprudence.

B. *Affirming a Baseless Conviction Clashes with Simple Justice*

The State has no interest in affirming a baseless conviction.¹³³

¹²³ F.B. v. State, 852 So. 2d 226, 230 (Fla. 2003).

¹²⁴ E.g., *id.* at 230; Nelson v. State, 543 So. 2d 1308, 1309 (Fla. 2d DCA 1989).

¹²⁵ Griffin v. State, 705 So. 2d 572, 574 (Fla. 4th DCA 1998); Stanton v. State, 746 So. 2d 1229, 1230 (Fla. 3d DCA 1999).

¹²⁶ Dydek v. State, 400 So. 2d 1255, 1258 (Fla. 2d DCA 1981).

¹²⁷ F.B., 852 So.2d at 227.

¹²⁸ See Griffin, 705 So. 2d at 574-75 (citing Harris v. State, 647 So. 2d 206 (Fla. 1st DCA 1994)).

¹²⁹ See People v. Silva, 24 N.Y.3d 294, 299 (2014).

¹³⁰ See People v. Dumay, 23 N.Y.3d 518, 521 (2014).

¹³¹ People v. Udzenski, 146 A.D.2d 245, 250 (2d Dep’t 1989).

¹³² People v. Santiago, 22 N.Y.3d 900, 903 (2013).

¹³³ Dretke v. Haley, 541 U.S. 386, 388, 392 (2004); People v. Henderson, 60 Cal. 2d

Telaro, a matrimonial case, affirmed this rule of simple justice: “No party should prevail on appeal, given an unimpeachable showing that he had no case in the trial court.”¹³⁴ *Telaro*’s common sense applies with greater force in criminal cases, where affirming a baseless conviction means condemning an innocent person to incarceration in a violent warehouse. Ignoring *Telaro*’s message in criminal cases ultimately undermines the “integrity or public reputation” of our appellate courts and prosecutors,¹³⁵ and should “cause some to question whether the State has forgotten its overriding ‘obligation to serve the cause of justice.’”¹³⁶

The government’s interest in reversing a baseless conviction is particularly pressing when the government has failed to prove identity (that is, the government “got the wrong guy”).¹³⁷ In those cases, the government has locked someone up who did nothing wrong. If an appellate court affirms the baseless conviction on procedural grounds, “the true culprit escapes punishment.”¹³⁸

C. *Affirming Baseless and “Incurable” Convictions Advances No Preservation “Interests”*

The Court of Appeals has articulated several justifications for the preservation rule:

- Inducement to object, which in turn promotes “efficiency” and “finality”;¹³⁹
- Guidance to the appellate courts;¹⁴⁰
- Fairness to the trial judge;¹⁴¹ and
- Opportunity to cure.¹⁴²

As shown below, the inducement, guidance, and “fairness to trial judge” rationales are illegitimate grounds for affirming a baseless conviction. On the other hand, the curing rationale *is* valid.¹⁴³

482, 497 (1963) (“[T]he state has no interest in preserving erroneous judgments . . .”).

¹³⁴ *Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969) (internal citations omitted).

¹³⁵ *United States v. Olano*, 507 U.S. 725, 732 (1993) (internal quotation marks omitted).

¹³⁶ *Haley*, 541 U.S. at 398 (Stevens, J., dissenting) (quoting *United States v. Agurs*, 427 U.S. 97, 111 (1976)).

¹³⁷ See, e.g., *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 99 (2009) (Stevens, J., dissenting).

¹³⁸ See *id.*

¹³⁹ See, e.g., *People v. Hawkins*, 11 N.Y.3d 484, 492-93 (2008); *People v. Gray*, 86 N.Y.2d 10, 20-21 (1995).

¹⁴⁰ See *Hawkins*, 11 N.Y.3d at 493.

¹⁴¹ See *People v. Finch*, 23 N.Y.3d 408, 435 (Abdus-Salaam, J., dissenting).

¹⁴² *Gray*, 86 N.Y.2d at 20-21.

¹⁴³ *Finch*, 23 N.Y.3d at 414.

Accordingly, the preservation exception should be pinned to that interest: if a sufficiency objection would have allowed the government to “cure” its insufficient case, preservation is required. On the other hand, when the record conclusively establishes insufficient evidence, preservation is not required.

1. The “Inducement” Interest

Although courts often claim that preservation doctrine promotes efficiency and finality,¹⁴⁴ that is not really true. *Timely objections* promote those interests, and the preservation rule only advances those interests if it *incentivizes* timely objections. Thus, the theory of preservation rules (in general and in the sufficiency context) is that by punishing trial lawyers with preservation affirmance, the court system scares future litigants into making arguments they otherwise would omit.¹⁴⁵ Here’s how the theory works:

1. The threat of waiver “induces” a lawyer to object on sufficiency grounds.
2. The objection gives the judge the chance to consider the sufficiency issue.
3. If the judge accepts the argument, the judge can prevent needless future proceedings (e.g., jury deliberations, sentencing, and an appeal), thus saving resources. Further, the judge can bring the case to a swift “final” end, thus promoting the State’s purported interest in finality.¹⁴⁶

As shown below, the resources and finality interests underlying the inducement rationale are not cognizable in the insufficiency context. Even if they were, affirming convictions on preservation grounds does not advance those interests. And finally, even if the inducement theory did successfully advance valid interests, that theory requires appellate courts to ignore the right to effective assistance of counsel and unfairly punishes lay (often poor) clients instead of their hapless lawyers. On balance, the inducement theory does not justify *Gray*.

¹⁴⁴ See *id.* 414-16; see also *Hawkins*, 11 N.Y.3d at 492; *Gray*, 86 N.Y.2d at 21.

¹⁴⁵ See, e.g., *Wainwright v. Sykes*, 433 U.S. 72, 89-90 (1977); see also *id.* at 112 (Brennan, J., dissenting).

¹⁴⁶ See *Teague v. Lane*, 489 U.S. 288, 309 (1989) (“Without finality, the criminal law is deprived of much of its deterrent effect.”); see also *Sanders v. United States*, 373 U.S. 1, 25 (1963) (Harlan, J., dissenting) (“[Finality ensures] attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community.”); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 451 (1963).

a. *“Resources” and “Finality” Interests Are Not Cognizable in the Sufficiency Context*

The resources interest offends liberty. Under this theory, the State sacrifices an innocent individual’s liberty in order to provide future economic benefits to the whole. That view of the law—which, if uttered in other political contexts, would be dubbed “communism,” “socialism,” or some other “ism”—is misguided.

This finality theory is also bizarre as applied to insufficiency appeals. Essentially, the appellate message sent to an innocent defendant is, “we have a strong interest in quickly and finally announcing your innocence, but if you wait a few months to argue your innocence, we no longer care.” That is a strange view of justice.

The resources and finality interests also clash with the Legislature’s policies. In creating a comprehensive appellate regime, the Legislature has expressly announced an interest in spending money on appeals in order to nullify baseless convictions, including convictions based on insufficient evidence.¹⁴⁷ The Legislature has concluded that accuracy trumps money.

Similarly, the Legislature has rejected the “finality” interest. The statutory and constitutional creation of an appellate right reflects a policy decision that getting it *right* is more important than getting it *done*.¹⁴⁸ The same holds true for the Legislature’s decision to create a post-conviction remedy, which permits numerous distinct attacks on a conviction—without a statutory time limit.¹⁴⁹

¹⁴⁷ N.Y. CRIM. PROC. LAW § 470.15(2)(a) (McKinney 2015) (authorizing appellate dismissal when the evidence is insufficient).

¹⁴⁸ See *Engle v. Isaac*, 456 U.S. 107, 147 (1982) (Brennan, J., dissenting) (“Nor are we told why society should be eager to ensure the finality of a conviction arguably tainted by unreviewed constitutional error directly affecting the truthfinding function of the trial.”); see also *Wainwright*, 433 U.S. at 115 (Brennan, J., dissenting) (“[T]he very existence of the well-established right collaterally to reopen issues previously litigated before the state courts . . . represents a congressional policy choice that is inconsistent with notions of strict finality . . .”); *Kaufman v. United States*, 394 U.S. 217, 237 (1969) (“[E]xalt[ing] the value of finality in criminal judgments at the expense of the interest of each prisoner in the vindication of his constitutional rights . . . runs contrary to the most basic precepts of our system of post-conviction relief.”); *Bass v. Estelle*, 696 F.2d 1154, 1162 (5th Cir. 1983) (Goldberg, J., specially concurring) (“Yes, there must be an end to criminal litigation. Our duty as judges, a duty we may not shirk, is to ensure that the ending is a constitutional one. Some things go beyond time.”).

¹⁴⁹ See *People v. Corso*, 40 N.Y.2d 578, 580 (1976) (“Of course, it should be noted that if a petitioner possesses an underlying claim relating to the validity of his conviction which falls within the enumerated grounds set forth in CPL 440.10, he may move at nisi prius to vacate the judgment at any time.”).

Lastly, the premises of the finality theory do not apply in the sufficiency context. The finality theory posits that blocking appeals (1) enhances deterrence (because appeals render punishment uncertain); (2) promotes rehabilitation (because a final judgment will cause the defendant to face the reality of conviction); and (3) saves State resources.¹⁵⁰ These finality-based interests are only advanced if the defendant *does not appeal*. But even under a *Gray* regime, defendants convicted with insufficient evidence will *still* appeal because they will pursue “weight of the evidence” review,¹⁵¹ “interest of justice” review,¹⁵² or ineffective assistance of counsel review.¹⁵³ Stripped of its underlying justifications, the finality theory amounts to nothing more than an argument that convicted people should stay convicted.

b. *The Inducement Theory Does No Efficiency or Finality Work in the Sufficiency Context*

Even if resources and finality are cognizable interests in this context, the inducement theory does no meaningful “inducement” work in the sufficiency context because preservation rules don’t induce sufficiency objections. As the Supreme Court recently put it in a different preservation context, absent the threat of a “preservation punishment,” “counsel normally has other [very] good reasons for calling a trial court’s attention to potential [insufficiency] error.”¹⁵⁴ If trial counsel wins a sufficiency argument, his client is not only free to go, but double jeopardy bars a government appeal even if the sufficiency ruling rests on a fundamental misinterpretation of the penal law.¹⁵⁵ If there is a lawyer who is *not* incentivized by this windfall, but *is* somehow incentivized by the distant prospect of “preservation” affirmance, that lawyer, “like the unicorn . . . finds his home in the imagination, not the courtroom.”¹⁵⁶

Additionally, reviewing an unpreserved sufficiency claim *advances* efficiency. If a defendant has a winning sufficiency claim, and he loses the claim on preservation grounds in the Appellate Division, he will pursue collateral relief in state and federal courts,

¹⁵⁰ See, e.g., Bator, *supra* note 146, at 452.

¹⁵¹ CRIM. PROC. § 470.15(5); *People v. Danielson*, 9 N.Y.3d 342, 349 (2007).

¹⁵² CRIM. PROC. § 470.15(6)(a).

¹⁵³ See *People v. Heidgen*, 22 N.Y.3d 259, 278 (2013).

¹⁵⁴ *Henderson v. United States*, 133 S. Ct. 1121, 1128 (2013).

¹⁵⁵ See generally *Evans v. Michigan*, 133 S. Ct. 1069 (2013); see also *People v. Brown*, 40 N.Y.2d 381, 391 (1976) (“Double jeopardy principles will bar appeal unless there is available a determination of guilt which without more may be reinstated in the event of a reversal and remand.”).

¹⁵⁶ *Henderson*, 133 S. Ct. at 1129.

thus consuming more government resources. If our aim is to save money, we should promote direct appellate review, instead of kicking the can down the post-conviction road.

Assuming successful inducement, preservation still fails to do any meaningful work in this context. Recall that the purpose of the inducement doctrine is to promote early objections and thus prevent needless future proceedings (e.g., an appeal). In the sufficiency context, it is unlikely that a timely sufficiency argument will prevent future proceedings.

Unlike pre-verdict dismissals, post-verdict dismissals *are* appealable and do not trigger double jeopardy.¹⁵⁷ Thus, to ensure appellate review, the Court of Appeals has *expressly* instructed trial judges to reserve judgment on sufficiency arguments, send the case to the jury, and then rule on the motion after the verdict.¹⁵⁸ So, even if defense counsel makes a timely, pre-verdict motion to dismiss, that motion will often fail to prevent needless litigation because the trial court will reserve judgment, send the case to the jury, find insufficient evidence *after* the verdict, and then the government will appeal anyway.

Even if we assume that (1) the preservation rule induces arguments and (2) prompts early dismissal, the inducement theory still fails because applying preservation to sufficiency appeals violates the constitutional right to effective assistance of counsel.

To show ineffective assistance of counsel, an appellant must show that trial counsel's performance was "unreasonable" and violated professional norms, and that the professionally unreasonable performance prejudiced the outcome of the case.¹⁵⁹ The failure to

¹⁵⁷ See *United States v. Scott*, 437 U.S. 82, 91 n.7 (1978); see also *People v. Payne*, 3 N.Y.3d 266, 277 n.4 (2004) (Read, J., dissenting).

¹⁵⁸ *People v. Key*, 45 N.Y.2d 111, 120 (1978) ("*If trial courts in cases like this one were, whenever practicable, only to reserve decision until after trial has been completed and determinations of fact made, much difficulty would be avoided.* Of course, if the motion had been made and decided, as it should have been, before trial, no problem would have arisen. But, once trial has started, decision on a belated motion might well be delayed until after jury verdict or decision on the facts. If defendant were to be acquitted, that would be the end of the matter; if convicted, appeal of the ruling, and, if appropriate, retrial or reinstatement of the verdict or decision would be permissible on any view of double jeopardy doctrine. It is the premature dismissal that has caused the trouble in this case, and that should be avoidable in most other cases.") (emphasis added); *People v. Marin*, 102 A.D.2d 14, 15 (1st Dep't 1984) ("Although the Judge expressed *full agreement* with the defense's position on the deficiency of the evidence, he reserved decision on the motion and permitted the jury to consider the charges. In doing so, the Judge was seeking to preserve the prosecution's right to appellate review.") (emphasis added).

¹⁵⁹ See *Strickland v. Washington*, 466 U.S. 668, 691-92 (1984).

preserve a winning sufficiency argument invariably prejudices the defendant because it allows an illegal conviction to stand. Therefore, the only potential roadblock to an ineffective assistance claim is the “reasonable lawyering” prong. It is hard to imagine a case in which a counsel’s failure to raise a *winning* sufficiency argument would be “reasonable” lawyering. I am aware of no case holding as much,¹⁶⁰ and given that sufficiency preservation is fairly simple (counsel need only utter a few sentences to preserve the point), it is unlikely that counsel’s failure to raise a winning sufficiency argument will ever be found reasonable. Thus, applying preservation rules to sufficiency violates the right to effective assistance of trial counsel. And for that very reason, the theory is essentially useless because appellants can bypass the preservation problem by simply arguing to the appellate court that counsel was ineffective.

The Supreme Court’s federal-habeas-procedural-default jurisprudence hammers home this point.¹⁶¹ The Court has declined to enforce state preservation rules when the default stemmed from ineffective assistance of counsel.¹⁶² As *Murray v. Carrier* held, “if the procedural default is the result of ineffective assistance of counsel, the Sixth Amendment itself requires that responsibility for the default be imputed to the State, which may not conduct trials at which persons who face incarceration must defend themselves without adequate legal assistance.”¹⁶³ And as Justice Blackmun stressed several years later, “[t]o permit a procedural default caused by attorney error egregious enough to constitute ineffective assistance of counsel to preclude federal habeas review of a state prisoner’s federal claims in no way serves the State’s interest in preserving the integrity of its rules and proceedings.”¹⁶⁴ By this federal logic, the state courts should also decline to enforce procedural default when the default stems from ineffective assistance of counsel.

¹⁶⁰ See *People v. McPherson*, 22 N.Y.3d 259, 278 (2013) (“Even if a reasonable defense lawyer might have questioned whether a motion to dismiss . . . was a ‘clear winner,’ he or she could not have reasonably determined that the argument was ‘so weak as to be not worth raising.’” (quoting *People v. Turner*, 5 N.Y.3d 476, 483 (2005))).

¹⁶¹ See, e.g., *Murray v. Carrier*, 477 U.S. 478 (1986) (dismissing petition for habeas review of procedurally defaulted discovery claim because competent counsel’s failure to raise a substantive claim of error did not establish cause for the default).

¹⁶² See *id.* at 488-89 (acknowledging that when a defendant is represented by counsel whose performance is not constitutionally deficient under the *Strickland* standard, the defendant bears the burden of any resulting procedural defaults).

¹⁶³ *Id.* at 488 (internal citations and alterations omitted).

¹⁶⁴ *Coleman v. Thompson*, 501 U.S. 722, 773 (1991) (Blackmun, J., dissenting).

Finally, even if the preservation doctrine did some “inducement” work in this context, putting aside the ineffective-assistance problems, the inducement theory is still fundamentally unfair because it punishes the wrong person:

Punishing a lawyer’s unintentional errors[, that is, failures to object,] by closing the . . . courthouse door to his client is both a senseless and misdirected method of deter[rence] . . . [E]ven if the penalization of incompetence or carelessness will encourage more thorough legal training and trial preparation, the [client], as opposed to his lawyer, hardly is the proper recipient of such a penalty. Especially with fundamental constitutional rights at stake, no fictional relationship of principal-agent or the like can justify holding the criminal defendant accountable for the naked errors of his attorney . . . [I]f responsibility for error must be apportioned between the parties, it is the State, through its attorney’s admissions and certification policies, that is more fairly held to blame for the fact that practicing lawyers too often are ill-prepared or ill-equipped to act carefully and knowledgeably when faced with decisions governed by state procedural requirements.¹⁶⁵

In sum, the inducement theory advances invalid interests; does no inducement work; only applies to cases where the defendant’s representation violated the Constitution; and unfairly punishes the wrong party. The theory is hardly a solid foundation for a legal rule.

2. The Guidance Rationale

The Court of Appeals has stated that objections induce lower-court decisions, which in turn provide “guidance” to the appellate courts.¹⁶⁶ But sapping an appellate court’s sufficiency review power because the trial court did not “educate” the higher court is absurd and demeans the competency of the appellate courts. Granted, lower court analysis may be preferable, but it is not important enough to justify affirming a baseless conviction.

Indeed, the Legislature has implicitly rejected a guidance rationale.¹⁶⁷ Under C.P.L. § 470.35(1), a party *can* raise a claim in the Court of Appeals that it did not raise in the Appellate Division,¹⁶⁸ and can raise unpreserved claims before the Appellate Division

¹⁶⁵ *Wainwright v. Sykes*, 433 U.S. 72, 113-14 (1977) (Brennan, J., dissenting).

¹⁶⁶ *See People v. Hawkins*, 11 N.Y.3d 484, 492-93 (2008).

¹⁶⁷ *See, e.g., N.Y. CRIM. PROC. LAW* §§ 470.15(6)(a), 470.35(1) (McKinney 2015).

¹⁶⁸ *Id.* § 470.35(1) (“Upon an appeal to the court of appeals from an order of an intermediate appellate court affirming a judgment, sentence or order of a criminal court, the court of appeals may consider and determine . . . any question of law . . .

under that court's "interest of justice" power.¹⁶⁹ If the Legislature thought lower court guidance was so important, it would not have adopted such rules.

3. Fairness to the Trial Judge

The *Finch* dissent stated that reaching an unpreserved sufficiency claim is "manifest[ly] unfair" to the trial court.¹⁷⁰ It is unclear why correcting a sufficiency error is "unfair" to the trial court. Indeed, one would hope that the trial judge would prefer that a baseless conviction be reversed.

In any event, fairness to the trial judge is not a cognizable state interest, and it certainly cannot offset the countervailing liberty interests. The appellate system does not exist to ensure fairness to the state actor overseeing the trial. It is designed to protect the public's interest in the enforcement of the criminal law and the accused's interest in a fair, accurate proceeding.¹⁷¹

4. The "Substitute Procedures" Rationale

Gray held that barring *mandatory* review of unpreserved sufficiency claims is tolerable because defendants can still seek *discretionary* review under the Appellate Division's "interest of justice" review power:

[C]oncerns that defendants' rights are diminished by the holding here are misplaced. It should be emphasized that even where defendants have failed to adequately preserve claims for appellate review, they may request that the Appellate Divisions apply their "interest of justice" jurisdiction under CPL 470.15 (3). Nothing we hold here intrudes upon that jurisdiction.¹⁷²

Finch expressly rejected this argument:

The dissent responds by saying, essentially, that procedural rules do sometimes require us to uphold convictions of people who may be innocent, and that the task of avoiding such injustices must sometimes be left to the Appellate Division, which has interest-of-justice jurisdiction. True enough; but procedural rules

regardless of whether such question was raised, considered or determined upon the appeal to the intermediate appellate court.").

¹⁶⁹ *Id.* § 470.15(6)(a).

¹⁷⁰ *People v. Finch*, 23 N.Y.3d 408, 435 (2014) (Abdus-Salaam, J., dissenting) ("In relying so heavily on the alleged absence of prejudice to the People, the majority ignores the manifest unfairness its decision inflicts on the trial court.").

¹⁷¹ See Boris M. Komar, *On the Reform of Appellate Procedures of the United States Supreme Court*, 44 CHICAGO-KENT L. REV. 28, 35 (1967) ("[T]he sole purpose for the existence of the courts [is] to serve and aid the people in their quest for justice.").

¹⁷² *People v. Gray*, 86 N.Y.2d 10, 22 (1995).

should be so designed as to keep unjust results to a minimum. We think our interpretation of *Gray* serves that end better than the dissent's.¹⁷³

Finch was right. Discretionary review is no substitute for mandatory review. Unless we assume that our appellate bureaucracy never makes discretionary mistakes, some baseless convictions will invariably be affirmed under a discretionary system. Since applying preservation rules to sufficiency claims accomplishes virtually nothing, there is no need to accept the risk that some cases will slip through the discretionary cracks.¹⁷⁴

5. The Curing Interest

Unlike the four theories discussed above, *Finch*'s curing theory is sound. The curing theory recognizes that objections can remind the government of evidentiary problems, thus prompting the government to re-open its case to cure the deficiency.¹⁷⁵ Even Justice Brennan, an outspoken critic of procedural default, endorsed this interest.¹⁷⁶

The government has the burden of proof, and the defendant has no obligation to help it make its case.¹⁷⁷ *People v. Whipple* therefore limits the government's power to re-open its case to "narrow circumstances" of curing a "technical" omission, such as the number of parking spots in a drunk-driving-in-a-parking-lot prosecution (there must be at least "four" spaces).¹⁷⁸ Thus, in theory, a sufficiency objection could induce the government to re-open its case to fix a "technical mistake." Preservation should be pinned to the government's ability to cure. If the government could have "cured" the sufficiency defect under *Whipple*, appellate review is barred. If the government could not have cured the sufficiency problem, appellate review is required.

D. Due Process Requires a Sufficiency Exception

Even if statutory analysis did not require a sufficiency excep-

¹⁷³ *Finch*, 23 N.Y.3d at 415-16 (internal citation omitted).

¹⁷⁴ *See id.*

¹⁷⁵ *Id.* at 414.

¹⁷⁶ *Wainwright v. Sykes*, 433 U.S. 72, 112 n.11 (1977) (Brennan, J., dissenting) ("In my view, the strongest plausible argument for strict enforcement of a contemporaneous-objection rule is one that the Court barely relies on at all: the possibility that the failure of timely objection to the admissibility of evidence may foreclose the making of a fresh record and thereby prejudice the prosecution in later litigation involving that evidence.").

¹⁷⁷ N.Y. CRIM. PROC. LAW § 70.20 (McKinney 2015).

¹⁷⁸ *People v. Whipple*, 97 N.Y.2d 1, 7-8 (2001).

tion, constitutional analysis does. Affirming a baseless conviction on preservation grounds violates procedural due process under the state and federal constitutions. At a minimum, there is “constitutional doubt” about the issue, thus courts should resolve that doubt in favor of an exception.¹⁷⁹

Suppose the Legislature passed the following statute: “The Appellate Division cannot consider an appeal unless trial counsel filed a memorandum of law that was, at a minimum, 100 pages and cited every single case on the appellate issue.” This hypothetical procedural rule imposes an insurmountable, arbitrary burden on the appellant. But are rules like this subject to procedural due process attack? Is the Legislature free to create whatever rules it wants in this arena? This section contends that procedural due process covers rules governing access to appellate reversals. Under that due process analysis, rules that affirm convictions on preservation grounds are unconstitutional unless the government can show that they advance a meaningful state interest. As shown above, in the sufficiency context, the government cannot make that showing.

The state and federal due process clauses guarantee that “[n]o person shall be deprived of life, liberty or property without due process of law.”¹⁸⁰ At bottom, the clause bans “arbitrary” government power.¹⁸¹ Procedural due process requires a balancing of (1) the government’s interest in the challenged procedure; and (2) the countervailing liberty interests.¹⁸²

Procedural due process analysis only applies when the challenged procedures implicate a liberty interest or a statutory “entitlement.”¹⁸³ Here, the right to an appellate judgment on the merits implicates two basic liberty interests: the basic right to be free from physical incarceration and the statutory right to present a sufficiency claim to the appellate court.

¹⁷⁹ *E.g.*, *People v. Correa*, 15 N.Y.3d 213, 232 (2010) (“Where the language of a statute is susceptible of two constructions, the courts will adopt that which avoids . . . constitutional doubts” (internal quotes omitted) (citing *In re Jacob*, 86 N.Y.2d 651, 667 (1995))); *Almendarez-Torres v. United States*, 523 U.S. 224, 260 (1998) (Scalia, J. dissenting) (“[T]he answer to the constitutional question is not clear. It is the Court’s burden . . . to establish that its constitutional answer shines forth clearly from our cases.”).

¹⁸⁰ U.S. CONST. amend. 14 § 1; N.Y. CONST. art. I, § 6.

¹⁸¹ *See* *Stuart v. Palmer*, 74 N.Y. 183, 190-91 (1878).

¹⁸² *See* *Turner v. Rogers*, 131 S. Ct. 2507, 2517-18 (2011); *see also* *Mathews v. Elridge*, 424 U.S. 319, 335 (1976); *People v. Peque*, 22 N.Y.3d 168, 175 (2013); *People v. David W.*, 95 N.Y.2d 130, 136 (2000).

¹⁸³ *See* *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 67 (2009) (“[The Due Process Clause of the 14th Amendment] imposes procedural limitations on a State’s power to take away protected entitlements.”).

The Supreme Court's analysis in *District Attorney's Office v. Osborne* is on point.¹⁸⁴ *Osborne* held that because an Alaska law created a statutory right to obtain vacatur of a conviction upon demonstrating "innocence with new evidence," an Alaskan had an "entitlement" to an appeal, thus triggering procedural due process analysis.¹⁸⁵

The Texas Supreme Court agrees that appellate procedural bars are subject to due process analysis.¹⁸⁶ *In re M.S.* held that "because Texas provides the right of an appeal from a judgment on parental-rights termination, part of the process of ensuring the accuracy of judgments necessarily involves appellate review."¹⁸⁷ In so holding, the Texas Supreme Court relied on the United States Supreme Court's pronouncement that although there is no constitutional right to an appeal, the Legislature cannot arbitrarily limit the appellate right:

[I]t is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. Thus, error preservation in the trial court, which is a threshold to appellate review, *necessarily must be viewed through the due process prism*. In this context, we review our rule governing preservation of a complaint of factual sufficiency under the procedural due process analysis established by *Mathews v. Eldridge*.¹⁸⁸

The Texas Supreme Court's conclusion is sound. Preservation rules are essentially filing rules; they require the appellant to present a claim in a particular manner before a particular judicial body (the trial court).¹⁸⁹ Like filing rules, preservation rules are also subject to procedural due process analysis.¹⁹⁰

Under a balancing analysis, affirming a baseless conviction on preservation grounds violates due process. As shown above, the government has no interest in blocking incurable sufficiency ap-

¹⁸⁴ See *id.* at 67-70.

¹⁸⁵ See *id.* at 52-70.

¹⁸⁶ See *In re J.O.A.*, 283 S.W.3d 336, 342 (Tex. 2009); see also *In re M.S.*, 115 S.W.3d 534, 546-50 (Tex. 2003); *In re B.L.D.*, 113 S.W.3d 340, 352-55 (Tex. 2003).

¹⁸⁷ *In re M.S.*, 115 S.W.3d at 546.

¹⁸⁸ *Id.* at 547 (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)) (emphasis added).

¹⁸⁹ See *In re J.O.A.*, 283 S.W.3d at 342 ("[B]ecause error preservation in the trial court is the 'threshold to appellate review,' . . . it should be reviewed under . . . procedural due process analysis . . .").

¹⁹⁰ E.g., *In re A.M.*, 312 S.W.3d 76, 86-87 (Tex. App. 2010) (analyzing petition filing deadlines for adoption under *Mathews*); *In re C.M.*, 652 N.W.2d 204, 208-09, 212-13 (Iowa 2002) (analyzing Iowa's filing deadlines and brief format rules under *Mathews*); *Turner v. State*, 839 S.W.2d 46, 47 (Mo. Ct. App. 1992) (analyzing filing deadlines under due process clause).

peals on preservation grounds. On the other hand, the countervailing liberty interests—the basic right to be free from physical incarceration, the right to avoid harsh stigma, and the right to work—are significant.¹⁹¹ On balance, *Gray* violates procedural due process.

But the analysis may not be that simple. Arguably, the flexible *Mathews* balancing standard does not apply to criminal procedural rules. Instead, the rigid *Patterson v. New York* standard applies.¹⁹² The rigid *Patterson* standard considers whether a procedure “offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹⁹³ Because *Mathews* arose in the civil (administrative law) context,¹⁹⁴ *Medina v. California* held that, as a matter of federal due process, the flexible *Mathews* balancing applies to civil cases (e.g., social security benefits) while the stringent *Patterson* rule covers the criminal realm.¹⁹⁵ If *Patterson* covers New York’s preservation rules, *Gray* may survive because, arguably, *Gray* does not “offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” (whatever that means).¹⁹⁶

The *Patterson* argument is flawed for numerous reasons:

First, even if the “conscience of our people” analysis was the federal criminal due process test,¹⁹⁷ the New York Court of Appeals has never held, let alone suggested, that the state due process clause incorporates that subjective test.¹⁹⁸

¹⁹¹ See *Dist. Attorney’s Office v. Osborne*, 557 U.S. 52, 93 (2009) (“The ‘most elemental’ of the liberties protected by the Due Process Clause is ‘the interest in being free from physical detention by one’s own government.’”) (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (plurality)); see also *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992) (“Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause . . .”).

¹⁹² *Patterson v. New York*, 432 U.S. 197, 201-02 (1977); *Medina v. California*, 505 U.S. 437, 453-56 (1992) (O’Connor, J., concurring); Gerald L. Neuman, *The Habeas Corpus Suspension Clause After Boumediene v. Bush*, 110 COLUM. L. REV. 537, 555 (2010) (“[The] procedural due process field . . . *Mathews v. Eldridge* competes with older judicial precedents, historical practices, and area-specific deference, and the Justices have debated its proper scope of application.”).

¹⁹³ *Patterson*, 432 U.S. at 202 (internal citations and quotation marks omitted).

¹⁹⁴ *Mathews v. Eldridge*, 424 U.S. 319, 323-26 (1976) (concerning what process was due to a recipient of social security disability benefits whose benefits had been terminated).

¹⁹⁵ *Medina*, 505 U.S. at 443 (1992) (“In our view, the *Mathews* balancing test does not provide the appropriate framework for assessing the validity of state procedural rules which, like the one at bar, are part of the criminal process.”).

¹⁹⁶ *Patterson*, 432 U.S. at 202 (citations omitted).

¹⁹⁷ *Id.*

¹⁹⁸ See, e.g., *People v. Davis*, 13 N.Y.3d 17, 27 (2009) (applying *Mathews*) (citations

Second, the *Patterson* test ignores that the basic purpose of due process is fairness—not compliance with tradition. Permitting the government to adopt unfair, arbitrary rules, simply because “our people” have not yet condemned the practice,¹⁹⁹ violates that basic purpose. Indeed, by worshiping tradition over fairness, *Patterson* prevents courts from “responding to new forms of injustice that lack any historical antecedent,” “consider[ing] the constitutionality of historically accepted practices that come to be regarded as unjust in light of evolving concepts of fairness,” and “reconsider[ing] the constitutionality of practices that a prior Court approved.”²⁰⁰

Third, as the “conscience of our people” is in the eye of the beholder, a liberal judge will have a different conception of our “people’s conscience” than a conservative judge. Thus, this subjective test produces a flimsy, result-oriented jurisprudence.

Fourth, as a textual matter, *Patterson* forgets that the Due Process Clause guarantees “due process,” not “traditional process” or “process consistent with the conscience of our people.”²⁰¹ Absent a clear directive from our constitutional framers to freeze our rights in time or to subject procedural rights to a straw poll of the American “conscience,” the courts should interpret flexible constitutional text to permit flexibility.

Fifth, *Patterson* clashes with due process as we know it. The Supreme Court has consistently held that due process requires rights that were neither traditionally guaranteed nor “ranked as fundamental.”²⁰² As Justice O’Connor’s concurrence in *Medina* explained, if we take the *Patterson* approach seriously, we end up with a legal system that does not include *Brady* (the right to exculpatory

omitted); see also *People v. Thompson*, 90 N.Y.2d 615, 621 (1997) (applying the balancing test); *People v. Scalza*, 76 N.Y.2d 604, 610 (1990) (applying the balancing test).

¹⁹⁹ See *Patterson*, 432 U.S. at 202.

²⁰⁰ Bruce J. Winick, *Presumptions and Burdens of Proof in Determining Competency to Stand Trial: An Analysis of Medina v. California and the Supreme Court’s New Due Process Methodology in Criminal Cases*, 47 U. MIAMI L. REV. 817, 830-32 (1993).

²⁰¹ See *Patterson*, 432 U.S. at 202.

²⁰² See *Medina v. California*, 505 U.S. 437, 454 (1992) (O’Connor, J., concurring) (citing *Ake v. Oklahoma*, 470 U.S. 68 (1985) (due process right to psychiatric examination when sanity is significantly in question); *Chambers v. Mississippi*, 410 U.S. 284 (1973) (due process right to introduce certain evidence); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (due process right to protection from prejudicial publicity and courtroom disruptions); *Griffin v. Illinois*, 351 U.S. 12 (1956) (due process right to trial transcript on appeal); *Brady v. Maryland*, 373 U.S. 83 (1963) (due process right to discovery of exculpatory evidence)); see also Donald A. Dripps, *Miscarriages of Justice and the Constitution*, 2 BUFF. CRIM. L. REV. 635, 652-53 (1999) (discussing *Medina v. California*); accord Winick, *supra* note 200, at 827.

evidence does not have historical grounding),²⁰³ numerous due process cases invalidating arbitrary state evidentiary rules,²⁰⁴ and a host of other well-established opinions.²⁰⁵

Sixth, applying *Patterson* to criminal cases but applying *Mathews* to civil cases produces absurdity. Under that analysis, a restrictive standard applies to criminal law (where life or liberty is at stake) but a flexible, expansive standard covers administrative hearings such as disability benefits hearings,²⁰⁶ and horse-racing-license-suspension procedures.²⁰⁷ Where the liberty stakes are higher, the State must afford more protection, not less.

Seventh, *Patterson* is grounded in the federalism concept that “preventing and dealing with crime is much more the business of the States than it is of the Federal Government.”²⁰⁸ This argument is a non-starter. The states may be in the business of incarceration, but the Due Process Clause requires that the states conduct that business fairly.²⁰⁹ Further, this federalism rationale has no bearing on the state constitutional analysis. Even if the federal courts must treat state criminal procedure as some kind of unregulated free market, the state courts retain the power to regulate their own state governments.²¹⁰

Finally, post-*Medina* precedent supports application of the *Mathews* test.²¹¹ In *Hamdi v. Rumsfeld*, the Court reviewed an American citizen’s right to challenge his detention for aiding the Taliban in Afghanistan.²¹² A plurality applied *Mathews* in analyzing the procedural due process claim.²¹³ The dissent’s criticism of the majority’s reliance on *Mathews* balancing demonstrates that the test’s applica-

²⁰³ See *Brady v. Maryland*, 373 U.S. 83 (1963).

²⁰⁴ See *Rock v. Arkansas*, 483 U.S. 44, 56 (1987); see also *Crane v. Kentucky*, 476 U.S. 683, 691 (1986); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

²⁰⁵ *Medina*, 505 U.S. at 454 (O’Connor, J., concurring).

²⁰⁶ *Mathews v. Eldridge*, 424 U.S. 319 (1976).

²⁰⁷ *Barry v. Barchi*, 443 U.S. 55 (1979).

²⁰⁸ *Patterson v. New York*, 432 U.S. 197, 201 (1977) (citing *Irvine v. California*, 347 U.S. 128, 134 (1954) (plurality)).

²⁰⁹ See William J. Brennan, J., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 546 (1986) (“This country has been transformed by the standards, promises, and power of the Fourteenth Amendment— . . . ‘that each of us is entitled to due process of law and equal protection of the laws from our state governments no less than from our national one.’”) (quoting William J. Brennan, J., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490 (1977)).

²¹⁰ See U.S. CONST. amend. X.

²¹¹ See *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality).

²¹² See *id.*

²¹³ *Id.* at 528-29 (“The ordinary mechanism that we use for balancing such serious competing interests, and for determining the procedures that are necessary to ensure

tion was central to that decision.²¹⁴ Thus, *Hamdi* calls into question *Medina*'s holding that *Mathews* is limited to "civil procedure."

True, *Osborne* applied *Patterson* to a due process claim.²¹⁵ But the majority opinion neither discussed the debate over the appropriate due process standard nor grappled with *Hamdi*'s recent application of *Mathews*.²¹⁶ Therefore, while *Osborne* cuts in favor of a *Patterson* approach (to federal due process analysis), it should not be read as affirmatively resolving this question.²¹⁷

But let's assume *Patterson* applies. Under that test, we must consider whether affirming a baseless conviction because counsel did not object below "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."²¹⁸ Discerning the "traditions and conscience of our people" is challenging. Whatever that nebulous phrase means, locking people up without proof beyond a reasonable doubt passes that test. While some may support affirming baseless convictions, the vast majority of "our people" would likely be shocked to learn that innocent people can languish in prison because their lawyers failed to say a few words at trial.

V. CONCLUSION

When appellate courts affirm baseless convictions, they ignore the basic duty of our judicial system: to ensure accurate verdicts. While *Gray* ignored that simple premise, *Finch* revived it, as it strongly suggested that where the record conclusively reveals an illegal conviction, that conviction should never stand. It is now time for the Court of Appeals to fully embrace that common sense and establish an insufficiency exception to the preservation rule.²¹⁹ That exception promotes liberty, advances justice, and does no harm. It should be the law.

that a citizen is not 'deprived of life, liberty, or property, without due process of law,' is the test that we articulated in *Mathews v. Eldridge*." (internal citations omitted).

²¹⁴ *Id.* at 575-76 (Scalia, J., dissenting) ("[The plurality] claims authority to engage in this sort of 'judicious balancing' from *Mathews v. Eldridge*, a case involving . . . the withdrawal of disability benefits! Whatever the merits of this technique when newly recognized property rights are at issue (and even there they are questionable), it has no place where the Constitution and the common law already supply an answer.").

²¹⁵ See *Dist. Attorney's Office v. Osborne*, 557 U.S. 52, 67 (2009).

²¹⁶ *Id.* at 67-68.

²¹⁷ *Id.*

²¹⁸ *Patterson v. New York*, 432 U.S. 197, 202 (1977) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

²¹⁹ *Telaro v. Telaro*, 25 N.Y.2d 433, 439 (1969).

