COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 35

LAWRENCE PARKER,

Appellant.

PEOPLE,

Respondent,

-against-

NO. 36

MARK NONNI,

Appellant.

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20 Eagle Street
Albany, New York
June 5, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

MATTHEW J. BOVA, ESQ.
CENTER FOR APPELLATE LITIGATION
Attorney for Appellant Nonni
120 Wall Street, 28th Floor
New York, NY 10005

LORRAINE MADDALO, ESQ.
THE LEGAL AID SOCIETY
Attorney for Appellant Parker
199 Water Street, 5th Floor
New York, NY 10038

RYAN P. MANSELL, ADA
BRONX COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
198 East 161st Street
Bronx, NY 10451

Karen Schiffmiller
Official Court Transcriber

CHIEF JUDGE DIFIORE: The next appeal on the calendar - - - two appeals, numbers 35 and 36, People of the State of New York v. Lawrence Parker, and the People of the State of New York v. Mark Nonni.

Good afternoon, counsel.

MR. BOVA: Good afternoon. May it please the court, Matthew Bova for Mr. Nonni. I would request two minutes for rebuttal.

CHIEF JUDGE DIFIORE: Yes, sir.

MR. BOVA: For almost three decades, this court has enforced a clear rule in People v. O'Rama and its progeny. The failure to provide actual specific notice, as to the contents of a jury note, is a mode of proceedings error that requires reversal. That rule controls this case.

JUDGE FEINMAN: So is it your position, there's no evidence in this record that would support a finding that defense counsel had some notice of these notes?

MR. BOVA: Yes, Your Honor. There is no record evidence indicating that counsel had the notice that O'Rama and its progeny require, which is notice of the actual specific content of the jury notes. Mere notice of the notes' existence is insufficient.

JUDGE FEINMAN: But you don't think there's any reading of the - - - what went on with this experienced

trial judge, having marked them as court exhibits, and - - - and, you know, they're clearly marked as court exhibits, and - - - and sort of the discussion about, well, we'll go through the readback and trying to get it all done before lunch, and - - - and then letting them continue to deliberate. You don't think that that's a fair reading of this record?

MR. BOVA: No, it's not a fair reading, Your Honor, because what we have here is the court - - - the only thing the court says about these two critical notes, these two substantive notes, is that they are notes about a readback. That's it. But that's insufficient. People v. Walston was very clear on this matter.

JUDGE FEINMAN: So what do you think was going on from the time the notes came in to the time there's a readback?

MR. BOVA: What - - - what the record shows - - - what happened was, there are three notes sent in. And then the record indicates that there was conversation as to the first note, and then the court discussed that note with the parties and - - -

JUDGE FEINMAN: Wait, wait. You don't think that what happened is that they showed the three notes, they had - - - had it out with the reporter, and gone - - - I mean, you know, from experiences of somebody who sees what goes

on every day in the trial courtroom, they're working out what's going to be read back. There are specific discussions as I recall it about what should or should not be included, whether or not they come to an agreement about that.

You know, I don't think that it's to the point where they're actually literally flipping and having the court reporter and clipping it, the way they used to, because now they have it all computerized, but you don't think that's a fair reading, and at the very least we should send it back for a reconstruction to see if that's, in fact, what happened?

MR. BOVA: No, Your Honor, it's not a fair reading, because what this record only shows that there - - - is that there was a give-and-take as to the first note. But our claim is not as to that first note. It's as to the - - - the last two notes.

JUDGE FEINMAN: Jury note three and four, right?

MR. BOVA: Yes, Your Honor.

JUDGE FEINMAN: Right.

MR. BOVA: So what - - -

JUDGE FEINMAN: Both of which are also requesting readback, and one about the fingerprinting and the other about the - - - the testimony of the complainant and his wife.

MR. BOVA: Yes, Your Honor. So what we're talking about here is a record that is barren as to that critical issue. And what we're really doing here is trying - - -

JUDGE RIVERA: What's - - - what - - - what - - -

MR. BOVA: - - - to put together - - -

JUDGE RIVERA: What is our standard with respect to the way we assess that record? Can we infer something from the record?

MR. BOVA: No, the standard comes from Walston, and the standard is crystal clear, and I think it controls this case. "Where the record fails to show that defense counsel was apprised of the specific, substantive contents of the note, as it was in this case, preservation is not required. Where a transcript does not show compliance with O'Rama's procedures as required by law, we cannot assume that the omission was remedied at an off-the-record conference that the transcript does not refer to."

Silva, on the heels of Walston repeated the same rule in affirming that there is "an affirmative obligation on a trial court to create a record of compliance under CPL 310.30 and O'Rama."

JUDGE FEINMAN: Let's - - - let's just say you're right. This is a mode of proceedings error. Why - - - you know, let - - - let me walk that back. Assuming it's not a

mode of proceedings error or we're not clear whether what transpired was a mode of proceedings error occurred, why shouldn't we have a reconstruction hearing?

MR. BOVA: Be - - -

JUDGE FEINMAN: What - - - what's wrong with sending it back?

JUDGE FEINMAN: Because Walston and Silva already say that a reconstruction hearing is unavailable. Walston clearly held that there is an obligation on the trial court to create a record. Silva repeated the same rule. And then when Silva - - - Silva said when there was no record of compliance with the O'Rama guidelines, "defendants are entitled to new trials." That is the law under Silva and Walston, and that law controls this case.

What we're really - - -

CHIEF JUDGE DIFIORE: So assume for a moment - - - just assume that in the conference, the trial judge did actually hand the note to defense counsel. He got actual, specific notice of the contents, and they just failed to make a record. Is it your position that that is where we are? That's the mode of proceedings error, and there is no place to go from there?

MR. BOVA: Yes, Your Honor. Because what - - - what the - - - the question really amounts to not what can - - - what do we think might have happened - - -

CHIEF JUDGE DIFIORE: It's about the making of the record of the notice or it's about the notice?

MR. BOVA: It's a - - - it's about - - - no, it's about the notice. And in determining whether there is notice, it is the record that is dispositive. And it's - - -

JUDGE GARCIA: So if you were trial counsel here, and you knew you got the notice, could you raise this issue on appeal and point to the transcript and say there's no record of it? Would that be an ethical position to take?

MR. BOVA: As to ethical? I mean, the - - - the rule - - - under this court's precedence, the rule is whether the record shows. So, yes, you could do that.

JUDGE GARCIA: Your argument has to be, it's only the record of it. The fact that this person may have actually gotten this note, read it, had input in a discussion, all that is irrelevant if it isn't on the record.

MR. BOVA: Yes, because that's - - -

JUDGE GARCIA: And it requires reversal.

MR. BOVA: Because, Your Honor, that's not just a rule in this context, that is a rule in all areas of appellate procedure. What we're talking about here is a record that does not demonstrate compliance. And what the district attorney has done - - -

JUDGE FEINMAN: We - - - we send things back.

JUDGE GARCIA: We've also sent - - - specifically in Monclova, we sent back a mode of proceedings error for a defendant who it was unclear whether they were present at a material stage. Why would this mode of proceedings error be any different?

MR. BOVA: Because here, what we're - - - what we're talking about here is - - - what we're talking about, not the failure on the stenographer's part to make a record or a complete absence of a transcript. What we're talking about here is there is a proceeding that occurs, and there is no evidence in the record of record compliance.

JUDGE GARCIA: Going back to Judge Feinman's point, I think in the beginning of the argument, there are indications in this record that the note was given over. So again, it goes back to the point of, if that actually happened, I - - - it - - - I would think there's a good argument, we don't even have jurisdiction over this case, because it's not preserved. So what's the harm - - - if we're not saying just the failure alone to make a record is the error, even if you got the note, and you have to have had not had the note, what's the harm in sending this back for a reconstruction hearing?

MR. BOVA: Because that - - -

JUDGE GARCIA: Like we did in Monclova?

MR. BOVA: Because, A, that would require this court to overrule Walston and Silva, because those cases - - -

JUDGE GARCIA: But Walston and Silva, there was no indication in the record. I think that's some language there. And I think again, as Judge Feinman's pointing out, there is an indication in the record that these notes were turned over to defense counsel.

MR. BOVA: Because then, Your Honor, if that were the test - - - if the test is whether we can cobble together a theory based on an indication in the record - - -

JUDGE GARCIA: But how do you distinguish Monclova then where it's also a mode of proceedings error, that's exactly what we did. We said there's an indication in the record, it goes back.

MR. BOVA: Because - - - because Walston and Silva control this area. Walston and Silva were very - - - those - - -these were the same arguments that were made in Walston and Silva. Walston, the argument that was made in that case was, well, there's a pretty good - - - there's a pretty good idea here that possibly what happened was the record was shared. And in that case, this court held that, no, you do not get to make a new record.

And I think it would be impossible for this court

to cabin that rule. Because what we - - - what we - - - we would end up with is a new rule of appellate procedure. What - - - any time a critical element is missing from the record, a party on appeal could say, Your Honor, I have a theory as to how an inference can be made as to what really happened. And then from there, Your Honor, I want you to send it back.

So take a case involving Boykin warnings. Suppose the record does not show that Bor - - - Boykin warnings were provided in a plea case. Well - - - and the - - - and the record is completely barren. In a case like that - - -

JUDGE RIVERA: So we - - - we would go down the road of pure speculation.

MR. BOVA: Yes, Your Honor.

JUDGE GARCIA: But then should we never have reconstruction hearings then?

MR. BOVA: I think the - - - the rule - - - the rule as to reconstruction hearings would be, where the record, as to say, there's no transcript. That's a very clear rule. I mean, in Parris and the cases that the District Attorney relies on - - -

JUDGE GARCIA: But that would be - - -

MR. BOVA: - - - where there's no transcript - - -

JUDGE GARCIA: - - - the only time we've asked for reconstruction hearings, is where there's a missing transcript?

MR. BOVA: I mean, I think Velasquez, Your Honor, is a good example as to what you were - - - as - - - as to what you were saying before as to whether - - - when there is an incomplete record. In Velasquez, there was a - - - a chambers conference and the record did not indicate whether or not the defendant was present. And this court said, no, defendant, you can't on appeal argue, Your Honor, the record is vague as to this issue; send it back for a reconstruction hearing. Instead what this court said is, no, the record is not made, and that ends the - - - and that ends the inquiry.

And as to this specific issue, I think it's important, because it's not just about this issue. It's about all areas of appellate procedure. And I think a - - - the best example - - -

JUDGE GARCIA: But some appellate courts - - - I think, two departments, at least one - - - have been doing this. They have sent these cases back.

JUDGE FEINMAN: It was - - - the First Department is sending them back.

MR. BOVA: The - - - the First Department has done that. The Second Department has rejected that rule.

JUDGE GARCIA: And has that opened the floodgates of reconstruction hearings in the First Department for Boykin pleas or anything like that?

MR. BOVA: Well, there's no re - - - there's no logical reason why it wouldn't, Your Honor, because what we're really talking about here is, any appellant can come here, come to the Court of Appeals, come to the Appellate Division and say - - -

JUDGE GARCIA: But we have - - -

JUDGE RIVERA: Well - - - well, it would also presume, right, that - - - that judges, as a regular course, violate O'Rama. Would it not? - - - That we end up in situations where you've got these appellate - - - appealable issues, and so the First Department says go do a reconstruction hearing.

MR. BOVA: Yes, Your Honor, I mean I think there would be no - - - as to - - - as to what the impact would be, what we're really talking about are two options. We're talking about one option, which is that, create a clear rule that the courts must comply with. That ends the - - - ends the inquiry. The court has to put the - - - the court receives the notes, the court marks it in as an exhibit, the court does a very simple thing - - - provides notice on the record.

The alternative is a speculative inquiry that

requires appellants, respondents, and courts to guess as to what might have happened. And it's impossible to see how that will not result in an endless see-saw, back and forth. A case goes up to the Appellate Division, send it back to make a new record. I think a great example of this is the traditional rule of sidebar conferences.

If a defendant is obj - - - offers a general objection, and says, Your Honor, may I approach, goes up to the bench, and - - - and there is a record of an off-the-record conference. And then counsel does not put the objection on the record. In a case like that, there's a very fair inference, that counsel was making the specific objection that the context indicates. But preservation cannot be established that way. It's because it's what's on the record that controls.

That is the basic rule of appellate procedure that has governed for decades. That's the basic rule that has governed this area in Walston and Silva.

CHIEF JUDGE DIFIORE: Thank you.

JUDGE FAHEY: What - - - what you're saying is that, if - - - if we open the door to reconstruction hearings here, we're opening the door to reconstruction hearings in every setting where preservation is at issue.

MR. BOVA: Yes, Your Honor, and - - -

JUDGE FAHEY: What - - - what about Sandoval? A

reconstruction hearing seemed to be allowed in Sandoval.

MR. BOVA: Well, a reconstruction hearing in Sandoval where there's a - - - if - - - if there is an ab - - - a complete absence of a transcript, that's a different story. Because in that case, that - - - there's firm record evidence that something did happen, but it's absent. That is a conclu - - - that is an irrefutable fact as to the record. That's different than this case.

JUDGE FAHEY: I see.

MR. BOVA: In a case like this, this is an inference and speculation that something may have happened.

CHIEF JUDGE DIFIORE: Thank you, counsel.

JUDGE FAHEY: Thank you.

MR. BOVA: Thank you.

CHIEF JUDGE DIFIORE: Counsel?

MS. MADDALO: This court has made a clear - - -

CHIEF JUDGE DIFIORE: Do you care to reserve rebuttal time?

MS. MADDALO: No, he's - - -

CHIEF JUDGE DIFIORE: Okay.

MS. MADDALO: - - - going to do the rebuttal.

CHIEF JUDGE DIFIORE: Thank you.

MS. MADDALO: This court has made a clear rule that meaningful notice under CPL 310.30 is when the record reflects that a jury note is read verbatim in front of the

jury before the court answers it. That establishes to me the rule - - -

JUDGE FEINMAN: And - - - and yet, for however many years it's been since O'Rama was decided - - -

MS. MADDALO: Yes.

JUDGE FEINMAN: - - - we still are getting these cases, and - - - and so that leaves me to wonder, have - - - have - - - did we create a - - - an unworkable rule in O'Rama?

MS. MADDALO: The rule is very workable. It's very clear, and most courts do comply with it. They read the note. This court, recently in Mack, revisited whether or not once counsel has that meaningful notice, counsel then is required to object to any response. But that notice is so crucial - - - that meaningful notice is so crucial to the fundamental fairness of the trial, that - - -

JUDGE WILSON: Why is it - - - why is it crucial here, where the jury returned a verdict without having gotten any answer to those two last questions?

MS. MADDALO: It's always crucial.

JUDGE WILSON: But why here?

MS. MADDALO: It's crucial here - - -

JUDGE WILSON: Why?

MS. MADDALO: - - - the same way it's crucial in

every single trial, because - - -

JUDGE WILSON: Well, as I understand - - - go ahead.

MS. MADDALO: I'm sorry.

JUDGE WILSON: Go ahead.

MS. MADDALO: Because the jury's questions - - - that's the end-all and be-all of a trial. The whole trial is about, from defense counsel's position, presenting the evidence.

JUDGE WILSON: What is the purpose of notice? What is the purpose of notice, counsel?

MS. MADDALO: The purpose of the notice is so counsel knows what issue the jury is grappling with. What is the question, and so counsel can help the court craft a response - - -

JUDGE WILSON: And what if there's no response? Here - - -

MS. MADDALO: If there's no response - - -

JUDGE WILSON: Here there was no response.

MS. MADDALO: - - - this court has held in People v. Mack, that counsel is obligated to say, judge, I need you to respond to the jury's notes.

In this situation where the jury came back with a verdict, if counsel had had the required meaningful notice, if the notes had been read verbatim, then counsel should

have asked the judge - - - it would have been incumbent on counsel - - - to ask the judge, either to respond to the notes before accepting the verdict, or to ask the jury whether or not it needed those questions answered before it was going to accept its verdict. But counsel here - - -

JUDGE RIVERA: But is - - - isn't that implicit when it comes back and says we have a verdict?

MS. MADDALO: It's not implicit, because - - -

JUDGE RIVERA: How can that be? If they're asking for something and then they go and deliberate, they figured out they don't need it.

MS. MADDALO: They're asking for something, but - - - they're asking for something and they're sending a note that has a verdict. First of all, it does not obviate the court's responsibility to provide that meaningful notice, which it still has not done. Secondly, this court - - - because the mode of proceedings error occurred, we don't reach whether or not there's a harmful error analysis. We don't reach whether or not they have implicit - - -

JUDGE GARCIA: But pick up on Judge - - - to pick up on Judge Wilson's point, if the jury comes back in with a verdict, and you know they're - - - and they knew there were - - - at least, knew there were two outstanding notes here, right, that hadn't been responded to. They knew that. That's clear on the record.

MS. MADDALO: Yes.

JUDGE GARCIA: It's not one of these old cases, where no one knew a jury note was there or there's a reading of it and it's not verbatim. They knew there were two notes. The jury comes back in. Why isn't the combination of those factors - - - the jury coming back in, basically saying, we don't need this anymore, and the parties having notice there are outstand - - - at least, outstanding requests or notes that haven't been responded to, why isn't that enough to at least spark an obligation to say, hey, we have two notes that we haven't dealt with yet?

MS. MADDALO: That is the court's obligation. That do - - - the - - - the court already had that obligation, whether they came in with that note or not.

JUDGE GARCIA: But now they've come with a verdict.

JUDGE FEINMAN: I mean, if - - - if the court had read the notes, right, verbatim to the lawyers, and they're busy going through the transcript to figure out what the answer is, what portion's dealing with excising, you know, sustained objections, et cetera. The jury would still be free to deliberate while they were doing that, right?

MS. MADDALO: Yes.

JUDGE FEINMAN: And if the jury came back with a

verdict, while they were still gathering all of this, that would not be reversible error at all, would it?

MS. MADDALO: It would depend. It would depend. The court - - -

JUDGE STEIN: Can't - - -

MS. MADDALO: - - - it would really be incumbent upon the court then to ask the jury or for counsel - - -

JUDGE FEINMAN: But we've never said that.

MS. MADDALO: Counsel had been given the note - - -

JUDGE FEINMAN: Have we ever - - - I mean, because that - - - that's going beyond - - - I mean, assuming that they've had notice.

MS. MADDALO: They had notice.

JUDGE FEINMAN: The defense lawyers had notice of the note, all right. You cannot - - - you're, in essence, asking us to say, the minute the jury sends a note, part of the judge's instructions has to be, cease deliberations until such time that we can respond meaningfully to your note.

MS. MADDALO: No, I don't think I'm saying that. What I'm saying is - - -

JUDGE GARCIA: Does he have to ask the jury then before we take your verdict, do you still want the notes answered?

MS. MADDALO: That would be pro - - -

JUDGE GARCIA: Have we ever said that?

MS. MADDALO: That would be the preferred procedure from the court, but if counsel had been - - -

JUDGE GARCIA: But we've never held that, though, have we?

JUDGE STEIN: But haven't we made a distinction though between me - - - meaningful notice of the contents of the note and meaningful response? In one case we've held that - - -

MS. MADDALO: Yes.

JUDGE STEIN: - - - it - - - it's an absolute and it doesn't have to be preserved. In the other case, when it comes to meaningful response, we have held that you do have to preserve the argument.

MS. MADDALO: Yes, and that is not - - -

JUDGE STEIN: So here what's missing is the meaningful notice.

MS. MADDALO: Here what's missing is the meaningful notice.

JUDGE FAHEY: And - - - and the reason for that - - - the reasoning behind what Judge Stein said is - - - is that - - - that an attorney cannot respond unless they have notice, but once they have notice, then they have an obligation to respond. If they don't respond and they

don't object, then we held in Nealon and Mack and cases after that, that you have to preserve. But in the absence of notice on the record, there's no way for us to determine whether or not they received the notice. All we're left with is implication.

MS. MADDALO: Yes, yes. And - - -

JUDGE RIVERA: Yeah, but is - - - isn't the problem - - -

MS. MADDALO: I'm sorry?

JUDGE RIVERA: - - - that if the jury comes back with a verdict, that - - - isn't that an implicit withdrawal of the request, and then there is no requirement to provide notice?

MS. MADDALO: It doesn't obviate that earlier requirement to provide the notice. There are things that if counsel had notice, counsel should do - - -

JUDGE RIVERA: Simply because of the sequentiality or because of the statutory mandate?

MS. MADDALO: Because of the importance of the notice. I think because of the fundamental importance of the notice.

JUDGE GARCIA: Isn't notice go to response? I mean, it's hard to take them apart so literally, because notice of what, and a meaningful response here, if - - - again, if the jury's coming back with a verdict, the

meaningful response, even according to what we've just been discussing earlier, is don't take the verdict until we consider the notes. Don't you have enough notice to do that? Why do you need the contents at that point?

MS. MADDALO: You do have meaningful notice, yes.

JUDGE GARCIA: But you have meaningful notice there are two outstanding notes. Isn't that enough?

MS. MADDALO: That's not meaning - - - I'm sorry - - - but that's - - -

JUDGE GARCIA: But if you're going to respond to a jury and the judge is going in, and he's going to say, okay, I'm giving you this, and I'm giving you this, I'm not giving you this. You need meaningful participation from the parties. At this point - - - and you need to know exactly what the note says in order to respond meaningfully. At this point, the jury's in. There's a verdict. There's not going to be a response to these notes, whatever they said. The only objection the parties can make at that point is, don't take the verdict until we have a chance to respond. So what do you need the notice to do at this point?

MS. MADDALO: If I've had the notice of the notes, and I know that I want some input into that response for the court, and before the court responds, the jury comes in and says, we have a verdict, this court has held,

I have the note, I have the notice; it's incumbent on me to say, Your Honor, I am asking that you do not accept the verdict before you either answer the note, and this is my input into answering the note, or ask the jury. There shouldn't be - - -

JUDGE STEIN: Is it really possible that - - -

MS. MADDALO: - - - really guessing and implicit - - -

JUDGE STEIN: Is it possible that you might - - - if you knew the contents of the note, you might not want the jury to answer it?

MS. MADDALO: But that's why this court held in Mack, you have to preserve once you have notice. You have to preserve it. That's - - -

JUDGE STEIN: That's why you need to know what's in it.

MS. MADDALO: You need to know what's in it.

JUDGE STEIN: So you know whether to insist that it be answered.

MS. MADDALO: Right, so you can't make that decision.

JUDGE GARCIA: You can object - - - you can object before the jury renders the verdict. You - - - you - - - the judge comes out and says, I have a note; they've reached a verdict, right. Can't you stand up at that point

and say, before the jury comes in, I want to see the notes; I want to see if we can respond - - -

MS. MADDALO: If - - -

JUDGE GARCIA: - - - if - - - if I want to object or respond to this, because at that point, all your objection can be is don't take the verdict, respond to the note.

MS. MADDALO: Only if I want to respond to the - - - respond to the note. And I don't know if I want to respond to the note because I don't know what the note is. That's why - - -

JUDGE RIVERA: But I thought in part your argument was the damage - - - the error - - - the damage is already done.

MS. MADDALO: It's done.

JUDGE RIVERA: We're not going to get to the second question. It's an interesting, intellectual question. But it's not really posed by the case, because you got the - - - the error at the inception.

MS. MADDALO: Yes, yes, because the court - - - and I did just want to say, that, in actually - - - in this particular case, I disagree. It appears by looking at the record, that counsel here did not have access to those two other notes. Every other note, the court has them - - - even though the court doesn't read those notes into the

record until the first note in the - - - until the jury is there, that court has counsel say on the record, did you see the notes, even the notes about the exhibit, did you see the note? The verdict note, did you see the note?

When the judge says - - - when the jury sends out those three notes, the judge says, I have three notes. And there was that discussion beforehand - - - before the jury came back - - - about the response to that first note. The judge does not say - - - have counsel say on the record, have you seen all three notes? If anything, the indication that is in this particular case, they did not see.

And I did just want to briefly address the reconstruction hearing. In this case, in all cases, it is very problematic to think that this case is eight years ago. The trial that eight years earlier counsel in a court would remember whether or not they had seen notes that are not discussed on the record. It's not something that counsel would have notes in his own trial file log - - -

JUDGE FEINMAN: The trial judge is actually retired.

MS. MADDALO: The trial judge in this particular case - - -

JUDGE FEINMAN: Yeah, has retired.

MS. MADDALO: - - - the trial judge has passed away. Defense counsel has passed away. So in - - -

actually in this particular case, a reconstruction hearing is virtually impossible.

JUDGE FEINMAN: The hearing judge, I think, passed away. I don't think the trial judge has passed away.

JUDGE GARCIA: And one counsel - - - there were two counsel present. I mean - - -

MS. MADDALO: For Mr. Nonni, but Mr. Parker's counsel is - - -

JUDGE GARCIA: Right, but you have one defense lawyer who's, again, an officer of the court, was asked did you receive a note, if they remember - - -

MS. MADDALO: But you can't say whether Mr. Parker's attorney saw the note.

JUDGE GARCIA: Okay.

JUDGE RIVERA: Well, can - - - can the - - - excuse me. Can the ADA say if anybody saw the note?

MS. MADDALO: I don't know.

JUDGE RIVERA: And they certainly haven't said that to you. But have the ADA ever said we know for sure that they saw the notes?

MS. MADDALO: I don't know how they'd be able to unless they were standing there, and all three discussed the notes, and that person was ready to remember it from eight years earlier or however many years earlier. It - -

-

JUDGE RIVERA: Well, can they take the position they're taking now on these briefs, if the People knew that the notes had actually been seen?

MS. MADDALO: Can the prosecutor - - -

JUDGE RIVERA: Correct.

MS. MADDALO: - - - take the position - - -

JUDGE RIVERA: Well, I can ask them that question, thank you.

MS. MADDALO: Okay.

CHIEF JUDGE DIFIORE: Thank you, counsel.

Counsel?

MR. MANSELL: May it please the court, Ryan Mansell on behalf of the People. What appellants are attempting to do in this case is to extrapolate from a fairly large body of law a rule that is not supported by that jurisprudence. They are attempting to take the notice requirement that appears in CPL 310.30 and fashion it into a knowledge requirement, placing an obligation on the court, not simply to provide notice in the way it's traditionally understood and has been understood in the post-O'Rama - - -

JUDGE RIVERA: So I'm going to ask you that question that I - - -

MR. MANSELL: Sure.

JUDGE RIVERA: - - - let her off the hook on. What's the People's responsibility if the prosecutor does know that the notes were not actually shown?

MR. MANSELL: If the prosecutor - - -

JUDGE RIVERA: When the defendant makes this kind of a claim?

MR. MANSELL: If the prosecutor knows that the notes were not shown?

JUDGE RIVERA: Correct.

MR. MANSELL: At the actual proceeding or in appellate posture?

JUDGE RIVERA: No, no, no, on appeal.

MR. MANSELL: On appeal? Well, it - - - certainly it's not a part of the record at that point in time. I suppose we could mo - - - have moved in the Appellate Division, if the issue had been raised to expand the record with, perhaps, an affirmation or something from the attorney - - -

JUDGE GARCIA: No, I think what Judge Rivera is asking you, is if you know. You're the trial prosecutor and you're responding to this motion on appeal, and you know these notes were never turned over to the defense lawyers or the prosecution; the judge kept them. Could you ethically take the position on this appeal that the record could indicate that they were turned over?

MR. MANSELL: I don't think so, because I think the attorney would be obligated not - - - not to make a misstatement or law or misstatement of fact to a court of record, so I think, no, the answer would be no. I don't think we could misrepresent what had actually happened at the proceedings. Of course, as I'm sure this court is aware, most district attorney's offices, the appellant facet of the office is separated from the trial section of the office.

JUDGE GARCIA: But let's say you talk to the trial lawyer, and the trial lawyer told you that, no, we never - - - they never got the notes.

MR. MANSELL: Right, then I don't think we could make that claim. But when it comes to what could happen at a reconstruction hearing, just because a reconstruction hearing could come back as nothing more than common practice and procedure, doesn't mean that there's still no value in having the hearing in the first place. For instance, this court in Cruz - - -

JUDGE STEIN: Then what's the point in having the rule that the court is obligated to do something? So I - - - I mean, are you suggesting that because sometimes trial judges don't do what they're statutorily obligated to do, that the rule just doesn't work, so why don't we just open it wide up, and if it's not there, forget about the rule,

let's just go back and have a reconstruction hearing.

MR. MANSELL: Well, Your Honor, it's a bit like Schrodinger's jury note. We don't know if the court did the obligation or didn't do the obligation.

JUDGE FAHEY: Really? Schrodinger?

MR. MANSELL: Schrodinger, yes.

JUDGE FAHEY: Yeah.

MR. MANSELL: We don't know if the court did the obligation or didn't do - - -

JUDGE STEIN: No, no, the obligation to make a record.

MR. MANSELL: Right, of course, the - - -

JUDGE STEIN: We know whether the court made a record or not. It - - - it's not in the record.

MR. MANSELL: And a reconstruction hearing is a tool to correct that.

JUDGE FAHEY: It seems though that there - - - it seems the suggestion that you're making is in response, in this particular circumstance, to a perceived inequity. But this is why sometimes that way lies madness, because what you propose then could be applied to every situation where there's a dispute and there's an implication that could be made in the record.

And my experience as a trial judge is whenever anything is referred back, you say, and as a - - - an

appellate court judge, is - - - is that what we always get back is that this is what I generally do. There's very seldom that we get a specific recollection, because the trial judge and the attorneys have the same problem that we have, is that they don't have a record. So they have nothing to refresh their memory with.

And I - - - I'm trying to think if we have a black letter law now, that says the judge doesn't read it into the record, you don't have notice, and we know if we didn't read it into the record, because we can read the record to confirm that. It's a mode of proceedings error; you're out. What would your rule be? How would we determine whether or not the case would be referred back for a construction hearing? What would you suggest as a rule to this court?

MR. MANSELL: There would have to be sufficient indicators in the record to suggest that there was an off-the-record proceeding. We agree with counsel that - - -

JUDGE FEINMAN: So what are those indicators here?

MR. MANSELL: So those indicators here are the fact that they were marked as court exhibits in the presence of the attorneys, so they were certainly aware of the notes. The fact that the court had a practice as displayed with note number one and note number five - - -

JUDGE STEIN: Can it work both ways? On the one hand, you're saying that was the practice. On the other hand, there's no evidence in the record that the court did that with these two notes. And it - - - it just sounds to me like you're relying on the presumption of regularity, which we've said is not sufficient.

MR. MANSELL: Well, there's a distinction. There's whether there's an indication in the record of what actually happened, and then there's an indication in the record of whether there was another proceeding where the obligations may have been complied with. So while we may not have sufficient indicators that the court actually complied with its O'Rama obligations off-the-record, we do have sufficient indicia that there was an off-the-record proceeding, where that may have happened. And so what we are suggesting is that there should be a reconstruction hearing in those cases.

And there is a cru - - - a clear harm to not allowing for these types of re - - -

JUDGE RIVERA: I'm sorry. Do you know - - - there seems to be a - - - a little uncertainty about the life or death of the judge? The judge retired or - - -

MR. MANSELL: I was - - - I am aware that the defense attorney is deceased. I am not aware as to whether Judge Stadtmauer is deceased. I know that he is retired,

that he was doing some JSA duties for a period of time, but I am not aware of whether or not he is deceased or not. But certainly I don't think there's any reason that the remaining attorneys couldn't be asked if there was such a grouping of people that came together to discuss these notes.

But what's critical when we speak about a reconstruction hearing is just looking at the type of example where we could have a disastrous reversal. So for instance, in a - - - in the First Department case of People v. Mitchell, it had turned out that the stenographer had two pages of notes, which she had simply forgotten to put into the transcript when she produced it. So what happens in these situations is, what is essentially just an error in record making, perhaps even just an unfortunate clerical error, then becomes the mode of proceedings error.

JUDGE STEIN: But that's the - - - the difference there is, is that the question is - - - was whether there was or was not a record made. Here, that's not the question.

MR. MANSELL: Well, we simply - - -

JUDGE STEIN: So I mean, that - - - you know, that - - - that can easily have been - - - be corrected. Whereas this is, as has been discussed, going back to people's memories, and - - - and - - - well, they may not

be even available.

MR. MANSELL: It could be the case in this, that there is a page in between the end of the proceedings on the previous day and the beginning of the proceedings on the next day, because the first thing that happens in this case during the second day of deliberations, is these notes are received and marked into evidence around 11 o'clock. So it's possible as they're receiving these notes, every approximately fifteen minutes between 11:16, 11:30, 11:55, they're receiving them and discussing them, but the stenographer doesn't put that in the transcript. But we don't know that unless we have a reconstruction hearing.

JUDGE RIVERA: But see that's - - - there - - - there we go. Now you're down the road to recovery through speculation. And that's the problem. And isn't that, in part, also what the rule is designed to avoid?

MR. MANSELL: Well, in some cases, yes. It could be speculation. But what we are saying is in our case with our facts, it's not speculation, because of the practice and procedures that the court had used for the other notes, and the way in which these specific notes were handled. But we don't even think we have to get to a reconstruction hearing in this case, because the record on its face does demonstrate compliance with the O'Rama procedure.

If this court looks at the entirety of post-

O'Rama jurisprudence, there is no knowledge requirement or verbatim reading requirement in any of those cases. For instance, if we look at cases that were cited favorably, recently, in People v. Nealon in 2015, Ramirez, and Williams. In those cases, what happened with those notes is very simple. The court said I have received a communication from the jury. The jury was brought in and the court immediately launched into responding to the notes, indicating the general substance of the notes as a component of its response. The court did not read those notes into the record. It didn't ask from counsel an indication of whether or not they had seen the notes off-the-record. In that case, all counsel had before the court began to respond was knowledge of the existence of the notes.

But what's critical is that the court didn't do anything to frustrate that notice as the court did in Walston, as it did in Kisoon, as it did in O'Rama. It didn't mislead by purporting to read the note to the attorneys. It didn't obstruct them.

JUDGE RIVERA: So where - - - where in any of our cases, have we talked about the - - - the court somehow acting in a way that's untoward?

MR. MANSELL: So in Walston - - -

JUDGE RIVERA: Have we ever said that?

MR. MANSELL: Well, certainly in O'Rama. O'Rama was a situation where the court specifically obstructed the attorneys from learning what the breakdown was - - -

JUDGE RIVERA: But I'm saying when we've said what the rule is.

MR. MANSELL: Yes, well, for instance, in Mack, this court specifically said that the failure of the court in Silva was not meeting its core responsibility of providing notice, because it didn't tell the attorneys about the existence of the notes. Specifically used - - -

JUDGE RIVERA: But that's the failure as opposed to what you're suggesting as - - -

JUDGE FAHEY: Yeah, Mack was more about the - - -

JUDGE RIVERA: - - - an obstructionist policy.

JUDGE FAHEY: Judge - - - I - - - I agree with Judge Rivera. Mack was more about a failure to provide a meaningful response. And that not being a mode of proceedings error as long as there's meaningful notice.

MR. MANSELL: That's correct, but when looking at what that meaningful notice was, and looking to a notice case which was Silva, this court described the obligation as informing the attorneys of the existence of the jury note.

JUDGE FAHEY: So I'm clear then, you're not asking this court to overrule O'Rama?

MR. MANSELL: That's correct. What we are arguing is that - - -

JUDGE FAHEY: Right, so if you're not asking us to overrule O'Rama, you are asking us to create another rule in the interpretation where there is no written record as to - - - as to the court providing notice. So what's the rule that you're asking for?

MR. MANSELL: So, what we are saying is, there is a distinction between meaningful notice, which we believe is dictated by the case law, and the way in which appellants are reading that rule. What we are - - -

JUDGE FAHEY: Well, the case law seems to say that - - - in Nealon, we said, the court must read the note into the record in open court to provide meaningful notice. That did not happen here.

MR. MANSELL: Well, what O'Rama actually says is sort of two things. If - - -

JUDGE FAHEY: Well, I'm telling you what Nealon just said.

MR. MANSELL: Yes.

JUDGE FAHEY: All right, so it - - - so tell me what happened here that - - - that complies with that?

MR. MANSELL: So - - - that complies with what Nealon - - -

JUDGE FAHEY: With Nealon. What - - - which - -

- what I just said.

MR. MANSELL: Yes, well - - -

JUDGE FAHEY: Just assume for now, I'm reading the quote correctly.

MR. MANSELL: Right, so - - -

JUDGE FAHEY: Okay.

MR. MANSELL: - - - in - - - in Nealon the situation, as Your Honor remembers, is that the - - - there was an error that was committed in that case, and that the court did not comply specifically with the O'Rama guidelines as they were articulated. But it wasn't an error in that case, because at the moment in which the attorney had an opportunity to object, the note was read into the record. But that doesn't mean that that is the de minimis level of notice the court has to provide. That was certainly sufficient notice in that case. But that doesn't mean if the court had provided less notice - - -

JUDGE FEINMAN: So - - - so I - - - I think what Judge Fahey is asking you is, okay, what is going to be the articulation of the de minimis notice. How you - - - you know - - - you're writing on a blank slate. Tell us what your rule is.

MR. MANSELL: This - - - this is what we would say the rule is. If the attorney has notice of the existence of the note and has access to the note to be able

to ascertain the contents of the note, then that attorney has meaningful notice.

JUDGE RIVERA: And so what's access?

MR. MANSELL: So access would be availably of the note. So O'Rama specifically speaks - - -

JUDGE RIVERA: So where is the access here?

MR. MANSELL: The fact that it was marked as a court exhibit into evidence in the presence of the attorneys and there was no reason whatsoever they couldn't go over to the clerk and ask for a copy of the notes.

JUDGE RIVERA: But where - - - where in the record is there any of that?

MR. MANSELL: It - - - on the very first page - - -

JUDGE RIVERA: Other than it's marked into - - - into evidence?

MR. MANSELL: Other than it's - - - well - - -

JUDGE RIVERA: Yes.

MR. MANSELL: - - - it's marked into evidence and the - - - and there's - - - the court does not say anything about the fact that the attorneys - - -

JUDGE RIVERA: So, exactly, there's nothing in the record. What I - - - I'm really unclear - - - it sounds to me like your rule is going to create more litigation.

MR. MANSELL: No, because there's - - -

JUDGE RIVERA: And I - - - I thought the point, in part of O'Rama and its progeny, is an attempt to clarify the rule, so that we can avoid the appeals.

MR. MANSELL: Yes, and that line of cases creates a very clear series of situations where there is mode of proceedings error. Where the court does not make the attorneys aware of the note whatsoever. Because, of course, they cannot object in that situation, because they don't know what's happening. A second situation in which the court misleads the attorneys. If the court purports to read the note verbatim into the record, but in actuality, and this was the case in Walston - - - in actuality, leaves out critical information, then the attorney has no reason to go look at the note, because they don't suspect that the court has said it's going to do one thing and done a completely different thing.

And the final situation is the situation in O'Rama itself, where the court actively obstructs the attorney from getting at the contents of the note. So the distinction that we are making is simple, is that in O'Rama, in Walston, in Kisoon, in all of those cases, there was a point at which the court had provided meaningful notice. It made the attorneys aware of the note, and the note was available to them. But in all those cases, the

court then did something to make that notice ineffective, either by purporting to read it, but doing it incorrectly; by concealing portions of the note as was the case in Kisoon; or by misleading them, like in Walston.

JUDGE RIVERA: Counsel, it's - - - it's very revisionist history and very entertaining, but I - - - I just don't see where any - - - any of our case law, breaks down in the way that you have now suggested. The - - - the rule is - - - is - - - has been restated over and over in these cases. You get the note, you mark it, you - - - you let them know you have it, you read it into the record. Your rule is now, you get the note, you mark it, you stay silent, and now defense counsel, knowing that it's somewhere, apparently fails to preserve because the judge never did what we said they're supposed to do.

MR. MANSELL: But at the same time - - -

JUDGE FEINMAN: Counsel, if we were to reach that conclusion that was just suggested, right, and - - - and there's a reversal. Is there anything you want to say about the suppression issue?

MR. MANSELL: Yes, well, on the issue of the suppression issue, what we would say is, first, it's not preserved as to the search aspects of that particular issue. And the second thing we would say is that there was nothing at any point in time in which the officers were

acting without the requisite level of suspicion that was needed to approach the two in - - - individuals that they found on the burglarized property.

So what happened in this scenario was that the officers approaching, five minutes after a burglary call, find that the - - - there are two individuals on the gated, private driveway of the very establishment that has been burglarized. And so we would point this court to is some cases that have been decided in between when we filed our briefs and today's oral argument.

So if this court would look at Simmons, or Judge Garcia's dissent in Gates, or would look at the Perez case, we would see that it's not critical for the officers to, say, have a description of the individuals who are alleged to have burglarized the property. And that there are also subtle differences between a level one and a level two common law right of inquiry.

I see my time is expired. If this court doesn't have any questions about the suppression issue - - -

JUDGE GARCIA: A one - - - I - - - one other - - - Chief Judge, if I might?

CHIEF JUDGE DIFIORE: Yes, of course.

JUDGE GARCIA: Just one question on the process. I understood also your argument to be that if you are shown copies - - - you, counsel, defense counsel - - - are shown

copies of the notes, and the judge says, as I think they did with the verdict note here, you've seen copies of this. And the defense counsel say, yes. That's sufficient, right, without having read the note into the record?

MR. MANSELL: That's right, because this court has always said that the O'Rama procedure are guidelines. And that most deviations from that procedure are not mode of proceedings errors.

JUDGE GARCIA: So I understood - - - and correct me if I'm wrong - - - that part of the argument for reconstruction was to determine whether or not that happened. They actually had - - - not only that, well, you could have gone up and gotten a copy of the note, but as happens in many cases, the jury comes out with notes, the parties get copies of them, even before the judge comes on the bench sometimes.

MR. MANSELL: That's correct, and that happened to be the case in Kadarko that the note had been shown to the attorneys, rather than read into the record, and even O'Rama spoke to the fact that it would be proper procedure to either show or read the notes. So those certainly are available options for the court, and then one would think a reconstruction would be needed if that's the option that the court chooses.

JUDGE GARCIA: And in a way, you don't rely then

on either the judge getting something wrong or the stenographer getting something wrong in a transcript when you read the note into the record.

MR. MANSELL: Correct, it concentrates on the real gravamen of the O'Rama cases, which is the mode of proceedings error itself, not the failure to make a record, which often times, could simply be a clerical mistake.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. MANSELL: Counsel.

CHIEF JUDGE DIFIORE: Counsel?

MR. BOVA: The prosecution's new proposals here would substitute longstanding clarity for brand-new confusion. I think I've heard about four new tests proposed here: a de minimis test, a misleading test, an access test, an obstruction test.

This Court's cases provide the far better and long-settled test. When the court gets a note, the court has to provide notice on the record of the actual specific contents of the note. That is required under O'Rama and its progeny. This court's recent cases, Mack and Nealon, reinforce that rule, because in every one of those cases, the touchstone, the pivotal factor, as this court held in Mack, was that the court provided on the record notice of the actual, specific contents of the note.

The prosecution has claimed it's not seeking to

overrule that long-standing rule. It absolutely is. And this court should reject that effort. Thank you.

JUDGE FEINMAN: So if we do that and send it back on the suppression issue, is it your position this is a mixed question, and we should just leave it?

MR. BOVA: No, it is not a mixed question. As to the initial question, Your Honor, as to founded suspicion, there is simply - - - the prosecution has failed to meet its burden as a matter of law of coming forth and proving founded suspicion, because mere presence on the scene of a reported offense does not satisfy that.

And additionally - - -

JUDGE RIVERA: But there's more than mere presence, right?

MR. BOVA: No - - -

JUDGE RIVERA: Even more than mere presence? They're carrying these bags, it's a holiday, nobody's around.

MR. BOVA: Well, it's - - - it's - - - it's the morning on - - -

JUDGE RIVERA: They react to the police officers saying, I want to talk to you.

MR. BOVA: I mean, it's the - - - it's the morning - - - it's the morning on a holiday, and people are walking away from what the police believe to be a country

club, so that's all we have here is mere presence on the scene of a reported offense, walking, doing nothing suspicious.

And as to the additional question, the Appellate Division created a new rule of law. The Appellate Division took the Terry protective frisk doctrine and turned it into an internal search doctrine. Under the First Department's law, you can now perform - - -

JUDGE RIVERA: So let's say you're right, that the mere walking away from the country club with the bags after the 911 call is not enough. So once the officer says, may I speak with you; I want to talk to you, is evasive maneuvering or running away, if you add that to the knowledge of - - - of the crime?

MR. BOVA: No, that doesn't - - -

JUDGE RIVERA: Does that now give them enough?

MR. BOVA: No, that doesn't, Your Honor, because under Holmes and its progeny, the only way that flight can establish reasonable suspicion is if you have initially proven founded suspicion. And the problem with this record, is the prosecution has failed to meet its burden of coming forth and proving founded suspicion as a matter of law.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. BOVA: Thank you.

(Court is adjourned)

C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Lawrence Parker, No. 35, and People v. Mark Nonni, No. 36 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

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