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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 111

JAMEL WALSTON,

Appellant.

20 Eagle Street
Albany, New York 12207
May 07, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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1 CHIEF JUDGE LIPPMAN: Let's start with
2 number 111, People v. Walston.

3 Counselor, would you like any rebuttal
4 time?

5 MS. HUTCHINSON: Good afternoon, Your
6 Honor. Please, three minutes. Thank you.

7 CHIEF JUDGE LIPPMAN: Three minutes. Sure,
8 go ahead. You're on.

9 MS. HUTCHINSON: Thank you. May it please
10 the court, my name is Kendra Hutchinson, and I
11 represent the appellant in the matter, Mr. Jamel
12 Walston.

13 Your Honors, what occurred here was a
14 straightforward mode of proceedings error under
15 People v. O'Rama and People v. Kisoan.

16 CHIEF JUDGE LIPPMAN: Did it require
17 preservation? And if so, why not?

18 MS. HUTCHINSON: It did not require
19 preservation, Your Honor.

20 CHIEF JUDGE LIPPMAN: Why?

21 MS. HUTCHINSON: This was a mode of
22 proceedings error. The reason why is the court's
23 core responsibility - - -

24 CHIEF JUDGE LIPPMAN: Was the attorney on
25 notice?

1 MS. HUTCHINSON: Was the attorney on notice
2 as to?

3 CHIEF JUDGE LIPPMAN: From - - -

4 MS. HUTCHINSON: As to what was being
5 omitted?

6 CHIEF JUDGE LIPPMAN: - - - from the
7 judge's - - - yeah.

8 MS. HUTCHINSON: Well, no, not here, Your
9 Honor. Because the judge dis - - - purportedly
10 disclosed the note in open court, and yet omitted,
11 both times that it disclosed the note, that it was
12 omitting a portion, and so - - -

13 JUDGE READ: Didn't read it verbatim?

14 MS. HUTCHINSON: Exactly, Your Honor. Did
15 not read it verbatim, which is a core responsibility
16 of the court - - -

17 JUDGE SMITH: Was the omission significant?

18 MS. HUTCHINSON: Yes, Your Honor. It was
19 significant in this case. Number one, this was a
20 case entirely about intent, whether or not my client
21 intended to - - - to - - - you know, to commit a
22 murder, attempt to commit manslaughter - - -

23 CHIEF JUDGE LIPPMAN: Was the judge
24 corrected later when - - - when they gave - - - he
25 gave some kind of an instruction about intent?

1 MS. HUTCHINSON: Well, first of all, the
2 People are not arguing that on the - - -

3 CHIEF JUDGE LIPPMAN: No, in a later - - -
4 no?

5 MS. HUTCHINSON: The - - - the People are
6 not arguing that on this appeal, Your Honor, before
7 this court. And - - - and we'd argue that that - - -
8 that would not possibly cure this error in this case.
9 In People v. - - -

10 JUDGE GRAFFEO: Does the record tell us if
11 the defense counsel actually saw the note before this
12 conversation?

13 MS. HUTCHINSON: No, it does not, Your
14 Honor. There's nothing in the rec - - -

15 JUDGE GRAFFEO: If it did, would that
16 change the result here?

17 MS. HUTCHINSON: I think, Your Honor, if -
18 - - if the court had said I've disclosed the note to
19 counsel, and counsel doesn't pipe up at that point, I
20 think that that might - - - that might comply with
21 O'Rama. This court has alternatively used language
22 such as "read the note into the record" or "disclose
23 the contents of the note".

24 And I would think that - - - that that
25 might - - -

1 JUDGE GRAFFEO: But does the presumption of
2 regularity, then, fill that gap?

3 MS. HUTCHINSON: No, it does not, in this
4 case, Your Honor. This court has - - - has never
5 applied the presumption of regularity in the O'Rama
6 context, notwithstanding the fact that the People
7 have urged it upon this court in several other cases.

8 Number two, the presumption of regularity
9 and the insufficiency of the record principle that
10 the People are also relying on, should not apply in
11 this context. People v. O'Rama and that line of
12 cases, contemplates a record-making function on the -
13 - - on the - - - that is the obligation of the court.
14 It is inherent in the language of People v. O'Rama
15 that the court needs to make a record, et cetera.
16 Num - - -

17 JUDGE ABDUS-SALAAM: Could we go back to
18 the - - - the word that was left out of the note
19 "intent"?

20 MS. HUTCHINSON: Certainly.

21 JUDGE ABDUS-SALAAM: Is there anything that
22 - - - in the record that indicates that the intent
23 that the jurors were asking about wasn't a part of
24 those two charges that they were looking for, as
25 opposed to the so-called full-blown intent that they

1 did ask for in note 2 or 3?

2 MS. HUTCHINSON: Well - - - well, the core
3 of O'Rama being that counsel should be afforded
4 meaningful notice in order to suggest a response,
5 here there were other responses that counsel could
6 have suggested. And so to that extent, also, the - -
7 - the later instructions did not cure it.

8 You know, counsel, could have, for example,
9 suggested the expanded intent charges Your Honor
10 brought up. But counsel also could have asked for a
11 more focused, pinpointed comparison and contrast of
12 the two intents at the same - - -

13 JUDGE PIGOTT: If we assume - - - I'm
14 sorry.

15 If we assume you're right, the People are
16 making a couple other suggestions. One is that this
17 does not affect the CPW at all, because there - - -
18 there's no intent issue with respect to that. And it
19 was never part of this note.

20 And the other thing that - - - point they
21 make is that a reconstruction hearing might be in
22 order.

23 Can you - - - could you address those two
24 issues?

25 MS. HUTCHINSON: Yes, Your Honor. Because

1 this - - - because this prejudicial error affect - -
2 - you know, could have affected the deliberations in
3 any manner of ways, we - - - we're arguing that all
4 the counts should be - - - should be reversed. And
5 in addit - - -

6 JUDGE READ: How would it have affected the
7 CPW?

8 MS. HUTCHINSON: Because it could have - -
9 - you know, the timing and the occurrence of the
10 jurors as they're deliberating, and the precise two-
11 day deliberation period, could have been affected.
12 There could have been a prejudicial spillover in this
13 instance, Your Honor. And so we're asking that both
14 of them be reversed.

15 And in addition, the - - - the facts of the
16 CPW count were intimately connected with the facts of
17 the - - - of the homicide count. And as a result,
18 this court has reversed in the past when there is
19 some sort of relationship between the facts. And we
20 would ask that this court reach it here as well.

21 In addition, Your Honor, Judge Pigott, as
22 to the - - - as to the issue of reconstruction,
23 reconstruction is not appropriate. Number one we - -
24 - we maintain it's never appropriate in the O'Rama
25 context. In particular, however, it is not

1 appropriate in this context - - - in this case.

2 The record is crystal clear. The court
3 complied with O'Rama as to every other note. It did
4 not - - - it purportedly complied with O'Rama as to
5 this note, but it neglected to do so. Perhaps in
6 good faith. It - - -

7 JUDGE SMITH: Isn't - - - isn't the note
8 really saying we don't - - - we need you to explain
9 the difference between manslaughter and murder and -
10 - - taking intent into account?

11 MS. HUTCHINSON: That could be one way that
12 counsel would have suggested that the note was
13 saying, Your Honor.

14 JUDGE SMITH: I guess - - - I guess what
15 I'm saying is, does it - - - does it cure the problem
16 if the jury acquitted him of murder? I mean, didn't
17 he win the point on which the - - - to which the note
18 was relevant?

19 MS. HUTCHINSON: Well, Your Honor, we also
20 have another - - - we also have another point in our
21 brief urging that the - - - you know, that counsel
22 was ineffective for failing to ask for reckless
23 manslaughter.

24 Intent was the issue. And although the
25 People maintain that, you know, the - - - the jury

1 was deadlocked on this issue and it was resolved in
2 my client's favor, we can't know that from the course
3 of deliberations. That is the whole point of the - -
4 - the lack of prejudice standard that's inherent in
5 O' Rama, is that you cannot know what the prejudice
6 was.

7 And so in this instance, Your Honor, the -
8 - - the jury very well could have acquitted my client
9 of both counts that were charged to it, had intent
10 been focused upon, as it - - -

11 CHIEF JUDGE LIPPMAN: Because we can't - -
12 -

13 MS. HUTCHINSON: - - - asked for.

14 CHIEF JUDGE LIPPMAN: - - - get into the
15 jury room and figure out their - - -

16 MS. HUTCHINSON: Precisely.

17 CHIEF JUDGE LIPPMAN: - - - thinking.

18 JUDGE GRAFFEO: Except - - - except the
19 note does list the two crimes, and then "intent" is
20 in parentheses.

21 MS. HUTCHINSON: And that's because - - -

22 JUDGE GRAFFEO: So were they really asking
23 for the read-back, as Judge Abdus-Salaam suggested,
24 may - - - perhaps for - - - to hear the read-backs
25 again?

1 MS. HUTCHINSON: That's precisely the point

2 - - -

3 JUDGE GRAFFEO: They didn't just ask about

4 - - - they didn't ask a particular intent question.

5 MS. HUTCHINSON: That's precisely the - - -

6 the problem here, Your Honor. We have no idea what

7 they're asking, because - - -

8 JUDGE RIVERA: Well - - -

9 MS. HUTCHINSON: - - - defense counsel

10 wasn't - - -

11 JUDGE RIVERA: - - - if you look at the

12 note, and if you look at what indeed the judge did

13 during the charge, the note is asking for a

14 PowerPoint slide. I - - - I don't read the note in

15 any other way. At least on its face it seems to say

16 PowerPoint. And it looks to me, the way it's

17 written, that it's asking for the title of a slide.

18 And if it's asking for the slide that the judge later

19 on during responses to other jury notes, says I can't

20 give them the slides, and tells them I can't give you

21 the slides, why doesn't this fall under O'Rama's

22 special circumstances in which the foregoing

23 procedures will need to be modified or tailored to

24 ensure the integrity of the deliberative process?

25 MS. HUTCHINSON: Well, to the extent - - -

1 JUDGE RIVERA: Why - - - why isn't it an
2 appropriate modification to respond to the slides as
3 done in this case - - - the request for slides?

4 MS. HUTCHINSON: Well, Your Honor, we're
5 not - - - we're not complaining about - - - here,
6 about whether or not the judge should have disclosed
7 the PowerPoint aspect, and I think that's because
8 this court has addressed request for written instruc
9 - - - you know, written instructions in the past, and
10 has deemed them ministerial.

11 And so, to this extent, we're not
12 complaining about - - - about leaving out this
13 portion. And we believe that the - - - the intent
14 portion goes right to the material aspects of the
15 case.

16 JUDGE RIVERA: Well, okay. Let me ask it,
17 perhaps, another way. But what if what they're
18 asking for is exactly what he said? The - - - are
19 the slides anywhere in the record? No.

20 MS. HUTCHINSON: No. They're not, Your
21 Honor. We don't have the slides in the record. They
22 were not included on the record on appeal. We don't
23 - - - we do not know what is the contents of them.

24 CHIEF JUDGE LIPPMAN: Okay, counsel.
25 Thanks.

1 MS. HUTCHINSON: Thank you, Your Honors.

2 CHIEF JUDGE LIPPMAN: You'll have your
3 rebuttal.

4 MS. GROB: Good afternoon, may it please
5 the court. My name is Rhea Grob, and I represent the
6 respondent in this case.

7 CHIEF JUDGE LIPPMAN: Coun - - - counsel,
8 why isn't this a classic O'Rama situation?

9 MS. GROB: Your Honor, the statute - - -

10 CHIEF JUDGE LIPPMAN: Are you asking us to
11 change the law on - - -

12 MS. GROB: No, Your Honor, we're not - - -

13 CHIEF JUDGE LIPPMAN: No?

14 MS. GROB: - - - asking you to change - - -

15 CHIEF JUDGE LIPPMAN: How does it fit
16 within the O'Rama precedents?

17 MS. GROB: O'Rama is - - - is about notice.
18 And it suggests - - - it gives a variety of
19 suggestions or preferred procedures for how the court
20 should deal with it.

21 CHIEF JUDGE LIPPMAN: Yeah, what's the
22 notice here? What notice did they have of that
23 particular - - -

24 MS. GROB: In this case, the record's
25 really unclear as to what the count - - - the

1 attorney had. What we do know is that the judge did
2 paraphrase the note. The attorney did not object.
3 And under the O'Rama - - -

4 CHIEF JUDGE LIPPMAN: The judge doesn't
5 mention intent, right?

6 MS. GROB: He didn't - - - he left out the
7 word intent from the - - -

8 CHIEF JUDGE LIPPMAN: Isn't intent critical
9 in this case?

10 MS. GROB: Yes, Your Honor. That - - -
11 that - - -

12 CHIEF JUDGE LIPPMAN: Isn't that what this
13 case is all about?

14 MS. GROB: It is what the case was about.
15 But in this particular case, there's a presumption of
16 regularity that the court had, in fact - - -

17 CHIEF JUDGE LIPPMAN: Have we ever done
18 that in an O'Rama case, used a presumption of
19 regularity?

20 MS. GROB: Well, Your Honor, the
21 presumption of regularity was certainly rebutted in
22 O'Rama itself, where the court refused to give the
23 note to counsel when counsel asked for the note.
24 Here we don't - - -

25 JUDGE SMITH: Are you - - - are you saying

1 that the presumption of regularity means that where
2 the record doesn't exclude the possibility that some
3 off-the-record conference cured the error, we must
4 presume the error was cured?

5 MS. GROB: No, Your Honor, you don't have
6 to presume the error was cured. The question is
7 whether - - -

8 JUDGE SMITH: Or that no error - - -

9 MS. GROB: - - - or not - - -

10 JUDGE SMITH: - - - was committed, because
11 just - - -

12 MS. GROB: That's - - -

13 JUDGE SMITH: - - - just that the problem
14 was solved off the record?

15 MS. GROB: Correct, Your Honor. The fact
16 is, in this case, for all we know, and based on what
17 happened - - -

18 JUDGE SMITH: So - - - so if there's - - -
19 so if reasonable doubt is omitted from the charge,
20 and you read the charge and reasonable doubt isn't
21 there, then maybe there was a break in the middle of
22 the charge, the presumption of regularity should tell
23 us that he put reasonable doubt in there?

24 MS. GROB: Well, in terms of giving of the
25 charges - - - the regular charges on the record,

1 there is the presumption of regularity that all the
2 charges will be actually on the record with the court
3 reporter.

4 The statute itself just says that we have
5 to give notice of the requested instruction. It - -
6 -

7 JUDGE SMITH: So you - - - so you don't
8 think that implies that you've got to make a record
9 of giving the notice?

10 MS. GROB: No, Your Honor. I think that
11 O'Rama suggests that a record has to - - -

12 JUDGE SMITH: Isn't - - -

13 MS. GROB: - - - be made.

14 JUDGE SMITH: - - - that sort of the way
15 the Anglo Saxon legal system works? I mean, you
16 haven't done it unless you've done it on the record.
17 I mean, it's unusual to say well, I gave notice, it
18 just doesn't happen to be in the record.

19 MS. GROB: But here you have a case, Your
20 Honor, where there were several notes given and every
21 note except for this one was fully read on the
22 record. There is that presumption of regularity that
23 what happened here was that notice was given. The
24 requirement under 310.30 is that notice be given not
25 that the notice be put - - -

1 CHIEF JUDGE LIPPMAN: You don't think that
2 that requires - - -

3 MS. GROB: - - - on the record.

4 CHIEF JUDGE LIPPMAN: - - - a leap that's
5 inconsistent with the whole policy behind O'Rama?

6 MS. GROB: No, Your Honor, because it's no
7 different from the presumption of regularity in right
8 to counsel cases or the absence of - - - or
9 defendant's absence - - - his not being present on
10 the record, where this court has previously held in
11 Kisoan and in Velasquez and also in McLean, that
12 there has to be a substantive - - - there has to be a
13 record. There - - - it's the defendant's burden, the
14 burden of the person who's bringing the claim, to
15 show that the error, in fact, occurred.

16 JUDGE SMITH: Well, isn't that inconsistent
17 with a mode of proceedings error, that it's your - -
18 - that the burden to make a record is on the
19 defendant?

20 MS. GROB: Well, Your Honor, the mode of
21 proceedings is a rare - - - it's something that has
22 to be used very rarely. And we - - -

23 JUDGE SMITH: Yeah, but we did use it in
24 O'Rama.

25 MS. GROB: Yes. Because there the

1 presumption of regularity had, in fact, been
2 rebutted, because the court refused to give the note
3 over to counsel even though counsel requested to see
4 it. Similarly, in People - - -

5 JUDGE SMITH: That sounds - - - wait a
6 minute. That sounds like there was a - - - we were
7 relying on an objection. Or actually the request in
8 O'Rama actually came after the jury's question had
9 been answered, didn't it?

10 MS. GROB: Yes, but as - - - but even
11 regardless of that, just like in the right to counsel
12 cases where you don't - - - a defendant does not have
13 to preserve the case - - - the issue for it to be
14 reviewed, similarly in an O'Rama - - - in O'Rama
15 itself, where the defense attorney specifically asked
16 to see the note and the court refused to show it him,
17 this court found that it was mode of proceedings
18 error.

19 JUDGE SMITH: Are you - - - are you saying
20 O'Rama doesn't apply where the def - - - where the
21 defense counsel doesn't ask to see the note?

22 MS. GROB: Your Honor, it's not that O'Rama
23 doesn't apply, but O'Rama - - -

24 JUDGE SMITH: But there are several cases
25 where we haven't - - - where counsel haven't asked

1 and we've reversed, aren't there?

2 MS. GROB: This court has reversed in
3 People V. Tabb. But in People v. Tabb, it could be
4 read to show that the presumption was, in fact,
5 rebutted. The - - - the presumption of regularity.

6 People v. Tabb was a case where a request
7 for a self-defense was give - - - asked for by the
8 jury. The court - - - it stated in the record that
9 the court received the note at 2:15 p.m., and at 2:16
10 p.m. the court responded to the note.

11 JUDGE READ: Well, your - - - your opponent
12 is right, isn't she; if we relied on the presum - - -
13 if we relied on the presumption of regularity here in
14 this O'Rama context, it would be a - - - it would be
15 a first, wouldn't it?

16 MS. GROB: Well, Your Honor, I think O'Rama
17 itself, I think Tabb does have the - - - shows a case
18 where the presumption was, in fact, rebutted. And
19 then there are numerous cases - - -

20 JUDGE READ: We didn't discuss it, did we?

21 MS. GROB: No.

22 JUDGE READ: In those terms?

23 MS. GROB: It wasn't discussed in the
24 court's decision.

25 CHIEF JUDGE LIPPMAN: The nub of your

1 argument is presumption of regularity?

2 MS. GROB: Yes.

3 CHIEF JUDGE LIPPMAN: That's how we get
4 around or however you want to phrase it - - -

5 MS. GROB: Well - - -

6 CHIEF JUDGE LIPPMAN: - - - the - - - the
7 O'Rama - - -

8 MS. GROB: Well - - -

9 CHIEF JUDGE LIPPMAN: - - - protocols?

10 MS. GROB: - - - again, Your Honor, the
11 O'Rama protocols are - - - suggested a better way for
12 the court to do it.

13 CHIEF JUDGE LIPPMAN: Yeah, but it's more
14 than that. It's a mode of proceedings error. This
15 is a very serious thing.

16 MS. GROB: Except if the court - - -

17 CHIEF JUDGE LIPPMAN: If it is a mode of
18 proceedings error.

19 MS. GROB: Yes, Your Honor. But this court
20 has, on several cases, found where there was a
21 violation of O'Rama, and that it wasn't a mode of
22 proceedings error. For example, in Kadarko, that was
23 a case where the court did not give any notice
24 whatsoever. The attorney - - - it was only after the
25 court instructed the jury and gave them an Allen

1 instruction, did the court then disclose the note to
2 counsel.

3 JUDGE SMITH: Well, in Kadarko, as I
4 remember, the court said - - - told counsel that the
5 note showed divisions among the jurors.

6 MS. GROB: And refused to give that
7 breakdown.

8 JUDGE SMITH: Yeah.

9 MS. GROB: And has the court - - - and had
10 he had the breakdown, as in Kisoan, perhaps he would
11 have made some other suggestions.

12 JUDGE SMITH: Okay. But so this proves
13 what, that - - - that Kadarko is inconsistent with
14 O'Rama?

15 MS. GROB: It shows, Your Honor, that there
16 are occasions where O'Rama has been violated, but
17 this court has not found it to be a mode of
18 proceedings error.

19 JUDGE SMITH: What is it - - - what is it
20 that - - - I mean, can you tell me the difference
21 between Kadarko and O'Rama, because I - - - I don't
22 find it overwhelming.

23 MS. GROB: In - - - I guess in - - -

24 JUDGE SMITH: Even though I voted for
25 Kadarko, so I must have - - - I must be right, but I

1 can't understand it.

2 MS. GROB: In Kardarko, the court violated
3 the statute by not giving notice - - -

4 JUDGE SMITH: Why was it not - - -

5 MS. GROB: - - - prior - - -

6 JUDGE SMITH: - - - mode of proceedings
7 error?

8 MS. GROB: This court found that after the
9 - - - that after the instruction was given, when the
10 court then fixed its error, that therefore it should
11 have been an issue that could have been preserved.
12 And that's how this court decided Kadarko.

13 CHIEF JUDGE LIPPMAN: What should have been
14 preserved here? On what basis?

15 MS. GROB: In this case - - -

16 CHIEF JUDGE LIPPMAN: How would you have
17 notice in order - - -

18 MS. GROB: Well - - - well, this is the
19 problem with this - - -

20 CHIEF JUDGE LIPPMAN: - - - if you don't -
21 - - if you don't read it verbatim, and you don't know
22 it has that "intent" in it, how could it possibly be
23 preserved and then therefore get - - - get around
24 O'Rama?

25 MS. GROB: Your Honor, it was clear that

1 the court was paraphrasing the note in this case. He
2 said "they want" - - -

3 CHIEF JUDGE LIPPMAN: They should - - - he
4 should infer that it probably says something about
5 intent and that just paraphrasing it - - -

6 MS. GROB: No.

7 CHIEF JUDGE LIPPMAN: - - - and leaving it
8 out - - - does that make - - -

9 MS. GROB: No, Your Honor.

10 CHIEF JUDGE LIPPMAN: - - - any sense
11 whatsoever to you?

12 MS. GROB: No, Your Honor. But the
13 attorney could have asked to see the note. And
14 there's no record here that the attorney asked to see
15 the note. And based on the presumption of
16 regularity, it can be presumed that the reason the
17 attorney didn't ask to see the note, was because the
18 attorney had already seen the note.

19 There was a thirty-three-minute gap between
20 the time the note was - - - the time on the note till
21 the actual note - - - till the judge responded to the
22 note. In those thirty-three minutes - - -

23 CHIEF JUDGE LIPPMAN: We should base our
24 decision on that?

25 MS. GROB: Well, no, Your Honor. The - - -

1 the point is, is that the defendant - - -

2 CHIEF JUDGE LIPPMAN: Because - - -

3 MS. GROB: - - - failed - - -

4 CHIEF JUDGE LIPPMAN: - - - if he hasn't

5 seen it, you have no case, right?

6 MS. GROB: But the defendant always has

7 another remedy. He could bring a 440 motion

8 regarding things that happened off the record. He

9 could get an affirmation from the attorney to saying

10 - - - to - - - to the - - - bring to the trial court

11 to show that he did not see the note. So - - -

12 JUDGE ABDUS-SALAAM: Well, is this case any

13 different from our decision in Williams where I think

14 something similar happened?

15 MS. GROB: This is - - - this - - - Your

16 Honor, this case is very similar to Williams. In

17 Williams also, there was a suggestion that perhaps

18 there was some colloquy off the record that was - - -

19 that - - - and it wasn't clear what it was. The

20 first time notice was given of the note, was on the

21 record. And this court found that there had to be a

22 preservation. There had to be a preservation by

23 counsel.

24 JUDGE RIVERA: But what - - - what's the

25 suggestion of the colloquy off the record?

1 MS. GROB: Excuse me?

2 JUDGE RIVERA: What's the suggestion of any
3 conversation off the record?

4 MS. GROB: It - - - it didn't say in that
5 case what it was, but in this particular case there's
6 a po - - - there's - - - because defense counsel did
7 not object and say, Judge, I want to see the note
8 when it was clear that the court was paraphrasing it,
9 this record is equally consistent with the theory
10 that, in fact, he saw the note.

11 JUDGE PIGOTT: But rather than try to tease
12 that out, why don't we just have a rule that says if
13 you don't follow O'Rama, it's reversed?

14 MS. GROB: Well - - -

15 JUDGE PIGOTT: Because you're - - - you're
16 trying to explain, like a thirty-three-minute gap.
17 When - - - when you - - - when you said that, I
18 thought, well maybe - - - maybe the judge didn't tell
19 them to hang around. Maybe they went to other courts
20 or went back to the office and then he calls them
21 back.

22 I - - - if we - - - if we've got to fence
23 with that every time, it would seem to me, to make it
24 more difficult than if we simply say read the note,
25 we'd be better off, wouldn't we?

1 MS. GROB: Well, O'Rama has stated that
2 it's just suggested protocols, that there's no
3 mandatory adherence to it.

4 JUDGE PIGOTT: No, but one of the things
5 that I think gets overlooked, is that there's a
6 reason why you tell counsel, because they may have
7 suggestions, they may - - - they may object. They
8 may say we - - - you know, I don't want you to read
9 that, Judge. I think - - - I've got legal reasons to
10 do so, which are never presented if they never get to
11 see the note.

12 MS. GROB: Well, and in this case, we can't
13 tell whether or not he saw the note, because if
14 indeed, he did see the note, then he may very well
15 have not wanted the expanded intent instruction which
16 includes things like premeditation and things that
17 might not necessarily have been helpful for him.

18 JUDGE RIVERA: Isn't - - - isn't it just as
19 possible that he definitely didn't see the note,
20 because the judge didn't put on the record, I've
21 shown them the note?

22 MS. GROB: Yes, in which case, again, he
23 could bring a 440 motion to the state court, with an
24 affidavit from the attorney showing I didn't see the
25 note.

1 JUDGE GRAFFEO: So your time's expiring.
2 Before you sit down, can you just address the
3 possession of the weapon, that issue?

4 MS. GROB: Yes, Your Honor.

5 JUDGE GRAFFEO: Because if we - - - if we
6 disagree with you on the O'Rama issue, what do you
7 think we should do on the - - - on the charge on
8 criminal possession of a weapon?

9 MS. GROB: We believe that the possession
10 of a weapon should still be upheld. The weapon was -
11 - - possession of a weapon has separate elements from
12 the - - - and the defendant himself stated that he
13 was in possession of a weapon. And I think it could
14 be totally separated from the charge of the
15 manslaughter - - - from the conviction on
16 manslaughter. So, we would recommend you do that.

17 CHIEF JUDGE LIPPMAN: Okay, counselor.
18 Thanks, counsel.

19 Rebuttal.

20 MS. HUTCHINSON: This case is a perfect
21 illustration of exactly what the O'Rama rule should
22 be. Nice and easy - - -

23 JUDGE ABDUS-SALAAM: But why is it
24 different from Williams or Ramirez? That's where - -
25 - where notes were summarized and there was no

1 indication on the record that the judge had shown the
2 note to the defense counsel.

3 MS. HUTCHINSON: Sure.

4 JUDGE ABDUS-SALAAM: Could you just tell me
5 why it's different from those two cases?

6 MS. HUTCHINSON: Sure, Your Honor. Yes.
7 People v. Williams, in that case, as I understand it,
8 the entirety of the note was placed on the record
9 before the jury. That is the crucial difference
10 between that case and this case. In this case, the
11 entirety of the note was never placed on the record
12 for counsel to hear. Not at any point during the
13 proceedings, neither bef - - - neither before the
14 jury entered or after.

15 And that is a crucial difference between
16 this and People v. Alcide, this court's most recent
17 case on O'Rama as well. In that case, again, the
18 jury - - - while the jury was there, the note was
19 placed on the record. Counsel had the entirety of
20 the note. There was no surprise.

21 And if I may move on to People v. Kadarko,
22 that case is entirely consistent with People v.
23 O'Rama. And the difference between the two cases
24 illustrates exactly why this is an O'Rama violation
25 and a mode of proceedings error.

1 In People v. Kadarko, like in O'Rama, the
2 court there withheld the vote breakdown.

3 JUDGE ABDUS-SALAAM: Could you go back to
4 Williams. Are you sure that the - - - the entire
5 note was read before the jury? Didn't the court,
6 once the jury came in, say something like I - - - I
7 think you want to hear about in concert, and not read
8 the entire note?

9 MS. HUTCHINSON: Well, as I understand it
10 from this court's decision in that case, this court
11 set forth the rule that the - - - that the jury note
12 was placed - - - the contents of the jury note was
13 placed on the record, you know, before defense
14 counsel. And that's - - - that's this court's
15 holding in that case.

16 And you know, and that's why this case is a
17 perfect opportunity for this court to clarify that
18 the exact material contents of the note need to be
19 placed on the record. And we're not suggesting that
20 - - - that a court could not say the word "um" or it
21 could not, for example, remove two "thats" or
22 something like that. I mean, that's - - - that's not
23 a common sense rule.

24 What we are stating here thought, is that -
25 - -

1 JUDGE RIVERA: De minimis changes.

2 MS. HUTCHINSON: Exactly, Your Honor, de
3 minimis changes. And I don't think that anybody
4 could complain about an "um" on the record or
5 something like that.

6 But what we are saying is that counsel is
7 entitled to know everything about the note that - - -
8 you know, as to which he could have some sort of
9 suggestion or response.

10 CHIEF JUDGE LIPPMAN: Okay. Now finish on
11 Kadarko.

12 JUDGE RIVERA: Yeah.

13 MS. HUTCHINSON: Certainly. The crucial
14 difference between Kadarko and O'Rama is that in
15 O'Rama couns - - - pardon me, in Kisoan, counsel - -
16 - I'll step back.

17 O'Rama, counsel knew that it was being
18 withheld, the vote breakdown, and he objected.
19 Kadarko, he did not object. Judge Pigott, you wrote
20 that that was not a mode of proceedings error,
21 because he know about what was being with - - -

22 JUDGE SMITH: But that seems confusing. I
23 thought the point of mode of proceedings error was
24 you don't have to object. How does it becomes a mode
25 - - - mode of proceedings error because you objected?

1 MS. HUTCHINSON: This court held that it
2 was an error, but it required preservation in that
3 context.

4 JUDGE SMITH: In O'Rama?

5 MS. HUTCHINSON: Here - - - in - - - in
6 Kadarko. Here counsel did not know - - -

7 JUDGE SMITH: No. But I'm trying to figure
8 out what the difference is between O'Rama and
9 Kadarko.

10 MS. HUTCHINSON: The - - - the difference
11 is, Your Honor, is that counsel objected at that time
12 during O'Rama when - - - when it was being withheld
13 and in Kadarko, counsel did not object. And this - -
14 -

15 JUDGE SMITH: Well, if that's - - - if
16 that's the test, you've got a problem. You didn't
17 object to anything.

18 MS. HUTCHINSON: Here, Your Honor, counsel
19 had no idea that anything was being withheld
20 whatsoever.

21 CHIEF JUDGE LIPPMAN: Notice. Your
22 argument is notice, right?

23 MS. HUTCHINSON: Exactly, Your Honor. He
24 had no idea that anything was being withheld.

25 JUDGE RIVERA: So the distinction is if you

1 have notice, you need to act so the court has time to
2 cure, since we've said that in other cases.

3 MS. HUTCHINSON: Abs - - -

4 JUDGE RIVERA: When you don't have notice,
5 what are you going to object to? What are you unsure
6 of?

7 MS. HUTCHINSON: Yes, Your Honor. The
8 court controls the notes. Counsel has no idea what's
9 in the note unless the court discloses it.

10 CHIEF JUDGE LIPPMAN: Okay, counsel.
11 Thanks.

12 MS. HUTCHINSON: Thank you.

13 CHIEF JUDGE LIPPMAN: Thank you both.
14 Appreciate it.

15 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Jamel Walston, No. 111 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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