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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 132

TERRANCE L. MACK,

Respondent.

20 Eagle Street
Albany, New York 12207
September 10, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 132.

2 Counsel, would you like any rebuttal time?

3 MR. KAEUPER: Could I have two minutes,
4 Your Honor?

5 CHIEF JUDGE LIPPMAN: How much?

6 MR. KAEUPER: Two minutes, please.

7 CHIEF JUDGE LIPPMAN: Two. Okay. You're
8 on. Go ahead.

9 MR. KAEUPER: Thank you, Your Honor. And
10 may it please the court, Geoffrey Kaeuper for the
11 People. Even if we imagine there was a mode of
12 proceedings err - - - or even if we imagine there was
13 an error here, it wasn't a mode of proceedings error.
14 This court in its O'Rama jurisprudence has - - - has
15 developed a very clear rule about what constitutes a
16 mode of proceedings in - - - in the jury note
17 context, and that rule has been - - - it's - - - it's
18 clearly stated in - - - in O'Rama; it's made even
19 more clear in - - -

20 CHIEF JUDGE LIPPMAN: Were these notes ever
21 answered by the judge?

22 MR. KAEUPER: I beg your pardon?

23 CHIEF JUDGE LIPPMAN: Were the notes
24 answered by the judge after the break?

25 MR. KAEUPER: No. The - - - no. The - - -

1 the - - - there were out - - -

2 CHIEF JUDGE LIPPMAN: Isn't that a break in
3 the O'Rama protocols?

4 MR. KAEUPER: It may be a break in the
5 O'Rama - - - O - - - O'Rama protocol, but this court
6 has made very clear that not every break in the
7 O'Rama protocol is - - -

8 CHIEF JUDGE LIPPMAN: Yeah. But there are
9 very limited instances where it's not a break. How
10 does this fit into those few instances where we've
11 said all right, maybe they knew what the judge was
12 going to say, whatever it was? How did this
13 particular situation fit into that - - -

14 MR. KAEUPER: Right.

15 CHIEF JUDGE LIPPMAN: - - - those breaks,
16 as you call it?

17 MR. KAEUPER: Right. Yeah. And the - - -
18 the rule has been very clear that if - - -

19 CHIEF JUDGE LIPPMAN: What's the rule?

20 MR. KAEUPER: - - - that if - - - if the
21 defense has notice of the exact contents of the note
22 and the judge's intended response, any claim about
23 error in how the judge responds to it - - -

24 CHIEF JUDGE LIPPMAN: So here we know what
25 the response would have been to these notes?

1 MR. KAEUPER: Yes. Yes. The judge - - -
2 the judge discusses this with - - - with counsel,
3 indicates what's - - - what's going to happen. Then
4 before - - - before that does in fact happen, they
5 get the - - - the note indicating that the - - - that
6 the jury's reached a verdict.

7 JUDGE PIGOTT: Here - - - here's the
8 problem as - - - as I perceived it in - - - in what
9 the Appellate Division said. They - - - they said,
10 "The jury may have resolved the factual issue
11 regarding whether the eyewitness testified that she
12 saw defendant leave the scene without further
13 instruction or assistance from the court. However,
14 the request for a read-back of the instruction on
15 reasonable doubt, the determination of which is a
16 crux of a jury's function, and for a read-back of the
17 instruction regarding the importance of single
18 witness in a case versus multiple witnesses,
19 demonstrates confusion and doubt that exists in the
20 minds of the jury with respect to crucial issues of
21 law."

22 And isn't that an interesting distinction
23 that should be made that they apparently resolved
24 legal issues that they had questions about without
25 further guidance from the lawyers or from the jud - -

1 - from the judge?

2 MR. KAEUPER: Right. I mean, the - - - the
3 - - - the Fourth Department doesn't even take the
4 position that the defense is - - - is taking, the
5 majority of the Fourth Department didn't take the
6 position the defense, as I read their - - - their
7 brief, is taking which is that all of those are mode
8 of proceedings errors, that - - - that the - - - that
9 the jury can't have resolved the factual question
10 either.

11 Now, I mean, I don't - - - I don't know
12 that there's any - - - I - - - I can't - - - I can't
13 fathom how you draw that distinction between
14 questions that - - - that the juror - - - jurors
15 can't have resolved on their own versus questions
16 they can. For one thing, we don't know what's
17 prompting these - - - these questions. I mean, they
18 don't - - -

19 JUDGE PIGOTT: Well, that argues in favor
20 of the defense that we shouldn't - - - we shouldn't
21 parse it; we should say all of them have to be
22 answered by the court.

23 MR. KAEUPER: I think it - - -

24 JUDGE PIGOTT: Let - - -

25 MR. KAEUPER: I think it weighs in favor of

1 having the same rule for all notes.

2 JUDGE PIGOTT: Okay. Let - - -

3 MR. KAEUPER: I don't think that makes it a
4 mode of proceedings error to - - - to - - -

5 JUDGE ABDUS-SALAAM: Could it have been
6 acceptable, counsel, instead of the court answering
7 each note once the jury send that - - - sent out the
8 note saying it had arrived at a verdict, would it
9 have been acceptable for the court to ask, do you
10 need this other information that you asked for before
11 you send out your latest note? Would that have been
12 acceptable? Would that have been some form of
13 answer?

14 MR. KAEUPER: It certainly would have been
15 acceptable, and - - - and the defense could have
16 asked for that. And that's - - - I mean that was the
17 situation in - - - in Lourido, which is a - - - a
18 pre-O'Rama case, but - - - but there, this court
19 found it was error where - - - where the defense said
20 no, I want you to at least ask them, do you still
21 need those previous notes.

22 CHIEF JUDGE LIPPMAN: Yeah. Yeah. But is
23 this waivable by the defense? Is that what you're
24 saying?

25 MR. KAEUPER: Yeah. I mean, that's - - -

1 it - - - it's - - - it's certainly waivable unless
2 it's a mode of proceedings error, and - - - and I
3 mean here - - - and that - - - that's why I think
4 it's important that - - -

5 CHIEF JUDGE LIPPMAN: Can the jury - - -
6 are they competent to - - - to - - - to, without the
7 answers, to reach a verdict?

8 MR. KAEUPER: Well, I don't - - - I mean, I
9 guess I - - - I would want to step back from that a
10 little bit and say there hasn't been any dispute here
11 that the jury can withdraw a request. I mean, that -
12 - - and that - - - that - - -

13 JUDGE FAHEY: Well, we don't - - -

14 MR. KAEUPER: - - - happened - - -

15 JUDGE FAHEY: We don't know if that
16 happened, really, here so - - - you see, if - - - if
17 defense counsel had said, well, Your Honor, I - - -
18 that's fine, they have a note, but - - - but I - - -
19 I - - - I want to preserve my objection if you're not
20 going to respond and give them the reading on this,
21 then we wouldn't be here.

22 MR. KAEUPER: Well, I mean, I guess it
23 depends - - -

24 JUDGE FAHEY: But this way, if - - - if
25 they don't preserve their objection, they get the

1 verdict and then they have in their pocket, if it's a
2 mode of proceeding error - - -

3 MR. KAEUPER: Right.

4 JUDGE FAHEY: - - - a new trial, which is
5 the core of your argument.

6 MR. KAEUPER: Right.

7 JUDGE FAHEY: You either got to object and
8 get your ans - - - and get it on the record so at
9 least the judge can respond and correct the error, or
10 if not, then you can't - - -

11 MR. KAEUPER: Absolutely.

12 JUDGE FAHEY: - - - hold it in your pocket
13 and wait.

14 MR. KAEUPER: Absolutely. He want - - - he
15 wants it, "heads I win; tails, you lose". And - - -
16 and - - - and the mode of proceed - - - the reason
17 for the preservation requirement is exactly that you
18 would have a - - - a record here.

19 JUDGE FAHEY: Well, the - - - the mode of
20 proceeding error, of course, would have to apply to
21 the first prong as - - - as to what the note actually
22 said because then counsel wouldn't have any notice.

23 MR. KAEUPER: Right.

24 JUDGE FAHEY: They got to have notice to
25 deal with this issue.

1 MR. KAEUPER: Absolutely.

2 JUDGE FAHEY: And - - - and so that's
3 essential. So the - - - the decision for us is the
4 second part, really.

5 MR. KAEUPER: Right. And - - - and - - -

6 CHIEF JUDGE LIPPMAN: Don't they have to
7 full participation? Isn't this what the O'Rama
8 protocols are all about?

9 MR. KAEUPER: Sure. But again, I mean, I
10 want to draw that distinction between of mode of - -
11 -

12 CHIEF JUDGE LIPPMAN: You're saying that
13 they don't - - -

14 MR. KAEUPER: - - - proceedings and error.
15 Because, I mean, O'Rama gives us a very specific
16 reason that the error in that case is a mode of
17 proceedings error as opposed to just an error.

18 CHIEF JUDGE LIPPMAN: Because they're not
19 getting full participation.

20 MR. KAEUPER: Right. Be - - - because - -
21 - because defense can't object - - -

22 CHIEF JUDGE LIPPMAN: And then did get they
23 - - -

24 MR. KAEUPER: - - - to something they don't
25 know about.

1 CHIEF JUDGE LIPPMAN: Did they get full
2 participation here?

3 MR. KAEUPER: Defe - - -

4 CHIEF JUDGE LIPPMAN: Or you're saying - -
5 -

6 MR. KAEUPER: I'm saying - - -

7 CHIEF JUDGE LIPPMAN: - - - they waived
8 full participation?

9 MR. KAEUPER: I'm - - - I'm saying the
10 defense had the opportunity, which is what O'Rama was
11 concerned with.

12 CHIEF JUDGE LIPPMAN: You're saying they
13 waived full participation?

14 MR. KAEUPER: I'm saying - - -

15 CHIEF JUDGE LIPPMAN: And that O'Rama is
16 about full - - -

17 MR. KAEUPER: I'm saying that - - -

18 CHIEF JUDGE LIPPMAN: - - - participation.
19 You can't waive that. That's the whole basis of it.

20 MR. KAEUPER: No. O'Rama says that the
21 issue is that the defense attorney can't object to
22 what he doesn't know about.

23 JUDGE STEIN: So you're saying he had full
24 - - - he had notice?

25 MR. KAEUPER: Absolutely.

1 JUDGE STEIN: And - - - and - - - and that
2 - - -

3 MR. KAEUPER: And made a strategic choice,
4 and that I think is the - - - is the essence of this.
5 This is the most purely strategic choice you could
6 ever have.

7 JUDGE RIVERA: All right. So - - - so why
8 - - - why doesn't People v. Lourido, though, control
9 this case? Is it because it's a pre-O' Rama case?

10 MR. KAEUPER: No. Because there, there's
11 an objection. So I mean, certainly, if the - - - if
12 the defense attorney here said, I don't want you to
13 take the verdict; I want you to ask them, do you
14 still need those notes. But the defense has good
15 reason to not want to do that.

16 CHIEF JUDGE LIPPMAN: What about People v.
17 Silva?

18 MR. KAEUPER: Yeah. Peop - - - People v.
19 Silva and the - - - the defense relies on it - - -
20 People v. Silva involves a very different - - -

21 CHIEF JUDGE LIPPMAN: Isn't it the same - -
22 - isn't it the same case, basically?

23 MR. KAEUPER: No. Not at all. In - - -
24 Silva is - - - is decided, as I read Silva, on the
25 fact that there was no notice and that you can't

1 infer notice from a - - - from a silent record. So
2 the question is, can - - - can the - - - can the
3 verdict - - - let's, you know, call it an implied
4 withdrawal of the notes - - - can it subsequently
5 cure a mode of proceedings error? That has nothing
6 to do with this case.

7 JUDGE FAHEY: So is - - - is there - - - I
8 don't remember exactly, but I thought in Silva there
9 was no record of actually telling them what the court
10 exhibit said. I thought that that was - - -

11 MR. KAEUPER: Right.

12 JUDGE FAHEY: There was no - - - and here,
13 we don't have that problem.

14 MR. KAEUPER: Right. Here it's clear - - -

15 JUDGE PIGOTT: What's - - - what's the - -
16 - what was the strategy? You say - - - you say it's
17 so clear that there was a strategic choice here.
18 What was the - - - what was the - - -

19 MR. KAEUPER: The - - - yeah.

20 JUDGE PIGOTT: - - - defense strategy?

21 MR. KAEUPER: I mean, if - - - if I think
22 that the - - - the jury, which has been hung, has now
23 resolved its - - - its - - - its problems in favor of
24 me, I don't want you to send them back to get rehung.
25 If I think - - - if I think this case has gone well

1 for me, I put on my - - - my defendant; I had all my
2 alibi witnesses; this case is going well, the - - -

3 JUDGE STEIN: And if I don't say anything
4 and it goes the other way, now I can claim it's a
5 mode of proceedings error.

6 MR. KAEUPER: Right. If it's - - -

7 JUDGE STEIN: And - - - and - - -

8 MR. KAEUPER: If it's mode of proceedings
9 error then - - - then it's malpractice to - - -

10 JUDGE FAHEY: That's why - - -

11 MR. KAEUPER: - - - to say anything.

12 JUDGE FAHEY: That's why it would be error,
13 just like the judge said, but - - - or it may be
14 error but you got to preserve it if you want to save
15 it for later, but then if you preserve it, the judge
16 is going to correct the error immediately. So - - -

17 MR. KAEUPER: Right. And which I think
18 again is - - - I mean, the - - - the O'Rama rule
19 works. It works well. It cures errors. It - - - it
20 - - - I mean it - - - it functions properly the way
21 it is as - - -

22 JUDGE FAHEY: Though you wouldn't know that
23 today given the cases we have today.

24 MR. KAEUPER: But you don't get - - - you
25 don't get these cases about, well, you know, the

1 judge - - - the judge promised to do this and I
2 wanted him to do this other - - - I mean you don't
3 get into a lot of that - - - that sort of parsing of
4 things because, generally speaking, if the defense
5 says, no, I think this note is asking for this, I
6 want this, it gets worked out. It's - - - it's a
7 functional rule and it - - -

8 CHIEF JUDGE LIPPMAN: Okay, counsel. You
9 get your rebuttal. Let's hear your adversary.

10 MR. BOURTIN: Thank you, Judge, and good
11 afternoon, and may it please the court, Nick Bourtin
12 from Sullivan & Cromwell for the respondent, Terrance
13 Mack. The holding of O'Rama is very clear, and its
14 application here - - -

15 JUDGE STEIN: Did you know - - - did you
16 know exactly what the note said?

17 MR. BOURTIN: The - - - the defense counsel
18 knew exactly what the note said but not the time that
19 it was submitted, and that is clear. And that goes -
20 - -

21 JUDGE STEIN: Where does O'Rama say you
22 have to know the time that it was submitted?

23 MR. BOURTIN: O'Rama says that to - - - for
24 notice to be adequate, for notice to be meaningful,
25 the defendant - - - the defense counsel must

1 understand all of the specifics of the note, and this
2 is the language that's important, so that he can
3 understand the situation in the jury room.

4 JUDGE ABDUS-SALAAM: Well, counsel, in this
5 situation didn't the judge indicate that the - - -
6 they were going to take a dinner recess and that any
7 notes that the jury sent out would be responded to or
8 dealt with after dinner? So these notes came out
9 during the dinner recess, and that wasn't all day,
10 right. It - - - it was a specific amount of time,
11 wasn't it, like, an hour, two hours, or something
12 like that?

13 MR. BOURTIN: You're - - - you're right,
14 Judge Abdus-Salaam, except for one important fact; he
15 didn't say that to the jury. The jury had had every
16 note that day responded to either immediately, within
17 a minute, from the record, or in one case within
18 twenty minutes. He sent the jury away after
19 instructing them there was no time limit on their
20 deliberations - - -

21 JUDGE STEIN: You're arguing that counsel
22 needed to know the time of the notes. What's - - -
23 what's the import of - - -

24 MR. BOURTIN: Counsel needed to understand
25 the time of the note to understand, as O'Rama says,

1 the situation in the jury room.

2 JUDGE STEIN: Okay. But Judge Abdus-Salaam
3 knows - - - as Judge Abdus-Salaam indicated, they
4 knew that there was this period of time during the
5 dinner break so it had to be sometime in - - - during
6 that time.

7 MR. BOURTIN: Right.

8 JUDGE STEIN: And they - - - they knew what
9 the note said. They could have asked, when were
10 these notes received?

11 MR. BOURTIN: But the case law says counsel
12 doesn't have to ask. That the - - - that meaningful
13 notice requires that the court make counsel aware of
14 all of the - - - all of the pertinent portions of it.

15 CHIEF JUDGE LIPPMAN: Counsel can't waive?

16 JUDGE ABDUS-SALAAM: That's not substantive
17 - - -

18 CHIEF JUDGE LIPPMAN: Counsel can't waive?
19 Is that what it is?

20 MR. BOURTIN: Counsel cannot waive. And
21 this is - - -

22 JUDGE ABDUS-SALAAM: But - - - but the
23 timing is really not substantive. That's not part of
24 the note.

25 MR. BOURTIN: Well, the - - -

1 JUDGE ABDUS-SALAAM: That the jury - - -
2 the jury doesn't ask - - -

3 MR. BOURTIN: We - - - we - - - we think it
4 was.

5 JUDGE ABDUS-SALAAM: - - - at 6:54 p.m., we
6 want to know X, Y, or Z. That is part of the - - -
7 the note itself because most judges - - - I know I
8 did when I was a trial judge - - - put the time on
9 there.

10 MR. BOURTIN: In - - - in this case the
11 time was on the notice. It was never read into the
12 record, and we know from - - -

13 JUDGE RIVERA: Well, I'm - - - I'm really
14 unclear; what is it that the counsel did not know?

15 MR. BOURTIN: He didn't know the time the
16 notes were issued. We - - - and you know why we - -
17 -

18 JUDGE RIVERA: But he knows that it's in -
19 - - I - - - I see where Judge Abdus-Salaam was asking
20 you that he knows that it's in less - - - it's only
21 during this break, it's less than a two-hour period
22 of time. May not know that it was five minutes after
23 the break started, five minutes before the break
24 ended. Why is that - - -

25 MR. BOURTIN: Because he thought it - - -

1 JUDGE RIVERA: - - - level of specificity
2 necessary?

3 MR. BOURTIN: He thought it was - - - he
4 thought it was five minutes before the verdict, and
5 we know that's what he thought because that's what he
6 said in his affidavit post-trial - - -

7 JUDGE FAHEY: But it actually was about an
8 hour?

9 MR. BOURTIN: It was nine - - - it was
10 ninety-four minutes. It was - - -

11 JUDGE FAHEY: Okay. And - - - and I - - -

12 MR. BOURTIN: - - - an hour-and-a-half - -
13 -

14 JUDGE RIVERA: Yeah. At a minimum.

15 MR. BOURTIN: - - - at - - - at eight
16 o'clock on a Friday night.

17 JUDGE RIVERA: You're saying that defense
18 counsel didn't realize that this might really spill
19 over into a period of undue delay?

20 MR. BOURTIN: Correct. Now, that's notice.
21 I do want to focus on the second prong, the second
22 core responsibility of O'Rama, which also was - - -
23 was fundamentally not complied with here, and that is
24 that no response was ever given to the jury. In a
25 sense, what the People want is they want to take two

1 core responsibilities under O'Rama, which the case
2 law - - - very clear that there are two, and they
3 want to turn them into one.

4 CHIEF JUDGE LIPPMAN: So what should the
5 judge have done in this situation about responding?
6 They say they have a verdict, what does the judge do?

7 MR. BOURTIN: The judge should have done ex
8 - - - exactly what Judge Abdus-Salaam sugg - - -
9 suggested which was to bring the jury into the
10 courtroom and say we - - - at - - - at a minimum, the
11 judge should have said we understand you've reached a
12 verdict. We know, however, that you have not - - -

13 CHIEF JUDGE LIPPMAN: That's the - - -

14 MR. BOURTIN: - - - we have not had a
15 chance to respond to three questions that you had,
16 and get some sort of confirmation either by polling
17 the jurors or by sending them back.

18 JUDGE ABDUS-SALAAM: What if counsel didn't
19 want him - - - or the judge to do that? What if
20 counsel wanted to do what he did which is to
21 essentially hear the verdict and if it was in favor
22 of his client, then - - -

23 MR. BOURTIN: Right.

24 JUDGE ABDUS-SALAAM: - - - no need to
25 answer those questions. And - - -

1 MR. BOURTIN: Counsel doesn't have that
2 right under the law. Three - - - CPL 310.30 is very
3 clear. It puts an obligation on the court, not on
4 counsel, not on the defendant, to ensure that
5 requests from the jury are answered.

6 JUDGE PIGOTT: Yeah. But what you're - - -
7 what you're saying is that if defense counsel says
8 whatever you do, I don't want you to read those notes
9 and not going to do it, you think that's going to
10 help the defendant; well, I'm telling you I'm going
11 to do it ev - - - you know, because I think it helps
12 the People. I think defense lawyers have broad - - -
13 broad discretion here, and - - - and I'm - - - I'm
14 not - - - I didn't see where this was a great
15 strategy. But I - - - I don't know, if I - - - if I
16 thought it was leaning the right way, I - - - you
17 know, I might say, Judge, I don't want you to go
18 into, you know, reasonable doubt again.

19 MR. BOURTIN: But again, to avoid that kind
20 of gamesmanship, a bright-line rule is needed, and if
21 the rule is jury questions always get answered unless
22 they're explicitly withdrawn, then there is no
23 opportunity for - - -

24 CHIEF JUDGE LIPPMAN: Do we assume that the
25 jury is incompetent to give the verdict without the

1 answers?

2 MR. BOURTIN: You - - - you have to. I
3 mean, this is - - - this is the core of what O'Rama
4 says.

5 CHIEF JUDGE LIPPMAN: Or do you assume what
6 the dissent says that - - - that, you know, well, we
7 must assume that they gave up the questions?

8 MR. BOURTIN: You can't assume that. This
9 court in Hall said, "The jury is entitled to the
10 guidance of the court and may not be relegated to its
11 own unfettered course of procedure."

12 CHIEF JUDGE LIPPMAN: So they have to
13 answer the questions - - -

14 JUDGE FAHEY: I - - - I - - - I totally - -
15 - I - - - I see this as it probably was error not to
16 respond. The question is, did you have to object to
17 it?

18 MR. BOURTIN: Right.

19 JUDGE FAHEY: And that if you - - - that's
20 really the - - - what the core here is. It's because
21 - - - and that's where we get into the gamesmanship
22 and the strategy of it.

23 MR. BOURTIN: Right.

24 JUDGE FAHEY: And a good law - - - a good
25 defense lawyer would say well, if I don't object

1 here, then I got a mode of proceedings error in my
2 pocket to get another trial.

3 MR. BOURTIN: The law is - - -

4 JUDGE FAHEY: That's the - - - that's - - -
5 that's my - - - so that's the point. So is it
6 correctable? Notice of content has to be a mode of
7 proceedings error because how can somebody object if
8 they don't even know, right? That's very easy for
9 all of us to make that leap. But the second part of
10 the O'Rama standard, which is an opportunity to
11 provide input, that second part of it - - - once you
12 know what it says, you can either provide input or
13 not, that's up to you, and if you're not given that
14 opportunity and there's going to be a verdict and you
15 don't object, then you're stuck with the verdict.
16 You don't get two verdicts.

17 MR. BOURTIN: The problem with that, Judge
18 Fahey, is that it gets the O'Rama ana - - - analysis
19 and the spirit of O'Rama exactly backward. So - - -

20 JUDGE ABDUS-SALAAM: So, counsel, I just
21 need to ask. You said an explicit waiver of the
22 answer to the question by the jury. So when the jury
23 sent out the note saying we have a verdict, it would
24 be your position, and correct me if I'm wrong, that
25 the jury would have to say, ignore those other notes

1 we sent out, we don't need that information, we have
2 a verdict?

3 MR. BOURTIN: Correct. And they said that
4 in this case. They withdrew an earlier question.
5 But it really - - - I - - - I - - - I need to get - -
6 -

7 JUDGE FAHEY: I see. To go back - - -

8 JUDGE ABDUS-SALAAM: They what? I'm sorry?

9 MR. BOURTIN: They withdrew an earlier
10 question in that - - - in their deliberations in this
11 case, so clearly the jury knew how and - - - and
12 could have done that. But it - - -

13 JUDGE FAHEY: Go back to Judge Pigott's
14 point. I - - - I - - -

15 JUDGE RIVERA: But that was during the
16 course of deliberations, right? That's not - - -

17 MR. BOURTIN: Correct.

18 JUDGE RIVERA: - - - I - - - I've got a
19 verdict. You don't necessarily, at that point,
20 expect a jury to say, well, I don't need those notes,
21 I've got a verdict.

22 MR. BOURTIN: If - - - if they don't, then
23 the court has to confirm it. But I - - -

24 JUDGE FAHEY: Yeah. To go back to Judge
25 Pigott's point, I think it would be malpractice for a

1 defense lawyer, if he doesn't have an opportunity to
2 respond to - - - to a note, to ever object, then,
3 because he's - - - he's always going to have a mode
4 of proceedings error.

5 MR. BOURTIN: But - - - but it can't be
6 malpractice because the law will be clear that judges
7 have to do this. The law's already clear. And - - -
8 and I do make - - - I do need to make a point about
9 why this is so important. Because it makes no sense
10 under O'Rama or under the - - - the mode of
11 proceedings doctrine to elevate notice and make it
12 more important than an answer to the jury. Let's
13 think about - - - the whole point of notice to
14 counsel is so that counsel can give input to the
15 judge on how to respond to the jury.

16 JUDGE RIVERA: So to be clear, you're
17 arguing there is never the possibility of implied
18 waiver by the jur - - -

19 MR. BOURTIN: There - - - there - - -

20 JUDGE RIVERA: - - - implied withdrawal by
21 the jury?

22 MR. BOURTIN: There cannot be, because if
23 there is, then the - - - the - - - the whole point of
24 O'Rama gets undercut.

25 JUDGE ABDUS-SALAAM: But under your

1 proposal, counsel, if defense counsel - - - and
2 defense counsel obviously did have an opportunity to
3 give input in this case. If defense counsel had
4 said, Judge, I don't want you to answer those other
5 questions, then your - - - your position would be the
6 judge should ignore that input and answer the
7 questions anyway?

8 MR. BOURTIN: Yes. And - - - and here's
9 why. I'm quot - - - quoting from Malloy from 1982.
10 This court said "CPL 310.30 leaves to the trial court
11 no discretion whatever as to whether or not to answer
12 a proper question from the jury". There - - -

13 JUDGE STEIN: Well, that may be true, but
14 that doesn't answer the question as to whether
15 defense counsel has to bring that to the attention of
16 the judge at a time when the error can be corrected.

17 MR. BOURTIN: But it's already to the
18 attention of the judge. The jury - - - the jury has
19 issued a verdict as they're discussing three pending
20 questions.

21 JUDGE STEIN: Well, obviously the judge
22 knows the situation. What I'm saying is that the
23 error has to be brought to his attention. Judge, you
24 know, you have to do this. That's - - -

25 MR. BOURTIN: There - - -

1 JUDGE STEIN: - - - what the law requires.

2 That's - - - that's - - -

3 MR. BOURTIN: But there is - - -

4 JUDGE STEIN: - - - why we require
5 preservation.

6 MR. BOURTIN: The - - - the People say that
7 there is case law supporting this - - - this
8 position; there is none. The cases that they cite as
9 saying that preservation - - - that - - - in - - - in
10 all of the cases where they say the court requires
11 preservation, an answer was given to the jury's
12 question.

13 And that's fundamentally different because
14 what the case law that the People cite says is, if
15 the - - - if - - - if the court answers a jury
16 question of course defense counsel has to put on the
17 record yes or no, whether - - - whether he approves
18 it or not. But here there was no answer given. This
19 is fundamental. It is a quintessential O'Rama error,
20 and it does require the re - - - the - - - a new
21 trial, and this court should affirm the Fourth
22 Department.

23 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
24 you.

25 Counsel, rebuttal.

1 MR. KAEUPER: If I could pick up on Judge
2 Abdus-Salaam's sort of hypothetical, we could take
3 that even a step further. You could have a situation
4 where the People says, don't take the verdict, we - -
5 - we want - - - we think they need to hear those
6 answers to those previous questions, and the defense
7 says no, no, don't want them to, we think they've
8 settled on an acquittal, take the verdict. And - - -

9 JUDGE STEIN: Do - - - do the People have
10 any obligation to bring it to the court's attention
11 that - - - that the court's required to answer the
12 question?

13 MR. KAEUPER: No. And I - - - and I - - -
14 I guess I - - - I also don't think that the court is
15 necessarily - - - necessarily required to answer the
16 question. I think that - - - that the - - - the
17 question here is - - - ultimately is, was the - - -
18 the jury withdrawing their previous request.

19 CHIEF JUDGE LIPPMAN: Is there - - - is it
20 the responsibility of the judge, though? Just
21 putting aside what the defense lawyer does, what the
22 prosecutor does, doesn't the judge, under our
23 precedents, have to answer the questions?

24 MR. KAEUPER: I - - - I think not, if the
25 jury has - - -

1 CHIEF JUDGE LIPPMAN: His responsibil- - -
2 or her responsibility.

3 MR. KAEUPER: Not if the jury has sent out
4 a note saying we've reached a verdict. I think it's
5 - - -

6 CHIEF JUDGE LIPPMAN: Then you're inferring
7 that the jury has withdrawn their questions?

8 MR. KAEUPER: Right. And - - - and if the
9 - - - and if the defense - - -

10 CHIEF JUDGE LIPPMAN: That's the - - -
11 that's the - - - that's - - -

12 MR. KAEUPER: - - - wants to - - - to
13 question that, they certainly can.

14 CHIEF JUDGE LIPPMAN: No. No. But at the
15 core of your argument is, they come in with a
16 verdict, we can presume that they don't want the
17 answers to the questions; even though O'Rama says,
18 judge has to answer the questions.

19 MR. KAEUPER: Right. I mean - - -

20 CHIEF JUDGE LIPPMAN: Our - - - our
21 jurisprudence says judge must answer the questions.

22 MR. KAEUPER: Well, but - - - but this
23 certainly doesn't say you have to - - - to answer a
24 question that's withdrawn.

25 JUDGE FAHEY: I didn't think you were

1 arguing that. I didn't think you were arguing that
2 the judge was right here, only that they - - - if the
3 judge was wrong, you got to object.

4 MR. KAEUPER: Right. I mean, I guess - - -
5 I guess - - -

6 JUDGE FAHEY: There's a big difference
7 between arguing they're right, because it's clear the
8 Obama (sic) rules set out the - - - an - - - an
9 opportunity to respond and there should be some
10 response and the better practice would be exactly
11 what Judge Lippman says. But the question is, do you
12 have to observe - - - preserve an objection to it or
13 can you - - - is it a mode of proceedings error which
14 automatically entitles you to another trial?

15 MR. KAEUPER: Right. Right. And - - - and
16 - - - and I'm - - - I'm not particularly trying to
17 insist that there wasn't an error here. I - - - I
18 think we don't really know, because nobody asked the
19 jury, did you or didn't - - - by sending an out say -
20 - - a note saying we reached a verdict, did you - - -

21 JUDGE RIVERA: Do we not - - - do we not
22 create more confusion, though, with respect to the
23 O'Rama protocols by doing exactly what you're
24 suggesting, which is every other note, yes, a judge
25 has to respond to it, but if the notes are pending

1 and a verdict comes in, judge doesn't respond and the
2 defense counsel doesn't object, no mode of
3 proceedings? Every other case it's mode of
4 proceedings but not that one?

5 MR. KAEUPER: No. The - - - the rule is
6 clear now. It - - - it becomes confusing if you
7 accept the defendant's position because then - - -
8 because the statute says meaningful response.

9 CHIEF JUDGE LIPPMAN: No. But are - - -
10 aren't we making it up as we go along by saying oh,
11 in this situation, they withdrew the question? The -
12 - - it's fundamental that the judge has to answer the
13 questions. And now we're saying, yeah, it's
14 fundamental, but we can infer that - - - that they
15 don't want the answers to the questions.

16 MR. KAEUPER: I'm say - - - I'm not saying
17 anything different from what was in O'Rama, that - -
18 - that O'Rama creates a mode of - - -

19 JUDGE RIVERA: No matter how long the notes
20 have been pending?

21 MR. KAEUPER: I think that matters in terms
22 of what the - - - the appropriate response is if
23 there's an objection. I don't think it matters as
24 far as whether or not there - - - there's a mode of
25 proceedings error, again, given that the counsel has

1 notice.

2 JUDGE RIVERA: I - - - I'm not sure I
3 understand your answer. If - - - if the notes had
4 come out - - - if one note had come out, two minutes
5 have passed, and then the verdict comes out, is that
6 different from the almost two hours and three notes
7 are pending, I think, is - - -

8 MR. KAEUPER: Yeah. And I - - - I think -
9 - - I think it changes - - - it changes how the judge
10 has to respond to an objection. If - - - if the
11 defense says, Judge, you know, I object, it's been
12 eight hours since you said you were going to do that
13 read-back and there hasn't been a read-back, I think,
14 you know - - -

15 JUDGE RIVERA: No. No. I'm sorry.

16 MR. KAEUPER: No. I'm thinking - - - I'm
17 thinking of ridiculous example, but - - -

18 JUDGE RIVERA: My question is not - - - my
19 - - - my question is not that. My question is does
20 that differ your analysis or - - - or impact your
21 analysis on whether or not there's an implied waiver,
22 whether it's five minutes, two hours, five hours,
23 eight hours in your hypothetical?

24 MR. KAEUPER: I - - - I mean, I suppose
25 that's relevant, again, to the question of whether

1 there's an implied waiver, but - - -

2 JUDGE RIVERA: So then again, aren't we
3 creating more confusion - - - because you sound like
4 you've got a little sliding-scale argument going on
5 there - - - are we creating more confusion allowing
6 the courts to have these arguments, well, it was five
7 minutes; oh, no, it was five hours; oh, no, it was
8 ninety-four minutes, whatever you said?

9 MR. KAEUPER: No. No. Because - - -
10 because by making it not a mode of proceedings error,
11 that gets fleshed out in the trial court.

12 JUDGE STEIN: You're saying even if it's
13 not a - - - a case where, as here the jury comes back
14 with a verdict, you're saying any time a judge
15 doesn't answer a note and the - - - the - - - the
16 lawyers know about the note, they know the contents
17 of the note, and the lawyer doesn't say hey, Judge,
18 you've got to answer this note, you're saying that is
19 not a mode of proceedings error, the lawyer has to
20 make the - - - the - - -

21 MR. KAEUPER: Right. If - - - right. If -
22 - - if - - - if - - - as O'Rama says, if they have
23 notice of - - -

24 CHIEF JUDGE LIPPMAN: Yeah. But I return
25 to the question I asked you before. Isn't it the

1 responsibility of the judge? Isn't that what this is
2 all about?

3 MR. KAEUPER: Sure. And - - - and - - -
4 and it's the responsibility of the judge to do other
5 things in the O'Rama procedure that this court - - -

6 CHIEF JUDGE LIPPMAN: Yeah. But it's - - -

7 MR. KAEUPER: - - - has found - - -

8 CHIEF JUDGE LIPPMAN: - - - a fundamental
9 core responsibility of the judge to answer the
10 questions. That's what O'Rama's all about.

11 MR. KAEUPER: Yeah. But I mean, if - - -
12 if the - - - if the jur - - -

13 CHIEF JUDGE LIPPMAN: If the answer is
14 "yeah", then how can you prevail?

15 MR. KAEUPER: Because - - - because the
16 jury is sending out a note that says, we've reached a
17 - - - a verdict. So it's reasonable to infer - - -

18 JUDGE PIGOTT: I - - - I think what we get
19 down to, Judge Fahey said it a little differently, is
20 - - - I get that, you know, they - - - they knew the
21 note, but can't you get on the record from the
22 defendant or defense counsel what he wants to do with
23 the notes? If he says, I don't want them read, then
24 let's argue that out.

25 In - - - in building a conspiracy or a

1 weird thought, I mean in - - - within these notes,
2 they wanted reasonable doubt explained to them again;
3 they all - - - somebody also wanted a smoke break.
4 Now you're two hours down the line. That poor
5 bastard hasn't had a cigarette in two hours and he's
6 the one that asked about reasonable doubt and he's
7 not about to spend another fifteen minutes waiting,
8 so he says, all right, fine, throw it in, and he
9 never gets the instruction on reasonable doubt
10 because he never got to smoke, because the judge
11 never read the notes. I mean should - - - shouldn't
12 - - - shouldn't - - - shouldn't - - -

13 MR. KAEUPER: I mean, we have no idea about
14 anything like that.

15 JUDGE PIGOTT: Shouldn't we guard against
16 that and not simply say well, it wasn't preserved?

17 MR. KAEUPER: No. No. Because if the
18 defense attorney has notice of it, he can raise that
19 issue if he's - - - if he's concerned about that.
20 But if he's looking at this case and saying, I think
21 I got an acquittal, I don't want you to mess with the
22 jury - - -

23 JUDGE PIGOTT: Shouldn't he say that?

24 MR. KAEUPER: Well, he - - - we don't know
25 what he said. I mean it was a - - -

1 JUDGE FAHEY: But the more likely thing
2 would be - - - I think I'm going to be convicted was
3 probably the more likely thing, and - - - and he's -
4 - - so what he's really going to say is, since I
5 think I'm going to be convicted, why not take the
6 verdict? If it goes my way, great; if not, I have a
7 mode of proceedings error and I get a new trial.

8 MR. KAEUPER: Yeah.

9 JUDGE FAHEY: That's - - - that's - - -

10 JUDGE PIGOTT: Well, that - - -

11 JUDGE FAHEY: That's what you're saying, so
12 object so the judge can correct the error and we
13 won't have that mode of proceedings error.

14 JUDGE PIGOTT: So the D - - - the - - - the
15 ADA can stand up and say, Judge, you know what he's
16 trying to do?

17 JUDGE FAHEY: Yeah.

18 JUDGE PIGOTT: And then he or she can say,
19 you got to read the notes, Judge, and - - - and - - -
20 and find out what they're about, because otherwise
21 you're handing him a mode of proceedings error.

22 MR. KAEUPER: Yeah. I mean, but all of
23 these things are going to be better if - - - if we
24 require an objection when the defense is in a perfect
25 opportunity to object.

1 CHIEF JUDGE LIPPMAN: Yeah. But the
2 judge's response - - - I mean, it's Friday night, and
3 like Judge Pigott said before, isn't there a danger
4 as to what's going on here that you - - - that by the
5 judge not doing what the judge is supposed to do,
6 proactively, and that that's the basis of what he's
7 suppo - - - he or she's supposed to be doing under
8 O'Rama?

9 MR. KAEUPER: And - - - and so - - - and so
10 maybe it's an error, but it's not a mode of - - -

11 CHIEF JUDGE LIPPMAN: Okay.

12 MR. KAEUPER: - - - proceedings error.

13 CHIEF JUDGE LIPPMAN: Well - - -

14 JUDGE PIGOTT: We got you.

15 CHIEF JUDGE LIPPMAN: - - - you're both
16 great. See you.

17 (Court is adjourned)

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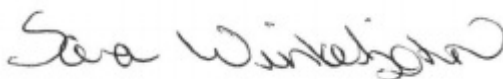
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I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Terrance L. Mack, No. 132 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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