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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 112

TIMOTHY WILLIAMS,

Appellant.

20 Eagle Street
Albany, New York 12207
May 1, 2013

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 112.

2 Counselor, you want any rebuttal time?

3 MS. COHEN: Yes, please, two minutes.

4 CHIEF JUDGE LIPPMAN: Two minutes. Sure. Go
5 ahead.

6 MS. COHEN: Good afternoon. My name is Laura
7 Lieberman Cohen, and I represent Timothy Williams.

8 Your Honors, the lower court erroneously refused
9 to charge the jury on the agency defense.

10 CHIEF JUDGE LIPPMAN: What does the agency
11 defense turn on? How do we - - - how do we know whether
12 you - - - you get the - - - the agency charge?

13 MS. COHEN: You have to look at the surrounding
14 circumstances and determine whether the defendant was
15 acting solely on behalf of the buyer and not for an
16 independent desire to - - -

17 CHIEF JUDGE LIPPMAN: How - - - how dominant in
18 that analysis is the relationship between the alleged
19 agent and the buyer?

20 MS. COHEN: Well, just yesterday, this court
21 decided People v. Echevarria where this court stated
22 specifically that the fact that a defendant does not know
23 the buyer does not render the agency defense - - -

24 JUDGE SMITH: Yeah, but in - - - but in that
25 case, there were the - - - the defendant had testified

1 that he was a - - - he was a drug addict who liked to help
2 out other addicts and he was being a Good Samaritan. You
3 didn't have anything like that here, did you?

4 MS. COHEN: No, but - - - well, let's look at
5 the surrounding circumstances in this case. The defendant
6 was standing alone on the street where an undercover
7 officer joined a couple who said to the defendant "is
8 anyone out?" The defendant did not then direct them to a
9 specific location where a seller could be located. In
10 fact, it appears the defendant has no idea where there's a
11 seller. The defendant has to walk down the street, he
12 looks around the corner, and then when he comes back, he
13 doesn't provide them with a specific address to find a
14 seller. He doesn't even describe what the seller looks
15 like. He just says to them, "go around the corner".

16 When they go around the corner, they - - - the
17 undercover says that he sees a person who appears to be a
18 drug seller sitting in plain view in the middle of a
19 street on the stoop. This was not a situation where there
20 was a seller in a secretive location where you would
21 require a steer or a referral in order to make a sale.

22 CHIEF JUDGE LIPPMAN: Counselor, do you agree
23 this is a weaker case than Echevarria?

24 MS. COHEN: I don't agree that it's a weaker
25 case because if we look at all of the factors that this

1 court has outlined - - -

2 CHIEF JUDGE LIPPMAN: I mean, I'm not saying
3 that means you don't win. I'm just asking do you think
4 it's weaker given the circumstance.

5 MS. COHEN: I don't because I think that the - -
6 - this court has set out several factors that are relevant
7 to determining whether a defendant is entitled to an
8 agency defense. Those factors include who suggested the
9 purchase. In this case, the defendant did not suggest the
10 purchase; the buyer came to him. The relationship is a
11 problem, and that's a factual - - - that's a fact that the
12 jury is best equipped to determine. Looking at all the
13 facts surrounding this case - - -

14 JUDGE SMITH: Well, what about the fact that
15 he's treating - - - seems to treat all buyers the same
16 way, at least - - - at least, he - - - on two occasions he
17 does exactly the same thing? I mean, is it a reasonable
18 view of the evidence that he's just somebody who helps out
19 everybody who comes along?

20 MS. COHEN: I think that this is a misstatement
21 of fact that the prosecutor seems to keep repeating in his
22 brief. In this case, there's one transaction. A couple
23 come over to my client one time. The undercover officer
24 specifically testifies that what he does is he kind of
25 just - - -

1 JUDGE SMITH: So he's trying - - -

2 MS. COHEN: - - - stands up next to him - - -

3 JUDGE SMITH: - - - to make himself look like
4 part of the group.

5 MS. COHEN: - - - to make himself look like it.
6 So it's really one transaction.

7 JUDGE SMITH: But they did - - - they both
8 talked to the - - - to the defendant, right? There were
9 separate conversations.

10 MS. COHEN: Not at first. They said, does
11 anyone - - - only the couple said to my client, "Is anyone
12 out?" When my client returned and said, "Go around the
13 corner", the undercover tried to inject it and said, "Get
14 me two", and my client just simply repeated the same
15 statement, "Go around the corner". He's just saying that
16 sellers can be found around the corner.

17 JUDGE GRAFFEO: If he wasn't engaging in
18 steering them, why - - - why did he bother to go to the
19 corner and look down the street? Why didn't he just say I
20 don't know?

21 MS. COHEN: He was standing on - - - it's - - -
22 you know, we could speculate about that. Once again, this
23 is an issue for the jury.

24 JUDGE SMITH: He likes - - - the answer has to
25 be he really likes to be helpful.

1 MS. COHEN: In many cases. I mean, this is - -
2 -

3 JUDGE SMITH: But at some point, doesn't that
4 get totally implausible? I mean, the streets aren't
5 teeming with these Good Samaritans.

6 MS. COHEN: No, but this is - - - the undercover
7 officer actually specifically testified that he routinely
8 asked fellow drug users where he can find drug sellers.
9 So this is something that this undercover officer
10 routinely did. He would go out on the street, look for
11 someone and say, where can I find a seller? So - - - and
12 in this case, my client - - -

13 JUDGE GRAFFEO: And he just happened to think
14 this person sitting on the stoop was a drug dealer?

15 MS. COHEN: My client is not sitting on the
16 stoop. The undercover officer - - -

17 JUDGE GRAFFEO: I said your - - -

18 MS. COHEN: Yes.

19 JUDGE GRAFFEO: - - - your client just happened
20 to think that this one person sitting on the stoop was a
21 drug dealer?

22 MS. COHEN: Well, actually the undercover
23 officer also testified that as he was walking to this
24 woman sitting on the stoop, she appeared to look like
25 someone who was selling drugs. So even the undercover

1 officer thought that she looked like a drug seller. This
2 is clearly a drug-prone location; that's why the
3 undercover officer is there. So - - -

4 JUDGE SMITH: What - - - what about the lifting
5 of the shirt to cover his mouth? Is that relevant?

6 MS. COHEN: I think that that's just someone who
7 is aware that drug selling is going on in the area. He
8 doesn't want to get involved in it. That's why he doesn't
9 have any, you know - - -

10 JUDGE SMITH: He doesn't want to get involved.
11 He - - - he's worried enough to cover his mouth when he
12 speaks, but he's - - - but he's nevertheless willing with
13 no - - - for no hope of return just to - - - to point
14 total strangers in the direction of somebody he knows is a
15 drug dealer.

16 MS. COHEN: Your Honor, where doubt exists, the
17 jury, using their common sense and experience, are best -
18 - - in the best position to evaluate my client's intent at
19 the time of the transaction. The fact is, when you look
20 at all the surrounding circumstances in this case,
21 including the fact that there are no other buyers - - -
22 the undercover officer testified that when he approached
23 my client no one else was near my client; my client was
24 standing alone. After my client told them to go around
25 the corner, he did not remain at the location trying to

1 promote additional sales. He's arrested ten minutes
2 later. He's with his friends a few blocks away talking to
3 them in front of a Laundromat.

4 JUDGE RIVERA: It could be he's already got
5 three of them, the couple and the undercover.

6 MS. COHEN: There's nothing to - - -

7 JUDGE RIVERA: - - - so I'll move on.

8 MS. COHEN: There's nothing to suggest that my
9 client has any relationship whatsoever with the seller,
10 anything connecting him with the seller. He doesn't even
11 know where the seller is. The undercover officer
12 testified that he watched my client go to the corner.

13 JUDGE SMITH: How about all that money - - - how
14 about the money they found in his pocket? That - - -
15 that's a strong point for the - - - against the agency
16 defense, isn't it?

17 MS. COHEN: It's a strong - - - that's a point
18 for the jury to consider, but it's not a strong enough
19 point to - - -

20 CHIEF JUDGE LIPPMAN: You'll agree there are
21 factors both ways?

22 MS. COHEN: Yes, I do agree that the fat cuts
23 both ways, but I think that looking at all of this
24 evidence in the light most favorable to the defense, there
25 was a reasonable view of the evidence to support the

1 agency charge. And any remaining factual issues or any
2 doubt regarding these certain bad facts that there might
3 be should have been brought to the jury's attention and
4 allow the jury - - -

5 JUDGE SMITH: Will you talk about the O'Rama
6 issue for a minute?

7 MS. COHEN: Sure. It's our position that the
8 trial court failed to fulfill its core responsibilities
9 under CPL 310.30. The core responsibilities require the
10 court to give counsel specific - - - notice of specific
11 content of the note and give counsel the opportunity to
12 provide input into - - -

13 JUDGE SMITH: Well, what about the suggestion
14 that there must have been an off-the-record discussion in
15 which that happened?

16 MS. COHEN: There's absolutely nothing in the
17 record to indicate that there was any off-the-discussion -
18 - - off-the-record discussion in this case, absolutely
19 nothing in the record.

20 JUDGE SMITH: And in general, would you say it's
21 a rule that off-the-record doesn't count; it's got to be
22 at least reflected on the record? Is that what you're
23 saying?

24 MS. COHEN: Absolutely. And that's what Tabb
25 says. Tabb is - - - this court recently, in Tabb, says

1 that you must have record proof of the court's compliance
2 with the core responsibilities. Here, there's absolutely
3 nothing to indicate that, but even if there was, that's -
4 - - Tabb says you must have record compliance. And it
5 makes sense because you're dealing with - - -

6 JUDGE GRAFFEO: What - - - what about Ramirez?
7 Isn't this somewhat comparable to the Ramirez situation
8 where there's no indication on the record that defense
9 counsel had been made aware of the note?

10 MS. COHEN: In Ramirez, there was indication
11 that defense counsel was made aware of the note. There
12 was an indication that there had been some colloquy during
13 the lunch period. It just wasn't put on the record. So
14 in that situation, there was perhaps, a de minimis, you
15 know - - -

16 JUDGE GRAFFEO: And we can't make that inference
17 in this record?

18 MS. COHEN: There's absolutely nothing in this
19 record. In fact, if you look at the record, the fact that
20 every other note is put on the record and that defense
21 counsel had an opportunity to respond, the presumption of
22 regularity, actually, in this case, works in our favor
23 because if you assume that the court is transcribing
24 everything that's occurring, and unlike in other cases
25 where the court reporter might put "pause in proceedings",

1 "off-the-record discussion", there's nothing like that in
2 this case. There's just the court reporter recording the
3 court, providing the note to counsel and giving them an
4 opportunity to respond.

5 And on this occasion, where the jury is asking
6 for clarification of the acting-in-concert charge - - -
7 and that's important. The jury is not asking for a
8 re-reading of a prior instruction. They're not asking for
9 the exact same definition to be over - - - given over
10 again like they did in Starling. In this case, the jury
11 is indicating that it was not satisfied with the previous
12 instruction that it was given and it's requesting
13 clarification.

14 CHIEF JUDGE LIPPMAN: Okay, counselor. Thanks,
15 counselor.

16 Counsel.

17 MR. ALONSO: May it please the court, my name is
18 Daniel Alonso. I represent the People of the State of New
19 York.

20 CHIEF JUDGE LIPPMAN: Counselor, how does - - -
21 how does Echevarria play into your situation here?

22 MR. ALONSO: Well, first of all, Echevarria,
23 Your Honor, is a case where the agency charge was given.
24 I think it stands for the proposition that if you give it,
25 you got to give it right, and there were a couple of

1 problems with that, particularly - - -

2 JUDGE SMITH: Well, but didn't we - - - didn't
3 we reject the argument it didn't - - - that if it didn't
4 have to be given at all, it would have been harmless
5 error, and we said it's not harmless because there was a
6 reasonable view of the evidence.

7 MR. ALONSO: That's right. But as Your Honor
8 pointed out a few minutes ago, the defendant in that case
9 testified, and it makes it incredibly different than this
10 case. In this case, we would have to posit that there - -
11 - the defendant is a roving agent in search of principals
12 trying to carry out the wishes of their principals in
13 their best fiduciary obligation.

14 I mean, it's - - - if you read the case People
15 v. Argibay, which is decided the same day as Lam Lek
16 Chong, which is relied on very closely by the defense in
17 their brief, the court says a lot of what I just said,
18 that you really - - - it has to be a reasonable view. I
19 mean, when you have this kind of silly concept that this
20 man is out there, you know, covering his mouth when - - -
21 when he talks, and when somebody walks up to him in a
22 similar way that we might walk up to a clerk at K-Mart and
23 say, let me get two, he says, okay, fine, you can go
24 around the corner. I mean, it's - - - it's so, you know,
25 way over the top as a situation where he is a drug seller

1 who is not touching the drugs; he's a steerer.

2 JUDGE GRAFFEO: So - - - so what are the
3 characteristics or elements when you would need to have
4 the agency charge?

5 MR. ALONSO: Well, it depends, according to this
6 court, in People v. Herring, which is a well-reasoned
7 decision that's withstood the test of time. It depends
8 entirely, a hundred percent, on the relationship between
9 the buyer and the seller.

10 CHIEF JUDGE LIPPMAN: You think that's good law
11 today?

12 MS. COHEN: I do, I do, Your Honor. I don't
13 think Herring has been criticized or overruled.

14 JUDGE SMITH: Does Herring stand for the
15 proposition that if act-in-concert is charged, then you
16 don't need an agency defense in every case?

17 MR. ALONSO: You could read Herring to - - - to
18 say that at the very end.

19 JUDGE SMITH: Is that good law?

20 MR. ALONSO: I don't think that's been overruled
21 either. I don't think that's necessary to your decision
22 in this case, you know, the Herring proposition that it's
23 entirely dependent on the relationship between the buyer
24 and the seller.

25 JUDGE GRAFFEO: And what do you need in that

1 relationship?

2 MR. ALONSO: You need to have some indication
3 that there is a relationship. It doesn't have to be
4 prior.

5 JUDGE GRAFFEO: But they have to know each other
6 beforehand?

7 MR. ALONSO: It doesn't have to be beforehand,
8 no, no. I don't think that the court - - - this court's
9 ever gone that far, and I think Echevarria makes that - -
10 - makes that clear. I can - - - but I think there has to
11 be a relationship, some evidence that, like in Echevarria,
12 you know, this is a fellow drug addict I thought I was
13 helping out. There has to be something, a conversation, a
14 - - -

15 JUDGE SMITH: Well, yeah. Suppose - - - suppose
16 you walk up to a stranger on the street and say know where
17 I can get some weed and he says the best in town is up at
18 92nd Street, take the subway; is there an agency defense
19 there?

20 MR. ALONSO: Seems a heck of a lot closer to
21 getting an agency charge because that's like somebody
22 asking you for directions. That's like the difference
23 between asking the K-Mart customer versus the K-Mart store
24 clerk with the tag on - - - on her - - - on her blouse.

25 JUDGE SMITH: And what exactly is it that

1 distinguishes those cases?

2 MR. ALONSO: The relationship between the buyer
3 and the seller, the fact that there's some evidence - - -

4 JUDGE SMITH: I'm assuming - - - I'm assuming
5 there was none, that they're strangers.

6 MR. ALONSO: It's not about prior; it's about
7 some evidence in the record to show that this principal
8 agency relationship was even established in the first
9 place. And remember what they're saying. They're saying
10 no, this is not a drug dealer out on the street that is
11 able to steer you to the person who actually has the
12 drugs; this is a roving agent who's looking for
13 principals. It's - - - it's a - - - it's a little bit of
14 a stretch of an argument to begin with, so there has to be
15 some evidence in the record to show it, a conversation,
16 test - - - testimony, something.

17 Here, we have nothing. Here, we have a guy who
18 covers his mouth when he's asked let me get two, which is
19 common parlance for I would like to buy two of something,
20 in this case crack vials, he covers his mouth, and he's
21 the one with the money, 879 dollars, in what's concededly
22 a drug-prone location.

23 I just think that, you know, in - - - in - - -
24 when you are claiming error of the court, the court has
25 some discretion. At a certain point, it's not a close

1 call. This one's not a close call in respect to this
2 event.

3 JUDGE READ: What about O'Rama? What about
4 O'Rama? Why isn't that a real problem here?

5 MR. ALONSO: We don't think that's a real
6 problem at all. I mean, the - - - this is a - - - this -
7 - - what they're claiming here and in the Appellate
8 Division is that there's not a sufficient record. O'Rama
9 is about not - - -

10 JUDGE SMITH: Well, I think she's claiming that
11 there is a sufficient record to show that O'Rama was
12 violated.

13 JUDGE READ: Yeah, that there's nothing,
14 nothing.

15 MR. ALONSO: I don't - - - I don't know. I read
16 - - - I read the claim to be there's nothing in the record
17 that shows that the judge fulfilled his core
18 responsibility, not that - - -

19 JUDGE SMITH: Well, okay, but wouldn't that - -
20 - in every - - - I mean, O'Rama requires an affirmative -
21 - - some affirmative action by the - - - by the judge. So
22 in every O'Rama case, since the record has to be negative,
23 it's the absence of his doing it that is there. You say -
24 - - you're saying that - - - are you saying that we can
25 never find O'Rama error just from the absence of the judge

1 - - - doing what he's supposed to do?

2 MR. ALONSO: I'm not saying - - - I'm not saying
3 never. What I'm saying - - - what I'm saying is that it's
4 - - - you know, a trial is a partnership among litigants
5 and a judge. You can't just say on appellate scouring of
6 a record, ah-ha, this judge failed to do something, and
7 call it a day, right?

8 JUDGE SMITH: But isn't - - - but isn't that
9 what mode of proceedings error is?

10 MR. ALONSO: I think mode of proceedings error
11 is very narrow and tightly circumscribed and applies in -
12 - -

13 JUDGE SMITH: Yeah, but somehow O'Rama got in
14 there.

15 MR. ALONSO: Well, not necessarily. First of
16 all, O'Rama was a case where the - - - where in O'Rama
17 itself the error was preserved. The defense lawyer asked
18 to see the note in O'Rama, and it was not shown.
19 Furthermore, the - - -

20 JUDGE SMITH: Belatedly.

21 MR. ALONSO: Sorry?

22 JUDGE SMITH: Belatedly.

23 MR. ALONSO: It was, but it was certainly at a
24 time where, under 470.05(2), you could preserve error.
25 You can do it after. I mean, really what O'Rama - - -

1 what O'Rama is about is just providing - - -

2 JUDGE SMITH: Well, suppose - - - suppose in
3 this case there's no more - - - what happened is on the
4 record and everything that happened is on the record and
5 the judge did exactly what he did, what - - - when - - -
6 you said the - - - the lawyer was supposed to make the
7 objection when?

8 MR. ALONSO: The - - - well, first of all, the
9 judge - - - if we're assuming for the sake of this
10 argument that there was no lunchtime colloquy, which we
11 submit the Appellate Division got it exactly right on
12 that, but if we take that aside for this question, if all
13 we have is the record, the defense lawyer could have
14 objected at the point where the trial judge said, we have
15 a note, bring them in. Right? That means the jury is not
16 in the room.

17 JUDGE SMITH: Okay. But I - - -

18 MR. ALONSO: What's the note? May I please see
19 it?

20 JUDGE SMITH: Okay, but so is there any - - - I
21 mean, is there any O'Rama situation that doesn't require
22 preservation on your theory?

23 MR. ALONSO: I think - - - I think that if you
24 read your cases, particularly O'Rama and Kisoan, that I
25 think that the rule that comes out of it is when there's

1 been a complete deprivation, usually intentional, from the
2 - - - from the defense of the contents of a note. Most
3 typically, the vote, you know - - -

4 JUDGE SMITH: Well, on the - - - on this record,
5 the deprivation is pretty complete, but you're - - - but
6 you're saying he could have - - - between the - - -
7 basically, you're saying he has to stand up between "we
8 have a note" and "bring them in", or at least before they
9 get brought in?

10 MR. ALONSO: I think there's a number - - -
11 lawyers in New York County and around the state are not
12 shy about standing up and saying, I'm sorry, Your Honor,
13 that's not - - - that's not my understanding. Okay. The
14 fact that this very able lawyer, who is extremely
15 experienced, did not stand up and say, whoa, what do you
16 mean we have a note, wait, wait, wait, please, Your Honor,
17 don't bring the jury in. Of course, he should have done
18 that because at that point, assuming this didn't happen -
19 - - remember, they're not even saying it didn't happen.

20 JUDGE SMITH: But I'm - - - I see your point,
21 that preservation is possible. I guess I'm - - - my
22 problem is that it's always possible.

23 MR. ALONSO: I mean, I certainly - - - I
24 certainly think that, you know, if this court wants to go
25 that far and say it's always required in 310.30 cases, it

1 would not be that much of a stretch. That said, if we - -
2 -

3 JUDGE SMITH: Well, but except we'd have to
4 overrule a whole line of cases beginning with O'Rama.

5 MR. ALONSO: Probably have to overrule Kisoan,
6 but in any event, this court repeatedly, in probably seven
7 or eight cases that I counted, has required preservation
8 in O'Rama situations. In this case - - -

9 JUDGE SMITH: And can you explain to me exactly
10 what the golden thread is that - - - that distinguishes
11 those from the others?

12 MR. ALONSO: In requiring preservation?

13 JUDGE SMITH: Yeah.

14 MR. ALONSO: When the defense lawyer - - -

15 JUDGE SMITH: Well, yeah. What you - - - when -
16 - - yeah.

17 MR. ALONSO: Well, when the defense lawyer has
18 an idea that there is a note and that it is being
19 responded to, the defense lawyer can object. For example,
20 recently in Kadarko, Your Honor wrote in a case with a - -
21 - a vote where the judge intentionally did not let the
22 jury have the count but then corrected himself once the
23 jury was in deliberating twenty minutes later. It's
24 exactly the same thing that happened here, right? Even if
25 - - -

1 JUDGE SMITH: But what about - - - what about
2 Tabb? Tabb? Do I have the name wrong?

3 MR. ALONSO: Yeah. So - - - so Tabb is an SSM
4 from 2009, and Ramirez is an SSM from 2011. In Tabb - - -
5 I submit that Tabb is exactly like the case Cruz that the
6 court decided in the last couple years. In Cruz, a
7 majority of the court held that the presumption of
8 regularity that usually applies to criminal proceedings
9 applies with equal force to O'Rama claims. So that's what
10 I'm urging here, that the presumption of regularity
11 applies; however - - -

12 JUDGE SMITH: I haven't - - - I haven't heard
13 the distinction of Tabb yet other than that it's three
14 years ago and is an SSM.

15 MR. ALONSO: I promise I'm - - - I promise I'm
16 getting there. The - - - the thing about Cruz is that the
17 presumption in that case was overcome because there were
18 several serious irregularities in the proceeding. Same
19 thing with Tabb, right?

20 Tabb, if you read the submissions, and the one
21 from the People was three pages long, the one from the
22 defense was a little bit longer; they seem hopelessly
23 confusing. I mean, frankly, in Tabb, it's very - - - when
24 the People urge that the presumption of regularity applies
25 with three to five notes, I can't tell how many, a bunch

1 of off-the-record colloquies, none of them put on the
2 record, I can imagine this court - - - I don't want to
3 presume, but I can imagine this court saying, life's too
4 short to figure out what happened in Tabb, you have not
5 overcome the presumption of regularity.

6 JUDGE READ: So you're saying everybody knew
7 what was coming, they weren't surprised. The defense
8 counsel - - -

9 MR. ALONSO: In this case?

10 JUDGE READ: Yes, in this case.

11 MR. ALONSO: Absolutely. You haven't heard - -
12 - you haven't heard anyone say here that the defense
13 lawyer didn't see the note, right? You're just - - -
14 you're just hearing the record doesn't show that he saw
15 the note. You have three record bases by which to affirm
16 this case. One is the reasonable inference that the
17 Appellate Division made that there was an off-the-record
18 colloquy. This was a 2:05 p.m. note. In New York County,
19 we're at lunch at 2:05 p.m. If we're lucky, we come back
20 on at 2:15. And, you know, when the judge - - -

21 JUDGE SMITH: Are you - - - you really
22 suggesting the rule that - - - that preserve - - - that we
23 have a different rule for cases between 2 and 3 than
24 between 3 and 4?

25 MR. ALONSO: I'm not suggesting that, but I am

1 suggesting that, like many cases, the appellate courts
2 make reasonable inferences about what the facts are. If I
3 may finish the answer to Judge Read's question - - -

4 CHIEF JUDGE LIPPMAN: Quickly counsel. Go
5 ahead.

6 MR. ALONSO: Thank you. So that the other two
7 bases for affirming this are on constraint of Starling and
8 Ramirez. Ramirez, the facts are identical to these,
9 identical. The judge reads it in front of the jury. And
10 the third I'm blanking on, so I won't ask for more time.

11 CHIEF JUDGE LIPPMAN: All right.

12 MR. ALONSO: But - - - but I do ask that you
13 affirm the judgment of the - - -

14 CHIEF JUDGE LIPPMAN: Thank, counselor.

15 MR. ALONSO: Thank you.

16 CHIEF JUDGE LIPPMAN: Rebuttal, counselor?

17 MS. COHEN: Yes. I just want to point out that
18 the same arguments that respondent is making now were
19 precisely the arguments that were made in Tabb. And this
20 court was aware of those arguments, considered those
21 arguments and determined that, because of the critical
22 nature of the proceedings where a deliberating jury is
23 requesting clarification of the elements of law at a time
24 where a court's response may well determine the outcome of
25 the case, there must be record proof that the court

1 complied with these core responsibilities, not just to
2 provide notice to counsel of the precise contents of the
3 note, but also to provide counsel with the opportunity to
4 provide input into the court's response.

5 JUDGE SMITH: I - - - I understand your point
6 about some of our cases. Assume - - - assume we were
7 writing on a clean slate, which we're obviously not, does
8 it make any sense to say that preservation shouldn't be
9 required in something like this? I mean, at some point
10 this lawyer surely could have said, hey, Judge, I didn't
11 even see the note.

12 MS. COHEN: At what point? I mean, he's
13 suggesting that you should have said it when you just
14 enter the courtroom. We don't know exactly when that is.

15 JUDGE SMITH: He - - - he never said it.

16 MS. COHEN: Well - - -

17 JUDGE SMITH: First time he says it is on
18 appeal. Is that - - - is that a good way to - - - I mean
19 - - -

20 MS. COHEN: I disagree with that. I - - -

21 JUDGE SMITH: - - - putting aside the precedent,
22 which is a problem, is that a good way to do business?

23 MS. COHEN: I actually disagree with that
24 because the - - - there's a note at 2:05. They're brought
25 in. We don't know what time they're brought in. The note

1 was written at 2:05. They come into the courtroom. The
2 judge gives this very expansive charge on acting in
3 concert, including elements that clearly defense counsel
4 had a problem with because, right on the heels of that
5 note, the jury at - - - the jury gives another note - - -

6 JUDGE SMITH: And - - - and he says you - - - he
7 says please do it better this time, Judge, read it more
8 slowly. But why - - -

9 MS. COHEN: Not just more slowly - - -

10 JUDGE SMITH: But if he's - - -

11 MS. COHEN: - - - remove the elements.

12 JUDGE SMITH: But why should we not require to
13 preserve O'Rama error? Why should we not require him to
14 say, Your Honor, I point out to you that in violation of
15 the - - - of the CPL, you didn't show me the note, and
16 you're supposed to show me the note?

17 MS. COHEN: Because there are certain moments
18 that are so critical to a jury trial, there - - - where a
19 mode of proceeding error has occurred where - - - in a
20 situation like this, precisely a situation like this,
21 where you have a jury who has tremendous difficulty
22 reaching a verdict, who's clearly conflicted about this
23 acting-in-concert charge, who keeps repeating and asking
24 different questions on this charge.

25 In this situation - - - where the jury is

1 requesting reinstruction on the law, clarification on the
2 law - - - in that situation, the court's response to this
3 jury note very - - - may very well determine the outcome
4 of the case. And in that situation, you must have record
5 compliance or else what you're doing basically is you're
6 saying, well, object. You're going to object in front of
7 the jury? When are you - - - you know, put a time for
8 objection. There's certain core requirements that must be
9 fulfilled, and those core requirements are not subject to
10 preservation or harm.

11 CHIEF JUDGE LIPPMAN: Okay, counselor.

12 Thank you, both. Appreciate it.

13 (Court is adjourned)

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

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Timothy Williams, No. 112 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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