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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 58

CHRISTOPHER SALAS,

Appellant.

20 Eagle Street
Albany, New York
May 15, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Salas.

3 MR. BRINDIS: Good afternoon, Your Honors. And
4 may it please the court. Benjamin Brindis for the
5 appellant, Christopher Salas. I request that three minutes
6 be reserved for rebuttal.

7 CHIEF JUDGE WILSON: Yep.

8 MR. BRINDIS: I'll address both issues raised in
9 the brief, beginning with the meaningful notice violation.

10 JUDGE HALLIGAN: Could you speak up just a bit,
11 Counselor?

12 MR. BRINDIS: Sure. I'll address both issues
13 raised in the brief, beginning with the meaningful notice
14 violation. In a line of unbroken precedent, this court has
15 stated the same rule that controls this case. There must
16 be specific record proof of meaningful notice for each
17 substantive jury note.

18 JUDGE GARCIA: Counsel, you raised this issue
19 first in a 440, right?

20 MR. BRINDIS: No. We - - - we sought a 440
21 initially on the ineffective assistance of counsel claim.
22 And because we were making that motion before the trial
23 judge, we were convening - - - you know, speaking with
24 trial counsel, it was going to be served on the respondent.
25 Essentially, everyone who may have had knowledge of how

1 jury note 2 was handled, because we were concerned about
2 sandbagging if we raised this for the first time in the
3 Appellate Division.

4 JUDGE GARCIA: So it was raised in the trial
5 court then, in that proceeding or no?

6 MR. BRINDIS: No. There was alternative relief
7 sought alter - - - on the 440 motion, the alternative
8 relief of reconstruction was sought. But you're correct
9 that everyone who may have had knowledge of how jury note 2
10 was handled was put on notice through that, that there was
11 an O'Rama issue here, and we have no reason to - - -

12 JUDGE GARCIA: It seems at some point in that
13 record, and I may have this wrong, that your position was
14 there was a missing transcript pages and a portion of
15 transcript was missing and that you were entitled to a
16 reconstruction hearing?

17 MR. BRINDIS: We were noting that there was no
18 transcript for how jury note 2 was handled.

19 JUDGE GARCIA: And before today you never asked
20 for reconstruction hearing?

21 MR. BRINDIS: No. We sought reconstruction as
22 alternative relief in the trial court. We raised this
23 O'Rama issue in the Appellate Division. And again, as
24 alternative relief, we - - - we sought reconstruction. But
25 this court - - -

1 JUDGE RIVERA: What was the primary relief? If
2 that's the alternative relief.

3 MR. BRINDIS: Vacatur under O'Rama. Because - -
4 -

5 JUDGE RIVERA: Okay.

6 MR. BRINDIS: - - - it's not contested here.

7 JUDGE RIVERA: For the O'Rama violation?

8 MR. BRINDIS: For the - - - yes, the O'Rama
9 violation and specifically a meaningful notice O'Rama
10 violation. There's no dispute here that the record is
11 devoid of any proceeding when meaningful notice could have
12 been given on note 2.

13 JUDGE TROUTMAN: So are you asking for a ruling,
14 if a transcript is missing, that there's a presumption that
15 there was a violation - - -

16 MR. BRINDIS: No.

17 JUDGE TROUTMAN: - - - that requires what - - -
18 the relief that you're asking?

19 MR. BRINDIS: No. To the contrary, this court
20 has found that there is no presumptions here in either
21 direction. The issue is that the record is dispositive of
22 whether meaningful notice was given in - - -

23 JUDGE TROUTMAN: And in normal O'Rama situations
24 you have a transcript. So - - - and - - - and it focuses
25 on the court making an error. Here, what was the error of

1 the court?

2 MR. BRINDIS: Well, the error of the court is the
3 same as it was in Silva and its companion case Hanson.
4 This court addressed this issue just over a decade ago. In
5 - - - in Hanson, what the record showed is basically on the
6 day the verdict was given, the court comes on the record
7 and says, we have a note, they have - - - you know, there's
8 a - - - the jury has reached a verdict and the case file
9 there, just like the case file here, contains substantive
10 notes that were not addressed on the record by the - - -
11 the court in Hanson.

12 JUDGE CANNATARO: But Counsel, you just - - -

13 JUDGE SINGAS: But they weren't addressed because
14 they were missing. And you acknowledge that they were
15 missing, right? So this is a different situation where
16 there wasn't something that happens off record that isn't
17 on the record. We know that there were on-the-record
18 discussions. We just don't know the exact what they were
19 because the transcripts are lost. So now you're asking us
20 to put that burden on the courts to keep those transcripts?

21 MR. BRINDIS: No. To the contrary, Your Honor,
22 the record shows that jury note 2 was handled differently
23 than jury note 1 and jury note 3. Both jury note 1 and
24 jury note 3 are marked on the - - - the face with a court
25 exhibit, Court Exhibit 2 and Court Exhibit 4. Court

1 Exhibit 3, which is jury note 2, is not marked on its face.

2 JUDGE CANNATARO: So - - -

3 JUDGE SINGAS: But we have no reason to
4 understand why that happened or why that didn't happen,
5 because there wasn't any diligence done beforehand to try
6 to get information from either anyone who was present to
7 reconstruct it, a la Parris.

8 MR. BRINDIS: Well, to be clear, we made this
9 motion with alternative relief of reconstruction which was
10 served on everyone who may have had knowledge of it. It
11 was made before Justice Carter, who oversaw the trial.

12 JUDGE TROUTMAN: How long after it was quite
13 clear that there was an issue with transcripts, was that
14 request made?

15 MR. BRINDIS: Well, I want to be very specific
16 about this because we received an affidavit in 2016, the
17 Williams affidavit. And what that affidavit said was that
18 in response to repeated requests for the minutes, Terry
19 Kline (ph.) informed us that she was in the process of
20 transcribing the minutes and would send them in as soon as
21 possible. That's at the record at A-96. We continued to
22 follow up with the reporter's office and - - - and the
23 First Department until 2019. In 2019, we did actually
24 receive additional transcripts. Those are the transcripts
25 that show meaning of notice number 1.

1 JUDGE TROUTMAN: So again, it's 2016, everybody's
2 waiting. So it's perfectly fine to just wait because the
3 reporter said they're coming?

4 MR. BRINDIS: Yes. We were - - - we were
5 instructed that the reporter was transcribing the minutes.

6 JUDGE TROUTMAN: But wouldn't it indicate with
7 such a long period of time - - - transcripts can be
8 prepared, daily copy, quite frankly. And a - - - a whole
9 trial transcript, it can be prepared in a - - - in a
10 reasonable amount of time, even when it's a long
11 transcript. It doesn't take years to produce. So my
12 question to you is because of the inordinate amount of
13 time, shouldn't something further have been done?

14 MR. BRINDIS: I - - - I don't think that this - -
15 - this court's precedent, even in Parris, requires that. I
16 mean, the - - - the fact of the matter is, is I agree with
17 you; it can be done in a short amount of time. But in
18 2019, we received the additional transcripts and - - -

19 JUDGE TROUTMAN: But do you - - - do you agree
20 that the more - - - the greater the passage of time - - -
21 there was a lot of time from trial up until now even, that
22 went by and the - - - the more time that passes, even if
23 one would ask for a reconstruction, it's kind of - - - it's
24 challenging to have one that can be successful.

25 MR. BRINDIS: Well, I'd emphasize again that this

1 court's O'Rama precedent and meaningful notice precedent in
2 cases like Silva and Hanson don't require reconstruction
3 before seeking relief under O'Rama.

4 JUDGE GARCIA: Counsel, I'm looking - - -

5 JUDGE SINGAS: I want to push - - -

6 JUDGE GARCIA: I'm sorry. I'm looking at the
7 record of your 440 motion, and I believe you told me you
8 didn't make this as part of your 440 motion. But in point
9 2 of your 440 motion is, "your client is entitled to a
10 reconstruction hearing to determine how the court handled
11 jury note 2". And that doesn't ask for anything in the
12 alternative, it just says "transcript is missing. We're
13 entitled to a reconstruction hearing." And that's what the
14 440 court ruled on.

15 MR. BRINDIS: Well, the 440 - - - 440 court
16 ruled, and I want to emphasize that - - -

17 JUDGE GARCIA: Wait. I'm sorry. Did you tell me
18 before you didn't make the reconstruction motion as part of
19 your 440, or did I misunderstand?

20 MR. BRINDIS: No. We did seek reconstruction as
21 alternative relief.

22 JUDGE GARCIA: To what?

23 MR. BRINDIS: To a 440 motion on the
24 ineffectiveness - - -

25 JUDGE GARCIA: Right.



1 MR. BRINDIS: - - - assistance of counsel point.

2 JUDGE GARCIA: Right.

3 JUDGE CANNATARO: And that motion was denied with
4 leave to renew, was it not?

5 MR. BRINDIS: Correct.

6 JUDGE CANNATARO: The court found that although
7 you made some efforts to ascertain what happened, you
8 didn't - - - to put it, you know, to paraphrase, you didn't
9 make sufficient efforts, and it was giving you an
10 opportunity to do that?

11 MR. BRINDIS: Correct. We granted - - - and we
12 granted multiple extensions to respondent here to conduct
13 their own investigation. There's eight months that passed
14 between the final - - -

15 JUDGE HALLIGAN: So - - -

16 JUDGE GARCIA: My issue - - -

17 JUDGE HALLIGAN: So after - - -

18 JUDGE GARCIA: I'm sorry. My issue primarily is
19 you took this position in your 440 that in the alternative,
20 you were entitled to a reconstruction hearing because there
21 was missing transcript. But now on direct appeal, your
22 position is you should just reverse because there's no
23 evidence in the record?

24 MR. BRINDIS: Well, to be entitled to a
25 reconstruction instance in the first instance there needs

1 to be evidence that a proceeding occurred that could be
2 reconstructed. And to this day - - -

3 JUDGE GARCIA: And you seem to be - - -

4 MR. BRINDIS: - - - there's no evidence in the
5 record.

6 JUDGE GARCIA: - - - saying there was, in your
7 440 papers?

8 MR. BRINDIS: There - - - there - - - to this day
9 - - -

10 JUDGE GARCIA: That there was evidence that
11 entitled you to a reconstruction hearing, that there was
12 missing transcript pages.

13 MR. BRINDIS: In the interest of judicial
14 economy, we - - - we raised that issue at our first
15 opportunity. We - - - we identified that there was a
16 transcript missing - - -

17 JUDGE GARCIA: Right.

18 MR. BRINDIS: - - - in the sense that it did not
19 exist. There was - - -

20 JUDGE GARCIA: No. You said a key portion is
21 missing. The record is incomplete. But now you're saying
22 you don't get a reconstruction hearing?

23 MR. BRINDIS: Well, we don't believe that
24 respondent was hiding the ball from us, you know, when
25 they're responding to it. If there was a transcript to be

1 reconstructed, if there was a proceeding, no facts or
2 evidence was added to - - - to the record that would
3 suggest that that - - - that that proceeding was held and
4 that transcript - - -

5 JUDGE RIVERA: So is that - - -

6 JUDGE SINGAS: Are you suggesting now that there
7 wasn't a - - - a - - - a missing transcript, if there was a
8 transcript? Because your 440, again, is very clear. "A
9 key portion of the transcript reflecting the court's and
10 counsel's handling of jury note 2 is missing. Thus, a
11 reconstruction hearing is needed to determine how jury note
12 2 was handled."

13 MR. BRINDIS: Correct. It is missing. There is
14 no transcript for how jury note 2 was handled.

15 JUDGE RIVERA: So am I - - - am I understanding
16 you now explaining why you're not necessarily pressing the
17 issue on reconstruction? Because, as you said before, all
18 those who might have had information were served with the
19 motion and no one came forward with information - - -

20 MR. BRINDIS: Correct. After they - - -

21 JUDGE RIVERA: - - - that would resolve this
22 issue? Because you were granted leave to renew if you
23 could - - - I think that's what the judge said anyway, to
24 go find information?

25 MR. BRINDIS: Well, we consulted with respondent

1 following it, and we did not think that information - - -
2 you know, there - - - there would be information that would
3 come from - - -

4 JUDGE HALLIGAN: What does the record tell us
5 about that specifically? What were the efforts? So - - -
6 so the application was denied with leave to renew. And
7 what does the record show about what efforts were made
8 subsequent to that, in light of the - - - the court's
9 determination that you had, quote, "fallen short of
10 pursuing other means available to increase the likelihood
11 of effective reconstruction"?

12 MR. BRINDIS: I - - - I would agree that the - - -
13 - the record itself is silent on that. The record does
14 reflect - - -

15 JUDGE HALLIGAN: So were there efforts made after
16 the denial of leave to renew or not?

17 MR. BRINDIS: Yes. We - - - we reached out to
18 the respondent.

19 JUDGE HALLIGAN: Okay. But is there anything in
20 the record that establishes the nature or - - - or - - -
21 you know, quantum of those efforts?

22 MR. BRINDIS: Well, I think that the record
23 establishes in respondent's papers in response to the 440
24 motion that they too had conducted investigation and they
25 could not find a - - - a transcript or - - - or - - - and

1 they didn't include any facts in their affidavit in
2 response to the 440 motion.

3 JUDGE HALLIGAN: So your - - - your position is
4 that it would have been futile to take any further steps as
5 the - - - as the trial court suggested you might?

6 MR. BRINDIS: Our position is that reconstruction
7 is not a prereq - - - prerequisite to a O'Rama vacatur and
8 relief under O'Rama - - -

9 JUDGE CANNATARO: So how do we - - -

10 MR. BRINDIS: - - - it wasn't necessary.

11 JUDGE HALLIGAN: Just - - -

12 JUDGE CANNATARO: - - - in - - - in the absence
13 of the - - - of the record, which is now just part of the
14 record that we have in front of us, how do we evaluate the
15 claim of the court's mishandling of its obligations under
16 310.10?

17 MR. BRINDIS: This case presents on the same
18 facts as Silva and Hanson did, and that's how this court
19 should - - - should evaluate it.

20 JUDGE CANNATARO: Weren't there records in that -
21 - - in those cases?

22 MR. BRINDIS: The - - - the record was completely
23 silent in both Silva and Hanson as to - - -

24 JUDGE CANNATARO: Yes, but we don't know whether
25 the record is completely silent in this case, because we

1 don't have the record.

2 MR. BRINDIS: Well, no, there's no - - - nothing
3 in the record that refers to a proceeding that wasn't
4 transcribed. There's no reference in the record to a
5 proceeding when meaningful notice was given. And the
6 record shows that note 2 was handled differently - - -

7 JUDGE RIVERA: I think the - - -

8 MR. BRINDIS: - - - than note 1 and 3.

9 JUDGE RIVERA: - - - I think the - - - I think
10 the line of inquiry here is because there are pages
11 missing, right? Pages missing from the transcript?

12 MR. BRINDIS: We don't know if there are pages
13 missing because - - -

14 JUDGE RIVERA: Well, I thought that was your
15 argument. That there is - - - there is a transcript, at
16 least part of a transcript that's missing. And I think the
17 line of inquiry is, well, that part that's missing might
18 show that indeed the note was provided to counsel, or it
19 might reveal something else about how the court handled the
20 note.

21 MR. BRINDIS: I mean, that could be said in any
22 meaningful notice context, right? Whenever meaningful
23 notice - - -

24 JUDGE RIVERA: Well, not necessarily, if you have
25 the transcript and you can just read it.

1 MR. BRINDIS: Right. But like in Silva and
2 Hanson, it could have been said in the briefing papers by
3 respondent unsupported by factual evidence in the record,
4 that in Hanson, you know, there was a transcript or there
5 were proceedings and it's simply missing. Right?

6 JUDGE HALLIGAN: Do you agree that if the pages
7 of the transcript had been recovered and it established
8 that jury note 2 was properly handled, that - - - that that
9 would be the end of it?

10 MR. BRINDIS: Well, yes. That would not present
11 a - - - a meaningful notice.

12 CHIEF JUDGE WILSON: Counsel - - -

13 JUDGE HALLIGAN: Right. And - - - and so - - -

14 CHIEF JUDGE WILSON: I'm sorry.

15 JUDGE HALLIGAN: - - - so it seems to me the
16 question is - - - is different than - - - than the other
17 cases you cite, because the problem is we don't know what
18 the pages say, and the pages could completely obviate any -
19 - - any potential error?

20 MR. BRINDIS: Well, it's actually very similar to
21 Morrison. For example, in Morrison, there was an affidavit
22 submitted by, in that case, the appellant prosecution in
23 the Appellate Division that said - - - that made a record
24 in the Appellate Division that meaningful notice
25 obligations were met by the - - - the judge, marking the

1 exhibits and handing the - - - the - - - the jury notes to
2 the defense counsel at trial. This court in Morrison did
3 not take that into account and said that the record
4 governs.

5 JUDGE GARCIA: Do you think it's different - - -
6 and I'm having some trouble here, where defense counsel in
7 the 440 said there's missing transcript, and there are a
8 number of back and forth with the court reporter's office
9 about the court reporter leaving pages not being able to be
10 recovered, there's clearly two different court reporters
11 here, and that record is developed in your 440. And it
12 seems to me now, where I read these papers as saying
13 there's missing transcript, and you were conceding that.
14 That now you're casting that as, no, there's missing
15 transcript in the sense that there's no transcript existing
16 that says this.

17 MR. BRINDIS: Well, I'd direct you specifically
18 to the affirmation that accompanied the 440 motion, because
19 that sets forward the forward the facts, you know that the
20 - - - the motion is relying upon. And I'd posit to you, if
21 you review that motion, you will not reach the conclusion
22 that it contains facts showing that a proceeding was held
23 to give notice for jury note 2.

24 JUDGE GARCIA: It just seems that's not entirely
25 consistent with the position you took in your 440 motion.

1 MR. BRINDIS: Well, the - - - the briefing papers
2 don't create the record and the factual record the same way
3 that respondent's briefing papers here - - - and it's
4 speculation about what may have happened to this
5 transcript, does not create a record that a - - - a
6 proceeding was held. This applies in all - - - in many
7 other contexts in appellate review. Take for example, the
8 issue of preservation. If someone makes a general
9 objection to something and then asks to approach the bench,
10 and then there's a discussion held off the record, off the
11 bench, for any - - - for some reason. And they return and
12 they don't place a specific objection on the record,
13 there's an inference that there was a specific objection
14 made, but that issue is not preserved for appellate review.
15 It does not cure that.

16 JUDGE RIVERA: Counsel, your red light is on.

17 MR. BRINDIS: Yeah.

18 JUDGE RIVERA: Could you just take a moment to
19 address the second issue?

20 MR. BRINDIS: Yeah, absolutely. Counsel's
21 multiple errors here transformed the identification
22 evidence before - - - before the jury. The only
23 identification evidence untainted by trial counsel's errors
24 were two in-court identifications made four years after the
25 incident for the first time by witnesses who were strangers

1 to Mr. Salas on the night of August 22nd, 2007. They were
2 first-time identifications.

3 JUDGE SINGAS: Yeah. I'd like to talk about the
4 - - - one of the identifications, because I - - - I find
5 this very interesting. So - - - and - - - and bear with me
6 - - - and I know that the light is on. But defense counsel
7 in his opening statement says there were never any
8 photographs shown. The judge decides that that opened the
9 door to an identification. The judge doesn't decide, as
10 defense counsel suggested, "Look, judge just ask the
11 question, were photographs shown?" The judge says, "No.
12 I'm going to allow in an identification that took place the
13 night of the murder, a few hours after the murder. I'm
14 allowing somebody to come in and talk about that
15 identification."

16 MR. BRINDIS: The only contemporaneous
17 identification that occurred.

18 JUDGE SINGAS: Right. But that wasn't the
19 defense attorney's ineffectiveness. I don't - - - I don't
20 know, I want your opinion on this, that caused that. I
21 think the judge came up with a disproportionate remedy of
22 actually bringing in an identification that now the defense
23 attorney has to deal with for the rest of the trial.

24 MR. BRINDIS: Well, the prosecution specifically
25 sought this relief immediately before Mr. Urena - - -

1 JUDGE SINGAS: correct.

2 MR. BRINDIS: - - - testified. And - - - and
3 they sought relief similar to this immediately after the
4 decision - - - the misstatement was made. So it - - - it
5 was directly the result of trial counsel's error that
6 brought in the only contemporaneous identification they
7 heard.

8 JUDGE SINGAS: I know. I guess that's what I'm
9 struggling with because the error was, I - - - I take it,
10 the statement at opening that there were no photographs
11 shown here. And from that statement, the judge makes a
12 ruling that an identification is going to come in. So now
13 a defense attorney has to deal with the fact that this
14 identification is coming in. So are you ascribing the
15 identification testimony to that error where he said there
16 were no photographs shown?

17 MR. BRINDIS: Correct. Because that
18 contemporaneous identification was categorically
19 inadmissible.

20 JUDGE SINGAS: But the defense attorney never
21 said anything about an identification.

22 MR. BRINDIS: In the context of what he's saying,
23 he says no, there were no lineups shown to witnesses.
24 There were no photographs shown to witnesses. It was
25 impeaching the - - - the quality of the investigation, and

1 it did open the door as the People took the position at
2 trial to that testimony. You know, and I want to emphasize
3 that there were three theories of identi - - -
4 misidentification during the opening statement. It was
5 that no witnesses had prior encounters with Mr. Salas, no
6 witnesses were - - - all of the witnesses would be close
7 friends with the deceased - - -

8 JUDGE SINGAS: Well, do we know at what point the
9 People told him that that witness was actually coming in?
10 Is it feasible that when he opened, he understood that that
11 person wasn't coming in, that had the prior familiarity
12 with him, and that he would only be dealing with those two
13 witnesses?

14 MR. BRINDIS: Well, he had been led to believe
15 that by the prosecution's statement, and they - - - they
16 described it as a definitive representation, that they're
17 not going to call Urena. And Urena - - -

18 JUDGE SINGAS: Right. So then how is it
19 ineffective for him to say, basically, you're not going to
20 hear at this trial that anyone had a prior familiarity with
21 him or whatever it is that he said, if he was under the
22 impression that that witness wasn't coming in?

23 MR. BRINDIS: Well, because he did not move for a
24 mistrial after the prosecution changed course on that
25 definitive representation. The prosecution can't engage in

1 a bait and switch where they make a definitive
2 representation prior to trial, when the defense counsel
3 selects the defense that they're going to make and makes
4 these representations that there were no photographs shown,
5 all of the witnesses were close friends of the deceased,
6 and - - - you know, none of these had prior encounters with
7 - - - with Mr. Salas. The very first identification
8 witness that the prosecution called was Mr. Urena and Mr.
9 Urena on direct the information was elicited from him that
10 he had never before even seen the deceased.

11 JUDGE SINGAS: Yeah. But I - - - I guess again,
12 that goes back to the remedy that the judge came up with.
13 So now, of course, a defense attorney has to elicit this
14 identification because it's coming in. So he's going to
15 try to temper it and bring it in on his terms.

16 MR. BRINDIS: It wasn't brought in by the defense
17 attorney. It was elicited by the prosecution, who also
18 elicited that he had a prior encounter with Mr. Salas, who
19 also - - -

20 JUDGE SINGAS: But I - - - I thought in your
21 papers you said that part of the error was the fact that he
22 elicited that the identification occurred via a photograph,
23 and that he did that through his cross-examination?

24 MR. BRINDIS: That was after the identification
25 had already come in. Mr. Urena testified in - - - on

1 direct that he had identified Mr. Salas to Det. Geary
2 (ph.), without any mention of photographs. That happened
3 on direct. It was only after that - - -

4 JUDGE SINGAS: Right. Pursuant to the judge's
5 orders.

6 MR. BRINDIS: Pursuant to the judge's orders,
7 that - - - that were the result of the error during opening
8 statement. Where he opened the door to this photograph
9 identification that was inadmissible.

10 I recognize my time is up.

11 CHIEF JUDGE WILSON: You do have your rebuttal
12 time still.

13 MR. BRINDIS: Okay. Thank you.

14 MR. MARRERO: Good afternoon, Your Honors. May
15 it please the court. Excuse me. Gamaliel Marrero for the
16 respondent.

17 On point one, Your Honors, I do think it's
18 incumbent upon me to clarify the record a bit to explain
19 exactly what happened here. So initially, counsel - - -
20 the defendant received an affidavit in 2016, a certified
21 record on appeal, including an affidavit from the court
22 reporters. Now, yes, in that affidavit, the court reporter
23 said the stenographer, Terry Kline, it told - - - told him
24 she's working on it. But it also says, this is at page 896
25 of the response - - - of the appendix. "Our most recent

1 request for Terry - - - for Ms. Kline to send in the
2 portion she already has transcribed, and to estimate when
3 we can expect to get the entire minutes, has gone
4 unanswered. Without the cooperation of Ms. Kline, we are
5 unable to provide the required transcript." So it wasn't
6 simply, well, we were told she's getting back to us. The
7 stenographer is being uncooperative. So even in 2016,
8 there was reason then to pursue reconstruction. But fine.

9 They wait until - - - I guess there's a phone
10 call or two. We don't really know. It's not in the
11 record. But they get a portion of transcripts in 2019;
12 three years later. The - - - I believe the morning of May
13 - - - the afternoon of May 25th, 2011, and the afternoon of
14 May 26th, 2011, it's still incomplete.

15 JUDGE TROUTMAN: Is it to pursue an actual
16 reconstruction at that point, or to at least alert those
17 who may have been involved before that if they have
18 information, it should in the very least be preserved?

19 MR. MARRERO: I'm sorry, Your Honor, what - - -
20 that wasn't done here.

21 JUDGE TROUTMAN: In this particular instance when
22 - - - 2016 there's equivocation as to does it exist, when
23 will you get the transcript? And there is a - - - you
24 argue that maybe there is a concern at that point that a
25 reconstruction should have been requested. But even if, at

1 that point, it's not risen to the level of you know you
2 need a reconstruction, might it alert one, there's a
3 problem with the transcript? And if there is information
4 that may be needed going forward for a reconstruction, one
5 should at least take efforts to preserve that?

6 MR. MARRERO: Yes, Your Honor. And that's what
7 this court said in Parris, that if you - - - if you learn
8 that minutes are missing, at a minimum, reach out to court
9 personnel, the - - - the judge, the prosecutor. I just
10 want to add, according to Parris, simply filing a motion
11 for reconstruction and putting, you know, the DA's office
12 and perhaps the judge on notice, that is not sufficient - -
13 - that that - - - that is - - - that is not a threshold
14 showing that reconstruction can actually be accomplished.

15 Before you get the reconstruction hearing, you've
16 got to show that you've taken these initial investigative
17 steps.

18 JUDGE GARCIA: Counsel, my sense of this record
19 is - - - and there's another letter in 2019 talking about
20 missing notes and unable to get them, that the entire focus
21 of this 440 was on trying to find missing pages and having
22 a reconstruction hearing?

23 MR. MARRERO: Well, frankly, Your Honor, that was
24 - - - was - - - wasn't really the main focus at all.

25 JUDGE GARCIA: No. But on that part of the

1 hearing. There was no allegation there's - - - this never
2 happened. It was, we can't find the transcript where it
3 may have happened.

4 MR. MARRERO: Right. And as - - - as you read in
5 the 440 papers, the defendant said at that time, without
6 the portion of the transcripts, we cannot determine what
7 happened with jury note number 2.

8 And I just want to read something from the 440 -
9 - -

10 JUDGE TROUTMAN: So is that creating a
11 presumption? There's a missing transcript, therefore there
12 must be an O'Rama violation?

13 MR. MARRERO: No, not at all, Your Honor. Not at
14 all, Your Honor. And just - - -

15 JUDGE CANNATARO: But doesn't it - - - I mean, it
16 - - - or would you - - - would you at least characterize it
17 as your adversary asking for that - - - like, a presumption
18 of irregularity, basically?

19 MR. MARRERO: Well - - -

20 JUDGE CANNATARO: We don't have the transcript,
21 therefore - - - because I - - - it sometimes sounds like
22 that's what they might be asking for. Since we don't have
23 the record, you have to assume that they didn't deal with
24 Exhibit 2 - - - the court didn't deal with Exhibit 2
25 correctly?

1 MR. MARRERO: That's exactly what they - - -

2 JUDGE RIVERA: And on - - - and on its face, the
3 note is treated differently?

4 MR. MARRERO: I'm sorry?

5 JUDGE RIVERA: On its face, the note is treated
6 differently?

7 MR. MARRERO: Well, it's treated differently - -
8 -

9 JUDGE RIVERA: It's sandwiched between two other
10 notes that are treated very differently.

11 MR. MARRERO: We don't know who treated it
12 differently. That's - - - and that's where Myers comes in
13 - - - this court's decision in Myers, because we don't know
14 who treated it differently. We don't - - - perhaps the
15 jury never submitted it. And that's why the bottom section
16 was not filled out for jury note number 2.

17 JUDGE RIVERA: So let's - - - so let's take the
18 hypothetical. There's absolutely no way to know. We just
19 will never know. Just assume no one is around to - - - who
20 recalls, or they are deceased. No, there is no way to
21 know. Who bears the consequences of that?

22 MR. MARRERO: Under Parris, the defendant. The
23 defendant. Here, you have missing transcripts. It's not
24 just the ambiguities in the jury note. You have missing
25 transcripts. And there actually was a factual

1 determination that those transcripts were missing. That's
2 at page 7 of the 440 court's decision, where it says, "To
3 date the transcript record of the colloquy between the
4 parties and the court as it pertains to jury note 2 is
5 irretrievably lost." That was a factual finding by the 440
6 court based on - - -

7 JUDGE RIVERA: But the court gave them leave to
8 go and try and get information to support a request for
9 reconstruction hearings.

10 MR. MARRERO: Right.

11 JUDGE RIVERA: So the court thought maybe you
12 could find information.

13 MR. MARRERO: Well, that goes to the Parris
14 analysis. I just wanted to point out that there - - - just
15 to clarify, there was a factual determination based on the
16 sworn affidavits of the stenographers and the incomplete
17 transcript that was available, that the note - - - there -
18 - - there was a transcript and was irretrievably lost. And
19 in fact, the defendant did rely upon that factual
20 determination in his brief to the Appellate Division. He
21 cited to that in reliance on his argument there - - -

22 CHIEF JUDGE WILSON: Put - - - put the jury note
23 in O'Rama aside for a second. Suppose the entirety of the
24 defendant's trial transcript is missing and the defendant
25 wants to appeal, where does the loss of the transcript

1 fall?

2 MR. MARRERO: Well, I - - - I would say it would
3 still - - - you - - - you apply the Parris analysis. I
4 mean, Parris - - - Parris analysis applies - - -

5 CHIEF JUDGE WILSON: Which is basically the whole
6 transcript is lost and so is your right to appeal?

7 MR. MARRERO: No. Well, no, Your Honor, because
8 you can still pursue reconstruction.

9 CHIEF JUDGE WILSON: So suppose it can't be
10 reconstructed. Same facts we have here. No way to get the
11 transcript and nobody remembers it.

12 MR. MARRERO: Well, in Parris, the inability to
13 reconstruct did not automatically guarantee reversal.

14 CHIEF JUDGE WILSON: Okay. So your answer here
15 to my hypothetical is if the - - - if a defendant's entire
16 transcript was lost and there's no way to reconstruct it,
17 no record of what happened at the trial; defendant has a
18 bunch of things he'd like to raise as errors, he is just
19 out of luck?

20 MR. MARRERO: Well, it depends on the reasons why
21 reconstruction can't be - - - why it can't be - - -

22 CHIEF JUDGE WILSON: Everybody's dead.

23 MR. MARRERO: Well, that could be a Rivera
24 situation where, through no fault of the defendant, I think
25 the attorney - - - the defense attorney was disbarred. I

1 think the judge who suffered from a - - - had - - - had
2 died.

3 JUDGE TROUTMAN: But why is it that the
4 defendant's burden to bear if and - - - the entirety of his
5 trial is lost?

6 MR. MARRERO: Well - - -

7 JUDGE TROUTMAN: Why is that fair?

8 MR. MARRERO: Well, Your Honor, we don't - - - we
9 don't really have to even reach that, because this - - -
10 this is not the sort of extreme example.

11 JUDGE TROUTMAN: But that is the Chief Judge's
12 question - - -

13 MR. MARRERO: That is the Chief Judge's question.

14 JUDGE TROUTMAN: - - - and it is important
15 because you said it - - - it's - - - if it's lost, you're
16 putting - - - you're shifting the responsibility or the - -
17 - the - - - that he's the one that suffers the consequences
18 of that loss alone.

19 MR. MARRERO: I believe - - - I believe in
20 Rivera, there was a reversal. And there are other
21 Appellate Division cases where there is a reversal due to
22 lack of transcripts. What I'm saying is reversal simply
23 based on - - -

24 JUDGE TROUTMAN: So you agree that there is a
25 responsibility for the record to be preserved, that is not

1 necessarily the defendant's responsibility?

2 MR. MARRERO: Well, sure, stenographers have a
3 responsibility to - - - that's in the judiciary law.
4 They're required to preserve and maintain their records.
5 What I am saying, though, is in terms of reversal, where
6 transcripts are missing, it depends on - - - it really
7 depends on the circumstances. And that's what this - - -

8 JUDGE HALLIGAN: But isn't - - - isn't the
9 question really this? O'Rama requires the court to make a
10 record of how a jury communication is handled, right?

11 MR. MARRERO: Right.

12 JUDGE HALLIGAN: And that's so that meaningful
13 appellate review is available, right? And isn't the
14 question just how far does that extend? You say Parris is
15 what governs the inquiry - - -

16 MR. MARRERO: And Myers.

17 JUDGE HALLIGAN: Pardon?

18 MR. MARRERO: And Myers. Excuse me. Sorry.

19 JUDGE HALLIGAN: Okay. But the alternative, I
20 think, would be to say the missing transcript pages mean
21 that there is not a record, and that's a classic O'Rama
22 error. Why isn't that the better way to think about it?

23 MR. MARRERO: Well, because Parker's (ph.)
24 language of creating a record refers to the court giving
25 notice on the record. Not - - -

1 JUDGE HALLIGAN: But - - - but it's in aid of
2 meaningful appellate review. Right? I think O'Rama says
3 that explicitly. And so the missing transcript pages are -
4 - - are - - - you know, something that - - - that deprived
5 the defendant. This is an iteration, perhaps, of the
6 Chief's hypothetical of - - - of meaningful appellate
7 review. And the question seems to me is where does that
8 burden fall? Is it the court's responsibility to ensure
9 that that record is available, even if what that means is
10 that the transcript pages are available? So why isn't that
11 the - - - the way to think about it?

12 MR. MARRERO: Well, that would be an - - - an
13 unworkable rule if like - - -

14 JUDGE HALLIGAN: Why?

15 MR. MARRERO: Because the courts do not have
16 absolute control. A trial court judge does not have
17 absolute control.

18 CHIEF JUDGE WILSON: Well, neither does the
19 defendant.

20 MR. MARRERO: No, Your Honor. No, Your Honor.

21 JUDGE HALLIGAN: And neither does the prosecutor,
22 presumably.

23 MR. MARRERO: No. None of us - - -

24 JUDGE HALLIGAN: So - - - so the question is
25 just what - - - who bears the cost of the lost pages?

1 Right? And I don't mean the - - - the financial cost,
2 obviously, I mean the consequence. So why should the
3 defendant bear the consequence of the lost pages?

4 MR. MARRERO: Because as in Parris, he did not
5 exercise reasonable diligence in ensuring that the
6 proceedings can be reconstructed.

7 JUDGE HALLIGAN: But that seems to me to be a
8 different question, right? That seems to me to be if we're
9 in the world - - - correct me if I'm wrong. But that
10 strikes me as if we're in the world of Parris - - - Parris,
11 Parrish? I can never remember.

12 JUDGE CANNATARO: Parris.

13 JUDGE HALLIGAN: Parris. Thank you. If - - - if
14 we are in that rubric, then was sufficient diligence
15 exercised? But it seems to me there's a additional, maybe
16 antecedent question, which is does Parris govern this
17 inquiry or not?

18 MR. MARRERO: It does govern.

19 JUDGE HALLIGAN: Yeah. But why - - - why does it
20 as opposed to saying there's no record because there's no
21 transcript and therefore there's an O'Rama error, period?

22 MR. MARRERO: Well, the court hasn't held that
23 before. There's never been - - -

24 JUDGE HALLIGAN: Well, that - - - isn't that the
25 question before us, though, is what about the clerical

1 error? So why - - - why decide to take the - - - to put
2 this in the Parris box?

3 MR. MARRERO: Because applying Parris would not
4 require creating a new rule that creates this presumption
5 of error just because transcripts go - - -

6 JUDGE CANNATARO: Does it change your answer at
7 all, that there seem to be some indications, not having to
8 do with the transcript of the proceedings, that things were
9 handled in a somewhat unusual manner? Exhibits weren't
10 marked the - - - the way you would hope to see them in the
11 record?

12 MR. MARRERO: Well, yes, Your Honor. But that -
13 - - that's why I mentioned Myers before. This court in its
14 unanimous decision in - - -

15 JUDGE CANNATARO: Okay. So how does Myers
16 address that issue?

17 MR. MARRERO: Well, there - - - where there's
18 significant ambiguity as to whether a jury note was even
19 submitted to the court. You know, if there's - - - if
20 there's a remedy for the defendant available, it's a
21 reconstruction hearing to determine in the first instance
22 whether that note was submitted, triggering the court's
23 obligations.

24 CHIEF JUDGE WILSON: Well, would you - - -

25 MR. MARRERO: So there's avenues here.



1 CHIEF JUDGE WILSON: - - - would you agree that -
2 - - would you agree that on the record here, we could
3 conclude that a reconstruction hearing would be futile or
4 no?

5 MR. MARRERO: No, Your Honor. The defendant
6 certainly hasn't made that choice. And again, that's the
7 defendant's responsibility. He hasn't made that showing.
8 He hasn't shown that the court reporter is unavailable.
9 But we believe she's passed away based on an online
10 obituary that we find, but we don't know for certain.

11 JUDGE HALLIGAN: Are you now opposing a
12 reconstruction hearing?

13 MR. MARRERO: Well, Your Honor, what we're simply
14 saying - - -

15 JUDGE HALLIGAN: I'm just asking, do - - - do you
16 oppose it or - - - or - - - or not?

17 MR. MARRERO: At this point, on this record we
18 would oppose, Your Honor.

19 JUDGE HALLIGAN: I thought previously you had
20 agreed that it was an appropriate course. Am I wrong about
21 that?

22 MR. MARRERO: Well, at - - - at the 440 level - -
23 -

24 JUDGE HALLIGAN: Yeah.

25 MR. MARRERO: - - - when we couldn't find the

1 transcripts ourselves, we, in our discretion, agreed.

2 JUDGE HALLIGAN: So why - - -

3 MR. MARRERO: We chose not to.

4 JUDGE HALLIGAN: - - - why a different position
5 now?

6 MR. MARRERO: Well, we're in a - - - we're in a
7 different procedural posture now. We're defending the
8 decisions of the lower courts, and we're in the position -
9 - -

10 JUDGE HALLIGAN: But if it was a - - - it was an
11 appropriate course of action before, what has changed that
12 would make it not an appropriate course of action now?

13 MR. MARRERO: Well, for starters, the defendant
14 has basically abandoned reconstruction himself. In his own
15 brief, he says reconstruction is an - - - an inappropriate
16 remedy, so he's not asking for it. So he himself has
17 foreclosed that.

18 JUDGE HALLIGAN: I thought - - - I thought that
19 that was because - - -

20 MR. MARRERO: Well - - -

21 JUDGE HALLIGAN: - - - and obviously, they can
22 respond, but because they were seeking vacatur under
23 O'Rama?

24 MR. MARRERO: Well, right. Because they want - -
25 -

1 JUDGE HALLIGAN: Okay. But - - -

2 MR. MARRERO: - - - a new rule.

3 JUDGE HALLIGAN: - - - but if - - - if there was
4 a request for a reconstruction hearing as - - - as an
5 alternate remedy, what has changed that, in your view,
6 would make it no longer appropriate if you thought it was
7 appropriate before?

8 MR. MARRERO: Well, here now, we already have a
9 decision from the 440 court with a factual finding - - -
10 with factual findings. He was already told what he should
11 do based on this court's guidelines in Parris. And so - -
12 - and - - - and it is our position that the 440 court
13 properly exercised its discretion, correctly applied the
14 law in simply telling the defendant, take these extra steps
15 and renew your motion. And as in Parris, the defendant
16 here is open to the suspicion that he doesn't expect
17 reconstruction to reveal any appealable issue but would
18 rather take advantage of the missing transcripts to claim
19 reversible error.

20 It's exactly what happened in Parris, and it's
21 what's happening - - - happening here.

22 JUDGE SINGAS: Can I ask you about the
23 ineffective assistance? Because I have a question on the
24 record. I don't - - - I don't know when and I don't know
25 if you can tell me. The prosecutor said that Urena would

1 not testify, was that before or after the hearing was
2 waived by defense counsel?

3 MR. MARRERO: She - - - she told the judge on the
4 record that the hearing - - - that there would be - - -
5 that Urena would not testify. That was before. So in
6 April - - - I think in April of 2011, the attorney spoke to
7 the judge and they both said, no, there are no hearings.
8 And - - - and then - - -

9 JUDGE SINGAS: So at that point, did the defense
10 attorney know from the prosecutor that that witness wasn't
11 coming in?

12 MR. MARRERO: The defendant - - - the defendant
13 never - - - didn't say in his papers.

14 JUDGE SINGAS: What did the People say?

15 MR. MARRERO: It's - - - we believe that there
16 must have - - - that there was likely some discussion
17 between the attorneys because they both seemed to have an
18 understanding, not a misunderstanding as to what the - - -
19 what hearings the court had ordered, but an understanding
20 that hearings would not be needed here.

21 CHIEF JUDGE WILSON: What is the evidence in the
22 record for that one way or the other?

23 MR. MARRERO: Well, the defendant hasn't shown -
24 - - provided any evidence one way or the other. He
25 certainly hasn't shown that there was an absence of a

1 legitimate reason for waiving the hearing. All he has from
2 defense counsel is defense counsel saying, I don't
3 remember. I can't think of any reason, but I didn't look
4 at my file.

5 CHIEF JUDGE WILSON: Is there a point when, on
6 the record, the People notify the court or the defendant
7 that Urena will not testify?

8 MR. MARRERO: Yes. It was around jury selection.
9 The court - - - the trial ADA told the court that they were
10 not calling Urena.

11 CHIEF JUDGE WILSON: So could you infer from
12 that, that up to that point in time, the expectation was
13 that he would testify? I mean, why would you notify the
14 court about something you'd already notified the court
15 about?

16 MR. MARRERO: Well, I'm not sure if the trial ADA
17 had notified the court. The question is whether defend - -
18 - defense counsel and the prosecutor had that
19 understanding.

20 CHIEF JUDGE WILSON: And the record is silent on
21 that.

22 MR. MARRERO: And we're not - - - and we're not
23 sure. The defendant had the opportunity to provide more
24 information on that. He chose not to. Defense counsel
25 chose not to review his file before providing an affidavit

1 on the 440.

2 JUDGE SINGAS: Well, do you think a 440 hearing
3 would shed some light on that?

4 MR. MARRERO: Sure. A 440 hearing could shed - -
5 - could shed light on whether there is - - - you know, what
6 - - - what the reasons were. But there's more to - - -
7 there - - - there was - - - there's more to consider on the
8 defendant's 440 motion. Here, the 440 court looked at the
9 record as a whole and found that counsel, while may - - -
10 may be imperfect representation in certain respects,
11 overall, provided meaningful representation. And so even
12 if you had a 440 hearing to determine why the suppression
13 hearing was waived at the beginning and - - - you know, or
14 why he didn't seek to, like, renew that request for a
15 suppression hearing once Urena was - - - you know, once he
16 knew Urena would testify, it wouldn't change the other
17 analysis. The fed - - - the reasonable - - - the
18 reasonable probability, the prejudice analysis under the
19 federal standard, which is still an important part of the
20 state standard.

21 In other words, even if Urena's testimony had
22 been removed - - - and pretty much all the alleged errors
23 revolved around Gregorio Urena - - - so say we take him out
24 entirely, you still had - - - you still had overwhelming
25 evidence of guilt. You still had two - - -

1 JUDGE SINGAS: Yeah. But we don't do harmless
2 error analysis in ineffective assistance.

3 MR. MARRERO: Well, I'm talk - - - well, as far -
4 - - well, prejudice, it's still an important part of the
5 meaningful representation analysis as a whole. And the
6 court did determine that - - -

7 JUDGE RIVERA: But even under the federal
8 standard - - - it's true under ours, of course, if there is
9 even a single error, right, that rises to the level of
10 ineffective assistance of counsel, it doesn't matter that
11 perhaps the rest of the representation was pristine.

12 MR. MARRERO: Right. But this record does not
13 establish that kind of error. It has not established that
14 kind of error because Urena's testimony was not crucial to
15 the People's case. Urena didn't even see the - - - he
16 didn't testify that he saw the defendant with a knife. All
17 he could say was, I knew the guy from the neighborhood, and
18 I - - - I saw him making an upward punching motion. It was
19 the two witnesses who we had intended to call from the
20 beginning, Gallardo (ph.) and Veloz (ph.), who testified in
21 detail about the stabbing, about seeing the knife, and the
22 number of times that the victim was - - - was stabbed.

23 Urena's testimony merely corroborated the - - -
24 the testimony of the - - - I guess, the weightier
25 witnesses.

1 JUDGE CANNATARO: What about with respect to
2 identification? Are you saying Urena's identification
3 testimony was inconsequential?

4 MR. MARRERO: I wouldn't say inconsequential.
5 What I would say to - - - what I was responding to Justice
6 - - - when I was responding to Your Honor's point, I was
7 simply saying that as far as a single error, Urena's
8 testimony coming in was not the sort of - - - to the extent
9 that it was error - - -

10 JUDGE CANNATARO: It doesn't make the attorney's
11 performance inadequate?

12 MR. MARRERO: Well, no, because we don't know his
13 reasons for not moving - - - for not - - - objecting to the
14 testimony or not moving for a mistrial as counsel argues.

15 JUDGE RIVERA: What could be the strategic
16 reasons?

17 MR. MARRERO: I'm sorry?

18 JUDGE RIVERA: What could be the reasonable
19 strategic reasons?

20 MR. MARRERO: For not objecting to the testimony?

21 JUDGE RIVERA: Correct.

22 MR. MARRERO: Well, he could have figured that
23 the testimony was going to come in either way. So rather
24 than spend time raising objections and asking for a
25 mistrial and perhaps wasting that capital with the court,

1 he asked for a continuance to get the - - -

2 JUDGE TROUTMAN: So isn't that a reason why we
3 don't guess? You go back, and you have a hearing.

4 MR. MARRERO: It could be if there's a question
5 as to whether an alleged error deprived the defendant of a
6 fair trial. And I think the - - - the 440 court, in its
7 review of the record and the Appellate Division, its
8 interview of the record determined that even if there were
9 errors here, they were not so consequential as to deprive
10 the defendant of a fair trial.

11 JUDGE CANNATARO: Would - - - would you dispute
12 that that's a - - - that's a disposition that's available
13 to us? To - - - to remit it for a hearing on the 440?

14 MR. MARRERO: Well, I wouldn't dispute if that's
15 - - -

16 JUDGE CANNATARO: I mean, we can do that, right?

17 MR. MARRERO: The court can remit it for a
18 hearing.

19 JUDGE CANNATARO: Yeah.

20 MR. MARRERO: That's what - - - yes, the court
21 certainly can. We're just saying that the - - -

22 JUDGE CANNATARO: You're just saying we don't
23 need one?

24 MR. MARRERO: Exactly. We don't need one. And
25 that the 440 court's and Appellate Division's decisions on

1 the 440 were not - - - they were provident exercises of
2 discretion, and they certainly were not errors of law.

3 So we ask the court to affirm.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. BRINDIS: I'd like to - - -

6 JUDGE HALLIGAN: Counsel, can I just ask you to
7 respond to a question I asked your adversary? Why is it
8 that the - - - the - - - the court should essentially be
9 responsible for securing all the pages of the transcript in
10 a way that a court is responsible for making a record in
11 the first instance of a - - - of a jury note.

12 MR. BRINDIS: I was going to address that, Judge
13 Halligan. So again, here, we don't know if there were
14 missing transcripts, but the reason - - - it's important to
15 remember that this case took place approximately six months
16 after the trial in Parker did in 2011. There were various
17 Appellate Division approaches to addressing O'Rama issues
18 at that time, and through a series of - - - of reasoned
19 precedent this court reached in - - - in - - -

20 JUDGE HALLIGAN: But - - - but just, if I - - -

21 MR. BRINDIS: - - - Walston (ph.), Silva.

22 JUDGE HALLIGAN: - - - just to cut to the chase
23 if I can. I think before us is the specific question of
24 what we do with a clerical error. Right? And - - - and so
25 your position, I - - - I think, is if there are missing

1 pages of a transcript, that that is no different than a
2 classic O'Rama error where the judge fails in the first
3 instance to convey to counsel the contents of a jury note
4 and give them an opportunity to comment. Is that - - - is
5 that right?

6 MR. BRINDIS: That's correct. And that's
7 especially - - -

8 JUDGE HALLIGAN: So why should that be the rule
9 as opposed to thinking about this under Parris?

10 MR. BRINDIS: Well, that should especially be the
11 case in this individual case, because this has already gone
12 back down to the trial court, who is the ultimate arbiter
13 of the record. And the trial - - -

14 JUDGE HALLIGAN: So you would have us decide for
15 a particular kind of clerical error or particular sort of
16 posture? I'm not sure I understand the cabining principle
17 you're - - - you're proposing.

18 MR. BRINDIS: Well, I - - - I think in this case
19 it has already gone down. And the principle is that the
20 record is the record. It arrives in this court which has
21 constitutional jurisdiction over questions of law.

22 JUDGE RIVERA: I - - - I - - - I thought - - -
23 correct me if I misunderstood this record with respect to
24 the 440, the judge thinks that, no, there are no
25 transcripts. You didn't do enough to try and reconstruct

1 or to persuade the judge, excuse me, to order a
2 reconstruction hearing and that that's what - - - that was
3 the opportunity provided that you did not follow up on?

4 MR. BRINDIS: There was a motion made to the
5 trial judge. Yes, that - - - that was the opportunity,
6 because there was a motion in - - - in the trial court
7 before the very judge who oversaw the trial.

8 JUDGE RIVERA: So we do not really know whether
9 or not it would be possible to find out what happened in
10 note 2?

11 MR. BRINDIS: Based on what - - - like, the
12 representations that were made to us. You know, we don't
13 know more than what is in the record. And the record shows
14 there was no - - - there's no proceeding in the record when
15 meaningful notice was given. This isn't - - -

16 JUDGE GARCIA: Counsel, that seems to be a very
17 different posture or position you're taking here than you
18 did in the trial court. Because in the trial court, you
19 attach these letters that were talked about, one of which
20 from the senior court reporter says, "As a result of the
21 loss of the stenographic notes containing the required
22 proceedings, we are unable to provide the required
23 transcript." And in your brief to this court you say, "To
24 reopen the record for reconstruction, some untranscribed
25 proceeding must have occurred in order to have something to

1 reconstruct. There is no record evidence of an
2 untranscribed proceeding curing the meaningful notice."
3 How do you square those two things?

4 MR. BRINDIS: To address these questions in turn,
5 the posture is different because when we were in the trial
6 court, the trial court could have reopened the record and
7 made a record of compliance. The second point is, is the
8 Goodman (ph.) affidavit, which is the one you're referring
9 to. Goodman was not the reporter in court on May 25th,
10 2011.

11 JUDGE GARCIA: No, but the clear import - - -

12 MR. BRINDIS: She has no pers - - -

13 JUDGE GARCIA: - - - of that letter is there is
14 notes, there's a transcript, I - - - they can't be found.
15 We can't give you the transcript. The clear meaning of
16 your brief to me is there is no untranscribed proceeding.

17 MR. BRINDIS: The most that that affidavit can be
18 read for is that the court reporter conducted a reasonable
19 review of their records and could not find a transcript.
20 Goodman had no personal knowledge of what happened on May
21 25th, 2011. It's not a - - - an affidavit from Terry
22 Kline, for example, which maybe could establish whether or
23 not there - - - there was a proceeding held. You know,
24 Goodman had no - - - no firsthand knowledge and - - - and -
25 - -

1 JUDGE RIVERA: Trial counsel didn't look at their
2 file?

3 MR. BRINDIS: There were no jury notes in - - -
4 in the file that we received from - - - from trial court.

5 JUDGE SINGAS: The trial counsel? Did you ask
6 trial counsel?

7 MR. BRINDIS: Yes. The - - - the final paragraph
8 of trial counsel's affidavit that was submitted with the
9 440 motion, says that he has no recollection of how any of
10 the jury notes - - -

11 JUDGE RIVERA: True. But I thought he also said
12 - - - I thought he also said he didn't look at the file.

13 JUDGE TROUTMAN: Right.

14 MR. BRINDIS: There were no notes in the file
15 that we received from trial counsel. And - - - and I want
16 to - - - yeah.

17 JUDGE TROUTMAN: Right. But there's a difference
18 between there's no notes you received from trial counsel
19 and whether he presented an affidavit saying he didn't
20 actually look at the file.

21 MR. BRINDIS: Well, he looked at some portions of
22 the file that that were provided to him, yeah.

23 JUDGE RIVERA: But that's not what he says. And
24 the fact that there are no notes in his file the - - -
25 excuse me? The jury notes, I think that's what you meant,

1 right?

2 MR. BRINDIS: Yes. Sorry.

3 JUDGE RIVERA: The jury notes in his file,
4 doesn't mean that if he had looked at the file, it would
5 not refresh his recollection as to what happened. Those
6 are very different things.

7 MR. BRINDIS: I think that's the sort of kind of
8 speculation that - - - you know, this court's clear on. We
9 could speculate about what trial counsel could remember,
10 but - - -

11 JUDGE RIVERA: Well, I guess that also goes to
12 what - - - right? The shortcomings in - - - in the request
13 and why the judge is giving you another opportunity.

14 MR. BRINDIS: Well, the judge - - -

15 JUDGE RIVERA: To try and support the request for
16 the reconstruction hearing.

17 MR. BRINDIS: Well, I want to emphasize here that
18 the respondent consented to reconstruction. And the
19 application of Parris in this context was done sua sponte
20 by the court. It was no longer Justice Carter. It was a
21 sua sponte superimposition of Parris, which this court has
22 never applied in the O'Rama context and was done without
23 the benefit of briefing or oral argument.

24 JUDGE RIVERA: Your light is on. Could you just
25 perhaps quickly address on the O'Rama issue on that

1 testimony? Your friend on the other side, their - - -
2 their argument that that testimony wasn't crucial to the
3 People's case?

4 MR. BRINDIS: Oh, well, Urena's testimony was
5 certainly crucial to the People's case. The other two
6 witnesses were fourteen and fifteen at the time of the
7 incident. They were children. They were strangers to Mr.
8 Salas. The entire theory of misidentification, as I was
9 saying before, came down to no witnesses had prior
10 familiarity with Mr. Salas. All of the witnesses had an
11 interest in the proceeding because they were friends with
12 the deceased, and there was no contemporaneous
13 identifications.

14 The very first witness that the prosecution
15 called rebutted all of those major tenets of the
16 misidentification theory. It was crucial. And I want to
17 emphasize as well that each of the errors that trial
18 counsel made had different effects, but they were all in
19 relation to Mr. Urena, who was the most critical witness
20 and reflect trial counsel's lack of preparation overall to
21 deal with that most critical witness.

22 JUDGE GARCIA: Counsel, I'm sorry. One more
23 point. The point on the letter is that they could be read
24 different ways. They don't show - - - you - - - defense
25 counsel in the 440 interpreted them to say - - - this is

1 your motion. "The record in this case is incomplete. A
2 key portion of the transcript reflecting the court's and
3 the counsel's handling of jury note 2 is missing." That
4 seems pretty clear. "A key portion of the transcript is
5 missing", and you attach the notes from the stenographers
6 saying, we can't find the notes, we can't find the
7 transcript. But it sounds like now you're saying the
8 position was no - - - no transcript, there's no evidence
9 that there was any transcript of an untranscribed
10 proceeding, doesn't exist.

11 MR. BRINDIS: I - - - I would agree.

12 JUDGE GARCIA: It seems to be a very different
13 position you're taking.

14 MR. BRINDIS: Well, and to be clear, we didn't
15 cite Parris either in our briefs, we were citing O'Rama.

16 JUDGE GARCIA: I'm not talking about Parris. I'm
17 talking about your representations. And one of them was,
18 "A key portion of the transcript is missing." That shows
19 the court's handling.

20 MR. BRINDIS: In that instance, it - - - it - - -
21 it is missing because it didn't exist or it's missing
22 because of - - - of error. And - - - and to the fact that,
23 you know, there's some sort of factual finding by the trial
24 court, there is no evidence in the record that a proceeding
25 was held.

1 JUDGE SINGAS: So what - - - what is your
2 position today? Because you - - - you said when you first
3 got up, we don't know, there were missing transcripts. So
4 is that your position today?

5 MR. BRINDIS: Yes. The record does not show
6 evidence that a proceeding was held.

7 JUDGE SINGAS: Notwithstanding everything that
8 came before that Judge Garcia is referencing?

9 MR. BRINDIS: I think that the record - - -

10 JUDGE SINGAS: Your position is you don't know
11 that there are missing transcripts?

12 MR. BRINDIS: Well, I think that our position
13 today is no - - - nothing in the record refers to a - - - a
14 proceeding where that transcripts for which could be
15 missing. But it is different to that - - -

16 JUDGE HALLIGAN: Wait. Wait. So your position
17 is maybe there was no proceeding or maybe there is no
18 transcript? Which of those two?

19 MR. BRINDIS: So O'Rama focuses on whether
20 meaningful notice was given that has to be done in a - - -

21 JUDGE HALLIGAN: Yes. And that's what I mean by
22 a proceeding - - -

23 MR. BRINDIS: - - - proceeding?

24 JUDGE HALLIGAN: - - - to be clear.

25 MR. BRINDIS: Right. And the record is

1 dispositive of that.

2 JUDGE HALLIGAN: Yes.

3 MR. BRINDIS: And there's nothing in the record -
4 - -

5 JUDGE HALLIGAN: But are - - - are you now taking
6 the position that perhaps there was - - - that you think no
7 - - - no notice was given at all and that - - - that it - -
8 - it's a classic O'Rama error? Or are you taking the
9 position that you don't know if a transcript was made? Or
10 that the pages of the transcript appear to be missing, so
11 what do we do about that? Those are three different
12 options.

13 MR. BRINDIS: We're - - - we're taking the
14 position today that it's a classic O'Rama error in the form
15 of Silva and Hanson. And I'd emphasize that it is
16 positioned differently today because it has already
17 returned to the trial court once, which declined to expand
18 the record in there.

19 JUDGE CANNATARO: And can - - - just to clarify,
20 you're taking that position today because - - - am I
21 correct - - - that the record as it exists indicates that
22 there were no proceedings regarding this missing jury note?

23 MR. BRINDIS: That's correct.

24 JUDGE CANNATARO: Is that it?

25 MR. BRINDIS: The - - - the record as it emerged

1 from the trial court after we raised this in - - - in the
2 first instance when we had an opportunity on the 440
3 motion. Yes. The record today, as it exists, having once
4 already returned to the trial court, having already put
5 every party who may have knowledge about what was done on
6 notice, the record today remains - - - there's no evidence
7 in the record that meaningful notice was different - - -
8 was given. And we have no reason to believe that all of
9 these parties that we put on notice were hiding the ball
10 from us when we moved in the trial court.

11 JUDGE CANNATARO: Or a meaningful response for
12 that matter, right?

13 MR. BRINDIS: Or a meaningful response. But that
14 is, again, the same as in - - - in Silva and Hanson. In
15 those cases too, it was complete silence on those
16 substantive notes as it is here.

17 CHIEF JUDGE WILSON: Thank you.

18 MR. BRINDIS: Thank you.

19 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Christopher Salas, No. 58 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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