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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 225

CALVIN MAYS,

Appellant.

20 Eagle Street
Albany, New York 12207
November 13, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Calvin
2 Mays, number 225.

3 Counselor, do you want any rebuttal time?

4 MR. ECKERT: Two minutes, Your Honor.

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

7 MR. ECKERT: Thank you, Your Honor. The
8 trial court erred by allowing the prosecutor to
9 determine that the request to expand the jury note
10 would be granted and to conduct follow-up, and these
11 errors tainted the trial, not individual counts.

12 CHIEF JUDGE LIPPMAN: Why isn't it
13 ministerial as your adversary contends?

14 MR. ECKERT: A ministerial act is something
15 that involves no judgment, no choice; it's simply you
16 do what's clearly required. For instance, when a
17 deputy goes to tell the jury stop deliberating, you
18 simply say the words "stop deliberating". There's no
19 - - -

20 CHIEF JUDGE LIPPMAN: What was the
21 practical effect in this case of having the
22 prosecutor do the video, the - - - where to stop,
23 where to start? In practical terms, what is it that
24 was prejudicial about that?

25 MR. ECKERT: Well, I submit that prejudice

1 doesn't need to be shown, but the practical impact -
2 - -

3 CHIEF JUDGE LIPPMAN: But tell us in - - -

4 MR. ECKERT: Yeah.

5 CHIEF JUDGE LIPPMAN: - - - common sense
6 why is this a bad thing?

7 MR. ECKERT: Because the trial prosecutor
8 took over the role of the judge in doing several
9 things. First - - -

10 JUDGE CIPARICK: But there was no
11 objection, was there? There was no objection by
12 defense counselor. No one objected to the prosecutor
13 showing the video. No one apparently objected to the
14 exchange between the jurors and the prosecutor,
15 correct?

16 MR. ECKERT: Correct. Either this was mode
17 of proceeding or I lose. So - - -

18 JUDGE GRAFFEO: Well, maybe - - - what do
19 you do if the judge doesn't know how to use that kind
20 of electronic equipment?

21 MR. ECKERT: There's no fundamental problem
22 with having somebody else run the machine, but the
23 prosecutor made choices in terms of running the
24 machine that went beyond - - -

25 JUDGE SMITH: You're saying it should have

1 been some video technician, not the prosecutor?

2 MR. ECKERT: Or the prosecutor could, as
3 in, I think, a Second Department case, show the
4 jurors where the start button and stop button are and
5 the jury can do what they want or some independent
6 person.

7 CHIEF JUDGE LIPPMAN: What's the impact on
8 the jury of the prosecutor running it?

9 MR. ECKERT: Well, the impact - - - first
10 of all, going step by step through what the
11 prosecutor did, the judge gets a note that just says
12 "Fastrac video", meaning, I think, play the video.
13 The prosecutor, not the judge, decided to grant the
14 jury request that was granted - - - that was made on
15 the fly to stop the video. And I think that's a
16 choice - - - that's a nonministerial act by itself.

17 JUDGE SMITH: You're really saying that
18 that request, stop the video, should be treated as
19 though it was a jury note?

20 MR. ECKERT: I think that should be treated
21 as though it's a change to the - - - like as in
22 DeRosario, that it's a change on the fly.

23 JUDGE SMITH: So when a juror says could
24 you stop the video, the judge has to say, okay, hold
25 everything, I need a conference with counsel?

1 MR. ECKERT: First of all, if the judge had
2 made that mistake, that would require an objection,
3 but I think the prosecutor making the - - - to the
4 extent that I'm making an O'Rama error there that
5 require an objection, but I think the judge has to be
6 the one to decide whether or not that request should
7 be granted.

8 JUDGE CIPARICK: So this judge wasn't
9 monitoring - - - obviously, he was not monitoring
10 what was going on here, right? He didn't say one
11 word. He didn't say to the DA, let me ask the
12 question, or he didn't - - -

13 MR. ECKERT: Correct. I mean, the judge
14 just let the prosecutor - - -

15 JUDGE CIPARICK: Just let him keep going.

16 MR. ECKERT: - - - take over.

17 JUDGE GRAFFEO: Although the judge was
18 present here.

19 MR. ECKERT: Yes.

20 JUDGE GRAFFEO: Because that's one thing in
21 Torres and Ahmed, we didn't have a judge present.
22 It's a court employee, it's the court officer, it's
23 the law clerk, but the judge - - -

24 MR. ECKERT: Correct.

25 JUDGE GRAFFEO: - - - wasn't present.

1 Here, the - - - I take it the judge was still sitting
2 on the bench here and aware of what was happening.
3 So it's a bit different from our previous cases.

4 MR. ECKERT: It's different, but the
5 question is who is making the judgment, who is making
6 the - - -

7 JUDGE SMITH: The judge even interjected.
8 I mean, the judge speaks a couple of times, says can
9 everybody see, things like that.

10 MR. ECKERT: At the very beginning, yes, a
11 couple of the questions that the judge - - -

12 JUDGE SMITH: I mean, isn't - - - can't you
13 read this transcript as the judge was supervising the
14 courtroom and allowing the prosecutor to do the
15 ministerial function of showing the video?

16 MR. ECKERT: But the prosecutor didn't
17 perform - - - the judge - - - if the prosecutor had
18 hit the play button, that's ministerial. If the
19 jurors had then said, can you stop it there, and the
20 judge said, okay, why don't you stop it there - - -

21 CHIEF JUDGE LIPPMAN: If the colloquy had
22 been with the judge, it's okay, right?

23 MR. ECKERT: If the colloquy arguably - - -

24 CHIEF JUDGE LIPPMAN: The judge said stop
25 it here, Judge, what should I do here, that would be

1 okay, right?

2 MR. ECKERT: That - - - there might
3 arguably be an O'Rama error that requires
4 preservation at that point. So arguably there's
5 still an error, but it requires preservation because
6 the judge is sort of taking information or taking
7 changes from the jury on the fly.

8 JUDGE PIGOTT: How did your client do with
9 the jury on this issue?

10 MR. ECKERT: Pardon me?

11 JUDGE PIGOTT: How did your client do with
12 the jury on this issue?

13 MR. ECKERT: With regard to this - - - with
14 regard to the facts in this video, he was acquitted
15 of all counts.

16 JUDGE READ: Yeah. That's the kind of
17 error you'd like to see all the time, isn't it?

18 MR. ECKERT: Well, no, and that's why I
19 think what's important about Ahmed is - - - this
20 Court's decision in Ahmed is that when the judge
21 turns over a judicial function, and I submit that
22 reinterpreting or allowing the jury to change their
23 note is a judicial function - - -

24 JUDGE PIGOTT: But that happens. That's
25 not unusual when they want a readback, for example.

1 They say, we want all the testimony of so-and-so, and
2 then there's a colloquy when the - - - and the judge
3 says, are you sure you want all of it, and they say,
4 well, we mean just the direct. And then, of course,
5 a good defense lawyer says, Judge, if you're going to
6 read the direct, you got to read the cross, and then
7 that happens. That could have happened here. The
8 defense lawyer could have said, wait a minute, you're
9 stopping and starting it, even though they want to
10 see this part, Judge, I want them to see the other
11 part. And then you would have had an objection.

12 MR. ECKERT: Correct. And that's, I think,
13 important because if the judge had committed the
14 O'Rama error, that requires an objection.

15 JUDGE PIGOTT: No, no. I'm saying - - -
16 they're saying what happened here, and then you stand
17 up - - - I know you weren't there, but the defense
18 lawyer stands up and says, Judge, they're asking the
19 DA here to do this, I think that we ought to help
20 them out a little bit more and give them what
21 happened just before that. It's not the judge doing
22 anything; it's just making - - - fixing this.

23 MR. ECKERT: True. But I submit that what
24 goes on, when the juror makes a written request and
25 then has supplemental changes as in DeRosario,

1 supplemental changes to that request and the judge
2 grants or doesn't grant that, there's a potential
3 O'Rama error because there's no additional defense
4 input, and the defendant has to object. But I think
5 what's important here is the O'Rama error is
6 committed by the prosecutor; that's not something you
7 see every day.

8 JUDGE CIPARICK: But that happens all the
9 time. The jurors say, we heard enough, we heard
10 enough. They ask for everything, but then they come
11 to the part - - -

12 MR. ECKERT: Exactly.

13 JUDGE CIPARICK: - - - that they want to
14 hear - - -

15 MR. ECKERT: Right.

16 JUDGE CIPARICK: - - - and then they
17 somehow communicate to the court and to everybody and
18 to the court reporter, we've heard enough.

19 MR. ECKERT: Correct.

20 JUDGE CIPARICK: And it ends right there.
21 So that's an O'Rama error?

22 MR. ECKERT: And to the extent that there's
23 an error though, that requires an objection. To the
24 extent that there's a problem with the court taking
25 supplemental comments from the jury that changes to

1 note and not going through the O'Rama process, to the
2 extent that there's an error there, absolutely that
3 requires an objection by defense counsel.

4 JUDGE SMITH: Well, why does it become mode
5 of proceedings when it's the prosecutor, not the
6 judge?

7 MR. ECKERT: Because the prosecutor
8 shouldn't be doing it at all. That's the Ahmed
9 error. I think the purpose of the O'Rama error - - -

10 JUDGE GRAFFEO: This isn't the first case
11 though where - - - I mean, there are some Appellate
12 Division cases where prosecutors ran the tape and it
13 was approved.

14 MR. ECKERT: Well, it was approved because
15 the prosecutor hit start and stop or showed them
16 where the start and stop button was. It wasn't the
17 prosecutor - - - first of all, the prosecutor didn't
18 reinterpret the note from the jury to say, now we're
19 going to start and stop the tape. But I think the
20 reason that it's important with regard to all - - -
21 the trial and not regarding individual counts is that
22 Ahmed says that when a judge allows a nonjudicial
23 person to take over judicial function, that violates
24 the right to trial by jury.

25 JUDGE SMITH: If I understand you, you

1 could make exactly this argument if it were a law
2 secretary or some video technician had been running
3 the videotape.

4 MR. ECKERT: If the video technician had
5 carried out a judicial function, yes. If the judge
6 was directing - - -

7 JUDGE SMITH: It supposes you have exactly
8 the same transcript except it's not the prosecutor
9 standing there; it's a video technician. That's
10 still mode of proceedings error?

11 MR. ECKERT: I think so because you've
12 still got the - - -

13 CHIEF JUDGE LIPPMAN: Is it - - -

14 MR. ECKERT: It's less of an error; it's
15 less - - -

16 CHIEF JUDGE LIPPMAN: Wait. Is your
17 argument really that the jury gets a different
18 relationship with the prosecutor by his doing it or
19 is your argument that because - - - in answer to
20 Judge Smith's question that really that has nothing
21 to do with it. I mean, that I understand as there
22 can be subtle things that work on a jury, but doesn't
23 it - - - but does it - - - if you have a neutral
24 who's doing the machine, you think it's still the
25 same error, there's no difference - - -

1 MR. ECKERT: Well - - -

2 CHIEF JUDGE LIPPMAN: - - - on your theory
3 of this argument?

4 MR. ECKERT: If the neutral is
5 reinterpreting the jury note by allowing them to
6 change Fastrac video to saying - - -

7 CHIEF JUDGE LIPPMAN: Well, that's O'Rama,
8 right?

9 MR. ECKERT: - - - telling them where to
10 stop.

11 CHIEF JUDGE LIPPMAN: That's O'Rama?

12 MR. ECKERT: I think that's Ahmed.

13 CHIEF JUDGE LIPPMAN: That's Ahmed?

14 MR. ECKERT: That's Ahmed because a
15 nonjudge is deciding that that request will be
16 granted.

17 CHIEF JUDGE LIPPMAN: So it doesn't matter
18 who takes over the courtroom; anyone taking over part
19 of the judge's role is no good?

20 MR. ECKERT: Correct. I mean, there was a
21 neutral party; it was a neutral party in Ahmed.

22 CHIEF JUDGE LIPPMAN: Let's hear from your
23 adversary, and then you'll come back with rebuttal.

24 JUDGE CIPARICK: So what about the
25 distinction between an advocate and a neutral party?

1 MR. O'BRIEN: Well, I mean, I guess - - -

2 JUDGE CIPARICK: He says it doesn't make a
3 difference.

4 MR. O'BRIEN: I think what we're talking
5 about, pausing a video player, it probably doesn't
6 make a difference. But if I take the defendant's - -
7 -

8 JUDGE SMITH: If there had been an
9 objection, if the defendant had stood up and said,
10 Judge, I object to the defense - - - to the
11 prosecutor getting up there and bonding with the jury
12 by chatting back and forth with them, would that have
13 been a good objection?

14 MR. O'BRIEN: I mean, I think probably if
15 the defendant actually objects to that and he - - -

16 CHIEF JUDGE LIPPMAN: So then - - - but if
17 that would be a good objection, why isn't this a mode
18 of proceedings error that you really don't need to
19 object to if it's prejudicial, if it goes to the
20 heart of the function of the judge and there is a
21 relationship that builds, assume that this went a
22 little further than what - - - and it's hard to draw
23 these lines, suppose there was a real colloquy about,
24 well, what do you think about that particular part of
25 the tape and he engages in more of a back and forth

1 with the jury, that would have been mode of
2 proceedings, right?

3 MR. O'BRIEN: Well, I still - - -

4 CHIEF JUDGE LIPPMAN: Or not?

5 MR. O'BRIEN: No, I still think with O'Rama
6 under Kadarko and Ramirez, which I think was not
7 cited in the briefs - - -

8 CHIEF JUDGE LIPPMAN: But what about Ahmed?
9 What about Ahmed?

10 MR. O'BRIEN: Okay. Ahmed is different but
11 with - - -

12 CHIEF JUDGE LIPPMAN: Yeah, but I'm asking
13 you - - -

14 MR. O'BRIEN: Okay.

15 CHIEF JUDGE LIPPMAN: - - - about Ahmed.
16 Why is that not a mode of proceedings error? Say it
17 was a little bit more extreme than this and we - - -
18 and I think you'd agree it's hard to draw a line as
19 to what they said and didn't say, why isn't that mode
20 of proceedings that if you and I engage in some kind
21 of a dialogue where I kind of - - - the possibility
22 that I'm going to bond with you, why isn't that a
23 mode of proceedings error?

24 MR. O'BRIEN: Okay. Well, I mean, I - - -

25 CHIEF JUDGE LIPPMAN: Judge shouldn't allow

1 that, right, when it's his role, when it's his role.

2 MR. O'BRIEN: Yeah, if it's his role. Now,
3 the bonding thing, I think, is maybe a separate
4 point, but with respect to - - -

5 CHIEF JUDGE LIPPMAN: Yeah.

6 MR. O'BRIEN: - - - with respect to Ahmed,
7 I mean, Ahmed has to do with the judge delegating the
8 substantive instruction on the law to somebody else.
9 But here - - -

10 CHIEF JUDGE LIPPMAN: Yeah, but the point
11 is theoretically, and I'm not saying in practical
12 terms, but theoretically if you're taking the role of
13 the judge and you're performing the judge's function
14 back and forth with the jury, can't - - - wouldn't
15 you think that that - - - that if that's what
16 happens, and we'll see how it applies to this
17 particular case, that that's a mode of proceedings
18 error?

19 MR. O'BRIEN: I think that's not what
20 happened here. I think that - - -

21 CHIEF JUDGE LIPPMAN: But if it did, that
22 would be a mode - - -

23 MR. O'BRIEN: I think it would be a mode of
24 proceedings error if the prosecutor were giving
25 substantive instructions, absolutely. I think that's

1 - - -

2 CHIEF JUDGE LIPPMAN: Okay, so your quibble
3 - - - or not quibble - - - your argument is this - -
4 - what he did was ministerial and that it shouldn't
5 have arose to that level, but how do we know which it
6 is, ministerial or substantive? Or do you think this
7 is just obviously ministerial?

8 MR. O'BRIEN: Well, I think this is
9 obviously ministerial, but I also think that - - - I
10 mean - - -

11 JUDGE CIPARICK: But what about his asking,
12 do you want to see the next one? I mean - - -

13 MR. O'BRIEN: Well, and I think that - - -

14 JUDGE CIPARICK: - - - do you want me to
15 play it again, do you want me - - -

16 MR. O'BRIEN: I think as was pointed out -
17 - -

18 JUDGE CIPARICK: Getting close.

19 MR. O'BRIEN: - - - in our brief, that
20 question seems to be directed at the judge from the
21 prosecutor. And if you read - - - I mean, the judge
22 is very involved in this also. Really, I mean, the
23 one thing where I can sort of see the prosecutor
24 maybe doing something sort of out of bounds is with
25 the pause, when the juror asked to pause it. Okay.

1 I mean, there the prosecutor is sort of doing
2 something other than just press play.

3 But I think it's the same thing as if you
4 had a readback and the court reporter is doing a
5 readback, and one of the jurors says, wait a second,
6 I didn't hear that, could you read that back to me.

7 CHIEF JUDGE LIPPMAN: But the court
8 reporter is different than the prosecutor, isn't it?

9 JUDGE CIPARICK: Neutral, works for the
10 court.

11 MR. O'BRIEN: Right, right. So if there
12 were actually a delegation - - -

13 CHIEF JUDGE LIPPMAN: Isn't this in some
14 ways a stronger case than Ahmed because - - -

15 MR. O'BRIEN: No.

16 CHIEF JUDGE LIPPMAN: - - - you're not
17 dealing with a neutral; you're dealing with - - -

18 MR. O'BRIEN: No - - -

19 CHIEF JUDGE LIPPMAN: - - - an advocate.

20 MR. O'BRIEN: - - - because Ahmed deals
21 with the court delegating authority. The court
22 didn't delegate - - - the court delegated - - -

23 CHIEF JUDGE LIPPMAN: But delegating - - -

24 MR. O'BRIEN: - - - the playing of the
25 video.

1 CHIEF JUDGE LIPPMAN: But delegating
2 authority to a neutral is not as significant. It
3 still may be enough under Ahmed but delegating it to
4 one of the sides, the prosecutor, that's quite more
5 serious, isn't it?

6 MR. O'BRIEN: Right, but that's - - - I
7 guess my point is that the business of pausing the
8 video is not something the court delegated to the
9 prosecutor. The prosecutor answers that question,
10 but the court doesn't say, well, I'm going to defer
11 to the prosecutor, let the prosecute - - - that would
12 be delegating. Delegating is an active thing.

13 CHIEF JUDGE LIPPMAN: What did the judge do
14 other than at the very beginning that indicated
15 active involvement?

16 MR. O'BRIEN: Well, the court - - - well,
17 first of all, I mean, I think, if, in fact, this was
18 just played and that was it, the court wouldn't have
19 had to do anything basically. And so, I mean, what
20 it does is, because there are two clips, there's this
21 - - - and because there's the glare from the lighting
22 and turn off the light, so it's involved with those
23 little things, but basically playing back a video
24 doesn't require the court to do much of anything.

25 Now, the prosecutor inserts herself. That

1 may - - - maybe that's misconduct.

2 CHIEF JUDGE LIPPMAN: What about the
3 defense during all of this? What about the defense?
4 Are they entitled to play a role if the prosecutor is
5 playing a role?

6 MR. O'BRIEN: Again, if the defense
7 objected to the fact that the prosecutor was playing
8 this video - - -

9 CHIEF JUDGE LIPPMAN: If they don't say
10 anything, forget about what the - - -

11 MR. O'BRIEN: No, I do think there are also
12 practical issues here, I mean, noted in the record
13 that the prosecutor says before the read - - - or
14 before the playing back of the video, I've got the
15 officer out in the hallway in case I can't get this
16 to work. These surveillance videos are usually - - -
17 they're proprietary software, they have their own
18 special software player. It's not as simple as
19 instruct the jurors how to press play on the VCR, and
20 there may be problems with it, and the prosecutor was
21 aware of that and, therefore, had the police officer
22 there.

23 If I can make a point about the prejudice
24 though, as well - - -

25 CHIEF JUDGE LIPPMAN: Go ahead. Sure.

1 MR. O'BRIEN: - - - because counsel seems
2 to equate mode of proceedings with automatic
3 reversal, and for lots and lots of mode of
4 proceedings errors, maybe the vast majority of mode
5 of proceedings errors, the nature of the error is
6 going to be such that if it's committed it's going to
7 result in a reversal, but that's - - -

8 JUDGE CIPARICK: So here it's harmless
9 because of the acquittal?

10 MR. O'BRIEN: Absolutely, absolutely. And
11 there's no argument of spillover effect. I don't
12 think there could be.

13 CHIEF JUDGE LIPPMAN: Well, if there were
14 no other charges, we all agree, but what's the effect
15 that he was convicted on the other charges?

16 MR. O'BRIEN: The fact that he was
17 convicted of the other charges?

18 CHIEF JUDGE LIPPMAN: Yeah.

19 MR. O'BRIEN: I think shows that this
20 couldn't have prejudiced him. I mean, typically the
21 prejudice works the other way. It's the propensity
22 sort of argument. It's - - - they convicted me on
23 both of these, and you should reverse both of them
24 because that playing of the video on the other one
25 which convinced them that I was the burglar in that

1 one spills over into this one. Here, they looked at
2 this video - - - this is an ID case - - - they looked
3 at this video and said, we don't know it's him. How
4 does that - - - how can that possibly spill over onto
5 the other case? It doesn't - - -

6 CHIEF JUDGE LIPPMAN: You didn't think it's
7 tainted by - - -

8 MR. O'BRIEN: I don't think it works
9 logically the way that a spillover argument can
10 typically work.

11 And with respect to DeRosario and changes
12 on the fly, this is not a substantive change in the
13 request. Play the video, that's all that - - - all
14 that happens is the video is played. Pausing it at
15 one point is not substantively changing the request.
16 And I think it's important to remember again with the
17 nature of the this video, these are surveillance
18 videos. They're recorded at high speed, multiple
19 cameras, and they have to be slowed down, and that
20 was - - - that's indicated in the record that they
21 had to slow this down to something like normal speed.
22 If you just put this in and play it, you see a
23 hundred frames a second or something.

24 So you have this video which is already
25 playing at a sort of odd speed, but they want us to

1 see the video. That's all they request; that's all
2 that happens here. It's paused at one point because
3 it's going by quick.

4 JUDGE CIPARICK: They wanted to see it at
5 one point where the defendant was together with
6 somebody else supposedly. They wanted to see that
7 particular image.

8 MR. O'BRIEN: Right, right. And that's
9 part of - - - in the video. It's like you were
10 saying about a readback. They may ask for the
11 readback testimony of an entire witness and what
12 they're looking for is one little thing in it. I
13 don't think that change - - -

14 JUDGE CIPARICK: They communicated that to
15 the district attorney, not to the judge, not to the -
16 - - it's - - -

17 MR. O'BRIEN: Well, I don't know who it's
18 said to. I mean, we get to - - - the jury - - - a
19 juror says it, and the prosecutor responds to that.
20 But I don't know who it's addressed to.

21 And as a practical matter, I mean, if
22 somebody were to object or if the court were to step
23 in here, the practical effect would be you'd send the
24 jury back into the jury room, they'd send out a note
25 that says we want you to pause it at a particular

1 point; I mean, it would change nothing. There's
2 nothing the defense can offer here.

3 JUDGE CIPARICK: But there's more control
4 over the courtroom that way, actually. I mean, it's
5 cleaner that way, if the judge had taken - - -

6 MR. O'BRIEN: It's cleaner. And if the
7 defense wanted it to be cleaner, they could have
8 objected to it and they could have cleaned it up that
9 way. And again, I mean, I think this is all
10 happening on the record in front of the defense
11 attorney. If this is a problem to the defense
12 attorney, they can object to it at the time when it
13 can be cured, and it could be cured.

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

16 Counselor, rebuttal.

17 MR. ECKERT: Yes, Your Honor. Thank you.

18 With regard to - - - it can't be harmless
19 as an Ahmed error. I mean, what was the harm in
20 Ahmed? It was the law clerk - - - there's no
21 indication that the law clerk got the law wrong.
22 With regard to Mays where the two attorneys answered
23 the question, there's no indication there was any
24 harm there that either of them got it wrong. So I
25 think the fundamental holding in Ahmed is that

1 turning over judicial function to a nonjudicial
2 person deprives a defendant of the right to trial as
3 guaranteed under the Constitution.

4 CHIEF JUDGE LIPPMAN: But do you think
5 there's a distinction between substantive and what
6 went on here? In many ways, I understand your
7 argument is stronger here because - - -

8 MR. O'BRIEN: Yeah.

9 CHIEF JUDGE LIPPMAN: - - - it's not a
10 neutral - - - a person who he's giving over the
11 courtroom to. But what about this distinction
12 between substantive and the running of the video
13 machine?

14 MR. ECKERT: The jury request was simply to
15 see the tape. The prosecutor was the one who
16 determined that the tape would be stopped at
17 different places. I think that's a change in the
18 jury note, the change that was determined by someone
19 other than the judge. And there were repeated other
20 discussions between the prosecutor making suggestions
21 and doing other things which you're not permitted to
22 do during the course of these things.

23 But the decision that the jury note would
24 be modified to provide them with something else was
25 made by the prosecutor and not by the judge and that

1 the additional communication between the prosecutor
2 and the jurors were O'Rama errors, and you can't have
3 a case in which an O'Rama error is committed by
4 someone other than a judge unless the judicial
5 function is being performed by someone other than the
6 judge.

7 And I think there's a reason that Ahmed,
8 with regard to harmlessness - - - and the last thing
9 I'll say - - - is the reason that there's a violation
10 of the trial by jury under Ahmed requires reversal is
11 that the Constitution provides that the right to
12 trial by jury shall remain inviolate forever as was
13 guaranteed in common law. And that means that any
14 judicial function carried out by some person other
15 than a judge requires reversal of the trial and that
16 the entire trial is tainted.

17 CHIEF JUDGE LIPPMAN: Okay. Thank you
18 both, appreciate it.

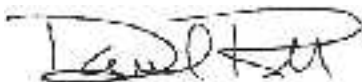
19 (Court is adjourned)

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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. Calvin Mays, No. 225 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

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