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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent, Papers Sealed

-against-

No. 134

RHIAN TAYLOR,

Appellant.

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

Before:

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 134.

2 Counsel, you want any rebuttal time?

3 MR. RUDIN: Two minutes, Your Honor.

4 CHIEF JUDGE LIPPMAN: Two minutes. Sure.

5 Go ahead, counsel.

6 MR. RUDIN: May - - - may it please the
7 court, my name is Joel Rudin, and I represent the
8 appellant Rhian Taylor. This is an O'Rama case where
9 there's no question in the record - - -

10 CHIEF JUDGE LIPPMAN: We never would have
11 guessed. Keep going.

12 MR. RUDIN: - - - that - - - there's no
13 question in the record that there was no notice. The
14 court received a note where the jury specifically
15 asked for the benefits received or rather offered - -
16 - to see the benefits offered to the People's - - -

17 CHIEF JUDGE LIPPMAN: What - - - what - - -

18 MR. RUDIN: - - - two key witnesses.

19 CHIEF JUDGE LIPPMAN: - - - about the
20 judge's take on the note, that essentially the judge
21 said, well, yeah, give them what - - - what they see,
22 which is the evidence in the record?

23 MR. RUDIN: It - - -

24 CHIEF JUDGE LIPPMAN: What was wrong with
25 not going to the second - - - to whatever the name

1 was - - - Hilton? What was wrong with that? Was it
2 the - - - the - - - the misimpression to the - - - to
3 the jury? What was it, not following O'Rama? What -
4 - - what was the matter with the way he handled it?

5 MR. RUDIN: The judge made a - - - a
6 judgment. In his discretion, which of course is the
7 - - - is the opposite of a ministerial act, he
8 exercised discretion, he made a judgment, to
9 disregard the jury's specific request for the
10 benefits offered to the witness Hilton which the
11 parties had vigorously disputed throughout the trial.

12 CHIEF JUDGE LIPPMAN: Well, he - - - he
13 interpreted it.

14 MR. RUDIN: He - - - exactly.

15 CHIEF JUDGE LIPPMAN: Then what should he
16 have done? Should he had gone to them and say - - -
17 assuming it was not clear, and said well, what
18 exactly do you want or what - - -

19 MR. RUDIN: He - - -

20 CHIEF JUDGE LIPPMAN: - - - how should the
21 judge have handled it?

22 MR. RUDIN: Well, this is a - - - this is
23 why this is a fundamental O'Rama case, because the
24 note wasn't clear. The jury used the word - - -

25 JUDGE ABDUS-SALAAM: The note was clear,

1 counsel. It said "see".

2 MR. RUDIN: See. Yes, Your Honor. He said
3 "see".

4 JUDGE ABDUS-SALAAM: Usually you don't see
5 testimony, you hear testimony, and so you see
6 exhibits, and if counsel had agreed in advance that
7 the jury could see exhibits without any consultation
8 with counsel, then why is that incorrect?

9 MR. RUDIN: Because as - - -

10 JUDGE ABDUS-SALAAM: Why is that an
11 inaccurate reading by the judge?

12 MR. RUDIN: Because I - - - I challenge
13 this court to find a dictionary, an English
14 dictionary - - - English-language dictionary that
15 doesn't provide an alternative definition to "see",
16 which is to learn, to know, to ascertain, to
17 perceive, to come - - - to come to know.

18 JUDGE ABDUS-SALAAM: People speak like that
19 in common language? I want to see the testimony so I
20 can learn something?

21 MR. RUDIN: I'd like to see the results of
22 the trial.

23 JUDGE ABDUS-SALAAM: Well, you'd want to
24 see a transcript, but you don't see testimony. You
25 hear it. And the only test - - - there - - - the

1 only - - -

2 MR. RUDIN: Well - - -

3 JUDGE ABDUS-SALAAM: - - - evidence of Mr.
4 Hilton's - - - am - - - am I correct here, the only
5 evidence of Mr. Hilton's benefits was testimony?

6 MR. RUDIN: Yeah. But the - - - every time
7 in this case that the jury asked to see an exhibit,
8 it named the exhibit. We want to see the photographs
9 of the crime scene; we want to see all the exhibits
10 that - - - that - - - that show the automobile. When
11 they ask for a read-back they asked for - - -

12 JUDGE RIVERA: This - - - this - - - this
13 isn't seeing the benefits anyway, because they saw a
14 document that represents an agreement. You're not
15 seeing the benefits.

16 MR. RUDIN: That's correct.

17 JUDGE RIVERA: So there's some difficulty
18 anyway with any way you want to interpret this.

19 MR. RUDIN: You're - - -

20 JUDGE RIVERA: Which just shows the
21 ambiguity of it that I assume you have argued over
22 and over - - -

23 MR. RUDIN: Yes, Your Honor.

24 JUDGE RIVERA: - - - is the inherent
25 problem with the way the judge handled this.

1 MR. RUDIN: Yes. But plus also to expect
2 the - - - a - - - a group of twelve laypeople to use
3 "see" in - - - in the sense that Your Honor is - - -
4 is - - - is using "see", when this jury had just sat
5 through - - - it must have been a dozen pages of
6 argument back and forth between the prosecutor and
7 the defense counsel about the benefits that the
8 defense lawyer said Hilton had received and the
9 prosecutor said, well, those really aren't benefits.

10 JUDGE ABDUS-SALAAM: Assuming you're
11 correct, counsel - - - assuming you're correct, when
12 the judge does respond and says, we handed you the
13 document that showed one person's agreement with the
14 prosecution, but if you want any other evidence or
15 information, give us, you know, another note or we're
16 here for you - - -

17 MR. RUDIN: But that's not - - -

18 JUDGE ABDUS-SALAAM: - - - that doesn't
19 correct it?

20 MR. RUDIN: No. Not at all, Your Honor.
21 That's not what the judge did. The judge say you - -
22 - the judge said - - - first the judge responds to
23 the note asking for the benefits offered to Hilton by
24 only giving the jury Turner's written cooperation
25 agreement, nothing more. So he's already

1 communicating to the jury that notwithstanding the
2 defense argument throughout summation, throughout the
3 trial, that Hilton received benefits, that that's not
4 really true. But then he tells the jury after the
5 defense counsel, unlike these oth - - - you know,
6 unlike some of the court - - - this court's decisions
7 and - - - and, Judge, your - - - your decision where
8 you expressed concern about gamesmanship, this is - -
9 - the - - - the defense lawyer vigorously objected to
10 the judge's response. He said, the jury knows that
11 there was a written cooperation agreement, and - - -
12 and the jury wants to know about the benefits as well
13 that Hilton received.

14 The - - - then the judge - - -
15 notwithstanding that, the judge instructs the jury,
16 you have what's in evidence in response to his note -
17 - - to the note, and the jury had to find evidence,
18 correctly, as not only tangible exhibits but
19 testimony. So the judge tells the jury, this is it,
20 the written cooperation agreement, and it's - - -
21 implicitly he's telling the jury that what the
22 prosecutor has contended throughout this case, that
23 Hilton didn't receive any benefits, is - - - is the
24 accurate state of the record.

25 JUDGE FAHEY: You - - -

1 MR. RUDIN: And that's what the jury's left
2 with.

3 JUDGE FAHEY: You know why - - - about
4 preservation, you have a strong argument there, I
5 think, on preservation. What I'm wondering, though,
6 is - - - is - - - is an - - - so let's assume it was
7 an error, was - - was it a harmless error?

8 MR. RUDIN: Well, not at all, Your Honor.
9 I mean, of course the - - - the fundamental premises
10 of O'Rama is that where a jury note comes out that is
11 not ministerial, where there - - - there might be two
12 - - - two sides to - - - to how the jur - - - the
13 judge should respond to the note or the defense might
14 have something to say to influence the judge's
15 construction of the note, that the judge - - - the
16 jud - - - the defense has to be given notice and the
17 opportunity to address the judge before the judge
18 makes up his mind. I mean, imagine a re - - - a
19 regime of appellate - - - of appellate advocacy where
20 the prosecutor submits a brief - - -

21 JUDGE FAHEY: Well, that's kind of what
22 we've been talking here today, though. There's - - -
23 I think you're - - - I think we're all agreed - - -
24 everyone in this courtroom has agreed that notice of
25 what the note says is mode of proceedings error. So

1 the second question is - - - the second part of it is
2 an opportunity to be heard. Clearly, counsel had an
3 opportunity to be heard.

4 MR. RUDIN: The judge obj - - -

5 JUDGE FAHEY: Objected, right.

6 MR. RUDIN: The judge - - -

7 JUDGE FAHEY: The court refused to go back
8 and re-correct it and change it again after that. So
9 then - - - so then he's had an opportunity to be
10 heard, the court may or may not have made a mistake.
11 I'm saying assuming he made a mistake, is it
12 harmless?

13 MR. RUDIN: No. Because the judge had
14 already made up his mind. He made - - - he made up -
15 - - that's the - - - that's the structural error, why
16 this is so insidious.

17 JUDGE FAHEY: His one error is a mode of
18 proceedings error? I'm a little lost on that.

19 MR. RUDIN: First of all, the - - - the
20 mode of proceedings error is that - - - is the
21 structural error that the judge made a - - - a - - -
22 a decision to construe an ambiguous note without
23 according the defense the fundamental right to
24 participate in the process and to address the court.
25 So now - - - and instead, what the defense is left

1 with is a motion for reargument, and that's why in my
2 brief I analogize to imagine this court deciding an
3 appeal and then saying to the defense, well, now you
4 have the right to submit a brief and ask us to change
5 our minds.

6 It's only human nature that once any
7 person, particularly a - - - a trial judge, makes up
8 his mind, he's - - - he may not be open minded in - -
9 - in re - - - in readdressing the issue, and that's
10 what happened here. The judge virtually cuts off
11 defense counsel and says, the jury said "see", that's
12 the end of the story. And - - - and he - - - maybe
13 if - - - if the defense had the opportunity to
14 address the judge before he locked himself into a
15 position on - - - on this significant issue, it would
16 have come out differently.

17 And the second part of O'Rama and the
18 second reason why there's prejudice here - - - and I
19 remind the court that in the Kisoan case, the court -
20 - - without even acknowledging there could be a cure
21 exception, the court stated that the burden on the
22 People is to show to a requisite certainty, to a
23 certainty, that there wasn't prejudice due to the
24 structural violation.

25 So I've already addressed one area in which

1 the People cannot show with certainty that there was
2 no prejudice. The judge made up his decision and
3 maybe didn't have a totally open mind to re - - -
4 reconsider, but the second thing is that the jury was
5 allowed to continue to deliberate based upon the
6 judge's unilateral construction of the note that
7 prejudiced the defense.

8 And by the time that - - - that the judge -
9 - - and took up the issue - - - and we don't know - -
10 - there's nothing in the record to indicate how many
11 minutes or hours went by. Again, that - - - that's a
12 failure of the court and of the prosecutor to make a
13 record. If - - - if they think that this was a de
14 minimis error and there was no prejudice, then they
15 have the obligation to make the record; they didn't.
16 The record doesn't indicate how many minutes or hours
17 went by.

18 But the point is that at the time when one
19 or more jurors was concerned about the issue of the
20 motive to lie of this crucial witness - - - witness
21 Hilton, and they asked for the evidence about the
22 benefits he received, they were told by the judge, in
23 - - - in - - - in - - - in essence, there's no - - -
24 nothing in the record about benefits to Hilton
25 received, only Turner.

1 So by the time that this issue came up
2 again in open court and the judge addressed it - - -
3 and by the way, didn't cure his error - - - the juror
4 may have al - - - jur - - - one or more jurors may
5 have already made up their minds, and - - - and - - -
6 and it - - - it - - - you can't unwind it. Just as a
7 judge may be reluctant to revisit an issue, a juror
8 might be reluctant to revisit an issue.

9 And so that's the second type of prejudice
10 that's impossible to quan - - - absolutely quantify
11 because this all happens in secret; the jurors
12 deliberate in secret. And so how - - - that - - -
13 that's why this - - - this kind of structural error
14 doesn't - - - traditionally, beginning with O'Rama
15 and in every other case, it has not required the - -
16 - the defense to prove prejudice, because how can you
17 show prejudice when - - - from secret del - - - jury
18 deliberations where there's been a structural error
19 like this where the defense is denied its opportunity
20 to partic - - - participate?

21 And then the second - - - the second area
22 here is - - - is the meaningful response. I've
23 already - - - I mean, the jury specifically asked
24 about the witness Hilton, benefits received by
25 Hilton. The judge - - - judge only gave a partial

1 response. It only - - - the judge only - - - or
2 responded to the jury about Turner, and it was - - -
3 it was - - - then the judge misled the jury by
4 indicating to the jury that it had what was in
5 evidence when it didn't. There was a lot more
6 evidence about Hilton.

7 And again, I would point out that on the
8 meaningful response part of this, not only was the
9 defense clearly prejudiced, but if there was a lack
10 of clarity, it was the judge's obligation to clarify
11 with the jury by asking the jury what it really meant
12 if the judge was unsure.

13 And how could any judge not at least be
14 unsure by this sequence where the - - - the parties
15 had vigorously disputed the issue of benefits, the
16 jury had just heard in summations about Turner having
17 a written agreement and Hilton having been cross-
18 examined and only given oral testimony about his
19 benefits? And then - - - then the jury - - - the
20 jury specifically asked about Hilton. They asked
21 about Hilton first, they say Hilton and Turner, and
22 then the judge withholds that from the jury.

23 CHIEF JUDGE LIPPMAN: Okay, counsel.
24 You'll have your rebuttal. Let's hear from your
25 adversary.

1 MR. RUDIN: Thank you.

2 MS. BRODT: Good afternoon, Your Honors,
3 Sharon Brodt from the Office of Richard A. Brown for
4 the People for the respondent in this case. If - - -

5 CHIEF JUDGE LIPPMAN: Counsel, the - - -
6 the - - - the note mentions Hilton.

7 MS. BRODT: Yes. It - - -

8 CHIEF JUDGE LIPPMAN: Didn't the judge at
9 least have an obligation to say what do - - - what do
10 you need or what do you want?

11 MS. BRODT: No, Your Honor. And - - - and
12 I will get to the ministerial - - -

13 CHIEF JUDGE LIPPMAN: Why, because of the
14 word "see"?

15 MS. BRODT: It - - - I will get - - -
16 precisely because of the word "see" and the context
17 of the notes that were - - -

18 CHIEF JUDGE LIPPMAN: Even though they
19 specifically mentioned the two of them?

20 MS. BRODT: Yes, Your Honor. And I will
21 get to that in a moment - - -

22 CHIEF JUDGE LIPPMAN: Tell us why. Go
23 ahead.

24 MS. BRODT: I will get to that in a moment
25 but if I may just - - -

1 CHIEF JUDGE LIPPMAN: Answer the question
2 first.

3 MS. BRODT: Okay. The reason is, Your
4 Honor, because this jury was very clear about what it
5 was saying. When it wanted to see something, it
6 asked to see something; when it wanted to hear
7 something it asked to hear something, and even though
8 it mentioned Hilton - - -

9 CHIEF JUDGE LIPPMAN: You mean they were
10 saying - - - even though they mentioned both of them,
11 they were in effect saying, if there's nothing I can
12 see on paper, I don't want to know about Hilton? Is
13 - - -

14 MS. BRODT: They're - - -

15 CHIEF JUDGE LIPPMAN: Or don't give me
16 anything about Hilton?

17 MS. BRODT: They're not saying I don't want
18 to know, but what they're saying is, that's not what
19 we're asking for in this note.

20 CHIEF JUDGE LIPPMAN: Yeah. That's what
21 I'm saying that - - - that they were saying, and they
22 mentioned both of us - - - both of them; in effect,
23 your interpretation is that they're saying, if it's
24 not something in writing, then we don't expect to get
25 anything?

1 MS. BRODT: It's not just my
2 interpretation. It's the interpretation of the trial
3 judge in the context of - - -

4 CHIEF JUDGE LIPPMAN: Yeah. Yeah. But I'm
5 asking you was the - - - was the trial judge's
6 interpretation rational or at the very least, was
7 there an ambig - - - at the very least, was there
8 ambig - - - an ambiguous note that required him to
9 say, gee, what do you really want here, instead of
10 just saying, oh, they want to see it; even though
11 they mentioned Hilton, we know they don't want
12 anything on that, so here's what you get? And
13 doesn't it send a message to the jury that there's no
14 benefit that was given to Hilton?

15 MS. BRODT: No, Your Honor. And here's
16 why.

17 CHIEF JUDGE LIPPMAN: Why not? Go ahead.

18 MS. BRODT: Here's why. Not only is there
19 the use of the word "see" where if a jury wanted to
20 know about benefits, it would have said one of two
21 things, we want to know about the benefits, we want
22 to hear about the benefits. When they say we want to
23 see the benefits, they don't - - -

24 CHIEF JUDGE LIPPMAN: You're saying that's
25 a - - -

1 MS. BRODT: - - - say about.

2 CHIEF JUDGE LIPPMAN: - - - that is a term
3 of art that they're using?

4 MS. BRODT: They're using it because
5 they're using it in every note, clearly - - -

6 JUDGE PIGOTT: Yeah. But - - -

7 MS. BRODT: - - - and - - - and not only
8 that, but when they asked to see a - - - an exhibit
9 and they want to hear more about it, they don't
10 hesitate to say, we want to hear the testimony
11 concerning that.

12 JUDGE PIGOTT: But I - - - I don't - - - I
13 don't - - - I don't see your point.

14 MS. BRODT: I'm sorry, Your Honor. But
15 this is the point - - - this is the - - -

16 CHIEF JUDGE LIPPMAN: Let him tell you why
17 he doesn't see your point.

18 JUDGE PIGOTT: Because it's not on a
19 written document.

20 MS. BRODT: Correct, Your Honor. Because
21 they're asking to see - - -

22 JUDGE PIGOTT: Stop. When I said I don't
23 see your point, I think you knew what I meant.

24 MS. BRODT: I understand perfectly what you
25 meant, Your Honor. But - - -

1 JUDGE PIGOTT: So - - - so - - - so could a
2 court when they say they want to see the benefits
3 that - - -

4 MS. BRODT: Corr - - - correct, Your Honor.
5 And defendant - - -

6 JUDGE PIGOTT: It's - - - it's - - - I'm
7 almost done, Ms. Brodt.

8 MS. BRODT: Sorry. Sorry.

9 JUDGE PIGOTT: So conceivably they wanted
10 to find out if both of these guys had turned State's
11 evidence because they got great benefits for their
12 testimony, and for a judge to say well, I know they
13 want the written document, but they don't want to
14 hear where he got his, seems to be leaning toward the
15 People.

16 MS. BRODT: Here's why, Your Honor. And I
17 was going to add before - - - before the question was
18 elaborated on, I was going to add that it's not just
19 the trial judge, it's four judges of the Appellate
20 Division who agreed with this context, and that's a
21 court that has not been very liberal on interpreting
22 O'Rama error - - -

23 CHIEF JUDGE LIPPMAN: Yeah. Yeah. But
24 that's why we're here.

25 MS. BRODT: Right. Correct, Your Honor.

1 CHIEF JUDGE LIPPMAN: To - - - whatever
2 they say, we're going to say what we're going to say.

3 MS. BRODT: I'm saying it was at least a
4 rational interpretation of the note in the contents
5 of - - -

6 CHIEF JUDGE LIPPMAN: You're saying the
7 Appellate Division is always rational?

8 MS. BRODT: I'm not saying they're always
9 rational, Your Honor.

10 CHIEF JUDGE LIPPMAN: I'm kidding you. I'm
11 kidding.

12 MS. BRODT: Because that's why we're here
13 on three cases - - -

14 CHIEF JUDGE LIPPMAN: Go ahead. Go ahead.

15 MS. BRODT: - - - right before this case.

16 CHIEF JUDGE LIPPMAN: Go ahead.

17 MS. BRODT: But - - -

18 JUDGE RIVERA: Didn't - - - didn't the jury
19 usually say I want to see the exhibit or refer to the
20 - - -

21 MS. BRODT: They did, Your Honor.

22 JUDGE RIVERA: - - - exhibit by number?

23 MS. BRODT: They did, Your Honor. They
24 asked for exhibits - - -

25 JUDGE RIVERA: So - - - but why here when

1 they just say "see" and they then mention the two
2 people - - - are you saying they would have had to
3 say, why didn't - - - why - - - why isn't the order
4 there see Exhibit whatever for Turner and hear
5 Hilton; you really think they're going to write that?

6 MS. BRODT: Right, Your Honor. Because - -
7 - and this is something I want to mention with
8 respect to what - - -

9 JUDGE ABDUS-SALAAM: Couldn't they have
10 asked, counsel - - -

11 MS. BRODT: - - - counsel pointed out - - -

12 JUDGE ABDUS-SALAAM: Couldn't they have
13 asked, we want all the evidence related to Hilton and
14 Turner and their benefits? Wouldn't that have been a
15 clearer response to - - -

16 MS. BRODT: There - - -

17 JUDGE ABDUS-SALAAM: Then you would know
18 that they want to see something that's a document and
19 hear something that is - - -

20 MS. BRODT: Correct, Your Honor.

21 JUDGE ABDUS-SALAAM: - - - testimony?

22 MS. BRODT: But you have to - - - you have
23 to look at the context also of what they were invited
24 to do by counsel in summation. Counsel pointed out
25 the summations. Counsel spent I don't know how long

1 on saying ask for the cooperation agreement, look at
2 paragraph X, look at paragraph Y. When it came to
3 Hilton, he didn't say, ask to hear the testimony. He
4 said - - - he just described it. He said here is
5 what the agreement was. So - - -

6 JUDGE PIGOTT: So did they - - - what did
7 they - - - what did they mean when they - - - when
8 they - - - when - - -

9 MS. BRODT: So - - -

10 JUDGE PIGOTT: - - - when they said we
11 would like to see - - -

12 MS. BRODT: The jury - - -

13 JUDGE PIGOTT: - - - almost done - - -

14 MS. BRODT: I'm sorry.

15 JUDGE PIGOTT: - - - we'd like to see the
16 benefits offered to Mr. Hilton and Mr. Turner? What
17 did they mean when they said they wanted to see the
18 benefits offered to Mr. Hilton?

19 MS. BRODT: They were asking for something
20 in writing, and what they may have been confused
21 about - - -

22 JUDGE PIGOTT: No. So - - -

23 MS. BRODT: - - - is whether there was
24 something in writing - - -

25 JUDGE PIGOTT: Did they get it?

1 MS. BRODT: They got what was in writing.

2 JUDGE PIGOTT: Did they get his in writing?

3 MS. BRODT: There was only one document in
4 writing.

5 JUDGE PIGOTT: Did somebody tell them that,
6 that there was - - - there - - - there was no writing
7 for Mr. Hilton but there was testimony and if you'd
8 like the testimony, we can give it to you?

9 MS. BRODT: No. The court did not say
10 that, Your Honor.

11 JUDGE PIGOTT: Wonder why?

12 MS. BRODT: But here's - - - here's why,
13 because the court's interpretation was correct. But
14 if I may, Your Honor, what I wanted to say before - -
15 -

16 JUDGE PIGOTT: Oh, yeah.

17 MS. BRODT: - - - any of the question of
18 ministerial versus not ministerial and whether it was
19 see or interpreted correctly is this is not an O'Rama
20 case. Okay. This is the only case on the calendar
21 today that's not an O'Rama case. And here's why,
22 because again, counsel had notice - - - albeit late
23 notice - - - full notice of what the note said, and
24 he objected. He objected to the answer given. So
25 what we have here is an ordinary Almodovar,

1 Steinberg, Malloy case where - - - that happens every
2 day - - - where they have full notice of the note,
3 they don't agree with the answer, and then the dis -
4 - - the debate for the court is, was the answer
5 meaningful? Was it good; was it bad; and does - - -
6 is there harmlessness? So coun - - - defendant would
7 very much like for this to be an O'Rama case because
8 he didn't object to the proceeding even - - -

9 JUDGE STEIN: But isn't it O'Rama if we
10 find that there is an ambiguity in the note and
11 therefore it didn't call for just a ministerial
12 response? Doesn't that make it an O'Rama case?

13 MS. BRODT: If - - - if in fact it were - -
14 - I don't believe it is in this case, but if in fact
15 it were, then it would be an ordinary - - - you need
16 to object because you had notice in that case. So it
17 become - - - it falls into the category of, did he
18 have full notice? He did. It was belated, but
19 Kadarko says it can be even after the response. In
20 this case, it was correctable, assuming there was an
21 error on the part - - -

22 JUDGE STEIN: But he did object.

23 MS. BRODT: He did. That's my point, Your
24 Honor. He did, so now we come - - - it becomes an
25 ordinary dispute between a judge and a defense

1 attorney or a prosecutor as to what the response
2 should be. Once it's that, there is an issue of
3 harmlessness. There is not automatic reversal.

4 He has to show that A, the court was wrong
5 in its response; B, that if it was wrong, it was
6 wrong to the point where the jury was prej - - -
7 where he was prejudiced, not because the court
8 wouldn't change its mind, but because the jury's
9 verdict was affected by it.

10 And here's why he fails on that level. He
11 fails here because first of all, there clearly has to
12 be some indication that if - - - if the prosecutor
13 had not disclosed these agreements and it came out
14 later in a 440 there'd be harmlessness, there'd be
15 materiality and a Brady, Giglio violation. Here, the
16 jury heard all about it. The jury heard about it
17 again on summation when counsel went into it at
18 length as to both of the witnesses.

19 JUDGE PIGOTT: Yeah. But we always tell
20 them that summations are not evidence, and we are
21 very, very strong about - - -

22 MS. BRODT: No. But nobody disputed that -
23 - - that there were agreements, Your Honor, and - - -

24 JUDGE PIGOTT: I know. But what I'm saying
25 is you're saying well, they got the evidence they

1 needed in summation, and I'm saying we always say
2 that's not evidence.

3 MS. BRODT: Cor - - - I didn't say they got
4 the evidence they needed. I said they were reminded
5 of the agreement.

6 JUDGE RIVERA: But doesn't the court tell
7 the jury there is no other evidence other than that
8 document?

9 MS. BRODT: He says that's what's in
10 evidence. Correct. That's what's in evidence.

11 JUDGE RIVERA: Right. So is - - - isn't
12 that then telling the jury there is no other evidence
13 - - -

14 MS. BRODT: I don't believe so in the cont
15 - - -

16 JUDGE RIVERA: - - - from - - - from - - -
17 from - - - excuse me - - -

18 MS. BRODT: Sorry.

19 JUDGE RIVERA: - - - from the only person
20 in the room who can direct the jury on the law?

21 MS. BRODT: Correct, Your Honor. But in
22 the cont - - - again, if you look at the context of
23 the request what the judge is saying and what I
24 believe the jury is hearing is that they're hearing
25 there's no other evidence in this form. Bec - - -

1 and even though that's - - -

2 JUDGE RIVERA: He didn't say that, though.

3 MS. BRODT: He didn't qualify it, Your
4 Honor.

5 JUDGE RIVERA: He didn't say that.

6 MS. BRODT: He didn't qualify it, Your
7 Honor. But he's responding to what he perceived to
8 be a note on written - - - a request for written
9 exhibits.

10 CHIEF JUDGE LIPPMAN: He can uni - - -
11 unilaterally interpret the note?

12 MS. BRODT: I'm sorry?

13 CHIEF JUDGE LIPPMAN: The judge
14 unilaterally interprets the note?

15 MS. BRODT: Absolutely, Your Honor. The
16 judge has - - -

17 CHIEF JUDGE LIPPMAN: Even when they
18 mention the two names and he still unilaterally
19 interprets it and that's just, you know, the most
20 simple response to the question? There's nothing
21 more he's - - - he or she is required to do?

22 MS. BRODT: Not - - - no, Your Honor. He
23 is not required - - - this is not an ambiguous note.
24 And here's the thing; there are notes - - -

25 CHIEF JUDGE LIPPMAN: No. It's not

1 ambiguous, but I'm not sure in the way that you're
2 thinking it's not ambiguous.

3 MS. BRODT: Correct, Your Honor. And - - -

4 CHIEF JUDGE LIPPMAN: Mentions both of them
5 and the word "see", they're not such wordsmiths that
6 - - - that "see", they mean just what we can see.
7 Isn't that a - - - isn't it - - - talk about rational
8 and reasonable, isn't that a reasonable view of the
9 note that they don't just mean just give me what I
10 can see, what you can put on a piece of paper?

11 MS. BRODT: Again, Your Honor, if we're
12 talking about ministerial versus not ministerial, and
13 I see - - - I - - - I just want to get to the
14 distinction - - - then I still believe that it was a
15 rational and a nonambiguous meaning in favor of us.

16 CHIEF JUDGE LIPPMAN: Okay. Get to the
17 distinction. Go ahead.

18 MS. BRODT: But in any case, again, even if
19 it is O' Rama error in the sense that it was an
20 ambiguous note - - -

21 CHIEF JUDGE LIPPMAN: Right. Go ahead.

22 MS. BRODT: - - - even then, he still got
23 to object. The purpose of O' Rama - - - the notice
24 purpose was served. He had to say, this is not
25 meaningful; he did.

1 CHIEF JUDGE LIPPMAN: But when does he get
2 to object so that he could provide meaningful
3 participation?

4 MS. BRODT: The timing was not a problem
5 here. He didn't object to the timing. He didn't say
6 Judge, I needed notice then. He said I still - - -
7 you can still correct it, Judge. You can give them
8 the testimony as well. He's not saying, I'm
9 prejudiced by the timing.

10 CHIEF JUDGE LIPPMAN: Isn't O - - - is - -
11 - isn't O'Rama a bright-line rule?

12 MS. BRODT: Right. And the bright-line
13 rule is he got notice, and he got notice in time to
14 object, in time for the court to have cured it. But
15 because he disagreed with the court as to the
16 response, we are now in the world of ordinary
17 dispute. He got notice, he objected and he did what
18 he was supposed to do as far as that's concerned. He
19 got - - - he - - - there's a dispute now between the
20 judge and the attorney as to what the response should
21 be, and he has to show prejudice.

22 I want to remind the court that these
23 agreements affect the defend - - - these two
24 witnesses after they came forward, so they're - - -
25 they're still relevant, but this is - - - and - - -

1 but this is not the kind of case where it's make or
2 break that they had these agreements. The jury was
3 aware - - -

4 CHIEF JUDGE LIPPMAN: Okay.

5 MS. BRODT: - - - heard the testimony,
6 heard the summation.

7 CHIEF JUDGE LIPPMAN: Okay, counsel.

8 MS. BRODT: And was aware of it.

9 CHIEF JUDGE LIPPMAN: Let's hear from
10 rebuttal from your adversary.

11 MR. RUDIN: There are two decisions by this
12 court that completely dispose of their argument. The
13 first one is Kisoan, the - - - the Martin defendant
14 in Kisoan. In that case, the court received a note
15 from the jury, did not inform the defense counsel of
16 the note, did not answer the note. There were two -
17 - - the - - - the note appeared on its face to be
18 requesting a reinstruction about the elements of - -
19 - of all three counts. Then there were two follow-up
20 notes and some colloquy. By the end of the process,
21 the court had re - - - had given the jury a
22 reinstruction on the elements of all three counts.
23 So whatever argument defense might have made in
24 response to the note that it didn't have notice of
25 apparently had been satisfied by the court.

1 And yet this court held unanimously - - -
2 Judge Pigott, I - - - I think, didn't participate,
3 but the court held unanimously that the - - - the
4 People had failed to show to the requisite certainty
5 - - - and that's where the standard comes from, that
6 if - - - if there's any cure at all at the very least
7 the People have to show to a certainty that there was
8 no prejudice. So that's the first case that - - -
9 that utterly disposes of our - - - completely
10 disposes of our case.

11 And the second is - - - is Rivera where,
12 over the dissent of Judge Abdus-Salaam, a majority of
13 the court held just last year that at a right-to-be-
14 present violation, where defense counsel actually did
15 receive notice and consented to the process used by
16 the judge and the only defect was that the defendant
17 himself wasn't present and the judge offered an
18 accurate summary of what happened and - - - and
19 offered him a - - - a verbatim transcript of what
20 happened, and then after that offer the defense
21 didn't object, and the court still found that there
22 was error that required reversal.

23 And in that case, unlike this case, the
24 defense knew about the - - - the cour - - - the note
25 and it knew about the procedure that the court

1 intended to follow and it acquiesced and agreed to
2 the procedure. And - - - and in that case, on the
3 right-to-be-present violation, there is some case law
4 reco - - - recognizing that the right to be present,
5 sometimes it can - - - it can be a de minimis
6 violation, and - - - and yet this court - - -
7 majority of the court re - - - affir - - - overturned
8 the conviction.

9 And - - - and addressing Judge Abdus-
10 Salaam's dissent, that was a case where there was a
11 potential for gamesmanship. In this case there's no
12 potential for gamesmanship. Defense counsel objected
13 as vigorously as he possibly could once he knew about
14 the note.

15 CHIEF JUDGE LIPPMAN: Okay. Okay, counsel.

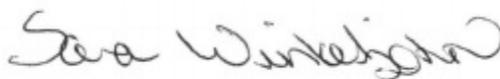
16 Thank you both. Appreciate it.

17 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Rhian Taylor, No. 134 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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