1 COURT OF APPEALS

2 STATE OF NEW YORK

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PEOPLE,

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Appellant,

5

-against-

6 No. 37

WILLIAM MORRISON,

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Respondent.

8

9 ---

20 Eagle Street
Albany, New York

10 June 5, 2018

Before:

11

CHIEF JUDGE JANET DIFIORE

12 ASSOCIATE JUDGE JENNY RIVERA

ASSOCIATE JUDGE LESLIE E. STEIN

13 ASSOCIATE JUDGE EUGENE M. FAHEY

ASSOCIATE JUDGE MICHAEL J. GARCIA

14 ASSOCIATE JUDGE ROWAN D. WILSON

ASSOCIATE JUDGE PAUL FEINMAN

15

16 Appearances:

17 HANNAH STITH LONG, AAG

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

18 Attorney for Appellant

120 Broadway

19 New York, NY 10271

20 MARY R. HUMPHREY, ESQ.

LAW OFFICE OF MARY R. HUMPHREY

21 Attorney for Respondent

4063 Oneida Street, Suite 6

22 Hartford, NY 13413

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24

Sara Winkeljohn

25 Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Number 37, the People of
2 the State of New York v. William Morrison.
3 Good afternoon, counsel.
4 MS. STITH LONG: Good afternoon. May it please
5 the court, Hannah Stith Long for the People. May I please
6 reserve one minute for rebuttal?
7 CHIEF JUDGE DIFIORE: Yes, you may.
8 MS. STITH LONG: No mode of proceedings error
9 occurred here for two independent reasons. First, the note
10 in question contained a ministerial recess inquiry not
11 subject to O'Rama. Second, the court gave notice of the
12 specific contents of the note by giving counsel reason and
13 opportunity to inspect the note herself. If - - -
14 JUDGE STEIN: Isn't there - - - isn't there a
15 possible ambiguity in the note? Certainly, it can be seen
16 as ministerial, and - - - and we know the background. And
17 - - - but if there's any question whatsoever that maybe
18 they were asking for something more than just can we go
19 home and come back the next day, isn't - - - isn't it
20 essential that counsel have an opportunity to see that and
21 - - - and make - - - make their argument?
22 MS. STITH LONG: If there were a reasonable view
23 of this note that it were a substantive request that would
24 be the case, but there is none. The court in this case - -
25 -

1 JUDGE FAHEY: Well, let's say we disagree with
2 you on that and get to the - - - to the next stage, whether
3 or not the court's dealing with the note is adequate.
4 MS. STITH LONG: Yes, if - - - if this court were
5 deemed - - - if this note were deemed substantive, the
6 record here, even the existing incomplete record, shows
7 meaningful notice.
8 JUDGE FAHEY: Well, let me tell you what my
9 problem is with that, and then you can respond to it. It
10 seems that the court here made a conscious decision not to
11 read jury note 9 into the record because the court was
12 concerned that there was media present in the courtroom and
13 that it would somehow affect jury deliberations by reading
14 the note into the record in open court. So the court not
15 only didn't read the note, but the court made a record of
16 making a conscious decision not to read the note. Would
17 you agree with that? Is that what happened here?
18 MS. STITH LONG: Yes.
19 JUDGE FAHEY: So do you think that that fulfills
20 the requirements of meaningful notice that are set out in
21 the O'Rama and its progeny?
22 MS. STITH LONG: That alone does not, but what
23 the court did was to alert counsel that the note was
24 available as a court exhibit.
25 JUDGE FAHEY: Well that - - - that's - - - we're

1 into the same thing we were talking about before, and it -
2 - - I'm having a difficult time seeing how - - - it's the
3 court's obligation to provide notice on the record. If
4 it's not on the record, then we can't review that notice.
5 It appears to have been clearly, consciously even, decided
6 not to be provided here.
7 MS. STITH LONG: Well, the lodestar of this
8 court's O'Rama jurisprudence has always been the effective
9 assistance of counsel. Not whether the note was read or
10 shown, but rather whether the court's notice procedure gave
11 counsel the information that she needed to participate
12 effectively in the court's response. O'Rama itself teaches
13 that no mode of proceedings error occurs where procedures
14 equally conducive to counsel's participation are void - - -
15 JUDGE STEIN: Isn't that - - - isn't that
16 confusing the meaningful notice with the meaningful
17 response? It seems to me that's where, you know, we - - -
18 we've sort of taken a fork in that road, and - - - and
19 we've said one, has to be exact, it has to be on the
20 record, this is what the court has to do. The other, okay,
21 well, you know, you may - - - you may have to preserve it.
22 But what we're talking about here is the meaningful notice,
23 not the meaningful response.
24 MS. STITH LONG: We are not challenging
25 meaningful notice. We believe there must be meaningful

1 notice and that counsel should have notice of the exact
2 contents. But that notice can be accomplished by giving
3 counsel reason and opportunity to inspect the note herself,
4 which the court did here. And neither the record in this
5 case shows - - - nor does defendant's counsel even claim
6 that there was any impairment of counsel's effectiveness
7 because of - - -
8 JUDGE FAHEY: Well, that's not what they have to
9 do if there's a mode of proceeding error. What - - - what
10 they have to do is you have to show that you gave them
11 notice on the record.
12 MS. STITH LONG: This court does not recognize
13 mode of proceedings errors that do not involve either the
14 impairment of some fundamental constitutional right or a
15 lack of jurisdiction on the part of the court. And that's
16 a long-standing principle throughout this court's mode of
17 proceeding jurisprudence and including in the note of - - -
18 jury note cases where the court has found a mode of
19 proceedings error there was some kind of impairment. Like
20 in Kisoon and Walston, the court left out a material part
21 of the note while purporting to read it verbatim. In Silva
22 and Hanson, the court didn't reveal the existence of the
23 note. Those things impaired counsel's effective
24 assistance, and therefore, there was a mode of proceedings
25 error.

1 Here, there was no impairment whatsoever of
2 counsel's effectiveness. Counsel could easily have looked
3 at the note if she had not already. If actual knowledge
4 were required - - - if the record were required to show
5 counsel's actual knowledge of the contents of the note,
6 counsel could create a mode of proceedings error by simply
7 refusing to look at the note. Because mode of proceedings
8 errors are unwaivable, reversal would be required.
9 JUDGE WILSON: But so your rule is that marking
10 the exhibit as a court's - - - as a court exhibit provides
11 sufficient notice under O'Rama?
12 MS. STITH LONG: If counsel doesn't realize it's
13 been marked as a court exhibit that might not be the case,
14 and if counsel doesn't realize that the court is not going
15 to read the note that might not be the case. But the rule
16 we're seeking here is that where the court - - - where the
17 court's procedure enables counsel to participate
18 effectively - - - in other words, where the court's
19 procedure is clear and gives counsel reason and opportunity
20 to inspect the note herself and learn the contents of that
21 note, no mode of proceedings error occurs.
22 JUDGE FAHEY: Well, here, let me ask this. If
23 you're asking for notice, I - - - you're saying that there
24 was notice. All right. And - - - but aren't you also
25 saying if there wasn't sufficient notice that we should

1 order a reconstruction hearing?
2 MS. STITH LONG: Absolutely. A - - -
3 JUDGE FAHEY: So - - - so you heard our
4 discussion before on the case before you and basically the
5 same question I wanted to ask you. What rule would you say
6 that we should apply in determining when to order a
7 reconstruction hearing in this context?
8 MS. STITH LONG: Well, the court laid out a rule
9 in Velasquez, and that is where it's clear a off-the-record
10 proceeding occurred or there's significant ambiguity in the
11 record, there doesn't have to be a whole lot of proof that
12 an off-the-record proceeding occurred. For example, in
13 Cruz, there was a reconstruction hearing where it was
14 unclear whether there was notice of the jury note or not.
15 In Odiat, it looked like the defendant actually wasn't
16 present for a Sandoval hearing, and this court remanded for
17 reconstruction. In Santorelli, there was no Antommarchi
18 waiver. It was remitted for reconstruction. So there
19 doesn't have to be a lot of proof, but there has to be some
20 indication that a material proceeding occurred that was not
21 transcribed, at least some ambiguity in the record. And -
22 - -
23 JUDGE FAHEY: But - - - but I don't see the
24 ambiguity here. Here the court clearly said I'm not going
25 to read the note into the record.

1 MS. STITH LONG: But the - - - there are - - -
2 there is a constellation of different factors that indicate
3 there was a discussion beforehand. And one - - - one of
4 those is that in the court's response the court expressed
5 the preference of the attorneys as well as of its own - - -
6 as its own preference that the jury continue deliberating.
7 The court could not have known that preference of the
8 attorneys without having had a discussion with the
9 attorneys beforehand.
10 Continue on the reconstruction point of the - - -
11 a breach of the affirmative duty to create a
12 contemporaneous record cannot itself be a mode of
13 proceedings error. It does not impair any constitutional
14 right except for the right to appeal and then only if
15 reconstruction is impossible. As the court said in Rivera,
16 valid trials have been held and appeals have been justly
17 determined long before the advent of modern stenography.
18 It is the court's duty, the trial court's duty as
19 the final arbiter of the record, to labor to elucidate what
20 originally occurred before the court, and this duty
21 dovetails with the principle that this court set forth in
22 McLean and Kinchen and prior cases that an appellate court
23 will not reverse on a record that does not conclusively
24 show reversible error. If it were otherwise, it would be
25 the ultimate opportunity for gamesmanship. What counsel

1 would object when the court is failing to make a record of
2 O'Rama compliance when counsel knows there would be a free
3 automatic reversal - - -
4 JUDGE FAHEY: Once again that's not what we have
5 here. There wasn't gamesmanship. The court made a
6 conscious decision not to read the note into the record.
7 MS. STITH LONG: Yes, and the court may have
8 showed it to counsel before that.
9 JUDGE FAHEY: Well, you - - - you're saying that
10 but - - - but there's no record that substantiates, that's
11 speculation.
12 JUDGE FEINMAN: But does the record show that the
13 court made a conscious decision not to show the note to
14 counsel or does it - - - a conscious decision not to read
15 the note in the - - - in the public courtroom?
16 MS. STITH LONG: Absolutely, Your Honor. It
17 shows a conscious decision not to reveal the partial
18 verdict. It does not show a conscious decision not to
19 share it with counsel. We are confident that a
20 reconstruction hearing would show that the court handed it
21 to counsel.
22 JUDGE FEINMAN: So there is sufficient evidence
23 in this record that perhaps defense counsel, had they not
24 seen the note, had enough here to say, Judge, can I just
25 see that, what you've just marked? Or - - - I mean, you

1 know, there's no fair reading of this record at this point
2 that he was trying to hide the partial verdict from the
3 defendant or the prosecution, is there?
4 MS. STITH LONG: No, absolutely not. Counsel had
5 all the information she needed to say, Your Honor, hold on
6 a second, may I please see the note before you proceed, if
7 she hadn't seen it already. We believe she actually had
8 seen it already, but if she hadn't, she could easily have
9 objected at that point.
10 CHIEF JUDGE DIFIORE: Thank you, counsel.
11 MS. STITH LONG: Thank you.
12 CHIEF JUDGE DIFIORE: Counsel.
13 MS. HUMPHREY: May it please the court, good
14 afternoon; Mary Humphrey for defendant-appellant William
15 Morrison. There was absolutely a mode of proceeding error
16 here. The record clearly shows that. The judge
17 undisputedly said I have Court Exhibit 9 here, and I will
18 not read that into the record. And there was no indication
19 that there was any off-the-record discussions where either
20 counsel were showed that - - - that particular jury note.
21 JUDGE GARCIA: But there are indications - - -
22 strong indications that there were off-the-record
23 discussions with respect to other jury notes.
24 MS. HUMPHREY: Other jury notes but not 8 - - -
25 or 9, Your Honor. That - - - the record does not indicate

1 that there were any prior off-the-record discussions
2 regarding specifically Court Exhibit 9.
3 JUDGE FEINMAN: So it's okay, then, for the
4 lawyer to hear the judge say I have this note and I'm not
5 showing it to you, and the lawyer doesn't have to do
6 anything in response to that - - - just hold it in their
7 back pocket and raise it when it gets here?
8 MS. HUMPHREY: That - - - that's the law.
9 JUDGE FEINMAN: Or to the Appellate Division?
10 JUDGE GARCIA: But that wasn't the decision in
11 Kadarko, right? In Kadarko the judge says I'm not - - -
12 I'm reading this note - - - and I think it was pretty clear
13 in Kadarko they didn’t have the note, but I'm reading this
14 note, it’s public, I'm not reading the split, I'm not
15 telling you the split. And we said in Kadarko even though
16 that was a notice issue, once you knew the judge wasn't
17 going to comply you had an obligation to object. So why is
18 that different than I'm not reading this note? You know
19 the judge isn't complying at that point, and why is that
20 different than Kadarko?
21 MS. HUMPHREY: It - - - it's a mode of
22 proceedings error. It's not in compliance with O'Rama or -
23 - -
24 JUDGE GARCIA: But Kadarko technically wasn't in
25 compliance with O'Rama either, and the argument was it was

1 a mode of proceedings error. But we rejected that argument
2 saying that when you knew the judge wasn't complying - - -
3 I am not telling you this, I am not reading this into the
4 record, you had an obligation to object at that point.
5 MS. HUMPHREY: I - - - I feel it's - - - that she
6 was not under any - - - under other case law, O'Rama CPL
7 310.30, that she was not obligated to object because it was
8 a mode of proceedings error. I understand your question
9 but I - - - I disagree that she was under any obligation to
10 object at that point.
11 JUDGE FEINMAN: Do you have anything to say about
12 whether or not this was ministerial when you were looking
13 in the context of the - - - the whole situation with the
14 snowstorms and the whole context from the whole transcript
15 that - - - that why wouldn't we be justified in - - - in
16 just saying you know what, this whole business was
17 ministerial and therefore it's not a mode of proceedings
18 error?
19 MS. HUMPHREY: Because as the majority of the
20 Fourth Department points out, it is ambiguous. The - - -
21 the dissenting judge in the Fourth Department decision does
22 make a good case for why it's ministerial, but that's only
23 speculative and it can only be - - -
24 JUDGE RIVERA: Well, what - - - what is that the
25 ambiguity? I wasn't really clear from the majority's

1 writing what - - - what they were articulating was the
2 ambiguity. All they say is well, you could read it that
3 way, but of course, there's speculation about what you can
4 and can't read. What's the ambiguity?
5 MS. HUMPHREY: Basically, not sure what to do was
6 the ambiguity. They - - - and the majority said that's - -
7 - that's a clear question - - - or a clear request for
8 direction, which I believe it is, not sure what to do.
9 JUDGE RIVERA: In context, couldn't that be about
10 not sure what to do to keep going or not going as opposed
11 to about a substantive material issue?
12 JUDGE FEINMAN: Especially when right before the
13 not sure what to do the sentence before is, "I don't see it
14 being quick," meaning a verdict?
15 MS. HUMPHREY: It's - - -
16 JUDGE RIVERA: And if I may, this problem had
17 come up over the - - - over a couple of days. What do we
18 do as we're getting closer to the end of the day?
19 MS. HUMPHREY: Right, I understand. But they had
20 previously specifically asked - - - when they wanted to
21 leave early and start the next day they specifically asked
22 that. I think if they wanted that specifically they would
23 have asked for it. They - - - they didn't ask for it in
24 this note. So they didn't know what the other options
25 were, so they're asking for direction. There's - - -

1 JUDGE FAHEY: I - - - I had thought that they
2 said that I'm not sure what to do. We reached a verdict on
3 one and two, it may take a while on three, or something
4 like that. And I - - - that's the way I read the
5 ambiguity, and part of it was it seemed to be information
6 that any attorney's going to want to know, which is that
7 the jury indicates they've reached a verdict on some
8 counts. And that information was not given to the
9 attorney, and part of it was how long should we keep
10 deliberating. I thought that's - - - that's the way I read
11 the Fourth Department's decision.
12 MS. HUMPHREY: I think it's ambiguous as the
13 majority points out.
14 JUDGE FAHEY: That's my point.
15 MS. HUMPHREY: I - - -
16 JUDGE FAHEY: Yes.
17 MS. HUMPHREY: And I think it could possibly have
18 been related to should we continue, should we stop and
19 start, but we will never know that. We can only speculate
20 that they possibly were asking, you know, should we stop
21 now or should we resume tomorrow morning. I - - - I think
22 that as the Fourth Department points out, the majority
23 decision, that the ambiguity has to be decided in favor of
24 the defendant.
25 JUDGE FAHEY: Well, the way I read it is is that

1 a defense attorney always has the right to know if a jury
2 is saying, oh, we've reached a verdict on some of the
3 counts but not the other counts.
4 MS. HUMPHREY: Right, but we have no indication
5 that the defense counsel actually saw that note.
6 JUDGE FAHEY: That's the point. That's why we
7 have O'Rama.
8 MS. HUMPHREY: Right.
9 JUDGE FAHEY: So they would know that, right.
10 MS. HUMPHREY: Right, and that was our - - - our
11 mode of proceeding error.
12 JUDGE FAHEY: Yes.
13 MS. HUMPHREY: Counsel also referred to the judge
14 saying that clearly there's an indication that the judge
15 had discussed the notes with the attorneys - - - attorneys
16 because he said we want you to continue deliberations.
17 Well, of course, you know, the attorneys want the jury to
18 continue deliberations whether it was further on that day
19 or tomorrow morning. There would - - - that is not an
20 indication that the substance of those notes were discussed
21 with - - - with counsel, with defense counsel or either
22 counsel.
23 JUDGE FEINMAN: If - - - if we were to hold that
24 reconstruction hearings are appropriate in certain
25 instances, why would a reconstruction hearing be

1 inappropriate as a remedy in this particular case?

2 MS. HUMPHREY: Because of the - - - the major

3 reason is because of the passage of time. These - - -

4 these proceedings took place in March of 2007. That was

5 over 11 years ago. There was a case that I spoke of in my

6 brief where a reconstruction hearing was ordered and four

7 years later no one, the judge, neither attorney, or the

8 court reporter could remember anything about that

9 particular jury note.

10 JUDGE FEINMAN: So instead we should reverse and

11 send it back for a new trial completely with 11-year-old

12 evidence?

13 MS. HUMPHREY: Right, I - - - I think a

14 reconstruction hearing would have to go back with construct

15 - - - with instructions as to what should happen on each

16 contingency. If they go back and depending on who says

17 what, then we need further instructions on where the court

18 - - - where the case would end up. Whether we started with

19 an appeal do novo, do we come back to this court, does it

20 go back to the Fourth Department? There were too many

21 contingencies that would need to be provided for if a

22 reconstruction hearing was ordered.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MS. HUMPHREY: Thank you.

25 CHIEF JUDGE DIFIORE: Counsel.

1 JUDGE GARCIA: Counsel, one problem I have with
2 this ministerial argument the government is making, as I
3 understand the response to the note, it was something of an
4 Allen charge indicating that, to me, the judge thought this
5 meant we're deadlocked.
6 MS. STITH LONG: Actually, the court had given
7 Allen-type instructions long before jury deliberations
8 began. And in this particular instance - - -
9 JUDGE GARCIA: In the spirit of optimism.
10 MS. STITH LONG: Yeah, well, the court had one
11 week to complete this trial. It was the court's third
12 attempt to bring the defendant to trial, and this jury note
13 came back on Thursday night.
14 JUDGE FEINMAN: Well, to conduct a trial. You
15 brought him to trial, but the - - - you meaning the People.
16 MS. STITH LONG: Yes.
17 JUDGE FEINMAN: Okay.
18 MS. STITH LONG: I'm sorry, Your Honor. Yes.
19 And this was Thursday night. There was one day remaining
20 available, and there was snow and sleet predicted overnight
21 that threatened the feasibility of jury - - - of
22 deliberations that day. None of the jurors had been vetted
23 for Monday availability, and the alternates had - - - at
24 this point had been dismissed.
25 JUDGE FEINMAN: Well, why wouldn't it have made

1 more sense to actually make sure that the lawyers have seen
2 the note, particularly given that, and take a partial
3 verdict? And, you know, maybe that's what defense counsel
4 would have done if the record reflected that they actually
5 had seen the note and they said, you know, Judge, let's
6 take the - - - because I think it said, "We have arrived a
7 decision," that's the note, "on two and three but we have a
8 lot of work to do on number one. I don't see it being
9 quick. Not sure what to do. We are starting to make way."
10 All right. If the defense lawyer had seen that they may
11 have - - - or the prosecution may have asked, Judge, take a
12 partial verdict so that if we do end up in this weather we
13 at least have that verdict and then you can declare a
14 mistrial on the third count.
15 MS. STITH LONG: Well, we believe the defense
16 counsel actually had seen it. But in any case, the defense
17 counsel could easily have asked, hey, can I see the note?
18 Interestingly, in Kadarko the court ruled that defense
19 counsel could have objected either before the note was
20 fully disclosed or afterward. So because the court's
21 procedure was made clear on the record, as it was here,
22 counsel could have objected before the note was fully
23 disclosed. And also, ultimately, in Kadarko the note was
24 fully disclosed by the court saying, "At this time, I'll
25 show the parties the last note." Whereupon, the note was

1 marked as a court exhibit.

2 Very similar to what happened here. The same

3 ability for counsel to learn the contents of the note and

4 object effectively. In sum, because ministerial matters,

5 O'Rama departures that do not affect the participation of

6 counsel, and omissions in contemporaneous record making are

7 not - - - do not affect the mode of proceedings, the

8 Appellate Division's order should be reversed.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MS. STITH LONG: Thank you.

11 (Court is adjourned)

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

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4 I, Sara Winkeljohn, certify that the foregoing

5 transcript of proceedings in the Court of Appeals of People

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14 Agency Name: eScribers

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16 Address of Agency: 352 Seventh Avenue

17 Suite 604

18 New York, NY 10001

19

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