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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Appellant,

-against-

No. 133

KENNETH NEALON,

Respondent.

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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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Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 133.

2 You want any rebuttal time to talk about  
3 O'Rama?

4 MR. BLIRA-KOESSLER: Can I have about - - -  
5 yeah. Can I have three minutes of rebuttal time,  
6 Judge?

7 CHIEF JUDGE LIPPMAN: Three minutes. You  
8 have it. Go ahead, counsel.

9 MR. BLIRA-KOESSLER: May it please the  
10 court, Chris Blira-Koessler for the Queens County  
11 DA's Office, the - - - the appellant in this action.  
12 Your Honors, in this case, the jury notes were  
13 disclosed both before the jury came back into the  
14 courtroom and after the jury came back into the  
15 courtroom. Therefore, there was no mode of  
16 proceedings error and we ask that this court reverse  
17 the Second Department's decision. The - - -

18 CHIEF JUDGE LIPPMAN: What - - - go ahead,  
19 counsel. I'm sorry. Continue.

20 MR. BLIRA-KOESSLER: No. The rule is very  
21 clear in this, you know, and should be very easy to  
22 apply, but in - - - in this instance, it was not.

23 CHIEF JUDGE LIPPMAN: If the court doesn't  
24 make a record of coun - - - of Obama comply - - -  
25 O'Rama compliance, is that it?

1 MR. BLIRA-KOESSLER: Yeah. I mean, in this  
2 case, apparently there - - - there were three  
3 sidebars that occurred right before the court went  
4 into the notes, and after each sidebar, the notes  
5 were marked as exhibits. Clearly, these sidebars  
6 were discussions about the notes, and we proved that  
7 through our investigation and through the  
8 resettlement proceeding that - - - that we ultimately  
9 brought. So the underlying - - -

10 CHIEF JUDGE LIPPMAN: Yeah. But that was  
11 brought in a while later, right?

12 MR. BLIRA-KOESSLER: No. It was brought  
13 about a few months after they filed their brief, so I  
14 believe their brief was filed, I may be wrong about  
15 this, but April or May of 2000- - - -

16 CHIEF JUDGE LIPPMAN: Three - - - three  
17 months is a few months, right?

18 MR. BLIRA-KOESSLER: A few months. Right,  
19 Judge.

20 CHIEF JUDGE LIPPMAN: Yeah.

21 MR. BLIRA-KOESSLER: Right.

22 CHIEF JUDGE LIPPMAN: So a 109 days is a  
23 few months, right?

24 MR. BLIRA-KOESSLER: But most of those  
25 adjournments - - - we - - - we sought adjournments to

1 finish our resettlement on record.

2 CHIEF JUDGE LIPPMAN: How many days are you  
3 supposed to have to make proposed amendments to the  
4 trial record?

5 MR. BLIRA-KOESSLER: Fifteen days, but that  
6 statute refers to the appellant. That statute refers  
7 to the appellant submitting the changes to the  
8 transcript.

9 CHIEF JUDGE LIPPMAN: So 109 days - - -

10 MR. BLIRA-KOESSLER: That's not us in the  
11 Appellate Division.

12 CHIEF JUDGE LIPPMAN: 109 days you can cure  
13 a fundamental error as to - - - as to not - - - in  
14 the record there's no O'Rama compliance? That's  
15 okay? Is that what - - -

16 MR. BLIRA-KOESSLER: First of all, yeah - -  
17 - yes. It is.

18 CHIEF JUDGE LIPPMAN: Is that what  
19 resettlements are supposed to be about?

20 MR. BLIRA-KOESSLER: That - - - that's  
21 exactly what resettlement is for. It's - - -  
22 specifically, this - - -

23 CHIEF JUDGE LIPPMAN: Or it's supposed to  
24 be for major cure and major fundamental mode of  
25 proceedings protocols that that's what it's about?

1 It's supp - - - is - - - is it supposed to be about,  
2 like, clerical errors and omissions and that kind of  
3 thing?

4 MR. BLIRA-KOESSLER: No matter how you  
5 denominate it, the error here is really no more  
6 clerical, substance - - - it's more important than -  
7 - -

8 CHIEF JUDGE LIPPMAN: I think it's a pretty  
9 - - - I think it's a pretty serious error - - -

10 MR. BLIRA-KOESSLER: It's - - -

11 CHIEF JUDGE LIPPMAN: - - - when it's  
12 automatic reversal if you haven't shown O'Rama  
13 compliance.

14 MR. BLIRA-KOESSLER: But it shouldn't be  
15 automatic reversal, because the full notes were  
16 revealed, even if you put the re - - - the  
17 resettlement proceeding aside.

18 CHIEF JUDGE LIPPMAN: So we're going to  
19 cure - - - we're going to cure fundamental error  
20 through resettlement?

21 MR. BLIRA-KOESSLER: That's - - - that - -  
22 - that's what this court has been doing for over 100  
23 years already. The error that occurred - - -

24 CHIEF JUDGE LIPPMAN: That's what we were  
25 doing in - - -

1 MR. BLIRA-KOESSLER: - - - here by omission  
2 - - -

3 CHIEF JUDGE LIPPMAN: - - - O'Rama cases?  
4 We've been curing reversible error by - - - by  
5 resettlement - - -

6 MR. BLIRA-KOESSLER: But this - - -

7 CHIEF JUDGE LIPPMAN: - - - and - - - and  
8 showing compliance 109 days afterwards?

9 MR. BLIRA-KOESSLER: But this court  
10 actually considered a reconstructed record in Cruz.  
11 There record didn't carry the day because all you had  
12 was custom and practice.

13 CHIEF JUDGE LIPPMAN: You think the judge  
14 is - - - that you think that it's - - - it's - - -  
15 it's an abuse of discretion to - - - to not allow a  
16 reconstruction hearing?

17 MR. BLIRA-KOESSLER: Well, if we're talking  
18 about discretion, the - - - the Second Department  
19 exercised no discretion here because they found - - -  
20 they - - - they have found - - -

21 CHIEF JUDGE LIPPMAN: Did they - - - did  
22 they abuse their discretion?

23 MR. BLIRA-KOESSLER: They - - - they didn't  
24 exercise it in the first place. They found, based on  
25 their own case law, People v. Powell, that as a

1 matter of law, resettlement is inappropriate in the  
2 circumstances of this case. So they didn't even  
3 exercise discretion to begin with.

4 CHIEF JUDGE LIPPMAN: What should they have  
5 done? What should they have done, the - - - the - -  
6 - the Appellate?

7 MR. BLIRA-KOESSLER: They should have  
8 accepted the - - - they - - - they should have  
9 accepted the record as resettled by the trial judge,  
10 because the trial judge is the final arbiter of the  
11 proceedings that occurred before him or her. There -  
12 - - there - - - this - - - this was uncontradicted  
13 evidence. We had an affidavit from the trial  
14 prosecutor, our adversary submitted no contrary  
15 evidence to show that anything the prosecutor said  
16 was incorrect.

17 CHIEF JUDGE LIPPMAN: If it was 209 days,  
18 still okay?

19 MR. BLIRA-KOESSLER: But - - - but they  
20 consented to the majority of the adjournments. So if  
21 - - - so if the other side consents to it, what's - -  
22 - what's - - - what's the problem? It - - - it takes  
23 us time to investigate these things as well. We got  
24 to call people, reach out to people, takes - - - you  
25 know, the court reporters, the judge - - - it takes

1           them time to get back to us as well. This is not  
2           something that we can just, you know, drop everything  
3           else that we're doing and get done in a week.

4                    JUDGE STEIN: I - - - I think you started  
5           to say - - - and I - - - I want to - - - is it your  
6           position that even without the reconstructed record,  
7           that what the court here did was okay, in other words  
8           which is to read the full jury notes to counsel  
9           before giving a response at the same time that the  
10          notes are read in the presence of the juror?

11                   MR. BLIRA-KOESSLER: It - - - it's - - -  
12          it's not that it's okay, because that is a deviation  
13          from O'Rama, but it's the sort of deviation that  
14          requires preservation. It's not a mode of  
15          proceedings error.

16                   JUDGE STEIN: Error, but it's not a mode of  
17          proceedings error?

18                   MR. BLIRA-KOESSLER: Error but not a mode  
19          of proceedings error. Why is it not a mode of  
20          proceedings error? For the very reason that this  
21          court has stated over and over and over again in  
22          Williams, Alcide, Ramirez, Starling, Kadarko, Lykes.

23                   JUDGE FAHEY: We're back to what we were  
24          talking about before. If you had notice of it, you  
25          could have objected; you didn't object.

1                   MR. BLIRA-KOESSLER: Correct. If - - - if  
2 you know what's in the note, you can object and say  
3 Judge, you know, I'd like for you to put this in, I'd  
4 like for you to add to your response; you know, I  
5 think something you're saying is incorrect. You  
6 know, as long as you know what's in it, you can have  
7 that chance to have a mean - - - to - - - to  
8 meaningfully participate in the proceedings. It's  
9 only when you don't know what's in the note, that's -  
10 - - that's where the mode of proceeding issue comes  
11 out of, because if you don't know a word in the note  
12 or you if you don't even know the note exists, you  
13 can't participate.

14                   CHIEF JUDGE LIPPMAN: But isn't O'Rama  
15 supposed to be kind of bright-line rule; that's why  
16 it's gotten so much attention? And isn't it  
17 conceivable to you that in the kind of situation we  
18 have here, and some of the other things we're talking  
19 about in the other cases, that the exceptions could  
20 swallow what's supposed to be a bright-line rule so  
21 that meaningful participation as being the absolute,  
22 you know, necessity really is eroded and no longer is  
23 - - - is meaningful?

24                   MR. BLIRA-KOESSLER: But, you know - - -

25                   CHIEF JUDGE LIPPMAN: Meaningful

1 participation is no longer meaningful?

2 MR. BLIRA-KOESSLER: Let me - - - let me  
3 answer that in two ways. I mean, I think - - -

4 CHIEF JUDGE LIPPMAN: Go ahead.

5 MR. BLIRA-KOESSLER: - - - it has been  
6 eroded because defense attorneys are pretty keen to  
7 the fact now that if they say nothing, if they don't  
8 meaningfully participate in the proceedings, if their  
9 client's convicted, they have that issue to raise on  
10 appeal. So if the response that the judge gives is  
11 not legally incorrect or prejudicial to their client,  
12 why speak up and say Judge, you didn't make a record  
13 - - -

14 JUDGE PIGOTT: Well, why isn't - - -

15 MR. BLIRA-KOESSLER: - - - or, Judge, we  
16 didn't discuss the note?

17 JUDGE PIGOTT: - - - the DA going to do it?

18 MR. BLIRA-KOESSLER: Sorry, Judge.

19 JUDGE PIGOTT: I think one of the things  
20 that concerned me about this reconstruction - - -  
21 first of all, the CPLR, I don't think it - - - it  
22 applies - - - but I understand what was trying to be  
23 done. But it seems like every time - - - if - - - if  
24 a defendant had done this, I - - - and I don't know  
25 this judge, I don't know - - - you know, I think the

1 judge would say, look, you got your record, go do - -  
2 - go - - - go handle your appeal. The People ask and  
3 all of a sudden, you know, things happen. I - - - I  
4 - - - I just worry sometimes that everything seems to  
5 lean toward what the People chose to do.

6 And you didn't have your record - - - and  
7 I'm not blaming anybody. I mean, sometimes in the -  
8 - - you know, in the - - - in the course of a trial  
9 things, you know, are off the record and don't get  
10 on. Now to say well, the reason it didn't get on is  
11 defense counsel was really wily and they - - - and  
12 they knew it should have been on the record but then  
13 they didn't put it on the record so I've got a right  
14 to go back and ask, well, the ADA should have said,  
15 you know, Judge, can we put on the record what we  
16 just discussed? And if - - - and if he or she  
17 didn't, I don't know that we can then go back and  
18 reinvent the record. It - - - it - - - it just - - -  
19 it just doesn't seem right. It - - - you get my gist  
20 of that?

21 MR. BLIRA-KOESSLER: Yeah. I mean, I - - -  
22 I - - - I understand what you're saying, and let me  
23 start - - - answer that by saying this. We - - - we  
24 tell our trial assistants, if you see the judge isn't  
25 doing something the judge should be doing, speak up

1 and say something, but with that said, it's not our  
2 burden to do so. It is the judge's burden to make  
3 the record. Judges should be making this record.

4 But - - -

5 JUDGE PIGOTT: Right.

6 MR. BLIRA-KOESSLER: - - - when - - - when  
7 - - - when they don't, it's not a mode of proceedings  
8 error.

9 CHIEF JUDGE LIPPMAN: Now aren't you  
10 putting - - -

11 MR. BLIRA-KOESSLER: That - - - that's what  
12 we're saying.

13 CHIEF JUDGE LIPPMAN: - - - all the burden  
14 on the defendant?

15 MR. BLIRA-KOESSLER: Excuse me, Judge?

16 CHIEF JUDGE LIPPMAN: Aren't you putting  
17 all the burden on the defendant - - -

18 MR. BLIRA-KOESSLER: No. I'm splitting - -  
19 -

20 CHIEF JUDGE LIPPMAN: - - - instead of you  
21 both have a burden, but the judge is the one who's  
22 responsible for making sure that this meaningful  
23 participation, notice meaningful participation? And  
24 this is again bright-line rules. This isn't a case  
25 where each case we say, well, you know, yeah, we'd

1           like to have more participation; we'd like to have  
2           better notice. It can't be that - - - that every  
3           case there's a reason around it because it's the  
4           defense's fault, it's the defendant's fault. It  
5           could be your fault but mostly, the responsibility is  
6           on the judge, and as you say, if the judge isn't  
7           doing what they should be doing, you have as much  
8           responsibility as they do to say hey, you know,  
9           that's what the - - - the - - - our precedents are.

10                   MR. BLIRA-KOESSLER: But - - - but - - -

11                   CHIEF JUDGE LIPPMAN: It's an O'Rama  
12           situation.

13                   MR. BLIRA-KOESSLER: But - - - but the only  
14           glitch in what you're saying, Judge, is that we're  
15           not raising this issue on appeal. They have the  
16           burden of objecting, and they have the burden of  
17           making the record.

18                   JUDGE PIGOTT: May - - - may - - -

19                   MR. BLIRA-KOESSLER: We don't have any  
20           burden on us whatsoever.

21                   JUDGE PIGOTT: Maybe - - - maybe I'm wrong  
22           about thinking about this, but if I was the trial  
23           judge and - - - and somebody came back and said  
24           Judge, one of your appeals is on - - - you know, one  
25           of your verdicts is on appeal and the big issue is

1 that maybe you screwed up; now, we had an off-the-  
2 record discussion over there, do you remember that,  
3 and do you remember that what you really said was  
4 something that'll save you from having a reversal on  
5 your record because it's going up to the Appellate  
6 Division, and would you agree with me at a  
7 reconstruction that you really did what - - - what  
8 you were supposed to do under O'Rama?

9 MR. BLIRA-KOESSLER: Well, I mean, it  
10 sounds like you're trying to paint it as a very  
11 suggestive sort of conversation.

12 JUDGE PIGOTT: I would - - - I might - - -

13 MR. BLIRA-KOESSLER: Well - - -

14 JUDGE PIGOTT: Well, I might say, yeah,  
15 that's - - - I think that's exactly what I did.

16 MR. BLIRA-KOESSLER: But - - - but that's  
17 all the more reason to delve into this more deeply by  
18 having a hearing where people can testify about  
19 conversations they had about the note.

20 Just very briefly on resettlement, because  
21 I see I'm running out of time - - -

22 CHIEF JUDGE LIPPMAN: Sure. Go ahead,  
23 counsel.

24 MR. BLIRA-KOESSLER: - - - you know, it's -  
25 - - it's here. It's - - - it's meant to conform the

1 record to the truth. Ultimately, that's one of the  
2 broadest purposes, clerical substantive aside, and  
3 that's what we were trying to do here.

4 CHIEF JUDGE LIPPMAN: No. I get it.

5 MR. BLIRA-KOESSLER: I don't think - - -

6 CHIEF JUDGE LIPPMAN: And the Appellate  
7 Division was trying to uphold the precedents in this  
8 area and saying huh-uh, automatic reversal. You  
9 know, you're not going to resettle a fundamental  
10 issue, not like a little omission or defect, and I  
11 think what my problem is I don't think it's the same  
12 thing as a ministerial little defect. I think this  
13 is a big deal. That's what you have to be able to  
14 argue around, that it's not a big deal?

15 MR. BLIRA-KOESSLER: No. No. I'm - - -  
16 I'm not saying the court shouldn't comply with  
17 O'Rama. We're just saying that this is the type of  
18 error that you have to preserve, and, you know - - -

19 CHIEF JUDGE LIPPMAN: Okay.

20 MR. BLIRA-KOESSLER: - - - the bright-line  
21 rule already exists.

22 CHIEF JUDGE LIPPMAN: Okay.

23 MR. BLIRA-KOESSLER: Disclosed, no mode of  
24 proceedings error; not disclosed, mode of proceedings  
25 error.

1 CHIEF JUDGE LIPPMAN: You'll have your  
2 rebuttal.

3 MR. BLIRA-KOESSLER: Thank you, Judge.

4 CHIEF JUDGE LIPPMAN: Let's see what your  
5 adversary says.

6 MS. HUTCHINSON: Good aft - - -

7 CHIEF JUDGE LIPPMAN: He say - - - your  
8 adversary says you got to object. Is that right?

9 MS. HUTCHINSON: Good afternoon. May it  
10 please the court, Kendra Hutchinson of Appellate  
11 Advocates for Mr. Nealon.

12 CHIEF JUDGE LIPPMAN: Yes. Is he right?

13 MS. HUTCHINSON: Not in this instance, Your  
14 Honor. No. If the core responsibility of the court  
15 is not only to give - - - well, the core  
16 responsibility of the court is to give meaningful  
17 notice, and the point, as Your Honor brought up, is  
18 participation by counsel. This court put it very  
19 wisely in Silva, the most recent case, "to delineate  
20 a set of guidelines calculated to maximize  
21 participation by counsel at a time when counsel's  
22 input is most meaningful." The - - - the - - - the  
23 rule here that we're proposing comports with O'Rama;  
24 it's the rule that this court has been applying; it's  
25 very simple and it's very easy to apply.

1 JUDGE PIGOTT: Isn't it an extension - - -  
2 I mean, he read - - - he read the notes in front of  
3 counsel. I mean - - -

4 MS. HUTCHINSON: Yep. Yes, Your Honor.

5 JUDGE PIGOTT: - - - so - - - so at some  
6 point, as - - - as your - - - as your opponent is  
7 saying, you got to say something.

8 MS. HUTCHINSON: Your Honor, we're - - -  
9 the - - - the rule is if a note requires a  
10 substantive response, if, in other words, it requires  
11 crafting from counsel, then defense counsel needs  
12 advance notice of that note, and he also needs  
13 advance notice of the court's response. Our  
14 adversary has - - - you know, has not spoken very  
15 much about this during this - - - during the oral  
16 argument, but it's at length in the briefs about  
17 Williams, Alcide, Ramirez, and Starling. None of  
18 those cases control here because in every single one  
19 of those cases the judge gave note - - - or the - - -  
20 the defense had notice of what it was that the court  
21 was going to be answering.

22 CHIEF JUDGE LIPPMAN: So that's a very  
23 narrow exception, in your mind anyway, right?

24 MS. HUTCHINSON: Pardon me, Your Honor?

25 CHIEF JUDGE LIPPMAN: That's a narrow

1 exception?

2 MS. HUTCHINSON: In this case? Yes. This  
3 case is very different. Here we have an  
4 extemporaneous off-the-cuff response both times the  
5 court responded. Both times the court did not just  
6 merely, as in Williams, repeat a charge of - - -  
7 about acting in concert. That's also Ramirez, an  
8 acting in concert charge; Alcide was simply a read  
9 back of testimony; and Starling, I believe, was the  
10 definition of intent. Every single one of those  
11 cases counsel had heard that before, and you'll note  
12 that in all of those cases, except for Williams, this  
13 court acknowledged in its holding that counsel had  
14 notice of the court's intended response. Every  
15 single one of those cases, this court hinged it on.  
16 Only in Williams did - - - did this court not cite  
17 that particular aspect of Ramirez.

18 JUDGE ABDUS-SALAAM: So, counsel, is your  
19 position that once the - - - the court starts to  
20 speak and counsel has not heard anything about what  
21 the court is going to say, although neith - - - the  
22 coun - - - counsel has neither heard the note, what  
23 was in the note, or what the court's position on the  
24 note is going to be, that counsel should just sit  
25 there and listen to what the court says and say

1 nothing?

2 MS. HUTCHINSON: Your Honor, this is a very  
3 delicate time. I mean, this is - - - this is when  
4 the court - - - you know, everybody knows that the  
5 jury identifies with the judge, not with the parties.  
6 Counsel risks invoking the ire of the jury by  
7 speaking up at that moment, particularly if the  
8 court, as in this case, is speaking off the cuff.  
9 And I think the court here - - -

10 JUDGE PIGOTT: May - - - maybe they could  
11 have an off-the-record conversation about what to do  
12 with the note?

13 MS. HUTCHINSON: Maybe they could have an  
14 off-the-record conversation, Your Honor? And well,  
15 if they did that, it wouldn't matter. It wouldn't  
16 matter because the record is the record. I mean, New  
17 York - - - New York has - - - is - - - is a - - -

18 JUDGE ABDUS-SALAAM: Well, why couldn't  
19 there be a reconstruction or a resettlement of the  
20 record?

21 MS. HUTCHINSON: Because this - - - because  
22 appellate procedure for hundreds of years in this - -  
23 - in this state, and most states and most juris - - -  
24 jurisdictions, depends upon the record being the  
25 record. Defense counsels are not allowed to come

1 back later and tell their appellate counsel, hey,  
2 guess what, you know, I said something off the  
3 record, why don't you resettle it.

4 JUDGE STEIN: Well, why - - - why couldn't  
5 defense counsel say, can - - - you know, can I have a  
6 - - - a sidebar here, Your Honor? And then the jury  
7 doesn't know what - - - what the issue is.

8 MS. HUTCHINSON: Well, I think, you know -  
9 - - for example, in People v. Alcide, where the only  
10 thing that counsel had to object to was the  
11 procedure, you know, the read - - - that was the - -  
12 - that was the case in which the judge participated  
13 in the read-back; disfavored, but it's about the  
14 procedure, which is Alcide. I think in that case it  
15 might have been easy for counsel to pull - - - to - -  
16 - to - - - to get a sidebar and say, Judge, you know,  
17 I - - - I don't want you to - - - to participate in  
18 the read-back.

19 Here, however, counsel has to process first  
20 the note, that he's hearing for the first time, and a  
21 proposed response that he might possibly want at the  
22 same time, and then also object in front of the jury.

23 JUDGE ABDUS-SALAAM: Well, but - - -

24 JUDGE STEIN: But after the - - - after the  
25 judge responds to the note and - - - and they go

1 back, you know, the jury leaves the room and - - -  
2 and counsel says, Your Honor, I'd like to, you know,  
3 discuss this on the record and - - - and then makes  
4 his or her complaints and then asks the judge to  
5 correct something the judge said. The judge can say  
6 yes or no, but at least there is - - - there is an  
7 objection on the record.

8 MS. HUTCHINSON: And I think the point  
9 here, Your Honor, is that this is all going so  
10 quickly that counsel may - - - may be surprised by  
11 the entire thing going on, number one, and - - -

12 JUDGE FAHEY: But that's - - - but that's -  
13 - -

14 JUDGE STEIN: But isn't the same true if -  
15 - - if it's done just before they go into the  
16 courtroom? The judge says, okay, I got this note,  
17 this is what I'm proposing to do, and all right, now  
18 let's go out in the courtroom?

19 MS. HUTCHINSON: But the - - - but the  
20 court has - - - has held that you do not need to  
21 preserve O'Rama error after the fact, and this is - -  
22 - this is a violation of the core responsibility, and  
23 indeed, the bell can't be unrung. I mean, that's the  
24 whole point, right, is that the jury has poss - - -  
25 has probably already heard the - - - the potentially

1 prejudicial or non-defense favorable response. I  
2 mean, here - - -

3 JUDGE ABDUS-SALAAM: No judge has ever  
4 corrected an instruction that it gave to the jury,  
5 counsel?

6 MS. HUTCHINSON: I - - - I'm sorry, Your  
7 Honor. I didn't hear.

8 JUDGE ABDUS-SALAAM: No judge has ever  
9 corrected an instruction or any advice it had given  
10 to the jury?

11 MS. HUTCHINSON: No. Of course, Your  
12 Honor. But the best practice would be that the judge  
13 would have done it beforehand - - -

14 JUDGE ABDUS-SALAAM: Well, that's the best  
15 practice.

16 MR. BLIRA-KOESSLER: Um-hum.

17 JUDGE ABDUS-SALAAM: But does that make it  
18 a mode of proceedings error?

19 MS. HUTCHINSON: It does here, Your Honor.  
20 It does. And this case is different than Williams  
21 and it is different from all the other cases cited  
22 because in this case, counsel did not have notice of  
23 the intended response. Yes. At one point the judge  
24 did read back - - - that was the - - - the second  
25 note that the judge - - - the jury sent. It asked

1 for just a straightforward read-back. The judge  
2 responded by a straightforward read-back of the - - -  
3 of the charge. However, the judge also, in two of  
4 the notes, gave an off-the-cuff - - - and I think  
5 well-intentioned, trying to make it more  
6 understandable to the jury - - - but said, for  
7 example, at one point, "The first count of robbery  
8 includes serious physical injury. There is no injury  
9 count in the assault." That's not true. "In the  
10 robbery in the second degree, there is another.  
11 However, only one count of assault in the second, and  
12 that has physical injury."

13 I mean, this is a muddled response, and I  
14 understand that the judge was trying to speak to the  
15 jury in its own language, but counsel certainly would  
16 not have been aware that that was a response, as in  
17 all of these other cases. And so the key - - - the  
18 key to those cases and the key to them being a - - -  
19 a violation of the - - - of the meaningful  
20 participation that counsel is entitled to is that not  
21 just that they - - - that counsel had notice of the  
22 note in advance, but also that counsel had notice of  
23 the response. And that is - - -

24 JUDGE PIGOTT: Well, but each time, there  
25 was this off-the-record discussion, and I know we had

1 that - - - you know, that - - - that - - -

2 MS. HUTCHINSON: Well, actu - - -

3 JUDGE PIGOTT: - - - complaint about it.

4 But I mean, they weren't - - - they weren't talking

5 real estate prices. I mean - - -

6 MS. HUTCHINSON: Well, I - - -

7 JUDGE PIGOTT: - - - the note - - - you

8 know, the note, an off-the-record discussion, and

9 then the instruction. Can - - - can't we presume

10 regularity with respect to something like that?

11 MS. HUTCHINSON: Well, this court rejected

12 the presumption of regularity in People v. Silva, so

13 I - - - I don't think it should apply it here. That

14 said, I do want to correct something factually very

15 quickly. There's only two off-the-record

16 discussions, there were three notes sent out; two in

17 one batch, two off-the-record discussions. And I

18 will point out that the second one on page 822 comes

19 direct - - -

20 JUDGE PIGOTT: Is that the note?

21 MS. HUTCHINSON: Appendix page 22 comes

22 right aft - - - after the court discussing a

23 different area. "All I am doing right now" - - - the

24 Court - - - "quite frankly, I can do this off the

25 record." Whereupon off-the-record conversation, that

1           seems clearly not related to a note.  It's about  
2           something else before it.

3                   JUDGE PIGOTT:  This note number 2 you're  
4           talking about?

5                   MS. HUTCHINSON:  A-22.  This is the - - -

6                   JUDGE PIGOTT:  Note number.  Note number.

7                   MS. HUTCHINSON:  This is note number 3,  
8           Your Honor.

9                   JUDGE PIGOTT:  Three, okay.

10                  MS. HUTCHINSON:  Note number 3.  Yep.

11                  JUDGE PIGOTT:  "Clarify if robbery in the  
12           first includes assault and robbery the second does  
13           not."

14                  MS. HUTCHINSON:  Yes.  And it seems pretty  
15           clear from A-22 that they're discussing the medical  
16           records.

17                  JUDGE PIGOTT:  Well, it says, "Does the  
18           degree of injury count towards assault first and  
19           second?"  There's another off-the-record discussion  
20           with counsel.  Then he called the jury back, read the  
21           note, and responded to it without objection from  
22           counsel.

23                  MS. HUTCHINSON:  Yes, Your Honor.  I'd  
24           point out, if - - - if the court would refer to page  
25           A-22, you'll see that right before this off-the-

1 record discussion, the parties are discussing medical  
2 records and then the court says, I'd like to do this  
3 off the record. So it's not clear. There's no break  
4 as there are sometimes in transcripts, like star,  
5 star, star when there's a recess. You know, it's not  
6 - - -

7 JUDGE ABDUS-SALAAM: Counsel, you - - -  
8 you've invoked Silva a couple of times, but in Silva,  
9 there was no notice at all.

10 MS. HUTCHINSON: Correct.

11 JUDGE ABDUS-SALAAM: Here, we at least - -  
12 - there is at least some indication that there may  
13 have been notice, probably was notice, because they  
14 were off-the-record conversations.

15 MS. HUTCHINSON: Your Honor, resettlement  
16 and reconstruction and off-the-record conversations  
17 do not cure O'Rama error. This court has been very  
18 clear that the - - - the court had - - - the trial  
19 court has - - - and it - - - and it said this in  
20 Walston as well - - - the trial court has an  
21 obligation to - - - an affirmative obligation to make  
22 on-the-record compliance with O'Rama. That's not  
23 what happened here, and the - - - I would point out  
24 that the resettlement findings meant essentially  
25 nothing in this case. All the court found on the

1 papers without a hearing was that the notes were  
2 shown. It specifically did not find what - - -  
3 "find" what the parties had been discussing or if - -  
4 - or if anything was said at all. That's very - - -

5 JUDGE ABDUS-SALAAM: So in this case, and -  
6 - - and I believe there are others in the pipeline,  
7 if the appellate court sends the case back for a  
8 reconstruction hearing where there's an O'Rama claim,  
9 you would say that would be error on the part of the  
10 appellate court?

11 MS. HUTCHINSON: We'd say that  
12 reconstruction is not appropriate to cure O'Rama  
13 error. No. It needs to happen on the record.  
14 That's - - - and for the exact same reasons that  
15 resettlement does not cure or obviate O'Rama error,  
16 reconstruction never can. It's the judge's - - -

17 JUDGE FAHEY: So all O'Rama errors are mode  
18 of proceeding errors, and all O'Rama errors are not  
19 subject to reconstruction?

20 MS. HUTCHINSON: No. Not all O'Rama  
21 errors. There's plenty of errors that this court has  
22 found violate or deviate from O'Rama.

23 JUDGE FAHEY: Well, it seems that you say  
24 that, but it seems that we're - - - that's where  
25 we're really - - - that's the core of the argument

1 here. Because if notice isn't enough to counsel and  
2 then you have an opportunity to turn and you don't  
3 object and failure to object isn't enough for  
4 counsel, and you can't reconstruct what was said to  
5 establish either one of those things, then it seems  
6 logically that's where we're at.

7 MS. HUTCHINSON: But, Your Honor, we don't  
8 send cases back to find out if the judge came to a  
9 different Sandoval ruling or if it followed its  
10 Batson procedure. I think - - - you know, thinking  
11 of other places where a court has an obligation or if  
12 they've - - - they've fulfilled their public trial,  
13 you know, the Waller v. Georgia steps one, two,  
14 three, and four - - -

15 CHIEF JUDGE LIPPMAN: There's some things  
16 that are reversible error. Period.

17 MS. HUTCHINSON: They just are. I mean we  
18 don't send it back and say - - - or, you know - - -  
19 or let a DA or let a defense attorney go back and say  
20 we have to reconstruct the record to see if maybe the  
21 - - - maybe the judge really gave a good plea  
22 allocution that we don't know about.

23 JUDGE FAHEY: It seems, though, like it  
24 would be an enormous policy extension of the meaning  
25 of O'Rama.

1 MS. HUTCHINSON: Well, I mean, at some  
2 point O'Rama, has to meet - - -

3 JUDGE FAHEY: Not saying that it can't  
4 happen. I - - - I don't mean to say that.

5 MS. HUTCHINSON: Right. Right. Well - - -

6 JUDGE FAHEY: But - - - but would you - - -  
7 would you say that it is an extension?

8 MS. HUTCHINSON: No. This comp - - -

9 JUDGE RIVERA: In your experience, this  
10 happens often? This is a frequent occurrence that we  
11 need to reconstruct the record? I mean - - -

12 MS. HUTCHINSON: Well, I'll tell you. I  
13 mean there's - - - there's some counties I think that  
14 are worse - - - the judges are worse than others, in  
15 all honesty, Your Honor. I mean I think you - - -  
16 this court has seen a bunch from certain counties  
17 more than others. Now, the reconstruction is - - -  
18 is coming I think - - -

19 JUDGE FAHEY: Right.

20 MS. HUTCHINSON: - - - mostly out of the  
21 Third Department.

22 JUDGE FAHEY: But back to my point. Is - -  
23 - is it an extension or not?

24 MS. HUTCHINSON: To allow reconstruction?

25 JUDGE FAHEY: No. Is this an extension of

1           - - - of the mode of proceedings analysis that  
2           basically doubles the O - - - O'Rama rule?

3                   MS. HUTCHINSON:  No.  No, Your Honor.  No.

4                   JUDGE FAHEY:  Okay.

5                   MS. HUTCHINSON:  Because this comports with  
6           Alcide, this comports with Ramirez and Starling.  In  
7           all of those cases, this court found no error because  
8           - - - not just because counsel had notice but also  
9           because counsel knew of what the court's intended  
10          response was.

11                   JUDGE RIVERA:  So - - -

12                   JUDGE ABDUS-SALAAM:  I think - - - I think  
13          we did find error.  We just found that it wasn't - -  
14          - it was not a mode of - - -

15                   MS. HUTCHINSON:  Yes.

16                   JUDGE ABDUS-SALAAM:  - - - proceedings  
17          error.

18                   MS. HUTCHINSON:  Correct, Your Honor.  And  
19          I apologize for mixing that up.

20                   JUDGE ABDUS-SALAAM:  The judge had  
21          incorrectly or in - - - you know, incompletely or  
22          improperly or imperfectly - - -

23                   MS. HUTCHINSON:  Yes.

24                   JUDGE ABDUS-SALAAM:  - - - complied with  
25          O'Rama.

1 MS. HUTCHINSON: Yes. And - - - and - - -

2 JUDGE RIVERA: It sounds like you're  
3 arguing that reconstruction is a - - - is a  
4 constriction of O'Rama, not an expansion.

5 MS. HUTCHINSON: Yeah. Reconstruction is  
6 not the way to - - - is not the way to address O'Rama  
7 error. And any concerns about gamesmanship, this  
8 court has addressed them before. And I see my time  
9 is up, so I'll sit down.

10 CHIEF JUDGE LIPPMAN: Okay, counsel.

11 MS. HUTCHINSON: Thank you very much.

12 CHIEF JUDGE LIPPMAN: Thanks, counsel.

13 Re - - - rebuttal, counsel.

14 MR. BLIRA-KOESSLER: Thank you, Judge. You  
15 know, one case that my adversary didn't distinguish  
16 or even mention in her brief is Kadarko, and I didn't  
17 hear her mention that case today either. She - - -

18 CHIEF JUDGE LIPPMAN: What does Kadarko  
19 stand for in your mind?

20 MR. BLIRA-KOESSLER: Kadarko stands for the  
21 proposition that when - - - that when a court reveals  
22 the full contents of a note, even when it reveals the  
23 full contents after the response is given, you still  
24 have to object. That's subject to the preservation  
25 requirement, and it's not a mode of proceedings

1 error. And - - -

2 JUDGE PIGOTT: Well, then why did you rule  
3 - - - why did run down there and try to get a  
4 reconstruction hearing if Kadarko was dispositive?

5 MR. BLIRA-KOESSLER: Excuse me, Judge?

6 JUDGE PIGOTT: Why did you go for a  
7 reconstruction hearing if Kadarko was dispositive?

8 MR. BLIRA-KOESSLER: Because we had already  
9 re - - - resettled the record so we didn't have to  
10 move for reconstruction before - - -

11 JUDGE PIGOTT: So you don't have to pick on  
12 your counsel for not citing a case, is my only point.

13 MR. BLIRA-KOESSLER: I'm sorry, Judge. Say  
14 it again?

15 JUDGE PIGOTT: You don't have to pick on  
16 your counsel for not - - - for - - - for not citing a  
17 case is my only point.

18 MR. BLIRA-KOESSLER: I'm not trying to pick  
19 on anybody, but I - - - but I think it's pretty  
20 significant that she makes this distinction about  
21 substantive and ministerial and states said that's  
22 the end-all and the be-all. Well, the note in  
23 Kadarko, that's clearly a substantive note. So if it  
24 - - - what - - - what we refer to as a timing error,  
25 if a timing error still required preservation even

1 with a note like that, then how does that rationale  
2 not apply to this case? And as far as the intended  
3 response goes, in all of those cases, the court just  
4 - - - in Williams, Alcide, Ramirez - - -

5 CHIEF JUDGE LIPPMAN: So basically we're  
6 going to get into a situation where O'Rama has been,  
7 again, a bright-line rule and now where we don't put  
8 O'Rama protocols in the record, we can just cure it  
9 easily a few months later by resettling the record?  
10 And that - - - is that the new norm? Is that how we  
11 deal with O'Rama error that again, you know, our  
12 precedents seems to say is a pretty important - - -  
13 just what we call them, mode of proceedings error.  
14 Now we're going to cure a mode of proceedings error  
15 on a regular basis with resettlements?

16 MR. BLIRA-KOESSLER: Well, this is a  
17 limited number of cases, number one. And number two,  
18 this - - -

19 CHIEF JUDGE LIPPMAN: But - - - but we  
20 could do it every time.

21 MR. BLIRA-KOESSLER: - - - the remedies - -  
22 -

23 CHIEF JUDGE LIPPMAN: What - - - why can't  
24 we do it every time? Why - - - why isn't it totally  
25 eviscerating O'Rama if every time you don't follow

1 the protocols, we just - - - we'll just resettle the  
2 record?

3 MR. BLIRA-KOESSLER: Right. But this court  
4 has stated that the reason why - - -

5 CHIEF JUDGE LIPPMAN: It's the whole idea  
6 of O'Rama is that judges should follow the protocols.  
7 That's what this is about. And if judges aren't  
8 following it and not putting it on the record, the  
9 answer is, well, it's okay, we'll correct it later?

10 MR. BLIRA-KOESSLER: But this is not some  
11 intentional thing the judges are doing - - - hey, I'm  
12 not going to comply with O'Rama. It's a lapse.  
13 That's why you have - - -

14 CHIEF JUDGE LIPPMAN: Judges are complying  
15 - - -

16 MR. BLIRA-KOESSLER: - - - resettlement.

17 CHIEF JUDGE LIPPMAN: - - - with O'Rama  
18 because they understand that if they don't, there are  
19 consequences to that.

20 MR. BLIRA-KOESSLER: Correct. If you don't  
21 disclose the full contents of the note or if you  
22 don't disclose the note at all. That's the bright-  
23 line rule, Judge. That's the bright-line rule. But  
24 when there's an omission in the record, where it's a  
25 correct - - - where - - - sorry.

1 CHIEF JUDGE LIPPMAN: It's a - - - you  
2 think this is a clerical error?

3 MR. BLIRA-KOESSLER: It - - - it's no more  
4 or less clerical or substantive than what happened in  
5 Minaya or Orange County Court or the Dalrymple case  
6 where the verdict was corrected. How is it any  
7 different or less - - - or less important? All those  
8 involved important issues. A court has an  
9 affirmative duty to impose a correct verdict or  
10 impose the correct sentence or record criminal  
11 histories correctly, so how is this any more or less  
12 of a serious error?

13 It - - - it's - - - it's along the exact  
14 same lines as every other case which this court has  
15 allowed for resettlement. That remedy should apply -  
16 - - should - - - should apply here as well, if - - -  
17 if we can adduce sufficient evidence in order to  
18 support it.

19 We're not always going to be able to do  
20 that. It's not a prosecution-specific remedy. In  
21 Cruz, it didn't work, it didn't work at all, because  
22 all you had is custom and practice. But where we can  
23 at least - - - all we're asking this court for is  
24 this. At least give us - - - you know, say that it's  
25 okay to try - - - it's okay to try to resettle these

1 records before we go to this very drastic remedy - -  
2 -

3 CHIEF JUDGE LIPPMAN: Every time there's -  
4 - -

5 MR. BLIRA-KOESSLER: - - - of reversal.

6 CHIEF JUDGE LIPPMAN: Every time there's an  
7 O'Rama record, we're going to try and resettle?

8 MR. BLIRA-KOESSLER: Why not? It - - -

9 CHIEF JUDGE LIPPMAN: Okay.

10 MR. BLIRA-KOESSLER: What - - - what's - -  
11 - well, why not at least try? It's not always going  
12 to work.

13 CHIEF JUDGE LIPPMAN: I hear you, counsel.

14 MR. BLIRA-KOESSLER: Judge, it won't always  
15 work but we - - -

16 CHIEF JUDGE LIPPMAN: Thank you.

17 MR. BLIRA-KOESSLER: - - - should at least  
18 try.

19 CHIEF JUDGE LIPPMAN: Thank - - - thank you  
20 both.

21 MR. BLIRA-KOESSLER: Thank you, Judge.

22 CHIEF JUDGE LIPPMAN: Appreciate it.  
23 Thanks.

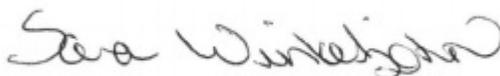
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Kenneth Nealon, No. 133 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: September 16, 2015