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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 74

TERRANCE L. MACK,

Respondent.

20 Eagle Street
Albany, New York 12207
April 26, 2016

Before:

CHIEF JUDGE JANET DIFIORE
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
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Meir Sabbah
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Good afternoon,
2 everyone.

3 Counsel.

4 MR. KAEUPER: Your Honor, may I have three
5 minutes of rebuttal?

6 CHIEF JUDGE DIFIORE: You may.

7 MR. KAEUPER: Thank you, Your Honor.

8 May it please the court, Geoffrey Kaeuper for
9 the People.

10 The class of mode of proceedings error should
11 not be expanded in this case. This court, in its O'Rama
12 cases, has developed a very clear and simple rule about
13 what constitutes a mode of proceedings error. In every
14 case where defense counsel had notice of the exact
15 contents of the jury notes, this court found there was no
16 mode of proceedings error. And in every case where
17 counsel lacked exact - - - notice of the exact contents of
18 the notes, this court found - - -

19 JUDGE RIVERA: What about the judge's
20 responsibility under 310.30?

21 MR. KAEUPER: Um-hum. Yes. And the judge
22 does have a responsibility under 310.30 to respond to
23 notes. I think - - -

24 JUDGE RIVERA: So let me ask you this.
25 What if a judge does advise counsel, and read the

1 note, and then counsel and the judge decide not to
2 respond to the note; could they do that under the
3 CPL?

4 MR. KAEUPER: I think that would be error,
5 but I don't think it would be a mode of proceedings
6 error. And I think that's really - - -

7 JUDGE RIVERA: Why is it not a mode of
8 proceedings error?

9 MR. KAEUPER: Because there, the defense is
10 making a strategic choice, they have an opportunity
11 for input; that was what - - - what O'Rama was
12 concerned about. And in O'Rama - - -

13 JUDGE RIVERA: But how can that supersede
14 though the mandatory language of the CPL though,
15 right?

16 MR. KAEUPER: Well - - -

17 JUDGE RIVERA: CPL says the judge must
18 respond - - -

19 MR. KAEUPER: Right.

20 JUDGE RIVERA: - - - So how could the judge
21 and counsel decide together that they're just not
22 going to respond?

23 MR. KAEUPER: Well, again, I mean, that
24 would be error. But there are lots of things that
25 are required under the CPL that are not mode of

1 proceedings errors if they - - - if there - - - if
2 the error occurs. So, you know, in O'Rama, the mode
3 of proceedings was based specifically on the fact
4 that - - -

5 JUDGE RIVERA: So - - - I'm sorry, so what
6 - - - it's not a mode of proceedings error because
7 it's some other kind of error. So what other kind of
8 error is it; just a generic error - - -

9 MR. KAEUPER: To - - -

10 JUDGE RIVERA: - - - failure to comply
11 with the statutory mandate?

12 MR. KAEUPER: Correct, correct. Yeah, and
13 I mean, that - - - you know, there are plenty of
14 statutory requirements that don't involve mode of
15 proceedings errors.

16 And I think, you know, that rule from
17 O'Rama is consistent also with this court's other
18 more recent mode of proceedings cases. I would note
19 People v. Conceicao, from November of last year, was
20 a case in which this court found that the Boykin
21 rights were not - - - did not involve a mode of
22 proceedings error if the defense had an opportunity
23 to object there. And so I think the same kind of
24 reasoning is working - - -

25 JUDGE RIVERA: So it's the failure to give

1 notice?

2 MR. KAEUPER: Excu - - -

3 JUDGE RIVERA: That's what makes it a mode
4 of proceedings error, the failure to give notice?

5 MR. KAEUPER: Right, because - - -

6 JUDGE RIVERA: Okay.

7 MR. KAEUPER: Because the failure to give
8 notice prevents counsel from participating in a
9 meaningful way. And that's what O'Rama is really
10 concerned with.

11 JUDGE RIVERA: But isn't the statute about
12 both the notice to counsel, and the judge's duty and
13 obligation to respond?

14 MR. KAEUPER: Correct. Correct, but that
15 wasn't - - -

16 JUDGE RIVERA: Why isn't - - - that's what
17 I'm saying, why isn't the second part of - - - why is
18 it only the first part of the statute a mode of
19 proceedings error, but not the second part of the
20 statute?

21 MR. KAEUPER: Because only first part
22 prevents counsel from having meaningful input.

23 JUDGE RIVERA: But isn't the second part
24 about insuring that the jury's request is responded
25 to? Aren't we as concerned - - - at least as

1 concerned about responding to the jury as we are that
2 counsel may engage in some kind of discussion with
3 the judge as to what would be an appropriate
4 response; isn't that all geared towards a response?

5 MR. KAEUPER: Well - - - but the mode of
6 proceedings aspect of O'Rama was geared on - - - was
7 geared towards meaningful participation. And so
8 here, defense counsel is meaningful - - -
9 meaningfully participating in the process, and is
10 making a strategic decision to say - - -

11 JUDGE RIVERA: I see.

12 MR. KAEUPER: - - - you know, I think - -
13 - I think whatever - - - whatever verdict they come
14 up with, I think I'm more likely to get an acquittal
15 now, then if you tell them to go back and reconsider.

16 JUDGE RIVERA: So "meaningful
17 participation" could mean that defense and the judge
18 decide that there - - - there will be no response to
19 the note.

20 MR. KAEUPER: Right. And I mean - - -

21 JUDGE RIVERA: JUDGE RIVERA: Responding -
22 - - compliance with half of the statute, you say is
23 sufficient, right?

24 MR. KAEUPER: Again, I'm saying it's error
25 but it's not a mode of proceedings error.

1 CHIEF JUDGE DIFIORE: Counsel, does the
2 failure by the court to respond to those notes in
3 fact, taint the whole process, the whole procedures?

4 MR. KAEUPER: I don't think it does. And I
5 do think it matters here, I mean, I think the
6 question of error here is not as straightforward as
7 it would be in a case where there is simply decision
8 to not respond to a note. Because I think that here,
9 the jury, by sending out a note saying, we've reached
10 the verdict, is argued - - - it's somewhat ambiguous,
11 what is arguably indicating that they do not need
12 those notes further.

13 So certainly in that circumstance, you
14 know, defense counsel could request clarification.
15 It's like, I think like any other ambiguous note.
16 The defense could request clarification. And in that
17 circumstance, I think the - - - the court would be
18 required - - - as occurred in the Lourido case, would
19 be required then, to at least make an inquiry about
20 that ambiguous note.

21 I'm not sure in saying you've reached a
22 verdict; do you mean that you don't need those
23 previous notes or do you need to hear answers.

24 JUDGE STEIN: Did the People have any
25 obligation to raise that?

1 MR. KAEUPER: No, I don't think it's the
2 obligation of the People to raise it. It's - - -
3 it's a strategic decision for defense counsel. And
4 really, you know, the defense is - - - I mean, this
5 is - - - this is the final moment of the - - - this
6 is the most important moment of the trial, and the
7 defense is making a strategic decision about - - -

8 JUDGE STEIN: So then - - -

9 JUDGE RIVERA: No, no, please.

10 JUDGE STEIN: No, so if the People want - -
11 - wanted to make sure, to clarify this ambiguity,
12 then they would ask the court. But if the defense
13 attorney wanted to know the answer to that, then it's
14 incumbent upon the defense counsel to raise the
15 issue; is that what you're saying?

16 MR. KAEUPER: Right. And if it was a mode
17 of proceedings error, we'd create the situation where
18 the People could ask for clarification, and the
19 defense could say, no, and if the judge does what the
20 defense wants, it would be an automatic new trial,
21 which I think would really kind of skew the
22 intentions of O' Rama, where you would have the
23 defense attorney, you know - - -

24 JUDGE RIVERA: So - - -

25 MR. KAEUPER: - - - having meaningful

1 input, and yet getting a - - -

2 JUDGE RIVERA: So the defense counsel says
3 to the judge, yes, I want to know, or I think you
4 should ask whether or not they want the note
5 responded to, even though they've indicated they have
6 a verdict. And the judge does so, and they say,
7 well, yes, we'd like a response. Could the counselor
8 and the judge at that point say, well, we're not
9 going to respond?

10 MR. KAEUPER: Again, I think that would be
11 error, but not a mode of proceedings error.

12 JUDGE RIVERA: Not a mode of proceedings
13 error.

14 MR. KAEUPER: Yeah, because at that point
15 you have the defense participating meaningfully.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MR. KAEUPER: Thank you.

18 CHIEF JUDGE DIFIORE: Counsel.

19 MR. BOURTIN: Good afternoon, thank you.

20 Nick Bourtin of Sullivan & Cromwell for the
21 respondent, Terrance Mack.

22 Mr. Kaeuper just talked about the court not
23 expanding the mode of proceedings doctrine. The way I see
24 it, the question this court is grappling with is whether
25 it should be reduced. Whether the two core requirements

1 of the O'Rama doctrine, which this court has recognized
2 for more than a quarter century, should in fact be reduced
3 to one.

4 JUDGE GARCIA: Counsel, isn't the problem
5 here though, okay, we have this fact scenario, and
6 the jury is asking for all these different things,
7 I'm the defense counsel, then they come out and they
8 say they have their verdict. I don't have to object
9 here on the note issue, so I take the verdict.
10 Because they've been asking all these kinds of
11 questions, they don't understand reasonable doubt,
12 good shot I am going to get an acquittal.

13 Worst-case scenario, if we do what you
14 want, I'm going to get a do over. Why wouldn't you
15 do that in every case?

16 MR. BOURTIN: Because that's not what O'Rama is
17 about. O'Rama is not concerned with - - -

18 JUDGE GARCIA: Forget O'Rama, why wouldn't
19 you do that?

20 MR. BOURTIN: You know, number one, I'm not
21 sure that missing an opportunity to advocate for your
22 client, and to try to influence the jury in a way for
23 a favorable verdict, is a real strategy that a
24 defense attorney in that position would pursue. You
25 know, in the hopes of some get-out-of-jail-free card.

1 JUDGE GARCIA: Really?

2 JUDGE ABDUS-SALAAM: How - - - how is it
3 that that would be advocating for favorable result
4 for your client? Because the - - - if you're talking
5 about beyond a reasonable doubt, there are two parts
6 to that. Right. I mean - - -

7 MR. BOURTIN: We know here that the jurors'
8 questions telegraphed three things. That they were
9 concerned about what reasonable doubt meant, that
10 they were concerned about what to do about a single
11 witness; those are both, you know, favorable
12 questions from a defense perspective, but also they
13 had misapprehended the evidence.

14 They had thought that there was testimony
15 of the defendant leaving the scene, when in fact
16 there was none. There is no way that failing to
17 answer that question could be anything except
18 prejudicial to the defendant.

19 JUDGE PIGOTT: But doesn't that go back to
20 Judge Garcia's point? I mean, why - - - why wouldn't
21 you sit silently and say, this is golden, I'm either
22 going to win or I'm going to win.

23 MR. BOURTIN: Because - - - you know,
24 whatever defense counsel's motivation is, I think
25 that's the point. 310.30 and O'Rama, they don't put

1 the obligation to answer jury questions on defense
2 counsel or the People; that's why it sits with the
3 court.

4 JUDGE PIGOTT: Am I being unclear with my
5 question? In other words, if the judge is going to
6 not respond to those, I know because of what the
7 Court of Appeals has said, that's error, it's mode of
8 proceedings, I'm going to get a do over unless they
9 come back and acquit, in which case there is no do
10 over. So I win or I win.

11 MR. BOURTIN: If that's defense strategy,
12 then that - - - I think that emphasizes the point
13 that the burden shouldn't be on the defendant.
14 Because what the statute is about, what O'Rama is
15 about, is not about tactical decisions that one side
16 or the other might want to make. It's about the
17 fundamental mode in which criminal proceedings in
18 this state are conducted.

19 JUDGE PIGOTT: But isn't it - - - isn't it
20 the structure? In other words, you know, we want to
21 make sure that the notes get responded to. Now, one
22 of the notes was, we want a smoke break. Now, I
23 would think we would all agree that if that was the
24 only note, and then the next one, while we're talking
25 about whether or not we're going to give them a smoke

1 break is we've reached a verdict, then we don't call
2 them back in and say, would you like a smoke break
3 before going back to deliberate; we would think that
4 would be silly.

5 MR. BOURTIN: Correct.

6 JUDGE PIGOTT: So the mode of proceedings,
7 the structure is there, all the architecture of what
8 is required under the statute is there. The notes
9 came in, the judge read them, talked to the lawyers
10 about them, and a new one - - - and a new one came,
11 and no one said, well, wait a minute, we've got to
12 cover these because I think it was suggested earlier,
13 defense is making a tactical decision, prosecutor
14 probably is too, and we get a verdict.

15 MR. BOURTIN: Right. And again, the way
16 the law in New York is designed is not to put that
17 judgment with either party. It's up to the court - -
18 -

19 JUDGE PIGOTT: So the smoke - - - so the
20 smoke break - - - it would be an error if he did not
21 give him a smoke break before.

22 MR. BOURTIN: No - - -

23 JUDGE PIGOTT: No?

24 MR. BOURTIN: - - - I think the court's
25 case law is clear; it needs to be - - - a substantive

1 jury question is what triggers 310.30.

2 JUDGE PIGOTT: It doesn't say that.

3 JUDGE STEIN: But what - - - what makes - -

4 -

5 MR. BOURTIN: It says that; it says a
6 question about the law or about the facts of the
7 case.

8 JUDGE PIGOTT: Oh, okay.

9 MR. BOURTIN: The statute itself references
10 a question of substance. Not, you know, whether I'm
11 saying - - -

12 JUDGE FAHEY: So let's say we - - - say
13 it's a mode of proceedings error if the court doesn't
14 get a meaningful res - - - give a meaningful
15 response. Would we then be at the point where we
16 would continually litigate what is or is not a
17 meaningful response?

18 MR. BOURTIN: No. Because this is - - -
19 and this is where the Nealon case, this court decided
20 in October - - -

21 JUDGE FAHEY: I'm familiar with it.

22 MR. BOURTIN: - - - is so instructive
23 here. And it really - - - it takes, you know, all of
24 the O'Rama jurisprudence, and it distills it to a
25 very simple rule; the application of which, I submit,

1 is simple here. And that rule is this. That
2 preservation is required where the court discharges
3 its court duties, but does so imperfectly, and the
4 defense counsel had an opportunity to have input into
5 that discharging of duty.

6 JUDGE PIGOTT: But does that - - - does
7 that mean in this particular case - - - let's assume
8 everything happened as the way it happened, and the
9 judge says, so I'm going to bring them out and I'm
10 going to answer these questions. Defense says,
11 judge, don't. They've said they've reached the
12 verdict, you know, we want the verdict. Would the
13 judge be wrong then to say, I don't care Mr.
14 Defendant, you may think this is your trial, it's
15 mine, and I'm going to give them this information
16 even though they have now reached a verdict.

17 MR. BOURTIN: Absolutely.

18 JUDGE PIGOTT: Really?

19 MR. BOURTIN: Well, of course, because
20 that's what the judge is required by law to do. It
21 doesn't mean the judge has to - - - has to answer the
22 questions necessarily, but the judge has to assure
23 himself or herself that the jury reached a verdict
24 based on a proper understanding of the law.

25 JUDGE PIGOTT: What do you mean, they don't

1 have to answer the questions? How - - -

2 MR. BOURTIN: It may very well be that the
3 jury satisfied its question itself. But the judge
4 can't assume that; it can't be implied.

5 JUDGE PIGOTT: Oh, he sh - - - he should
6 call them out and say, I've got three notes from you,
7 I also got this verdict one, do you want me to answer
8 the three before announcing your verdict or not? Is
9 that - - -

10 MR. BOURTIN: Correct, simple. It could -
11 - - it would - - - could take less than a minute.

12 CHIEF JUDGE DIFIORE: Counsel, I'm not
13 clear, you referenced twice I think, the counsel's
14 opportunity to be heard here. Are you suggesting
15 that counsel did not have a full and maximum
16 opportunity to be heard under these circumstances?

17 MR. BOURTIN: No. What I'm saying is,
18 under the law of Nealon, the opportunity is important
19 if the court discharges its duty in some way, but
20 makes a mistake in how it does it.

21 But I think what the case law is clear on,
22 is if the court utterly fails to discharge the duty,
23 on the notice side, by failing to even alert defense
24 attorney to the note, or on the response side, by
25 failing to respond to the jury questions, then that

1 is a mode of proceedings error, and whether counsel -
2 - -

3 JUDGE STEIN: How does that square with
4 Conceicao?

5 MR. BOURTIN: I'm sorry?

6 JUDGE STEIN: How does that square with the
7 [Con-see-co] or Conceicao case?

8 MR. BOURTIN: Well, I don't think this
9 court has ever held in any case that a complete
10 failure to respond to a jury question requires
11 preservation by defense counsel. The court has never
12 ruled that way.

13 JUDGE RIVERA: But it's a unique case here,
14 right, because - - - putting aside the hypothetical,
15 but before, you have the verdict, so it could be, as
16 some Appellate Departments have held, that the judge
17 believes that the jury is now withdrawn its prior
18 outstanding request articulated in those notes.
19 Right? So it's not necessarily a choice not to
20 respond, it is one where the judge views the
21 circumstances as there is now no request on the table
22 to which I must respond. Why can't we view the case
23 that way - - -

24 MR. BOURTIN: But that - - - that - - -

25 JUDGE RIVERA: - - - for this narrow class

1 of cases?

2 MR. BOURTIN: That can't be, because if
3 there is some implied withdrawal - - -

4 JUDGE RIVERA: Um-hum.

5 MR. BOURTIN: - - - then that would swallow
6 up the O'Rama rule itself. Because that would mean
7 anytime a jury reaches a verdict, it cures whatever
8 failure there's been up to that point to answer a
9 question.

10 JUDGE FAHEY: Do you know the more
11 interesting question I thought was, Judge DiFiore
12 made reference to the integrity of the process as a
13 whole. And all of us are concerned about that
14 simultaneously, and I wrote Nealon, and in Nealon, I
15 think the court - - - what the court was saying there
16 is, the integrity to process is compromised, like you
17 said, if we don't know, if we simply don't know, if
18 there is no notice.

19 Meaningful response, though, is not the
20 same. Response isn't really the same situation.
21 Then it gets into responding creates a situation
22 where an attorney, an effective advocate, is going to
23 want to get his client acquitted; that's his job.
24 His job is not the integrity of the process as a
25 whole, I should - - - that shouldn't be his burden.

1 MR. BOURTIN: Exactly.

2 JUDGE FAHEY: The judge is to make - - -
3 we're assuming here that the judge made an error.
4 The question is whether or not the error transcends
5 to that relatively rare situation where it was
6 impossible for them to make - - - by them, I mean the
7 attorney, to make an intelligent choice.

8 And that's I think what I'm struggling with
9 here, and that's why I don't see notice as the same
10 as response. But I think you are right though, and I
11 think we would all agree that we are really reaching
12 here for what ensures the integrity of the process.
13 And - - - but I don't see how you convince us on
14 response just yet.

15 MR. BOURTIN: And what I would submit,
16 Judge Fahey, that the response is that much more
17 important, even than the notice.

18 JUDGE FAHEY: But your - - - your proposal
19 would eliminate all strategic choices for defense
20 counsel.

21 MR. BOURTIN: Correct. Because this is - -
22 - O' Rama is not about strategy, it's not about
23 tactics. You know, to - - - to impart a requirement
24 of preservation now, it doesn't do away with tactics
25 or gamesmanship - - -

1 JUDGE PIGOTT: How do you - - - how do you
2 figure this - - -

3 MR. BOURTIN: - - - it just changes it.

4 JUDGE PIGOTT: In this situation, where
5 they wanted the testimony with respect to the person
6 leaving and one person - - - now they've reached a
7 verdict, the twelve of them have decided unanimously
8 to go one way or the other.

9 You're calling them back and you're saying,
10 I'm going to give you that instruction on - - - on
11 one witness, and I'm going to give you the instr - -
12 - you know, and I'm going to tell you that that - - -
13 no one saw him leave. Does that make - - - put the
14 judge in a funny situation, where it sounds like he's
15 dissatisfied with the verdict that he knows is
16 coming, and he wants them to review two things that
17 they apparently have decided, either they don't want
18 to do, or they've reached whatever wrong conclusion
19 that they may have reached instead?

20 MR. BOURTIN: But all the court has to do
21 is inquire as to whether they've satisfied themselves
22 as to their questions.

23 JUDGE PIGOTT: Um-hum.

24 MR. BOURTIN: This - - - it is a mist - - -

25 JUDGE RIVERA: Well, if we rule in your - -

1 - your favor, again, it's a unique set of
2 circumstances; you have a verdict, you have these
3 outstanding notes. If we rule in your favor on the
4 question of gamesmanship, what's the gamesmanship?
5 Doesn't the judge know that when a verdict comes out,
6 I should either ask, I should not assume, and that
7 way we avoid this problem of there will be no
8 response? Because your argument is about the total
9 lack of a response.

10 MR. BOURTIN: I - - - that's exactly right.
11 The only way to do away with the gamesmanship is to
12 tell courts - - - to insist that courts do what the
13 law requires them to do. Then there can't be any
14 gamesmanship. A preservation requirement was just
15 going to generate gamesmanship of a different sort.

16 JUDGE PIGOTT: What - - - what - - - what's
17 gamesmanship in your view in this case?

18 MR. BOURTIN: Gamesmanship is allowing a
19 tactical decision by defense counsel that can later
20 be second guessed on appeal as having - - -

21 JUDGE PIGOTT: Oh, I see, the - - - okay.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 JUDGE GARCIA: But isn't games - - - isn't

24 - - -

25 CHIEF JUDGE DIFIORE: Go ahead, Judge

1 Garcia.

2 JUDGE GARCIA: Isn't gamesmanship here,
3 like any time when we want preservation or we look to
4 preservation, that a judge makes an error - - - a
5 judge makes an error, and you know it, but you hold
6 it, because you know you don't have to object. So
7 later on in an appellate setting, you can say mode of
8 proceedings error. I get it reversed.

9 That's gamesmanship to me, and that drives
10 our preservation requirements, which is why if you
11 have noted - - - no notice of a note, under your
12 example earlier, then we could say, look, that's mode
13 of proceedings error, you didn't have an opportunity
14 to do that.

15 But gamesmanship to me, would seem to be in
16 the preservation context. You know the judge has
17 committed an error, you have an opportunity then to
18 object and to correct the record here, or to make an
19 appropriate process going forward, but you don't
20 because you know you don't have to, and later on a
21 court will take care of it for you.

22 MR. BOURTIN: But I suggest you're just
23 creating a different types of gamesmanship here.
24 Because then there will be second guessing a trial
25 counsel's failure to object, to preserve an error,

1 which can lead to ineffective assistance of counsel
2 and other claims.

3 JUDGE GARCIA: But that's an argument for
4 any time not having a preservation requirement.

5 MR. BOURTIN: Preservation requirements are
6 critically important when the judge may
7 inadvertently, you know, make a mistake, and there's
8 a duty on counsel to speak up. This can't be one of
9 those cases. The question is put to the judge; the
10 judge knows it's his responsibility or her
11 responsibility to respond to that question. Here,
12 she doesn't need counsel telling her that.

13 JUDGE RIVERA: But where - - - where does
14 the jury fit in that equation in your answer?
15 Because isn't the point of the statute to respond to
16 a jury's request?

17 MR. BOURTIN: To make sure that - - -
18 exactly, to make sure juries are rendering a verdict
19 based on a proper understanding of the law. That's
20 what 310.30 is all about; that's what O'Rama is all
21 about.

22 JUDGE GARCIA: Then anytime there is a
23 statutory requirement for judges, there's no need for
24 preservation, because he knows the law.

25 MR. BOURTIN: This court has held for

1 twenty-five years that in this context, which this
2 court has described as the most - - - in some ways,
3 the most critical moment in any trial, this court has
4 said, is when a jury comes back with a question,
5 because the answer to that question may very well
6 determine the outcome of a jury's deliberations.

7 JUDGE GARCIA: But if a judge gives an
8 instruction or a response on a note, and there is no
9 objection to it, but later on the court might think
10 that's not the right instruction, does the defense
11 counsel have an obligation to object to that?

12 MR. BOURTIN: If the judge gives a
13 response.

14 JUDGE GARCIA: Right.

15 MR. BOURTIN: At that point, the judge has
16 dis - - -

17 JUDGE GARCIA: But why isn't that the
18 fundamental part of the trial, where he is telling
19 the jury an answer to a question?

20 MR. BOURTIN: Because the court has at
21 least, you know, attempted to satisfy the court's
22 obligations, the core obligations. And Nealon says,
23 in that case, preservation is required. But if the
24 court utterly fails, it isn't; that's what this court
25 has always held.

1 And I know I am long over time, but just
2 let me finish with one final thought. This court
3 cannot reverse the Fourth Circuit here without
4 essentially overruling O'Rama. These facts, I
5 suggest, are the worst facts imaginable to overrule
6 O'Rama.

7 This was a razor-thin case based on a
8 single witness, and the jury understood how weak the
9 evidence was, because - - - we know that because they
10 were deadlocked at 5:42 p.m. They were sent back to
11 deliberate and took - - - and given the impression
12 that they would deliberate all night, if necessary,
13 before they reached their verdict. They waited
14 ninety-four minutes for answers to three of the most
15 important questions that a jury could have, based on
16 the facts here. They never got those answers.

17 There is a strong concern here that the
18 verdict in this case was not based on the evidence,
19 but as a result of coercion because the jurors - - -

20 JUDGE PIGOTT: Coercion?

21 MR. BOURTIN: Coercion in the - - - from
22 the circumstances that it was now nine - - - 8
23 o'clock on a Friday night.

24 JUDGE PIGOTT: Now, I realize you're - - -
25 now, you're saying, you know, that the judge should

1 have sent them home, and then told them they may be
2 cloistered.

3 In my mind, I was thinking, you know, maybe
4 the mistake here was the judge let them deliberate
5 through dinner, you know, I mean, but I don't think
6 any of that is coercion. I mean, I think that's just
7 the normal processes of the court.

8 MR. BOURTIN: It was a jury who had reason
9 to believe that they were never getting an answer to
10 their questions.

11 JUDGE PIGOTT: Okay.

12 MR. BOURTIN: And doubts were overcome by
13 the stress of the moment, and not by the evidence.

14 The court should affirm the Fourth Cir - -
15 - the Fourth Department, and overturn the verdict.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.
17 Counsel.

18 MR. KAEUPER: As to gamesmanship, Nealon
19 discussed gamesmanship, and if it were sufficient to
20 say the court knows the law, therefore gamesmanship
21 isn't an issue, Nealon would have come out
22 differently. So I think that's - - - that's really
23 not an answer to that problem.

24 JUDGE RIVERA: But in this kind of a narrow
25 case, where there are lower courts that have

1 permitted - - - that recognized this implied
2 withdrawal of a note. If we resolve that - - - if we
3 were to agree with the defendant on that point, that
4 you can't rely on that, wouldn't that at least put
5 that question to bed, so that judges moving forward
6 would not repeat that error, which is a failure to
7 completely respond?

8 MR. KAEUPER: Right, and - - -

9 JUDGE RIVERA: Just different from other
10 errors.

11 MR. KAEUPER: Right, and I mean, yeah,
12 certainly this court could clarify this. I don't
13 think - - - I don't think you have to reach that
14 question, because I think the mode of proceedings
15 issue is dispositive, but you could certainly reach
16 to that issue, it would clarify things.

17 Judges sometimes make mistakes. And that's
18 true of all kinds of different errors, and that
19 doesn't - - - that, you know, the fact that a judge
20 may make a mistake doesn't mean that it's a mode of
21 proceedings error automatically. I mean, as a
22 general rule, the defense has to object when the
23 judge makes a mistake. And I - - -

24 JUDGE PIGOTT: Could the People have
25 objected?

1 MR. KAEUPER: Yes, the People could have
2 objected, but I - - - both sides are making a
3 strategic choice. As counsel said, this was a - - -
4 this was a razor-thin case. This was a close case;
5 they were - - - the jury was deadlocked for a while.

6 Both sides are making a strategic decision
7 about, you know, what do I think is going to get the
8 outcome I want here. And the defense is thinking, I
9 don't want you to give them more information, I think
10 they have settled on an acquittal. And maybe - - -
11 and maybe if they haven't, I got in my back pocket an
12 automatic reversal.

13 JUDGE RIVERA: Here is what I am asking, if
14 the judge is choosing - - - forget the error, as in,
15 I didn't realize it, I didn't know. Choosing that
16 kind of an error, conscious choice. I think the jury
17 has withdrawn the request. Let's say we disagree
18 with that. Why isn't that error fall right within
19 310.30, that you have failed to respond to the jury
20 request - - -

21 MR. KAEUPER: Right.

22 JUDGE RIVERA: - - - and in that
23 circumstance - - -

24 MR. KAEUPER: But - - -

25 JUDGE RIVERA: - - - it doesn't matter if

1 the defense counsel raised a question, because the
2 duty is on the court. And you made a choice not to
3 respond.

4 MR. KAEUPER: Well - - - but again, I mean,
5 I think - - - I don't think the fact that the court
6 makes an error makes it a mode of proceedings error.
7 And I think, you know - - - you know, there was a
8 case in - - -

9 JUDGE RIVERA: I understand that point, I
10 guess I'm not understanding why you elevate the
11 notice to the mode of proceedings error.

12 MR. KAEUPER: Because - - -

13 JUDGE RIVERA: Perhaps you're relying on
14 Nealon; I just want to be clear why that - - -
15 because that's the first part of the statute, why are
16 you unwilling to elevate the second part of the
17 statute?

18 MR. KAEUPER: Because the first part is
19 what prevents counsel from participating
20 meaningfully. And that really is the core of O'Rama.
21 Whereas the second part does not do that. And so
22 once - - - once counsel had the opportunity, and is
23 making - - -

24 JUDGE RIVERA: No, but the point of that is
25 to get a response to the jury, right? I mean, isn't

1 that what that - - - the whole point of that is to
2 get the response to the jury?

3 MR. KAEUPER: But I don't think that's the
4 point of the mode of proceedings error. And so
5 People v. King from last month, was a case in which -
6 - - in which there was not a mode of proceedings
7 error found in part because defense counsel was
8 making a strategic decision not to object, or
9 possibly making a strategic decision not to object.

10 So I mean, I think - - - I think that is
11 critical to the mode of proceedings error analysis,
12 as opposed to the analysis whether the statute is
13 being complied with.

14 CHIEF JUDGE DIFIORE: Thank you.

15 MR. KAEUPER: Thank you.

16 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Terrance L. Mack, No. 74 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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