JURY NOTE

Summary of the Law

The Court of Appeals has emphasized several times the procedure a trial court must follow when the court receives an inquiry from a jury, normally by a written note, about a substantive matter.[1] The essence of the procedure is that the trial court: (1) must inform the parties of the verbatim content of the note; (2) must accord the parties an opportunity to comment on an appropriate response; and (3) must have the record reflect that the foregoing was done.

If the defense is unaware of a jury's inquiry about a substantive matter or is not given meaningful notice of the precise content of a substantive jury inquiry, or if the defense is denied an opportunity to comment on the appropriate response, the court will have committed a "mode of proceedings" error for which a defense protest is not required to preserve the issue for appellate review and the error requires a reversal of the judgment regardless of whether demonstrated prejudice ensued. *People v. O'Rama*, 78 N.Y.2d 270 (1991); *People v. Cook*, 85 N.Y.2d 928 (1995) (failure to provide defense an opportunity to comment on a response to the jury note); *People v. Kisoon*, 8 N.Y.3d 129, 135 (2007) ("failure to read the note verbatim deprived counsel of the opportunity to accurately analyze the jury's deliberations and frame intelligent suggestions for the court's response"); *People v. Nealon*, 26 N.Y.3d 152, 157 (2015) (requiring "meaningful notice"); *People v. Mendez*, 26 N.Y.3d 1004 (2015).[2]

The recommended *O'Rama* procedure is as follows:

"[J]urors' inquiries must generally be submitted in writing since . . . written communications are the surest method for affording the court and counsel an adequate opportunity to confer. Further, whenever a substantive written jury communication is received by the Judge, it should be marked as

a court exhibit and, before the jury is recalled to the courtroom, read into the record in the presence of counsel. Such a step would ensure a clear and complete record, thereby facilitating adequate and fair appellate review. After the contents of the inquiry are placed on the record, counsel should be afforded a full opportunity to suggest appropriate responses. . .. [T]he trial court should ordinarily apprise counsel of the substance of the responsive instruction it intends to give so that counsel can seek whatever modifications are deemed appropriate *before* the jury is exposed to the potentially harmful information. Finally, when the jury is returned to the courtroom, the communication should be read in open court so that the individual jurors can correct any inaccuracies in the transcription of the inquiry and, in cases where the communication was sent by an individual juror, the rest of the jury panel can appreciate the purpose of the court's response and the context in which it is being made. *O'Rama at* 277–78 (emphasis in original).

The Court of Appeals has further emphasized the importance of the record demonstrating adherence to *O'Rama*: "[W]here a trial transcript does not show compliance with *O'Rama's* procedure as required by law, we cannot assume that the omission was remedied at an off-the-record conference that the transcript does not refer to. In other words, in the absence of record proof that the trial court complied with its meaningful notice obligation under CPL 310.30, a mode of proceedings error occurred requiring reversal". *People v. Morrison*, 2018 WL 3147613, at 1 (quotations and citations omitted); *see People v. Parker*, 2018 WL 3147690 at 6 ("an insufficient record cannot be overcome with speculation about what might have occurred . . . the record must indicate compliance with adequate procedures under *O'Rama*") (quotations and citations omitted). Trial courts must therefore be scrupulous in ensuring that a complete record of its compliance with O'Rama requirements has been made.

Recommended Colloquy

THE CLERK (*In open court, upon the record*):

This is a continuation of *People v.* (*specify*).

The defendant, his/her attorney and the assistant district attorney are present. The jury is not present.

THE COURT:

I have received a Note from the Jury.[3]

It [has been / will now be] marked as Court Exhibit # (*specify*).

Optional: I have already shown the Note [or given a copy of the Note] to the lawyers.

The Note reads as follows:

> (*The Note is then read aloud, verbatim, into the record in the presence of the defendant and the lawyers*.)

THE COURT CONTINUES BY SELECTING ONE OF THE FOLLOWING ALTERNATIVES:

(1) If the Note is for an exhibit which was sent to the jury in the absence of the parties but pursuant to the consent of the parties placed on the record after the jury retired to deliberate [see note three], the court should so state on the record.

(2) I have already consulted with the lawyers[4] and we have agreed that (*specify – e.g. (a) the reporter will isolate the requested portion of the transcript and then read it to the jury; (b) I should respond to the Note by re-reading my final instruction on "justification.")*

(3) I intend to respond to the Note as follows: (*specify*).
TO THE LAWYERS: Is that acceptable?

(*Court will then hear from the defense and prosecution*.)

(4) Do the lawyers wish to be heard on how to answer the Note?

(*Court will then hear from the defense and prosecution*.)

I have decided to respond as follows: (*specify*).

(*Depending on the prior interchange with the lawyers and the nature of the court's response, it may be appropriate to permit a party to make a further comment*.)

THE COURT:

Jury in please.

THE COURT TO THE JURY:

Members of the jury, I have received your note [which reads as follows:]

[If it is the first note, the Court may in lieu of bracketed words add:

The procedure is for me to first read each note into the record]:

(The Note is then read aloud on the record and then the Court should provide the jury with the response the Court has agreed with the parties to give, or the response the Court has decided to give after having heard from the parties on what the response should be. If the Note was for an exhibit which had been given the jury, the Court should have the foreperson acknowledge receipt of the exhibit.)

[1] The "procedure is not implicated when the jury's request is ministerial in nature and therefore requires only a ministerial response." *People v. Nealon,* 26 NY3d 152, 161 (2015) (quotation and citations omitted). *See People v. Mays,* 20 NY3d 969 (2012) (a claimed error in responding to a deliberating jury's oral requests in open court in the presence of the defense on how they wanted a video exhibit played for them (which the defense did not object to) was a ministerial inquiry). A question of whether a jury communication is ministerial, however, will often be in the eye of the judicial beholder; thus, the wiser and reasonable course of action is to comply with the procedure set forth herein.

[2] Preservation of a purported error related to a jury's inquiry is required when the defense is on meaningful notice of the jury inquiry and fails to protest the trial court's response. *People v. Starling*, 85 NY2d 509 (1995) (a claimed error in the court reading a jury note in open court in the presence of the defense was not preserved in the absence of a defense objection); *People v. Stewart*, 81 NY2d 877 (1993) (a claimed error in oral questions from the jury, responded to by the court, during the giving of supplemental instructions was not preserved in the absence of a defense objection); *People v Ramirez*, 15 NY3d 824 (2010) (a claimed error was not preserved when "defense counsel had notice of the contents of the note and the court's response" and failed to object); *People v. Alcide*, 21 NY3d 687 (2013) (a claimed error was not preserved when in open court in the presence of the jury and the defense, the court revealed that it had received a jury note for the readback of testimony and specified how it would be responded to and there was no defense objection); *People v. Nealon*, 26 NY3d 152 (2015) (a claimed error was not preserved when the trial court "read the precise contents of the notes into the record in open court in the presence of counsel, defendant, and the jury before providing its response" and the defense failed to object).

[3] A common request of a deliberating jury is to be given an exhibit, often at a point in time when the parties are not immediately available. A common practice to avoid the delay that is occasioned by reassembling the parties and then conducting an in-court proceeding simply to give the jury an exhibit is to ask the parties on the record, after the jury has retired to deliberate, whether they would consent to having an exhibit being given to the jury upon the jury's written request without first consulting with them if they are not in the courtroom and conducting an in-court proceeding. If the parties agree, the court should: (1) on the record direct the lawyers to gather the exhibits, consult on their accuracy, and provide them to the Clerk of the Court; (2) upon receiving a request for an exhibit from the jury, the court should preserve the Note and when possible have it marked as a court exhibit; (3) have a court officer take the requested exhibit into the jury room; (4) when the parties, including the defendant, are next assembled in the courtroom, place on the record the exhibit number and the verbatim contents of the Note and that pursuant to the consent of the parties, the exhibit the jury

requested was given to them; and (5) when the jury is next in the courtroom on the record reference the jury's Note, with its court exhibit number, read the Note, and have the foreperson confirm receipt of the exhibits the jury had asked for.

[4] When a response to the Note relates to a question of law or a readback of the testimony of a witness, a trial court may show the Note to the lawyers and consult with them off-the-record on how to respond and then proceed on the record, acknowledging on the record that the off-the-record conference took place and what transpired and then permitting the parties, upon request, to state or explain their positions for the record.