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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 208

JULIAN SILVA,

Appellant.

PEOPLE,

Respondent,

-against-

No. 209

PAMELA HANSON,

Appellant.

20 Eagle Street
Albany, New York 12207
October 23, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

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1 CHIEF JUDGE LIPPMAN: Let's go to number
2 208 and 209.

3 MR. LEWIS: May it please - - -

4 CHIEF JUDGE LIPPMAN: One - - - one second,
5 coun - - - let - - - let everyone come up to the
6 front.

7 MR. LEWIS: Always too anxious.

8 CHIEF JUDGE LIPPMAN: Okay, counsel. You
9 want rebuttal time, counsel?

10 MR. LEWIS: May it please - - -

11 CHIEF JUDGE LIPPMAN: Rebuttal - - -
12 rebuttal time?

13 MR. LEWIS: Yes, I do, please.

14 CHIEF JUDGE LIPPMAN: How much?

15 MR. LEWIS: Three minutes.

16 CHIEF JUDGE LIPPMAN: Three minutes, you
17 have it. Go ahead, you're on.

18 MR. LEWIS: Thank you, Your Honor. May it
19 please the court, my name is John R. Lewis, and I
20 represent the appellant, Julian Silva. There's no
21 question that there is an - - - was an O'Rama.

22 CHIEF JUDGE LIPPMAN: Where does this fit
23 into - - - into O'Rama? Is this a classic O'Rama?

24 MR. LEWIS: Oh, it - - - it's - - -

25 CHIEF JUDGE LIPPMAN: What - - - what - - -

1 MR. LEWIS: - - - absolutely classic.

2 CHIEF JUDGE LIPPMAN: How is it central
3 O'Rama, mode of proceedings, tell us why.

4 MR. LEWIS: Right, well, there was a jury
5 note.

6 CHIEF JUDGE LIPPMAN: Yes.

7 MR. LEWIS: It was marked as a court
8 exhibit.

9 JUDGE GRAFFEO: Do we know who marked it?

10 MR. LEWIS: Well, no.

11 JUDGE GRAFFEO: No name?

12 MR. LEWIS: The record - - - the record
13 isn't clear who - - -

14 JUDGE GRAFFEO: I mean is it just a court
15 clerk or a court stenographer and the judge never
16 knew these notes came in?

17 MR. LEWIS: It - - - it - - - it may have
18 been but I would maintain that the - - - first of
19 all, it doesn't matter whether the judge knew or not.
20 I would maintain the clerk is an extension of the
21 judge in a - - - in that sense, in terms of running
22 the court.

23 CHIEF JUDGE LIPPMAN: But we have no way of
24 knowing whether the judge knew?

25 MR. LEWIS: Well, you - - - generally,

1 isn't it - - -

2 CHIEF JUDGE LIPPMAN: Or you're assuming
3 that the judge knew?

4 MR. LEWIS: Well, isn't it generally the
5 judge who orders an exhibit marked? You can't - - -
6 you can't just mark an exhibit without the judge
7 saying so.

8 JUDGE SMITH: You're saying that - - -
9 you're saying that if it says "court exhibit" on it,
10 that we - - - the best inference to draw is that the
11 judge saw it?

12 MR. LEWIS: Prima facie at the very least.

13 JUDGE SMITH: I mean it - - -

14 MR. LEWIS: At the very least it's prima
15 facie evidence that the court saw it.

16 JUDGE GRAFFEO: Well, you can - - - you can
17 just ask the court clerk to - - - to put the stickers
18 and the numbers of the exhibits on ahead of time, and
19 then later on you offer it.

20 MR. LEWIS: That's - - - that's probable,
21 but - - -

22 JUDGE GRAFFEO: But - - - but - - - but for
23 this case, at least, is what we know is that the
24 record doesn't indicate whether the judge was aware
25 of these notes.

1 MR. LEWIS: That's right, but the burden
2 should not be on us to prove that the judge knew.

3 JUDGE SMITH: I mean it - - - it would be
4 unusual for court exhibits to be pre-marked, wouldn't
5 it?

6 MR. LEWIS: I would think so.

7 JUDGE SMITH: Of course the plaintiff's and
8 defendant's are.

9 MR. LEWIS: I would think so. I mean jury
10 - - - jury notes, I mean this is major stuff. This -
11 - - this is the most important - - -

12 CHIEF JUDGE LIPPMAN: So when the record's
13 silent, that says what?

14 MR. LEWIS: Well, the record isn't - - -
15 the - - - the marking of the exhibit, number one,
16 means that it's not completely a sil - - -

17 CHIEF JUDGE LIPPMAN: Yes, we know we have
18 the exhibits, but we - - -

19 MR. LEWIS: It's not a silent record.

20 CHIEF JUDGE LIPPMAN: But we know nothing
21 else.

22 MR. LEWIS: You knew - - -

23 CHIEF JUDGE LIPPMAN: So what does the
24 record tell us when we see the marked exhibits but we
25 don't know beyond that?

1 MR. LEWIS: It doesn't matter because
2 People v. Cruz, this court says - - - the language of
3 this court was nothing in the record suggests that
4 the jury receive - - - that the judge received the
5 jury note. And yet, it still found an O'Rama
6 violation.

7 JUDGE PIGOTT: I'm a little - - -

8 MR. LEWIS: The same - - - well, the same
9 is true - - -

10 JUDGE SMITH: Is that O'Rama?

11 MR. LEWIS: - - - in - - - in Tabb and Kiss
12 - - - and Kissoon.

13 JUDGE SMITH: I - - - I - - - I mean you -
14 - - you - - - you - - - you read Cruz as a - - - I
15 mean I - - - I - - - the Chief Judge's concur - - -
16 concurrence is based on O'Rama. I didn't see the
17 majority opinion as based on that.

18 MR. LEWIS: Well, Tabb and Kissoon, the
19 same thing.

20 JUDGE SMITH: What - - - I mean, isn't this
21 - - - are you saying that - - - I mean, the - - - the
22 difference between this case and O'Rama, if you
23 assume that - - - if you assume there was an error at
24 all, but the - - - the - - - no one ever said
25 anything to the jury. There was never any response.

1 Why isn't that a Lourido/Agosto type of problem
2 rather than O'Rama?

3 MR. LEWIS: I think Agosto was before
4 O'Rama.

5 JUDGE SMITH: You - - - you say O'Rama
6 basically absorbed that - - - that whole line of
7 cases?

8 MR. LEWIS: It did, I mean the - - - the
9 judge - - - you can't - - - you know what, I've lost
10 track of your question; I'm sorry.

11 JUDGE READ: That's excusable.

12 JUDGE SMITH: Which - - - which one did you
13 lose track of?

14 JUDGE READ: Exactly.

15 MR. LEWIS: The - - - could you repeat your
16 question?

17 CHIEF JUDGE LIPPMAN: The judge asked you
18 if it absorbed that line of cases.

19 JUDGE SMITH: Yeah, yeah.

20 CHIEF JUDGE LIPPMAN: Did O'Rama absorb
21 those cases?

22 JUDGE SMITH: Do - - - do Lourido and
23 Agosto survive O'Rama, or are they just - - - or is
24 now it - - - it's all O'Rama now?

25 MR. LEWIS: Well, it's all O'Rama as

1 expanded by Tabb and Kissoon - - - and Kissoon. It
2 is a mode of proceedings error, and it is not the
3 appellant's - - - the appellant, it is not his fault
4 if somebody goofed.

5 JUDGE PIGOTT: I lost track of the time
6 frame here. I know the appellate counsel found
7 these, right? They - - -

8 MR. LEWIS: I'm - - - yeah, that was me.

9 JUDGE PIGOTT: Right, you - - - did you
10 then go back to court in a motion or something to
11 find out what happened?

12 MR. LEWIS: I don't have that burden. I
13 mean - - -

14 JUDGE PIGOTT: I didn't ask you - - -

15 MR. LEWIS: - - - the only - - - the only
16 time I'm aware - - -

17 JUDGE PIGOTT: I didn't - - - I didn't ask
18 you that. I - - - what I was asking is did you go
19 back to make a motion with respect to - - - to the -
20 - - and your answer's no because you don't think you
21 had to?

22 MR. LEWIS: The - - - the answer is no, I
23 did not go back and make a motion.

24 JUDGE PIGOTT: It is conceivable in some
25 cases that where jury notes can come out in a certain

1 order and all of a sudden, before you've had a chance
2 to address one, they say we have a verdict.

3 MR. LEWIS: Well, this - - - first of all
4 this is an hour apart.

5 JUDGE PIGOTT: And - - - pardon me?

6 MR. LEWIS: There have been cases where it
7 was a few minutes apart. Court Exhibit 2 and Court
8 Exhibit 3 - - -

9 JUDGE PIGOTT: Well, we don't know that
10 because, of course - - -

11 MR. LEWIS: We do.

12 JUDGE PIGOTT: - - - we didn't go back and
13 ask. Well, that - - - see that depends. I mean you
14 can get a jury note just before lunch and then all of
15 a - - - all of a sudden you say well, I'll - - - I'll
16 - - - I'll respond to their question when we get
17 back, and then you get back and - - - and then
18 there's a note sitting on your - - - on your - - - on
19 your desk saying we've reached a verdict. And - - -
20 and so my - - - my only - - - I'm - - - I'm not
21 faulting you. I think it's a pretty good research
22 here, but I'm just wondering, chronologically, if
23 there's any attempt to find out what is missing in
24 this record, which is - - -

25 MR. LEWIS: To - - -

1 JUDGE PIGOTT: - - - when did the judge get
2 them, were they marked by him, and what did he or she
3 do with them.

4 MR. LEWIS: To be perfectly candid, Judge,
5 I didn't look into it, because I didn't care, and I
6 don't care. I - - - I just don't think it matters.

7 JUDGE PIGOTT: Suppose - - - suppose it's -
8 - -

9 MR. LEWIS: We're - - - we're - - - we're
10 look - - - we're looking for problems that don't
11 exist.

12 JUDGE PIGOTT: Well, the only reason I'm
13 asking you that is suppose it does matter. Now
14 you've got a problem, it seems to me, that you maybe
15 could have avoided by finding out what the judge
16 wanted to do. Anyway, it's fine.

17 MR. LEWIS: You - - - you know, there - - -
18 there was in - - - in one of the cases, the
19 respondents brought it up, there were - - - the
20 Appellate Division ordered a reconstruction hearing
21 of what happened. They didn't order one in this
22 case; they could have done that. And in - - - in
23 that - - - in that other case, it wasn't the
24 appellant that did that.

25 JUDGE READ: Should that happen here?

1 MR. LEWIS: No, well, I mean - - -

2 CHIEF JUDGE LIPPMAN: What would be the
3 purpose of it happening?

4 MR. LEWIS: I - - - I can't see any purpose
5 for it happening and, as a matter of fact, I don't
6 see, at this point in time years later, how accurate
7 a reconstruction hearing you could have anyway. It
8 would be chaos.

9 JUDGE SMITH: But re - - - reconstruction
10 hearing usually - - - the typical reconstruction
11 hearing is where the transcript gets lost or
12 something like that. Here - - - here there's no
13 claim that any record was ever made in the first
14 place beyond the - - - the mere existence of the
15 notes.

16 MR. LEWIS: Right, I don't know what you
17 would do with that. I - - -

18 JUDGE SMITH: So you - - - you - - - your
19 position is if you've got something marked as a court
20 exhibit and it's time stamped and you see nothing
21 else, somebody made some kind of error somewhere?

22 MR. LEWIS: Undoubtedly.

23 CHIEF JUDGE LIPPMAN: And it's not you
24 because you didn't know about it?

25 MR. LEWIS: Because I didn't know about it,

1 no.

2 JUDGE GRAFFEO: Let - - - let - - - let me
3 ask you what do you think the judge should have done
4 here to avoid the O'Rama error, if in - - - if, in
5 fact, you're aware of the jury note and then on - - -
6 right on the heels of that get the note saying we've
7 reached a verdict?

8 MR. LEWIS: Again, it wasn't right on the
9 heels; it was an hour later.

10 JUDGE GRAFFEO: No, I under - - - no, I'm
11 just asking a best practices question here, hyp - - -
12 hypothetically.

13 MR. LEWIS: Well, I - - -

14 JUDGE GRAFFEO: Because we've got such a
15 flood of these O'Rama cases.

16 MR. LEWIS: If the judge - - -

17 JUDGE GRAFFEO: We obviously need to give
18 better - - -

19 MR. LEWIS: Sorry.

20 JUDGE GRAFFEO: - - - guidance to the trial
21 bench so that we somehow get this protocol correct.

22 MR. LEWIS: If the judge knows about the
23 jury note, there is no question what the judge should
24 do. The judge has to read the prior jury note, even
25 if anoth - - - even if right on the heels, a - - - a

1 - - - a note announcing the verdict has come in.

2 CHIEF JUDGE LIPPMAN: And if the judge knew
3 about it, the judge didn't do it here.

4 MR. LEWIS: Right.

5 CHIEF JUDGE LIPPMAN: And if the judge
6 didn't know about it, that's a problem, right?

7 MR. LEWIS: That's a problem. That's a
8 mode of proceedings error.

9 CHIEF JUDGE LIPPMAN: Okay.

10 MR. LEWIS: You know - - - you know - - -

11 JUDGE PIGOTT: So what's the remedy in your
12 view?

13 MR. LEWIS: The - - - the remedy? With
14 mode of proceedings error the remedy is com - - -
15 complete vacator of the entire conviction and, by the
16 way, not only the conviction relating to that note.
17 Now, I would concede in - - -

18 CHIEF JUDGE LIPPMAN: Why - - - why not?

19 MR. LEWIS: Well - - -

20 CHIEF JUDGE LIPPMAN: Why shouldn't it only
21 relate to the note?

22 MR. LEWIS: Number - - - number one because
23 that is the - - - the case law on mode of
24 proceedings. I didn't make this up. It was this
25 court that made this up.

1 JUDGE PIGOTT: What would - - - so what's
2 the remedy?

3 CHIEF JUDGE LIPPMAN: We make stuff up all
4 the time. Judge Pigott.

5 JUDGE PIGOTT: What - - - what - - -

6 MR. LEWIS: I mean I follow the law and - -
7 - and that's what the law is.

8 CHIEF JUDGE LIPPMAN: Judge Pigott, go
9 ahead.

10 JUDGE PIGOTT: What's the remedy, a new
11 trial?

12 MR. LEWIS: The rem - - - the remedy is
13 definitely - - - is definitely a new trial.

14 JUDGE PIGOTT: Then why can't a
15 reconstruction hearing be done? You said it was too
16 late for a reconstruction hearing, why wouldn't it be
17 too late for a retrial?

18 MR. LEWIS: Well, because - - - well, if -
19 - - if - - - if you prefer to call it a complete
20 exoneration of the defendant, that's fine with me.
21 I'm conceding that - - -

22 JUDGE PIGOTT: No, I'm saying - - -

23 MR. LEWIS: I'm conceding he doesn't have
24 that much of a right.

25 JUDGE PIGOTT: You're saying you do not

1 want a reconstruction hearing because it was - - - it
2 - - - it was too long ago but you're willing to take
3 a trial which was too long ago.

4 MR. LEWIS: Well, okay, I - - - no, I - - -
5 I'm not a fan of the reconstruction hearing, either.

6 JUDGE PIGOTT: I - - - I know.

7 MR. LEWIS: I'm - - - I'm not either. I
8 don't - - - I don't - - - I don't think it's going to
9 be - - - you know.

10 CHIEF JUDGE LIPPMAN: Judge Smith.

11 JUDGE SMITH: I'm - - - I'm sorry. Even
12 though it's - - - your red light is on, would you
13 just spend one minute on the summation issue?

14 MR. LEWIS: On the summation, yes. This
15 was really prejudicial. In the first - - - first of
16 all, she completely hammers away at - - - at him
17 being a drug dealer, generally. This is a business,
18 this is what he does. And my favorite - - -

19 JUDGE SMITH: I'm not concerned - - -

20 MR. LEWIS: - - - is just because he's a
21 bigger drug dealer - - -

22 JUDGE SMITH: What about the kids? The
23 kids and old lady, frankly, are what got - - - are
24 bothering me.

25 MR. LEWIS: Right, what does it have - - -

1 he says, yeah, he keeps his drugs and a gun in this
2 apartment where he keeps a nine-year-old kid; have
3 you ever heard of anything so awful. There was no
4 child endangerment charge. That was not relevant to
5 any of the charges. That was purely to get the
6 defend - - - the jury to detest and have contempt for
7 the defendant. And I'll tell you what else was, too,
8 which was her - - - her comments about the gun being
9 used to protect his drug-selling turf. There was no
10 evidence on that. In fact, there was no evidence
11 that the - - - that that gun ever went outside the
12 apartment.

13 CHIEF JUDGE LIPPMAN: Okay, counselor.

14 MR. LEWIS: You know, that's - - -

15 CHIEF JUDGE LIPPMAN: You'll have - - -
16 you'll have rebuttal.

17 MR. LEWIS: Thank you.

18 CHIEF JUDGE LIPPMAN: Let's hear from your
19 adversary, thanks.

20 MS. AXELROD: Good afternoon, Your Honors.
21 May it please the court, my name is Susan Axelrod. I
22 represent the respondent in this case.

23 CHIEF JUDGE LIPPMAN: Counsel, is this
24 anything other than a - - - a classic O'Rama
25 situation?

1 MS. AXELROD: This is not an O'Rama
2 situation.

3 CHIEF JUDGE LIPPMAN: Why is it not an
4 O'Rama situation?

5 MS. AXELROD: Because in this particular
6 case, when the jury note came out announcing a
7 verdict, the jury, by that announcement, indicated to
8 the court that it had no need of the prior - - -

9 CHIEF JUDGE LIPPMAN: But - - - but wait.

10 MS. AXELROD: - - - an answer to the prior
11 note.

12 CHIEF JUDGE LIPPMAN: But - - - but what
13 about the jury note? I mean we just ignore that,
14 it's - - - you have them put in as court exhibits,
15 nothing is ever done with them. We know what's
16 required under O'Rama.

17 MS. AXELROD: Your Honor - - -

18 CHIEF JUDGE LIPPMAN: How do you - - - you
19 want a rule that says when there's a verdict, even if
20 the jury notes were ignored in violation of the
21 O'Rama precedents, we ignore that?

22 MS. AXELROD: Your Honor, as this court
23 said in - - -

24 CHIEF JUDGE LIPPMAN: Is that rule - - -
25 that - - - is that - - - the rule you want?

1 MS. AXELROD: I'm about to explain the rule
2 I want. As this court said in O'Rama, in a situation
3 where the note is not answered and the next note is a
4 verdict, it is not an O'Rama issue. Under the facts
5 of O'Rama, it is resolved by Agosto and Lourido and -
6 - -

7 JUDGE SMITH: Suppose - - - well, suppose
8 the Lourido issue. Is - - - isn't this a lot - - -
9 doesn't this look a lot like Lourido?

10 MS. AXELROD: This is not remotely like
11 Lourido. In - - - in Lourido you had a - - - a - - -
12 a very convoluted trial with a number of errors. You
13 had a jury that asked for the cross-examination of a
14 - - - a witness whose credibility was impeached
15 during court.

16 CHIEF JUDGE LIPPMAN: Doesn't - - - doesn't
17 O'Rama supersede?

18 MS. AXELROD: No, in fact, in O'Rama you
19 specifically said we are - - - we are making a
20 distinction. When the note is read, the defendant
21 who hasn't seen the note is not permitted to
22 participate in the answering of the note, and that is
23 a harm. When the note is not read, it is a different
24 situation and you look to see whether the fact that
25 the note wasn't read seriously prejudiced the

1 defendant.

2 JUDGE SMITH: But the - - - the - - - the -
3 - - here, the note in question asked to see again the
4 absolutely key evidence on the gun charge, I mean the
5 - - - the tape that - - - that - - - that - - - that
6 - - - that supported the gun charge. And for an
7 hour, nothing happens, then they come in with a
8 verdict. Isn't that a lot like Lourido, except it
9 was three hours?

10 MS. AXELROD: No. First of all, there was
11 an agreement between the parties that allowed
12 exhibits to go in without the parties being present.
13 They asked for an exhibit, which was the transcript
14 of that conversation. There's no reason to think
15 that exhibit didn't come in.

16 Secondly, in this particular case, the jury
17 was told the day before when they left that the court
18 was going to be involved in - - - in its calendar
19 part, which meant it was going - - - not going to be
20 able to address them quickly, so the jury knew that
21 one of the problems was just the practical problem of
22 the court having time to ad - - - address the note.
23 I would also submit - - -

24 CHIEF JUDGE LIPPMAN: So you're saying the
25 jury knew. They - - - they put in these notes and

1 Lourido for what it stands for, which is an outlier
2 in this particular situation.

3 JUDGE GRAFFEO: But when you - - -

4 MS. AXELROD: Which is when you have that
5 lengthy period of time with no explanation for why in
6 a case where the judge has screwed up the charge to
7 begin with, where it's a he-said-she-said, where
8 they're asking for the - - - and - - - and, in fact,
9 in Lourido you basically said - - -

10 JUDGE SMITH: I mean you - - - you - - -
11 you - - - you're almost saying the defendant has to
12 be named Lourido.

13 MS. AXELROD: Well, the defendant almost
14 has to be in that position, that's absolutely
15 correct, because juries take the verdict process very
16 seriously. If this jury had not resolved whatever it
17 was that was this problem - - -

18 JUDGE SMITH: Yeah, com - - - coming back
19 to the note itself, it didn't just ask for - - - I
20 see your point about the - - - the - - - the exhibit.
21 But it says - - - the same note asks for the wire
22 transcript mentioning the gun and the judge's
23 instructions on Count III. We know they never got
24 the instructions.

25 MS. AXELROD: That's correct, but there's

1 no reason to assume that once they saw the note - - -
2 once they saw the exhibit and they understood what
3 the evidence was, it resolved any problem they had in
4 terms of the charge.

5 JUDGE PIGOTT: What - - - what - - - what,
6 Ms. Axelrod, do you think we should be doing then,
7 because we've been pretty strong in O'Rama saying
8 these notes are key. You know, they - - - they got
9 to be part of the record; they got to be addressed
10 by, you know, with both counsel. Isn't this - - -
11 are we backing off this - - - are we now saying, you
12 know, if a note is unexplained, it's okay?

13 MS. AXELROD: I think that your precedent
14 has been that if the note is not answered and the
15 next note after that is a jury note, the court should
16 look to see whether it's a - - - whether - - -
17 whether or not the fact that the note is not answered
18 substantially prejudices the defendant.

19 JUDGE PIGOTT: But shouldn't we talk to the
20 lawyers about that?

21 MS. AXELROD: Well, in this particular
22 case, I would also submit that the record indicates
23 that everybody knew about the note.

24 CHIEF JUDGE LIPPMAN: Counsel, if - - - if
25 O'Rama wasn't meant to - - - to cover a situation

1 like this, of what utility is it altogether?

2 MS. AXELROD: Well, O'Rama addresses a
3 different situation, but the truth of the matter is
4 now - - -

5 CHIEF JUDGE LIPPMAN: But - - - but - - -
6 but how can it not cover this situation?

7 MS. AXELROD: You - - -

8 CHIEF JUDGE LIPPMAN: This whole protocol
9 that we've established about what you have to do with
10 a jury note. If it doesn't cover this situation, it
11 can't have any meaning whatsoever.

12 MS. AXELROD: Well, wait a minute; first of
13 all, you said in O'Rama it doesn't cover this
14 situation. This situation - - -

15 CHIEF JUDGE LIPPMAN: We did, yeah.

16 MS. AXELROD: Absolutely, in the - - - in
17 the - - -

18 CHIEF JUDGE LIPPMAN: When there's a jury
19 note and - - - and it's not called to the attention -
20 - -

21 MS. AXELROD: - - - in the quote that I - -
22 - is in my brief - - -

23 CHIEF JUDGE LIPPMAN: It's not called to
24 the attention of counsel, it's not read, people
25 aren't given - - - counsel aren't given an

1 opportunity to suggest what to do, none of those
2 things happened.

3 MS. AXELROD: That's not correct, Your
4 Honor, even - - -

5 CHIEF JUDGE LIPPMAN: It's not correct that
6 none of those things happened?

7 MS. AXELROD: That is - - - that is correct
8 that it's not correct. First of all - - -

9 CHIEF JUDGE LIPPMAN: Wait a second, did
10 those things happen?

11 MS. AXELROD: The note was brought to the
12 attention of the parties. In this particular case,
13 when you look at - - -

14 JUDGE SMITH: How do - - - how do we know
15 that?

16 CHIEF JUDGE LIPPMAN: I would - - -

17 MS. AXELROD: When you look at the record,
18 when the judge brings the jury in, he says to them we
19 have your last note. There were no other notes other
20 than this one.

21 JUDGE SMITH: All - - - all right, so you -
22 - - you infer from that that there - - - that - - -
23 that - - - that - - - that they - - - you infer from
24 that that not only the judge knew about the earlier
25 note but that he had responded to it by sending in

1 the exhibit?

2 MS. AXELROD: I infer from that that the
3 judge and the defense attorney and the People knew
4 about the last note because, first of all, if - - -
5 if the jury got the exhibit - - -

6 JUDGE SMITH: Well, wait, no, that's - - -
7 the last note was the verdict, wasn't it?

8 MS. AXELROD: The judge says to them we
9 have your last note. Now, a reasonable attorn - - -

10 JUDGE GRAFFEO: Why - - - why does that
11 mean the note saying we've reached a verdict?

12 MS. AXELROD: It does mean that, but the
13 fact that the judge used the term "the last note,"
14 just that we have your note - - -

15 JUDGE SMITH: That means there has to have
16 been a next-to-late one and, therefore, you infer
17 from that that the judge had seen the next-to-last
18 one.

19 MS. AXELROD: Not the judge - - -

20 JUDGE SMITH: And you infer from that - - -
21 that everybody knew about it. Is that - - -

22 MS. AXELROD: Not just the judge.

23 JUDGE SMITH: Aren't you building a little
24 - - - kind of a long chain then?

25 MS. AXELROD: Absolutely not. This is a

1 verdict situation. The judge has now used a term of
2 art that suggests that there was something that
3 happened beforehand. The def - - - the def - - -

4 JUDGE SMITH: The last - - - last note is a
5 term of art?

6 MS. AXELROD: It's - - - it's definitely
7 the - - - the - - - the common sense interpretation
8 of last means that there was a first.

9 CHIEF JUDGE LIPPMAN: So you don't - - - in
10 that situation your view is you don't have to meet
11 the O'Rama protocols, or you're saying the judge did
12 meet it based on these inferences, his mention - - -

13 MS. AXELROD: I'm saying that the judge met
14 it. I'm also saying that if we had - - -

15 CHIEF JUDGE LIPPMAN: You're saying that
16 the judge met all of the O'Rama protocols based on
17 these suppositions that you're making as to what
18 happened?

19 MS. AXELROD: I'm saying that when you - -
20 -

21 CHIEF JUDGE LIPPMAN: Why - - - why would
22 you have such an exacting set of protocols and then
23 just throw them all away and say but look, I can see
24 what happened here, we could pretty much suppose it.
25 Does that make any sense?

1 MS. AXELROD: Makes every bit of sense
2 because the exacting protocols that you're talking
3 about when you have a situation where the defense
4 attorney knows about the note, you're now talking
5 about giving the defendant a new trial because people
6 didn't say a lot more when, in fact, the defendant
7 got everything that he wanted, which was his attorney
8 looking at the note and a decision made that they
9 would go to - - - directly to verdict.

10 If we'd had fact finding in this particular
11 case, we would have been able to prove that exact
12 thing. But because we - - - the - - - the court's
13 O'Rama protocols, as defense counsel himself
14 admitted, indicate that he doesn't even have to know
15 what happened at the trial, he doesn't even have to
16 go look, we're now in a situation where the court has
17 created a situation where the defendant gets this
18 complete windfall, not because anybody knows that
19 what happened was wrong, but because a judge,
20 thinking that something was on the record in a hectic
21 trial, simple failed to put on the record what
22 everybody in that courtroom knew had happened.

23 JUDGE SMITH: Whoa, well - - - well, didn't
24 - - - didn't - - - didn't we reject in Walston the
25 idea that we're going to assume there's an off-the-

1 record something that cured the problem?

2 MS. AXELROD: It - - - you - - - you did,
3 but I - - - I would submit to you that in Walston you
4 could - - - when you were looking at the record,
5 there was no inference that could be drawn. Here
6 there is an inference.

7 JUDGE SMITH: So you're - - - but you're
8 asking us to draw from this record an inference that
9 something happened off the record to cure any
10 problem?

11 MS. AXELROD: I'm asking - - - first of
12 all, I don't believe that there was a problem,
13 because I believe under Agosto and Lourido the
14 defendant can't show that he was substantially
15 prejudiced.

16 JUDGE SMITH: Okay, you - - -

17 MS. AXELROD: However, if you're asking - -
18 - if - - - if you're asking me to ask you to draw an
19 inference that, in fact, the defense attorney saw the
20 note from this record, then that's exactly what I'm
21 asking you to do. I - - -

22 JUDGE GRAFFEO: I want to ask you a
23 question that I asked your ad - - - your adversary
24 here. And - - - and this is a hypothetical, not this
25 case, but in situations where one or more notes come

1 in and the court's not aware of it because they're
2 doing something else and then they come on the bench
3 and then they get the note about the jury verdict,
4 what should be the proper procedure? Should the
5 court ask the jury if they want those earlier
6 inquiries dealt with or do you just - - -

7 MS. AXELROD: I would agree that if - - -

8 JUDGE GRAFFEO: - - - take the verdict?

9 MS. AXELROD: If the defense attorney asks
10 the court to ask the jury, the court should ask the
11 jury.

12 JUDGE SMITH: Wouldn't - - - wouldn't - - -
13 would it not be a good idea for the court to have a
14 policy, even, say, maybe it would say in the original
15 charge sometimes it takes us a long time to respond
16 to jury notes; please be patient? Or else when you
17 get a note, the first thing you do is send in the
18 court officer and say it may be a while; be patient?

19 MS. AXELROD: You know, actually, Judge,
20 for the most part that happens at - - - that trials.

21 JUDGE SMITH: And it happens off the
22 record?

23 MS. AXELROD: Or it happens off the record,
24 or sometimes it happens on the record. I just want -
25 - -

1 CHIEF JUDGE LIPPMAN: Counsel, how could
2 the defense do anything if they don't know about it?

3 MS. AXELROD: But here they did, and - - -
4 and here - - - and here - - -

5 CHIEF JUDGE LIPPMAN: That - - - you - - -
6 and that - - - that is an inference.

7 MS. AXELROD: Well, and it's a very strong
8 one.

9 JUDGE SMITH: The - - - the - - - the usual
10 way - - - the usual way of proving the defense know
11 about something is to put it on the record, say
12 defense counsel is here and I have a note. I mean
13 what's - - - what's wrong with that then?

14 MS. AXELROD: I understand that but now,
15 again, we're in a situation where you have a very
16 hectic calendar day where a lot of things are going
17 on, where I submit to you that the parties would have
18 been talking about the note.

19 CHIEF JUDGE LIPPMAN: Oh, okay.

20 MS. AXELROD: The jury comes in.

21 CHIEF JUDGE LIPPMAN: Judge Smith.

22 JUDGE SMITH: I mean I'm going to ask can
23 you spend a minute on the summation also.

24 MS. AXELROD: I - - - I can, but if could
25 just on - - - on the remedy, though.

1 CHIEF JUDGE LIPPMAN: Go ahead.

2 JUDGE SMITH: A specific - - -
3 specifically, let me just ask a pointed question.
4 Wasn't it outrageous for the district attorney to be
5 saying - - - to be saying look at this man who, too,
6 uses this kind of language in front a child?

7 MS. AXELROD: Well, the - - - the problem
8 was the defense - - - first of all, let's be honest
9 here. The defense attorney was talking about the
10 fact that the defendant was a drug dealer, but then
11 he was the one that raised the well; he's not - - -

12 JUDGE SMITH: I'm not - - - I'm not
13 bothered by the drug dealer.

14 MS. AXELROD: Well - - -

15 JUDGE SMITH: But - - - but if he's a bad
16 father isn't that kind of stretching a point?

17 MS. AXELROD: He - - - he was the one who
18 raised the - - - who made the argument that this is
19 not a man who would have a gun in the house. Well,
20 the bottom line is this is a man who sell - - - who
21 has drugs in the house. So why wouldn't he be a man
22 who has a gun in the house? The other thing is - - -

23 JUDGE SMITH: I - - - I still haven't heard
24 exactly why the child's - - - why - - - why the child
25 belonged in the summation.

1 MS. AXELROD: Only to count - - - to
2 counter that point and to point out the fact that
3 having a - - - a - - - the - - - the - - - that the
4 fact that the defendant was a nice guy didn't mean he
5 wouldn't have a gun in the house because he had drugs
6 in the house. The other thing is, Judge, this was a
7 - - -

8 JUDGE SMITH: Okay. Okay, counsel.

9 MS. AXELROD: And - - -

10 CHIEF JUDGE LIPPMAN: Let's hear from your
11 - - -

12 MS. AXELROD: I'm also going to ask the
13 court - - -

14 CHIEF JUDGE LIPPMAN: No, no, no. Counsel,
15 your time is up. Let's hear rebuttal.

16 MS. AXELROD: Thank you.

17 CHIEF JUDGE LIPPMAN: Counsel, rebuttal.

18 MR. LEWIS: Your Honors, my only rebuttal
19 on the O'Rama issue is, you know, you're - - -
20 counsel here is making inferences. She talks about
21 what happens off the record. Well, I - - - there
22 were other things that happened off the record, too.
23 Some of us may have seen the movie "12 Angry Men".

24 JUDGE PIGOTT: Many, many trials, you know,
25 they'll - - - they'll - - - a jury will come back and

1 ask for a read-back and strike fear into everybody
2 because they're asking for some particular testimony.
3 And then after the verdict, whichever way it goes,
4 and you talk to them, they say well, Bozo juror
5 number 7 was dozing at the time the guy was
6 testifying so we just had to satisfy him and - - -
7 and as we were before, we were unanimous to convict
8 or acquit or whatever.

9 And so things happen, I guess, is one of
10 the points here. And there's nothing in - - - in
11 this thing, there - - - that's the reason why I asked
12 you why you didn't do something before - - - to
13 indicate that there was anything but an ordinary
14 trial here and that there was a note that you
15 happened to find and chose to put in an appeal
16 instead of going back to court.

17 MR. LEWIS: Well, it - - - part - - - the
18 other thing, though, that - - - that - - - that also
19 - - - I think also happens in jury rooms is that
20 people want to go home. And there was a note, you
21 know, yes, okay, Lourido was three hours and this is
22 only one hour, but in one hour, you know, when you've
23 been - - - when - - - when they've been sitting for a
24 trial for several days and putting in a lot of time,
25 they're beginning to say we want to go home. And a

1 jury note - - - they sent out a jury note, an hour
2 goes by when they haven't got a response to it, and
3 they say - - - and excuse my language - - - the heck
4 with it, let's - - - let's say we've got a verdict.

5 CHIEF JUDGE LIPPMAN: We - - - we can
6 excuse that language. Go ahead, keep going.

7 MR. LEWIS: Yeah, I - - - I - - - I almost
8 said something worse, but, you know, they - - - they
9 say, you know, well, let's go home. Let's say we've
10 got a verdict. We're not waiting anymore.

11 JUDGE PIGOTT: Is that what happened here?

12 MR. LEWIS: I - - - I'm just saying it - -
13 - it - - - it - - -

14 JUDGE SMITH: So assume it did; assume
15 you're right in every - - - everything you've said,
16 why does it not taint only the gun charge?

17 MR. LEWIS: Well, because pressure on a
18 jury is wrong. I know the note only had to do with
19 the dru - - - with - - - with the gun charge, but
20 pressure on the jury to come up, you know. We want -
21 - - the process has to play out the proper way, and
22 if it doesn't play out the proper way, nothing is
23 proper. You know, and - - - and unlike in - - -

24 JUDGE SMITH: But in - - - in - - - in
25 Walston didn't we let one of the convictions stand

1 ahead, you're on.

2 MR. LAISURE: I'd like to start with the
3 statute, Your Honor, 3 - - - 310.30 says two things,
4 notice to defense counsel and meaningful response to
5 the jury note. In Lourido we find - - - you - - -
6 the court said that no response is not meaningful.
7 And so what we glean from that is that in a notice of
8 a no response and the meaningfulness of a no response
9 are things that are covered by the O'Rama protocol.

10 CHIEF JUDGE LIPPMAN: Counsel, is there any
11 great difference between your case and the - - - and
12 the previous case?

13 MR. LAISURE: Is there any difference?

14 CHIEF JUDGE LIPPMAN: Yeah, I mean on basic
15 principles that - - -

16 MR. LAISURE: The only difference, Your
17 Honor, is that - - - is that the judge in Silva said
18 that there was a note and that - - - and in - - - in
19 my case the judge simply said we have a verdict.

20 JUDGE SMITH: In other words, you don't - -
21 - you - - - you don't have the - - - the - - - you
22 don't have to deal with Ms. Axelrod's last note
23 argument.

24 MR. LAISURE: That's right, I don't. Your
25 Honor, the - - - the - - - the - - - I - - - I'd like

1 to point out that the - - - what this court has done
2 is, at the risk of being obse - - - obsequious, it's
3 textbook common law development. You have, in a
4 classic series of incremental decisions, established
5 a rule, a very clear and precise rule. And that rule
6 is that when counsel is in a position to know that a
7 O'Rama violation is - - - is going on, they have to
8 say something. Only where the court's conduct - - -
9 and remember, the court controls what's going on with
10 the jury notes, prevents counsel from knowing that
11 there's a violation, is there a mode of proceedings
12 error.

13 When you look at all of this court's prior
14 decisions, they fall along that line. Every case
15 where counsel had notice that there was a violation
16 going on, you said preservation required, and in
17 every case where counsel had no reason to know that
18 there was a violation, you said mode of proceedings.
19 That's the clear situa - - -

20 CHIEF JUDGE LIPPMAN: Is there any way this
21 set of facts does not fit within that set of
22 protocols, or the - - - the earlier case, for that
23 matter?

24 MR. LAISURE: No, Your Honor, you're - - -
25 because as we - - - as the court said in Walston - -

1 - well, let me start with - - - with - - - with Tabb.
2 In Tabb, the court said when - - - in - - - in the
3 absence of record proof that the trial court complied
4 with the responsibilities of 3 - - - 310.30 there's a
5 mode of proceedings error. But it clarified in
6 Walston. It said where the trial transcript fails to
7 show that counsel was aware, there - - - there is a
8 mode of proceedings. What the court did, I think,
9 was - - - was - - - was very clear. The - - - the
10 record is what the record is. The record is not what
11 might have been developed had the court - - -

12 CHIEF JUDGE LIPPMAN: What is the - - -
13 what is the record here?

14 MR. LAISURE: The record here is two notes
15 marked as exhibits, no mention. Counsel could - - -
16 there was - - - there was no reason to believe from
17 the record that counsel knew about them. There was
18 no inferences that could be drawn. If - - -

19 JUDGE SMITH: Well, you don't - - - you
20 mean - - - you mean aren't you making more of - - -
21 more of mode of proceedings error than you have to?
22 If the lawyer didn't ever see the notes, we - - - we
23 would - - - yeah, the one thing we can't accuse him
24 of is a failing to preserve the point.

25 MR. LAISURE: Yeah, well, that's right,

1 except - - - except that the - - - the People have
2 argued that it's our burden to establish a record, so
3 that's why I'm pointing out is that - - - is that
4 exactly what Your Honor said.

5 JUDGE GRAFFEO: But will reconstruction
6 hearings help at all in these cases?

7 MR. LAISURE: If - - - if - - - Your Honor,
8 if - - - if - - - if you - - - if you order a
9 reconstruction hearing here, first thing is that
10 you're - - - you're - - - you're going to open a big
11 door, because everybody who is at a bench conference
12 during a trial and may have talked about an
13 evidentiary ruling, the appellate lawyer's going to
14 say I want a reconstruction hearing because there was
15 something that went on off the record. I don't think
16 you want to go there.

17 JUDGE PIGOTT: Well, the - - - they're not
18 unusual. I - - - I - - - I've been in reconstruction
19 hearings where the only testimony is from the judge.

20 MR. LAISURE: But that's true. But it's -
21 - - that's - - -

22 JUDGE PIGOTT: He answers I remember what
23 happened and I remember what I did with the note and
24 you're right. You know, I should have shown it to
25 you and I didn't.

1 would cure the problem under those circumstances. I
2 don't think that - - - that the reconstruction
3 hearings are permissible under those circumstances,
4 because you've got 200 years of the record is what
5 the record is.

6 JUDGE SMITH: Then you - - - you - - - you
7 - what you're suggesting is that - - - that - - -
8 that - - - that yeah, maybe it - - - maybe it will
9 cure this problem, but then you're going to - - -
10 you're going to - - - we're going to be spending the
11 next six decades scraping up notes from judges of
12 things that should be on the record and weren't.

13 MR. LAISURE: That's exactly right.

14 CHIEF JUDGE LIPPMAN: So your point is the
15 record speaks for itself?

16 MR. LAISURE: The record speaks for itself.

17 JUDGE PIGOTT: Well you - - - how do you
18 interpret what the Second Department did then?

19 MR. LAISURE: Well, I don't - - - well,
20 Your Honor, they - - - they - - - they bought the
21 argument that the People have abandoned, which is
22 that the notes weren't in the record. The notes were
23 in the record because they were marked. The record
24 does not - - - is - - - is not limited to the
25 minutes. So, you know, the fact that - - - that - -

1 - that things are in the Supreme Court file, that's
2 part of the record. The judge's notes are not in the
3 Supreme Court file, that's not.

4 CHIEF JUDGE LIPPMAN: There's nothing - - -
5 there's nothing in the record what happened to those
6 exhibits?

7 MR. LAISURE: That's right. That's right.

8 JUDGE PIGOTT: Well, I - - - I thought they
9 were suggesting that you had to bring a motion.

10 MR. LAISURE: Well, to the extent that
11 they're suggesting that, it - - - it - - - it - - -
12 there's - - - there's no reason - - - that goes back
13 to the reconstruction thing. If you're going to make
14 us do hearings, then - - - then we're going to ask
15 for motions and all kinds of stuff and I - - - I
16 don't think that's the rule that you would - - -
17 because you're going to really upset the entire
18 presumption that the trial record is - - - is what
19 has been transcribed and what has been ordered to be
20 transcribed by the court.

21 JUDGE PIGOTT: But they said it wasn't in
22 my record. That's my point. I mean they're - - -
23 they're saying that it - - - that it - - - that it
24 wasn't in the record, and now you're saying they - -
25 - they concede that it was, but, I mean, the - - -

1 don't you need a reargument in front of the Second
2 Department or something? I mean, I - - - I don't
3 know.

4 MR. LAISURE: When I - - - I'm sorry, I'm
5 sorry.

6 JUDGE PIGOTT: Should you go back to the
7 Second Department and reargue it and say you
8 misunderstood; you know, the - - - the People now
9 concedes this was part of the record.

10 MR. LAISURE: We - - - we could have done
11 that. We could have done that, but - - - but we're
12 here instead. I - - - I don't think there's any
13 reason this can't - - - this court can't order the
14 same thing the Appellate - - - the Appellate Division
15 could order.

16 JUDGE PIGOTT: What, order them to rehear
17 it?

18 MR. LAISURE: Or order a new trial because
19 there was no record of - - - of counsel being
20 notified because that's what would end up happening.

21 JUDGE SMITH: Assume - - - I mean, if I
22 could change - - - change the direction for a moment.
23 Assume there is a problem here. Why is there no - -
24 - not a distinction between the situation where the
25 note is never answered, which is - - - which we

1 originally dealt with in Lourido and Agosto, and the
2 situation where the note is answered and counsel
3 don't have proper input?

4 MR. LAISURE: Because meaning - - - because
5 whether the note is answered is - - - is part of the
6 - - - the meaningfulness of a response to the jury
7 question. So - - -

8 JUDGE SMITH: Well, you're saying a non - -
9 - nonanswer is, by definition, not a meaningful
10 answer.

11 MR. LAISURE: That's right.

12 JUDGE SMITH: But - - - but - - - but it is
13 a - - - we did - - - in Cruz we had a situation where
14 the note, I guess, wasn't answered unless maybe
15 sending in the exhibits, if they were sent in, was an
16 answer. And we did - - - yeah, as I read the
17 majority opinion, that's - - - that's not an O'Rama
18 opinion. Is that - - - do you - - - do you think - -
19 -

20 MR. LAISURE: I agree, that is not an
21 O'Rama decision, that - - - that - - - it was a
22 reconstruction hearing to see whether the jury saw
23 the evidence that they weren't supposed to see.
24 That's - - -

25 JUDGE SMITH: And when - - - well, when we

1 considered it after the reconstruction hearing and
2 since we don't know.

3 MR. LAISURE: That's right.

4 JUDGE SMITH: Yeah.

5 MR. LAISURE: And - - - and the - - -

6 JUDGE SMITH: Why - - - why - - - I mean I
7 guess - - - what I'm suggesting is isn't O'Rama
8 pretty strong medicine, and shouldn't we - - -
9 shouldn't we stick to the - - - the somewhat less
10 powerful Lourido and Agosto approach to - - - in - -
11 - in a situation where O'Rama is distinguishable?

12 MR. LAISURE: Well - - -

13 JUDGE SMITH: And O'Rama's almost automatic
14 reversal every time there's a problem.

15 MR. LAISURE: I - - - I - - - my red light
16 is on. I just want to - - -

17 CHIEF JUDGE LIPPMAN: Go ahead, answer the
18 question, counselor.

19 MR. LAISURE: Okay, "Few moments are more
20 critical to the outcome of a trial than when the
21 court responds to a deliberating jury's question.
22 The answer may determine" whether the verdict - - -
23 "what the verdict will be." That's from Walston,
24 that's why it's so important.

25 CHIEF JUDGE LIPPMAN: Okay, thanks,

1 counsel.

2 Counselor?

3 MR. JOBLove: May it please the court, my
4 name is Leonard Joblove for the respondent. There
5 are two very different ways or grounds on which this
6 court could reject the defendant's claim and affirm
7 the conviction. First, even if an assumption was
8 made, and I'm not conceding it, but even if an
9 assumption was made that there actually was a
10 violation of the notice requirement of CPL 310.30 in
11 this case, in this case, as in Silva, the controlling
12 authority is this court's decision in Agosto, not the
13 court's decision in O'Rama, because, as in Agosto,
14 this is a case where the jury's request for - - -
15 jury's note, a request of something, to the - - - to
16 the court was superseded by the - - -

17 JUDGE SMITH: But even if - - - even if
18 you're right, obviously, there's some - - - some
19 people think you're not. But even if you're right,
20 isn't - - - isn't this a lot more like Lourido than
21 Agosto? This was - - - the - - - the - - - the - - -
22 it was just like - - - they - - - they said would you
23 please - - - can we please hear the key evidence
24 again, and they hear nothing for an hour.

25 MR. JOBLove: The question is whether

1 there's any reason to treat the jury's note that they
2 reached a verdict as anything other than we're
3 withdrawing our earlier request for a read back.

4 JUDGE SMITH: Why - - - why wasn't it so
5 treated in Lourido?

6 MR. JOBLove: Lourido it was a delay of
7 three hours. It was a request for the cross-
8 examination of, I believe, three prosecution
9 witnesses and - - -

10 JUDGE SMITH: This is - - - this is - - -
11 this is the - - - this is the - - - this is a
12 request, essentially, to - - - to hear what you say
13 is a confession again. You - - - you don't think
14 that's pretty important?

15 MR. JOBLove: Well, the question is whether
16 the taking of the verdict when the jury sent a note
17 that they had a verdict - - -

18 JUDGE SMITH: Yeah, that - - - that's the
19 question, but I guess my - - - my real question is
20 apart from the difference between three hours and one
21 hour, which I admit is not a small difference, this
22 is Lourido, isn't it?

23 MR. JOBLove: No, it isn't, Your Honor,
24 because in Lourido the request was for the cross-
25 examination of three of the People's witnesses. In

1 this case the request was specifically for the direct
2 examination of the detective who took the defendant's
3 confession to the murder, and that would hardly be
4 viewed as potentially favorable testimony the whole
5 way.

6 JUDGE SMITH: What - - -

7 CHIEF JUDGE LIPPMAN: Counselor, counsel,
8 why isn't this squarely O'Rama? The - - - the whole
9 purpose of O'Rama, is it not undermined by the
10 position that you're taking if we ignore the fact
11 that none of the protocols were followed, when you
12 have a note that's an exhibit that's in the record
13 and what - - - what does O' - - - O'Rama mean if we
14 don't hold this case under O'Rama? What - - - what's
15 the purpose of it?

16 MR. JOBLove: What O'Rama means - - -

17 CHIEF JUDGE LIPPMAN: Would O'Rama exist if
18 we - - - if we don't put this squarely under O'Rama?

19 MR. JOBLove: Yes, O'Rama does exist,
20 because O'Rama certainly stands for the proposition
21 that the - - - the notice requiring the 310.30 means
22 that the court has to give notice to the attorneys of
23 the actual specific contents of the note, and the
24 People are not disputing - - -

25 CHIEF JUDGE LIPPMAN: So - - - so was that

1 followed here?

2 MR. JOBLove: Well, there's not a record
3 that shows it wasn't, and I'll get to the - - - the
4 second argument.

5 CHIEF JUDGE LIPPMAN: Yes, so what's the -
6 - - so what's the supposition that you - - - you
7 draw, because there's not a note that says it was or
8 wasn't, therefore it was?

9 MR. JOBLove: Right, no, Agosto doesn't
10 stand for the proposition that the notice requirement
11 doesn't have to be complied with. The question is
12 even assuming you had a record that showed that the -
13 - -

14 CHIEF JUDGE LIPPMAN: Doesn't O'Rama
15 supersede those cases in a real sense in terms of
16 what's supposed to be done in this kind of situation?

17 MR. JOBLove: In terms of what's supposed
18 to be done, the difference - - -

19 CHIEF JUDGE LIPPMAN: Yes, the protocols
20 that are supposed to followed, and if they're not
21 followed, what is the consequence of that in terms of
22 our precedents and what O'Rama is trying to deal with
23 in terms of mode of proceedings errors?

24 MR. JOBLove: The question is assuming - -
25 - and, again, I'm not conceding that the record in

1 this case establishes that there was a violation of
2 the notice requirement, but even assuming that it is,
3 the difference between Agosto and O'Rama - - - and
4 O'Rama distinguished the Agosto situation, is simple
5 whether it's per se reversible error or whether the
6 court conducts a prejudice inquiry.

7 JUDGE GRAFFEO: Are we - - -

8 JUDGE SMITH: Is there - - - is there a
9 reason, though - - - is - - - is - - - is there a
10 reason to treat the case where the note is never
11 answered to the case where it is? I mean in both
12 case, we know what the judge is supposed to do. He's
13 supposed to call in the lawyers and read the note
14 verbatim and - - - and - - - and go through the
15 O'Rama routine. Is there a reason to treat the case
16 where there's no answer to the note differently from
17 the case where there is an answer?

18 MR. JOBLove: Yes, Your Honor, because
19 depending on the particular set of facts, and this
20 case is such a set of facts where the jury's
21 subsequent note saying we've reached a verdict is the
22 equivalence to them writing a subsequent note that
23 says that previous note, you can disregard it. We're
24 withdrawing our request. And in that circumstance,
25 certainly there would be no - - -

1 JUDGE SMITH: You're - - - you're saying
2 that withdrawal of the note before they get an answer
3 precludes any O'Rama violation. But suppose there is
4 a violation - - - suppose - - -

5 MR. JOBLove: No, no, Your Honor.

6 JUDGE SMITH: - - - suppose - - - suppose
7 it's nec - - - suppose we don't agree that it's a
8 withdrawal. Suppose we think that the - - - the jury
9 that - - - that there's - - - that's there's a risk
10 that - - - simplify. Suppose we got Lourido again
11 tomorrow, exactly the same, why should we apply
12 Lourido to Lourido and not O'Rama?

13 MR. JOBLove: Because I'm not saying that
14 there would be a clear rule that once the jury sends
15 a note saying we're withdrawing our previous request,
16 or we've reached a verdict, that automatically means
17 without further inquiry that that's treated as a - -
18 - a - - - a decision by the jury on their own as
19 opposed to whether there was coercion.

20 JUDGE SMITH: Let - - - let me - - - I
21 mean, I guess - - - I guess what I'm getting at is
22 this in - - - in - - - in the no-note cases, like
23 Lourido and Agosto, we look at the question of
24 prejudice. We did, didn't we?

25 MR. JOBLove: Yes, in Agosto and Lourido.

1 JUDGE SMITH: And - - - and in O'Rama we
2 don't.

3 MR. JOBLove: Yes.

4 JUDGE SMITH: Why, is there a reason for
5 that difference, or is it just the way it happened?

6 MR. JOBLove: No, I think there is a
7 reason, partly because that subsequent note can be
8 viewed as a withdrawal of the previous one, which
9 means there's no extant note.

10 JUDGE SMITH: Okay, well, it could be, but
11 maybe - - - but in Lourido it wasn't, and we still
12 would consider it prejudice. Why?

13 MR. JOBLove: Well, that's the prejudice
14 inquiry, which is whether the - - - whether the
15 subsequent note can be viewed as an independent,
16 voluntary, if you will, decision.

17 JUDGE PIGOTT: Well you were - - - you were
18 going to address, I think, the - - - the Detective -
19 - - the request for Detective Moss' direct, and I
20 thought you were going to say something about what we
21 can infer from that request and then a subsequent
22 verdict.

23 MR. JOBLove: Well, yes, in terms of
24 whether there's a showing of prejudice here, there
25 isn't, because given - - - given the nature of the

1 request, if - - - the record doesn't show that there
2 wasn't compliance of 310.30, and I'd like to get to
3 that.

4 JUDGE SMITH: The - - - the - - - the - - -
5 the - - - the testimony that they asked for included
6 her confession, right?

7 MR. JOBLove: Yes.

8 JUDGE SMITH: And did she ever say in there
9 I intended to kill him?

10 MR. JOBLove: No, she confessed to stabbing
11 him in the neck while he fled.

12 JUDGE SMITH: Yeah, I mean, I understand.
13 I'm not saying you have a weak case here, but could -
14 - - does - - - doesn't the - - - couldn't the - - -
15 the - - - that reading have provided a doubtful juror
16 with an argument maybe - - - maybe there's no intent
17 to kill? By the way, if there's no intent to kill,
18 they had to acquit, right? They had no manslaughter
19 count before them.

20 MR. JOBLove: I - - - I don't think that
21 was a substantial issue in this case, Your Honor.
22 And in terms of assessing prejudice, if the question
23 is whether - - - I'm not conceding that the record
24 establishes that there was a failure to give notice
25 to defense counsel, but assuming for a moment that

1 there was, whether notifying the attorney of this
2 note asking for the direct examination of the
3 detective who took the confession of your client to
4 murder is even, first is he going to say - - -

5 JUDGE SMITH: Forget - - - forget about - -
6 - forget about notifying the attorney. The - - - the
7 - - - the jury wanted to hear. It's obviously the
8 critical evidence in the case. They wanted to hear
9 it again. They didn't think that they got enough the
10 first time. They waited an hour, which is not three
11 hours, but it's not ten minutes, either, and then
12 they came in with a verdict. Wouldn't it be better
13 if someone had at least, in that interval, said to
14 the jury wait, don't - - - don't - - - don't give up,
15 we're going to get it for you?

16 MR. JOBLove: That was certainly an option
17 that the court could have pursued, but the fact that
18 it chose to interpret the subsequent note as a
19 withdrawal of the previous request under these
20 circumstances, where it's fifty-one minutes - - -

21 JUDGE PIGOTT: But - - - but the point is
22 that - - -

23 MR. JOBLove: - - - it was during the lunch
24 hour, and they had just gotten the case.

25 JUDGE PIGOTT: I think the point, though,

1 is that quite often, you know, as a judge you - - -
2 you would read a note and you see it the way a judge
3 would say it. But then one of the two counsels says
4 you're - - - you're overlooking this fact, judge,
5 that maybe the jury is thinking this or - - - or
6 doing that, which gets us right back into the O'Rama
7 issue, doesn't it. Doesn't it?

8 MR. JOBLove: Your Honor, I'd really like
9 to - - - yes, I'd like to address whether there even
10 is a record here that shows that there was a
11 violation of the notice requirement. And - - - and -
12 - -

13 CHIEF JUDGE LIPPMAN: What does the record
14 show? What does the fact that there's an exhibit or
15 exhibits in the record and no other protocols or
16 anything followed in relation to - - - what does the
17 silence in the record show?

18 MR. JOBLove: That shows that the record is
19 utterly silent and utterly inconclusive.

20 CHIEF JUDGE LIPPMAN: So what is the
21 inference that you're drawing from that silence?

22 MR. JOBLove: I'm drawing an inference that
23 an at least equally plausible explanation for this
24 record is that there was full disclosure to the
25 attorneys and the judge - - -

1 CHIEF JUDGE LIPPMAN: And is that
2 consistent with the spirit and the substance of
3 O'Rama? Don't we get into O'Rama, no matter which
4 way you try to avoid it; isn't this a basic O'Rama
5 situation?

6 MR. JOBLove: The only way you get into
7 O'Rama - - - because there's two possible realities
8 out to here to what happened. One is the judge got
9 these notes, con - - - concealed it, and never told
10 the - - - the lawyers about it and then took the
11 verdict. The other possibility, which is perfectly
12 plausible, is the judge got the notes, showed them to
13 the attorneys, they're engaging in discussion about
14 what - - - how - - - getting the court reporter
15 there, dec - - - deciding what testimony is going to
16 be read back in response to the request, and then the
17 jury - - - the judge receives another note that says
18 we have a verdict.

19 CHIEF JUDGE LIPPMAN: Judge Graffeo.

20 JUDGE GRAFFEO: Following - - - following
21 up what the Chief Judge said, looking at the big
22 picture here for a while, my concern is O'Rama was
23 1991, so we have quite a while that this precedent
24 has been out there.

25 MR. JOBLove: Yes.

1 JUDGE GRAFFEO: We don't seem to be
2 shutting the spigot off of cases about jury notes.
3 What - - - I know your red light is on, but what can
4 this court say to impress upon the trial bench that
5 there's got to be a protocol followed here, which
6 would avoid this problem of ask - - - of trying to
7 interpret what went on in chambers, what may have
8 happened?

9 MR. JOBLove: I think - - - I think the way
10 - - -

11 JUDGE GRAFFEO: Is - - - isn't upholding it
12 and applying mode of proceedings the only way to get
13 the message across that this information has got to
14 appear on the record?

15 MR. JOBLove: Well, Your Honor, the heart
16 of 310.30 and O'Rama is making sure that there's
17 notice to counsel of the actual content of the note.
18 In O'Rama, the court said that what the court should
19 do is make a record of that. Now, the question is
20 whether, as the court ultimately held in Walston,
21 whether a failure to make the record, a judge
22 forgetting to put on the record that there was
23 complete compliance with the statute, should be
24 treated as the legal equivalent of automatic
25 reversal, because there was no notice given under the

1 statute.

2 JUDGE SMITH: Well - - - well - - -

3 JUDGE GRAFFEO: It's - - - it's a harsh
4 remedy. I don't - - - you know, I don't dispute
5 that.

6 MR. JOBLove: But ordinarily - - -
7 ordinarily a defendant, where there actually is a
8 failure to give notice to the attorney in compliance
9 with the O'Rama protocol, if that doesn't - - - if
10 that fact is not established on the record, as it was
11 in the O'Rama decision itself, that showed that the
12 judge refused to give - - - to give notice of the
13 actual content in the note, the proper procedure is
14 to bring a motion under 440.

15 CHIEF JUDGE LIPPMAN: Okay, counselor.
16 Thanks. Thanks, counselor. Let's get rebuttal.

17 JUDGE READ: What - - - what should the
18 judge do in the situation that was postulated by Mr.
19 Joblove, where the - - - where the attorneys and the
20 judge are talking about how to respond to the note,
21 and then all of a sudden, they get notice that the
22 jury's come down with the verdict. What - - - what
23 should the judge do then?

24 MR. LAISURE: What the court ordered in
25 Lourido, which is to tell the - - - the - - - the

1 defense counsel that this has occurred and allow
2 defense counsel to make the decision whether to
3 suggest to ask the jury whether they want to hear
4 that testimony before - - - before they - - - before
5 the verdict is accepted. They - - - it's - - - it's
6 very - - - it's very plain, Agosto - - -

7 JUDGE SMITH: But then you've got to know
8 prosecutors rights.

9 MR. LAISURE: I'm sorry?

10 JUDGE SMITH: Not just defense counsel, the
11 pros - - -

12 MR. LAISURE: I'm - - - yes, Judge, that's
13 true.

14 JUDGE SMITH: - - - prosecutor has rights,
15 too, right?

16 MR. LAISURE: That's true, that's right.

17 JUDGE SMITH: Yeah.

18 MR. LAISURE: It's both sides. Agosto and
19 Lourido - - -

20 JUDGE READ: That way there'd be - - - that
21 way there'd be a record?

22 MR. LAISURE: Well - - -

23 JUDGE READ: That way there would be a
24 record?

25 MR. LAISURE: That - - - that would help

1 also, yes. I want to point out that Agosto and - - -
2 and Lourido are really not notice cases. They're
3 about what happens if - - - if the - - - if the notes
4 are not answered. And so to answer Your - - - Your -
5 - - Your Honor's questions earlier, I think O'Rama
6 would - - - would be the way it was analyzed if
7 Lourido came before the court today.

8 JUDGE SMITH: So - - - so in that sense,
9 O'Rama has superseded Lourido?

10 MR. LAISURE: In that sense that, I believe
11 so, yes. And - - - and there's a - - - a good - - -
12 the reason that Agosto and - - - and Lourido were
13 discussed is that in Agosto, the question was about
14 whether they could leave early because of Sabbath.
15 Had nothing to do with deliberations, and that was
16 the point. The question is - - -

17 JUDGE SMITH: But didn't - - - but didn't
18 the - - - didn't the O'Rama court itself distinguish
19 those cases?

20 MR. LAISURE: Yeah, well, yes, but - - -
21 but the point - - - the point was also that - - -
22 that - - - it - - - it was talking about Lourido
23 favorably, because Lourido involved something that
24 the jury was going to be deliberating. That affected
25 the deliberations, and that's the inquiry. If it

1 affected the deliberations, that's it under O'Rama.
2 You can't allow the trial courts to avoid O'Rama by
3 ignoring the notes, and that's what they want. And -
4 - - and to answer Your Honor's question, mode of
5 proceedings error ruling in this court will tell the
6 judges what they have to do, and it will also tell
7 the judges don't rely on defense counsel.

8 CHIEF JUDGE LIPPMAN: Okay, counsel, thank
9 you.

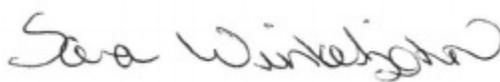
10 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Julian Silva, No. 208 and People v. Pamela Hanson, No. 209 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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