PEOPLE V. MORRISON: SOME ANXIOUS OBSERVATIONS ON THE COURT OF APPEALS' *O'RAMA* JURISPRUDENCE

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A politician once said, "I'm not known to make many mistakes, but when I do, it's a doozie."[1] The Court of Appeals' ("Court") decision last term in *People v. Morrison*[2] is a doozie. One can confidently say that no other jurisdiction in the country would reverse a defendant's conviction for raping a 90-year-old Alzheimer's patient because the trial judge may not have shared the exact contents of a jury note with defense counsel, even though counsel was aware of the note's existence and never objected to the judge's conduct.

I.

A. Morrison*: Factual Background*

William Morrison worked as an aide at a nursing home in Rome, New York where Helen Smith, a 90-year-old Alzheimer patient, was a resident.[3] On May 24, 2006, Morrison put Smith on her bed, penetrated her and ejaculated.[4] As he left the room, she told him that she was "going to tell on [him]," which she did.[5] An examination revealed the presence of semen in her vagina, and DNA testing confirmed that Morrison was its source.[6] Morrison later confessed to having intercourse with Smith, signing a statement in which he told the police that he had been sexually abused as a child and this was a

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[1] The quote is often attributed to Mayor Fiorello LaGuardia, but it is Senator Lloyd Bentsen's bastardization of LaGuardia's words. William Safire*, On Language*, N.Y. TIMES MAG. (Feb. 22, 1987), https://www.nytimes.com/1987/02/22/magazine/on-language.html (noting that LaGuardia actually stated, "When I make a mistake, it's a beaut.").

[2] People v. Morrison, 109 N.E.3d 1119 (N.Y. 2018).

[3] *See* Brief for Appellant at 5, *Morrison*, 109 N.E.3d 1119 (No. APL-2017-00105). Helen Smith is a pseudonym used in the Court of Appeals pursuant to New York Civil Rights Law section 50-b(1) (McKinney 2019).

[4] Brief for Appellant, *supra* note 3, at 5.

[5] *Id.*

[6] *See id.* at 6.

chance to reverse roles.[7]

An Oneida County grand jury indicted Morrison for Rape in the First Degree, Sexual Abuse in the First Degree, Endangering the Welfare of a Vulnerable Elderly Person in the Second Degree, and Willful Violation of Health Laws.[8] Morrison's trial, which had twice been postponed and garnered considerable media attention, began on Monday, February 26, 2007.[9] The judge was eager to finish it by Friday, having scheduled another trial for the next week.[10] For that reason, when deliberations began late Wednesday afternoon, the judge offered the jurors the option of staying past 4:30 p.m.[11] They chose instead to come back the next morning and were excused for the night.[12]

On Thursday, the judge addressed four jury notes requesting legal instructions, exhibits and read-backs of testimony.[13] In each instance, before giving his response, he read the note into the record in the jury's presence.[14] At 4:30 p.m., the jury sent out two more notes in rapid succession.[15] The first revealed a partial verdict: "We have made a decision on the Third Count [the endangering count] we are having hard time with 1 and 2 just giving you are [sic] status."[16] The second note revised the first: "We have arrived on decision on 2 [the sexual abuse count] and 3. [B]ut we have a lot of work to do on #1. [D]on[']t see it being quick. Not sure what to do. We ars [sic] starting to make way."[17]

The judge marked the two notes as Court Exhibits 8 and 9, respectively, and recalled the jury.[18] He then told the jurors, "I have received a note, which I have marked as Court Exhibit Number 9, and I will not read that into the record, but I'm sure you know what it says."[19] He stated, "[W]e are hoping that at some point you will be

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[7] Brief for Respondent at 7, People v. Morrison, 50 N.Y.S.3d (App. Div. 2017) (No. KA 09-00310).

[8] Brief for Respondent at 2, *Morrison*, 109 N.E.3d 1119 (No. APL-2017-00105). The fourth charge was not submitted to the jury. *Id.* at 3.

[9] *Id.*; *see* Memorandum from Hannah Stith Long, Assistant Attorney Gen. to John P. Asiello, Clerk of the Court of Appeals 4 (Aug. 16, 2017).

[10] *See* Memorandum from Hannah Stith Long to John P. Asiello, *supra* note 9, at 4.

[11] *See id.* at 5.

[12] *See id.* at 5–6.

[13] *See id.* at 6.

[14] *See* Transcript of Record at 591, People v. Morrison, No. 2006-233 (N.Y. Oneida Cty. Ct. 2007); Memorandum from Hannah Stith Long to John P. Asiello, *supra* note 9, at 6.

[15] *See* Memorandum from Hannah Stith Long to John P. Asiello, *supra* note 9, at 6.

[16] People v. Morrison, 109 N.E.3d 1119, 1123 (N.Y. 2018) (DiFiore, J. dissenting).

[17] *Id.*

[18] *See* Memorandum from Hannah Stith Long to John P. Asiello, *supra* note 9, at 7.

[19] *Morrison*, 109 N.E.3d at 1123 (DiFiore, J. dissenting).

able to come to a unanimous verdict on all three of the charges," and gave a mild *Allen*-like instruction, encouraging the jurors to "listen to what the other jurors have to say" but not to "just abandon your feelings to reach a unanimous verdict."[20] After telling the jury, "[W]e as a group would like you to keep working," he gave them the choice of deliberating "another hour tonight" or returning in the morning, and they chose the latter course.[21]

On Friday, the jury sent four more notes containing requests for further legal instructions.[22] The judge again read the notes into the record in the jury's presence before responding to them.[23] After the fourth note, he gave another *Allen*-like instruction.[24] That afternoon, the jury returned a guilty verdict on all three counts.[25] Morrison, who had one prior felony conviction and five misdemeanor convictions and lied to get the nursing job, was sentenced to twenty-five years imprisonment on the rape count with lesser sentences on the other counts, to run concurrently.[26]

Represented by the local public defender, Morrison appealed his conviction to the Fourth Department, raising two issues: first, that the People's belated disclosure of an investigator's report violated *Brady* and *Rosario*; second, that testimony about the DNA results by a laboratory supervisor who had not performed her own independent analysis violated his Sixth Amendment right to confrontation.[27] The Fourth Department found merit in both claims but concluded that the errors were harmless.[28] Leave to appeal was denied.[29]

That was merely the end of the beginning of Morrison's appellate litigation. In December 2014, Morrison, *pro se*, moved the Fourth Department for a writ of *coram nobis*.[30] He argued that he had been

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[20] Transcript of Record, *supra* note 14, at 607–08; Memorandum from Hannah Stith Long to John P. Asiello, *supra* note 9, at 7.

[21] Transcript of Record, *supra* note 14, at 608; *see* Memorandum from Hannah Stith Long to John P. Asiello, *supra* note 9, at 7.

[22] *See* Brief for Appellant, *supra* note 3, at 12.

[23] *See* Transcript of Record, *supra* note 14, at 611–15; Brief for Appellant, *supra* note 3, at 12.

[24] *See* Brief for Appellant, *supra* note 3, at 12–13.

[25] *See id.* at 13.

[26] *See id.* at 1; *Nursing Home Aide Convicted for Raping 90-Year-Old Resident Sentenced to 25 Years in Prison*, N.Y. ATT'Y GEN. (Apr. 18, 2007), https://ag.ny.gov/press-release/nursing-home-aide-convicted-raping-90-year-old-resident-sentenced-25-years-prison.

[27] *See* People v. Morrison, 935 N.Y.S.2d 234, 235–36 (App. Div. 2011).

[28] *See id.* at 236–37.

[29] *See* People v. Morrison, 978 N.E.2d 113 (N.Y. 2012).

[30] *See* Affirmation of Special Assistant Attorney General at ¶ 1, People v. Morrison, 6 N.Y.S.3d 925 (App. Div. 2015) (No. KA 09-00310); Notice of Motion for a Writ of Error Coram Nobis, *Morrison*, 6 N.Y.S.3d 925.

denied the effective assistance of appellate counsel—specifically that appellate counsel had not raised a claim that the trial judge had improperly handled Court Exhibits 8 and 9 by failing to comply with the procedures prescribed in *People v. O'Rama*.[31] In May 2015, the Fourth Department granted the writ.[32] It concluded that the previously unargued *O'Rama* claim "may have merit" and directed the parties to submit briefs.[33]

In March 2017, after full briefing, the Fourth Department ruled in Morrison's favor.[34] Court Exhibit 9, the court found, was not merely "ministerial" (it was a "substantive inquiry for guidance concerning further deliberations"), and the judge had not informed defense counsel of its precise contents before responding.[35] That was per se reversible error under *O'Rama*. The fact that defense counsel had not objected to the judge's handling of the note was irrelevant, since preservation by objection was not required under *O'Rama*.[36] One justice dissented on the ground that the note was ministerial and granted the People leave to appeal.[37]

B. Morrison*: The Court of Appeals' Decision*

In a memorandum opinion joined by Judges Rivera, Stein, Fahey, and Wilson, the Court of Appeals affirmed the Fourth Department's decision.[38] The majority held (i) that Court Exhibit 9 related to the substantive legal or factual issues of the trial and therefore was not ministerial; (ii) that defense counsel's "awareness of the existence and the 'gist' of the note" did not satisfy *O'Rama*, since counsel did not know its "entire contents"; and (iii) that because there was no record proof of compliance with *O'Rama*, a reconstruction hearing was not permissible to determine if the note had been shared with

[31] *See Morrison*, 6 N.Y.S.3d at 925; People v. O'Rama, 579 N.E.2d 189, 192–93 (N.Y. 1991); *infra* Part V.

[32] *See Morrison*, 6 N.Y.S.3d at 925.

[33] *See id.* at 925–26.

[34] *See* People v. Morrison, 50 N.Y.S.3d 673, 674 (App. Div. 2017). Morrison was represented by a court-appointed attorney at this stage. *See* Brief for Respondent, *supra* note 7, at 14.

[35] *See Morrison*, 50 N.Y.S. 3d at 674–75. The court found that Court Exhibit 8 was ministerial (and therefore not subject to *O'Rama*) because it was not requesting further information or instruction. *See id.* at 675.

[36] *See id.* at 675–76; *O'Rama*, 579 N.E.2d at 193 ("Accordingly, the error presents a 'question of law' within the meaning of CPL 470.05(2), notwithstanding that defense counsel did not object to the court's procedure . . . .").

[37] *See Morrison*, 50 N.Y.S.3d at 676; Brief for Appellant at 1, People v. Morrison, 109 N.E.3d 1119 (N.Y. 2018) (No. APL-2017-00105).

[38] *See Morrison*, 109 N.E.3d at 1120.

counsel at an off-the-record conference.[39]

Chief Judge DiFiore, joined by Judges Garcia and Feinman, dissented on the ground there was "sufficient ambiguity in the record as to whether defense counsel received meaningful notice of the content of [the] jury note" to warrant a reconstruction hearing.[40] Judge Garcia dissented separately.[41] In a lengthy opinion, he called on the Court to abrogate the *O'Rama* no-preservation-required rule and to hold instead that if defense counsel is aware of the existence of a jury note, an objection is required for there to be an error of law.[42]

II.

A. The O'Rama *Decision*

The starting point for analysis is the Court's opinion in *O'Rama* in 1991. John O'Rama was charged with driving under the influence of alcohol.[43] On the third day of deliberations, the jury foreman sent out a note stating, "I don't see us ever reaching a unanimous verdict."[44] In response, the judge gave an *Allen* instruction.[45] On returning to the jury room, an individual juror sent another note, which the judge declined to read aloud.[46] Instead, he brought the jury back into the courtroom and "summarized the 'substance' of the note[,]" saying only: "it 'indicate[d] that there are continued disagreements among the jurors.'"[47] After questioning the jurors and determining "that a unanimous verdict was still possible," the judge gave another *Allen* charge and sent the jurors back to work.[48]

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[39] *See id.* at 1120–21; *infra* Part IV; *cf.* People v. Parker, 109 N.E.3d 1138, 1146–47 (N.Y. 2018). The same day that it decided *Morrison*, the Court decided *People v. Parker*, in which it also considered a defendant's challenge to his conviction on *O'Rama* grounds. *See Parker*, 109 N.E.3d at 1140. *Parker* contains a somewhat more extended discussion of the reconstruction hearing issue than does *Morrison*.

[40] *Morrison*, 109 N.E.3d at 1121–22 (DiFiore, C.J., dissenting).

[41] *Id.* at 1122 (Garcia, J., dissenting).

[42] *See id.* at 1129. Judge Rivera responded to Judge Garcia's dissent in a footnote in *Parker*. There, she brushed aside Judge Garcia's arguments, noting that his preference for "a different outcome in our prior cases [was] no basis to ignore our precedent." *Parker*, 109 N.E.3d at 1145 n.4. She also advised that "if the People want to avoid reversals on *O'Rama* grounds they can bring errors to trial courts' attention." *Id.* at 1147 n.7.

[43] *See* People v. O'Rama, 579 N.E.2d 189, 190 (N.Y. 1991).

[44] *Id.* at 191.

[45] *Id.*

[46] *Id.*

[47] *Id.* The note indicated that the juror did not feel he could "honestly come up with a different decision than [he had]," and it ended, "We are split down the middle HELP 6/6." *Id.* at n.2.

[48] *Id.* at 191.

Outside the jury's presence, the judge told counsel that he had not read the note from the individual juror because "it indicate[d w]hat the present posture is as far as votes."[49] When defense counsel asked to see the note, the judge declined the request.[50] That afternoon, the jury returned a guilty verdict.[51]

The Court of Appeals began its discussion in *O'Rama* by citing Criminal Procedure Law section 310.30.[52] That provision dictates that upon receiving a jury note seeking further information or instruction with respect to a matter "pertinent to [its] consideration of the case," the judge "must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant . . . must give such requested information or instruction as the court deems proper."[53] Meaningful notice, the Court held, meant notice of the actual content of the note.[54] Only by knowing "the precise language and tone of the juror note" could counsel "frame intelligent suggestions for the fairest and least prejudicial response."[55]

More specifically, the Court outlined a four-step process that a trial judge should follow when receiving a substantive jury note.[56] First, the judge should mark the note as a court exhibit and read it into the record in the presence of counsel and the defendant.[57] Second, she should afford counsel an opportunity to propose an appropriate response.[58] Third, she should inform counsel of her intended response so that counsel can seek modifications.[59] And fourth, she should return the jury to the courtroom, read the note aloud (so that the jurors can correct any transcription inaccuracies), and then, assuming no inaccuracies, give her response.[60] The Court recognized that there might be "unique articulable circumstances" that could make this process impractical, but emphasized that it should be the norm.[61]

What came next is most important. The Court concluded that the

[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] N.Y. CRIM. PROC. LAW § 310.30 (McKinney 2018).
[54] *See O'Rama*, 579 N.E.2d at 192.
[55] *Id.*
[56] *See id.* at 192–93 (citing United States v. Ronder, 639 F.2d 931, 934 (2d Cir. 1981)).
[57] *O'Rama*, 579 N.E.2d at 192.
[58] *Id.*
[59] *Id.* (citing *Ronder*, 639 F.2d at 934).
[60] *O'Rama*, 579 N.E.2d at 192–93.
[61] *Id.* at 193.

trial judge's failure to disclose the contents of the jury's note had "prevent[ed] defense counsel from participating meaningfully in this critical stage of the trial" and that the error "represented a significant departure from the 'organization of the court and the mode of proceeding prescribed by law.'"[62] Under settled New York jurisprudence, denominating the judge's failure a mode of proceeding error had two consequences: (i) the error presented a "question of law," notwithstanding the fact that defense counsel had not objected "until after the supplementa[l] charge had been given" and (ii) the error was "inherently prejudicial."[63] That is to say, neither the preservation requirement nor harmless error analysis applied.[64]

*B. Post-*O'Rama *Developments*

In the twenty-eight years since *O'Rama* was decided, the Court has addressed it some twenty-five times.[65] From those cases, we have learned this: First, *O'Rama*'s four-step process and its no-preservation-required rule is not implicated if the jury's inquiry is "ministerial"—i.e., if it is unrelated to the substantive legal and factual issues of the trial.[66] A jury's request for a smoking break falls into this category.[67] Second, preservation is required if the judge reads the entire note to the parties *after* she has given her response and the jury has resumed its deliberations, at least if defense counsel

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[62] *Id.* (quoting People v. Coons, 551 N.E.2d 587, 588 (N.Y. 1990)).

[63] *O'Rama*, 579 N.E.2d 189 at 193 (citing People v. Jones, 517 N.E.2d 865, 868 (N.Y. 1987)).

[64] *See infra* Part III.

[65] *See* People v. Morrison, 109 N.E.3d 1119, 1121 (N.Y. 2018); People v. Parker, 109 N.E.3d 1138, 1140 (N.Y. 2018); People v. Mack, 55 N.E.3d 1041, 1049–50 (N.Y. 2016); People v. Wallace, 53 N.E.3d 705, 706 (N.Y. 2016); People v. Nealon, 41 N.E.3d 1130, 1137 (N.Y. 2015); People v. Taylor, 43 N.E.3d 350, 357 (N.Y. 2015) (Rivera, J., concurring); People v. Silva, 22 N.E.3d 1022, 1026–27 (N.Y. 2014); People v. Walston, 14 N.E.3d 377, 380 (N.Y. 2014); People v. Alcide, 998 N.E.2d 1056, 1060 (N.Y. 2013); People v. Williams, 991 N.E.2d 195, 197 (N.Y. 2013); People v. Ippolito, 987 N.E.2d 276, 281 (N.Y. 2013); People v. Mays, 982 N.E.2d 1252, 1253 (N.Y. 2012); People v. Williams, 947 N.E.2d 130, 134 (N.Y. 2011); People v. Ramirez, 935 N.E.2d 791, 791 (N.Y. 2010); People v. Cruz, 927 N.E.2d 542, 545–47 (N.Y. 2010) (Lippman, C.J., concurring); People v. Kadarko, 928 N.E.2d 1025, 1026–27 (N.Y. 2010); People v. Ochoa, 925 N.E.2d 868, 872 (N.Y. 2010); People v. Tabb, 920 N.E.2d 90, 90–91 (N.Y. 2009); People v. Kisoon, 863 N.E.2d 990, 992, 993 (N.Y. 2007); People v. Damiano, 663 N.E.2d 607, 613 (N.Y. 1996); People v. Giordano, 663 N.E.2d 588, 595 (N.Y. 1995); People v. Cook, 650 N.E.2d 847, 848–49 (N.Y. 1995); People v. Starling, 650 N.E.2d 387, 391 (N.Y. 1995); People v. Stewart, 613 N.E.2d 540, 541–42 (N.Y. 1993); People v. DeRosario, 611 N.E.2d 273, 275 (N.Y. 1993); People v. Lykes, 609 N.E.2d 132, 133–34 (N.Y. 1993); People v. Jackson, 585 N.E.2d 795, 805 (N.Y. 1991) (Titone, J., dissenting).

[66] *See Wallace*, 53 N.E.3d at 706 (quoting *Williams*, 991 N.E.2d at 197); *Ochoa*, 925 N.E.2d at 872 (first citing People v. Hameed, 666 N.E.2d 1339, 1344 (N.Y. 1996); and then citing People v. Collins, 780 N.E.2d 499, 502 (N.Y. 2002)).

[67] *Mack*, 55 N.E.3d at 1044 n.1.

can then seek further instructions.[68] Third, preservation is not required if the jury sends out a substantive note and then a second note announcing that it has reached a verdict and the judge accepts the verdict without informing counsel of the contents of the first note, no matter how short the duration between the two notes.[69] Fourth, preservation is required if the jury sends out a substantive note and counsel is fully informed of its contents and then a second note announcing that it has reached a verdict and the judge accepts the verdict without responding to the first note.[70] And fifth, and perhaps most significantly, preservation is required if counsel is fully informed of the contents of the note but not afforded an opportunity to be heard before the judge responds.[71]

Thus, under the *O'Rama* no-preservation-required rule, counsel must be informed of the precise contents of a substantive jury note in time to seek further instructions.[72] If that does not occur, then there is a mode of proceeding error, and a contemporaneous objection is not necessary for there to be an error of law.[73]

Although *O'Rama*'s no-preservation-required rule has been narrowed, what remains has been strictly enforced. Take *People v. Walston*[74] for example. There, the jury sent out a note asking for the "Judge[']s directions on Manslaughter/Murder in the Second Degree—(Intent)."[75] The judge told counsel that the jury "want[ed] the Judge's directions on manslaughter and murder in the second degree," but made no mention of the note's parenthetical reference to "intent."[76] The judge then repeated his instructions on the two crimes (all without objection), and the jury acquitted the defendant of murder but found him guilty of manslaughter in the first degree.[77] Because "the entire contents of the note" had not been shared with counsel, preservation was not required to raise an *O'Rama* claim, and Walston's manslaughter conviction was reversed.[78]

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[68] *See Kadarko*, 928 N.E.2d at 1026–27.

[69] *See Silva*, 22 N.E.3d at 1024, 1026–27. *Silva* effectively overruled *People v. Agosto*, 538 N.E.2d 340, 341–42 (N.Y. 1989), and *People v. Lourido*, 516 N.E.2d 1212, 1216 (N.Y. 1987), which required reversal only where a court's failure to respond to a jury note prior to a verdict prejudiced the defendant. *See Silva*, 22 N.E.3d at 1027 (Smith, J. dissenting).

[70] *See Mack*, 55 N.E.3d at 1048–49.

[71] *See* People v. Nealon, 41 N.E.3d 1130, 1134 (N.Y. 2015).

[72] *See, e.g.*, People v. Kadarko, 928 N.E.2d 1025, 1026–27 (N.Y. 2010); People v. Kisoon, 863 N.E.2d 990, 993 (N.Y. 2007).

[73] *See Silva*, 22 N.E.3d at 1026–27.

[74] People v. Walston, 14 N.E.3d 377 (N.Y. 2014).

[75] *Id.* at 379 (alterations in original).

[76] *Id.* (alteration in original).

[77] *See id.*

[78] *See id.* at 380.

Walston also underscores the fact that *O'Rama* failings are not subject to harmless error analysis. The jury in *Walston* was clearly focused on the mens rea elements of the two crimes: murder in the second degree requires a defendant to have acted "[w]ith intent to cause the death of another person," and manslaughter in the first degree requires the defendant to have acted "[w]ith intent to cause serious physical injury."[79] That is the only difference between the two crimes. It is hard to imagine how the outcome of the case would have been different had the word "intent" been read aloud.[80] That is especially so given that the jury sent out a note the next day asking for the "complete definition of the Intent section related to time when intent enters into the event," and the judge (again without objection) reread his entire instruction on intent.[81]

III.

All of this raises this question: Should the failure to advise counsel of the precise contents of a substantive jury note, even if counsel knows of the note's existence and the note is available for inspection, constitute a mode of proceeding error, so that a contemporaneous objection is not required to preserve the issue for review and harmless error analysis is inapplicable?

A. The Mode of Proceeding Doctrine

The mode of proceeding doctrine has its origin in *Cancemi v. People*,[82] decided in 1858. There, the defendant was convicted by a jury of eleven, one juror having been permitted "to withdraw from the jury box" with defense counsel's consent.[83] The Court of Appeals concluded that the 11-person verdict was a "nullity"—that to permit it would work a "radical change[] . . . to the organization of the tribunals or the mode of proceeding prescribed by the constitution and the laws."[84] As the Court saw it, if one juror might be waived, there was no limiting principle and the trial might be "committed to the court alone," which, at the time, was thought to be "a highly

[79] N.Y. PENAL LAW §§ 125.20, .25 (McKinney 2019).

[80] The Court upheld the defendant's weapon possession conviction because the note addressed only "an element relative to the homicide counts, and not to the weapon possession count." *Walston*, 14 N.E.3d at 380.

[81] Brief for Respondent at 15, *Walston*, 14 N.E.3d 377 (No. APL-2013-00094).

[82] Cancemi v. People, 18 N.Y. 128 (1858).

[83] *Id.* at 131.

[84] *Id.* at 137, 138.

dangerous innovation."[85] In 1858, a criminal trial without a 12-person jury was not a criminal trial at all.[86]

Seventy years later in *People ex rel. Battista v. Christian*,[87] the Court reached a similar conclusion when a defendant, awaiting action by the grand jury, successfully petitioned to have an information filed against him to expedite his case.[88] The Court of Appeals rejected the "shorten[ed] procedure."[89] Without an indictment returned by a grand jury "all our other tribunals are powerless to proceed[, for an indictment] is the foundation of jurisdiction."[90] The defendant's consent to the procedure was of no moment: Waiver, the Court held, "is not permitted where a question of jurisdiction or fundamental rights is involved and public injury would result."[91]

The modern incarnation of the mode of proceeding doctrine came in *People v. Patterson* in 1976.[92] The issue there was a jury instruction that placed the burden of proof on the defendant on the affirmative defense of extreme emotional disturbance, arguably in violation of the Supreme Court's decision in *Mullaney v. Wilbur*.[93] *Mullaney* had been decided during the pendency of Patterson's appeal.[94] Defense counsel had not objected to the instruction. Invoking *Cancemi*, the Court held that the error complained of—shifting the burden of proof to the defendant—was "just as significant as the proper composition of the jury" and "[went] to the essential validity of the proceedings conducted below."[95] Thus, a contemporaneous protest was not required to preserve the issue for

[85] *Id.* at 138. In 1938, the New York Constitution was amended to permit a criminal defendant to waive a jury except in capital cases. *See* N.Y. CONST., art. 1, § 2. In 2007, the Court of Appeals held that, in light of the 1938 amendment, "if a juror becomes unavailable after deliberations have begun and there are no alternates that can be substituted, a defendant [is] permitted to request that an 11-member jury decide his fate," thus overruling *Cancemi*. People v. Gajadhar, 880 N.E.2d 863, 869 (N.Y. 2007).

[86] *See Cancemi*, 18 N.Y. at 138.

[87] People *ex. rel.* Battista v. Christian, 164 N.E. 111 (N.Y. 1928).

[88] *See id.* at 111.

[89] *See id.* at 111, 113.

[90] *Id.* at 112.

[91] *Id.* In 1973, the New York Constitution was amended to permit a defendant to waive indictment where the offense is "other than one punishable by death or life imprisonment," thus overruling *Battista*. *See* People v. Trueluck, 670 N.E.2d 977, 978 (N.Y. 1996) (emphasis removed) (quoting N.Y. CONST. art. I, § 6).

[92] *See* People v. Patterson, 347 N.E.2d 898, 903 (N.Y. 1976).

[93] *See id.* at 900, 908; *see also* Mullaney v. Wilbur, 421 U.S. 684, 684–85, 704 (1975) (finding a Maine statute requiring a defendant charged with murder to prove that he acted in the heat of passion to reduce his crime to manslaughter violated due process).

[94] *See Patterson*, 347 N.E.2d at 902 (citing *Mullaney*, 421 U.S. 684).

[95] *Patterson*, 347 N.E.2d at 903; *cf.* Cancemi v. People, 18 N.Y. 128, 138 (1858).

review.[96]

Since *Patterson*, the Court has reiterated that the mode of proceeding doctrine applies only to a "tightly circumscribed class" of errors that "go to the essential validity of the process and are so fundamental that the entire process is irreparably tainted."[97] In the Court's words, mode of proceeding errors implicate "fundamental constitutional concerns that strike at the core of the criminal adjudicatory process."[98] They are "the most fundamental flaws,"[99] and are "so basic to the validity of a criminal proceeding that the failure to observe such a rule may be raised at any time during the appellate process."[100] Preservation is the general rule, which must be "adher[ed] to strict[ly],"[101] and the mode of proceeding doctrine is a "very narrow exception."[102]

Two post-*Patterson* cases are consistent with this restrictive approach. In *People v. Ahmed*,[103] the Court reversed a defendant's conviction where the trial judge had delegated to his law secretary the responsibility of responding to jury notes.[104] Finding that the "presence and active supervision of a judge [is] an integral component of [a trial]," the Court ruled that an objection was not necessary to preserve the issue for review.[105] And in *People v. Mehmadi*,[106] the Court held that a defendant's presence at all material stages of a trial was so fundamental that, even though his counsel may have consented to his absence during the formulation of a response to a jury note, the issue could still be reviewed.[107] These cases fit neatly into a "very narrow" mode of proceeding doctrine: A trial without the

[96] *See Patterson*, 347 N.E.2d at 903 (citing O'Connor v. Ohio, 385 U.S. 92, 93 (1966); People v. Baker, 244 N.E.2d 232, 235 (N.Y. 1968)). Notably, the Court gave an alternative ground for its conclusion that preservation was not required: Because *Mullaney* was not decided until after the Appellate Division had affirmed Patterson's conviction, a decision not to reach the merits would have deprived him of "a State forum in which his arguments could be heard." *Patterson*, 347 N.E.2d at 903. On the merits, the Court held that the instruction on extreme emotional disturbance did not violate *Mullaney*. *See id.* at 906–07 (citing *Mullaney*, 421 U.S. at 704).

[97] People v. Kelly, 832 N.E.2d 1179, 1181 (N.Y. 2005).

[98] People v. Hanley, 987 N.E.2d 268, 271 (N.Y. 2013).

[99] People v. Becoats, 958 N.E.2d 865, 867 (N.Y. 2011).

[100] People v. Michael, 394 N.E.2d 1134, 1136 (N.Y. 1979).

[101] People v. Goode, 666 N.E.2d 182, 183 (N.Y. 1996).

[102] People v. Thomas, 407 N.E.2d 430, 432 (N.Y. 1980) (citing People v. Patterson, 347 N.E.2d 898, 903 (N.Y. 1976)).

[103] People v. Ahmed, 487 N.E.2d 894 (N.Y. 1985).

[104] *See id.* at 894–95. *But see* People v. Hernandez, 729 N.E.2d 691, 693 (N.Y. 2000) (citing People v. Monroe, 688 N.E.2d 491, 492 (N.Y. 1997)) ("[T]he Trial Judge's absence [during readbacks] did not rise to the level of a 'mode of proceedings' error requiring reversal.").

[105] *Ahmed*, 487 N.E.2d at 896.

[106] People v. Mehmadi, 505 N.E.2d 610 (N.Y. 1987).

[107] *See id.* at 610–11 (citing People v. Ciaccio, 391 N.E.2d 1347, 1349 (N.Y. 1979)).

presence of a judge or defendant is not a valid proceeding.[108]

In the past forty years, the Court has decided scores of cases that confirm that preservation is the general rule.[109] These claims, among others, require preservation: a claim that the evidence was legally insufficient;[110] a claim that the judge failed to charge on the presumption of innocence;[111] a claim of lack of accomplice corroboration;[112] a speedy trial claim;[113] a claim that a count of an indictment is duplicitous;[114] a search and seizure claim;[115] a *Miranda* claim;[116] a *Sandstrom* claim;[117] a *Sandoval* claim;[118] a claim that the judge improperly replaced a sick juror with an alternate;[119] a claim that the defendant was prevented from discussing his testimony with his counsel during a recess;[120] a claim that kidnapping and related crimes should have merged;[121] a claim that a court officer conducted an unauthorized demonstration;[122] a claim that a jury instruction misstated the law;[123] a claim that the verdicts were repugnant;[124] a public trial claim;[125] and a claim of judicial bias.[126] The protest must

[108] Other mode of proceeding errors for which preservation is not required include: (i) a claim that the trial judge "unambiguously convey[ed] to the jury that the defendant should have testified," People v. Autry, 552 N.E.2d 156, 157 (N.Y. 1990) (citing People v. Thomas, 407 N.E.2d 430, 433 (N.Y. 1980); People v. McLucas, 204 N.E.2d 846, 848 (N.Y. 1965)); (ii) a double jeopardy claim, People v. Michael, 394 N.E.2d 1134, 1136 (N.Y. 1979); (iii) an illegal sentence claim, People v. Samms, 731 N.E.2d 1118, 1119 (N.Y. 2000); and (iv) a claim that the court lacked subject matter jurisdiction over the case, People v. Correa, 933 N.E.2d 705, 710 (N.Y. 2010) (citing People v. Casey, 740 N.E.2d 233, 239–40 (N.Y. 2000)).

[109] *See, e.g.*, People v. Gray, 652 N.E.2d 919, 921 (N.Y. 1995).

[110] *See id.* (citing People v. Cona, 399 N.E.2d 1167, 1169 n.2 (N.Y. 1979)).

[111] *See* People v. Creech, 458 N.E.2d 1249, 1250 (N.Y. 1983).

[112] *See Cona*, 399 N.E.2d at 1169.

[113] *See* People v. Beasley, 946 N.E.2d 166, 167–68 (N.Y. 2011).

[114] *See* People v. Allen, 24 N.E.2d 586, 591 (N.Y. 2014) (non-facial duplicity); People v. Becoats, 958 N.E.2d 865, 867 (N.Y. 2011) (facial duplicity).

[115] *See* People v. Turriago, 681 N.E.2d 350, 351, 353 (N.Y. 1997) (citing People v. Johnson 633 N.E.2d 1100, 1101–02 (N.Y. 1994)). *See generally* People v. Thomas, 407 N.E.2d 430, 433 (N.Y. 1980) ("[T]he rule requiring a defendant to preserve his points for appellate review applies generally to claims of error involving Federal constitutional rights . . . ." (citing People v. Tutt, 348 N.E.2d 920, 920–21 (N.Y. 1976)).

[116] *See* People v. Graham, 32 N.E.2d 387, 389 (N.Y. 2015).

[117] *See Thomas*, 407 N.E.2d at 433.

[118] *See* People v. Jackson, 74 N.E.2d 302, 304 (N.Y. 2017).

[119] *See* People v. Garay, 30 N.E.2d 145, 148 (N.Y. 2015) (citing People v. Medina, 960 N.E.2d 377, 381 (N.Y. 2011); People v. Gray, 652 N.E.2d 919, 921 (N.Y. 1995)).

[120] *See* People v. Umali, 888 N.E.2d 1046, 1050 (N.Y. 2008) (citing People v. Narayan, 429 N.E.2d 123, 125 (N.Y. 1981)).

[121] *See* People v. Hanley, 987 N.E.2d 268, 269 (N.Y. 2013).

[122] *See* People v. Kelly, 832 N.E.2d 1179, 1180 (N.Y. 2005).

[123] *See* People v. Robinson, 326 N.E.2d 784, 786 (N.Y. 1975).

[124] *See* People v. Stahl, 425 N.E.2d 876, 877 (N.Y. 1981).

[125] *See* People v. Alvarez, 979 N.E.2d 1173, 1174 (N.Y. 2012).

[126] *See* People v. Prado, 823 N.E.2d 824, 824 (N.Y. 2004).

be "'specifically directed' at the alleged error"[127] and made at a time when "the infirmity . . . might have been remedied."[128]

B. Jurisdiction, Preservation and Harmless Error

Keeping the mode of proceeding doctrine "very narrow" is important for two reasons. The first goes to the jurisdiction of the Court of Appeals. Under the New York State Constitution, the jurisdiction of the Court of Appeals, with narrow exceptions, is limited to "the review of questions of law."[129] And the Criminal Procedure Law makes clear that "[f]or purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time . . . when the court had an opportunity of effectively changing the same."[130] By contrast, the Appellate Divisions have "discretion in the interest of justice" to consider errors that were not protested at trial but deprived the defendant of a fair trial.[131] Thus, the Court of Appeals should be reluctant to expand the mode of proceeding doctrine beyond "the most fundamental flaws,"[132] since it is expanding its jurisdiction each time it does.

The second reason for limiting the class of mode of proceeding errors is more practical. A robust preservation doctrine and a sturdy harmless error rule are essential to an orderly criminal justice system.[133] As the United States Supreme Court has written,

> The reversal of a conviction entails substantial social costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place; victims may be asked to relive their disturbing experiences. The "passage of time, erosion of memory, and dispersion of witnesses may render retrial difficult, even impossible." . . .

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[127] People v. Gray, 652 N.E.2d 919, 921 (N.Y. 1995) (quoting People v. Cona, 399 N.E.2d 1167, 1169 n.2 (N.Y. 1979)).

[128] *Stahl*, 425 N.E.2d at 877.

[129] The exceptions are set forth in Article VI, Section 3, and include cases in which the "judgment is of death"; none is applicable here. *See* N.Y. CONST. art. VI, § 3(a).

[130] N.Y. CRIM. PROC. LAW §470.05 (McKinney 2019).

[131] *Id.* § 470.15.

[132] People v. Becoats, 958 N.E.2d 865, 867 (N.Y. 2011).

[133] *See* United States v. Mechanik, 475 U.S. 66, 72 (1986); People v. Patterson, 347 N.E.2d 898, 902 (N.Y. 1976).

> Even if a defendant is convicted in a second trial, the intervening delay may compromise society's "interest in the prompt administration of justice," and impede accomplishment of the objectives of deterrence and rehabilitation.[134]

All of these considerations counsel that, to the extent possible, errors should be brought to the attention of the trial judge in time for correction.[135] A trial should be the "main event" and not a "tryout on the road" to a subsequent proceeding.[136] Hence, the wisdom of a general rule that "[a] defendant cannot be permitted to sit idly by while error is committed, thereby allow[ing] the error to pass into the record uncured, and yet claim the error on appeal."[137]

A preservation rule is also necessary to prevent gamesmanship.[138] The Court's decision in *People v. Becoats* is illustrative. There, the indictment was arguably duplicitous in that it charged the defendants in one count (and not two) with the forcible stealing of a gun and of sneakers.[139] No objection was taken in the trial court to the pleading.[140] As Judge Robert Smith wrote in rejecting the claim on preservation grounds, the defendant may have chosen not to raise a duplicity claim in the trial court, preferring to face only one count.[141] If he were convicted and if preservation were not required, he could then raise the issue on appeal—i.e., he could "make [one] choice at trial . . . and make the opposite choice on appeal"—and conceivably "obtain a new trial on the basis of an error [he] consciously decided not to challenge because [he] thought it insignificant, or welcomed it."[142] No orderly criminal justice system should incentivize such conduct.

Some of the same concerns underlie the need for a sturdy harmless error rule. As students of criminal procedure know, in the mid-nineteenth century, American courts adopted England's so-called Exchequer Rule, under which a trial error was presumed to have

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[134] *Mechanik*, 475 U.S. at 72 (first quoting Engle v. Isaac, 456 U.S. 107, 127–28 (1982); and then quoting United States v. Hasting, 461 U.S. 499, 509 (1979)) (internal citations omitted).

[135] *See Patterson*, 347 N.E.2d at 902.

[136] Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

[137] *Patterson*, 39 347 N.E.2d at 902. A preservation requirement also avoids the unseemliness of telling a lower court it was wrong when it never was presented the opportunity to be right.

[138] *See* People v. Becoats, 958 N.E.2d 865, 868 (N.Y. 2011).

[139] *See id.* at 867.

[140] *See id.*

[141] *See id.* at 868.

[142] *Id.*

prejudiced the defendant and therefore required a new trial.[143] Retrials for inconsequential errors mounted, and appellate courts were criticized as "impregnable citadels of technicality."[144] Beginning in the early 1900s, reformers succeeded in securing harmless-error legislation that prevented reversals for errors that had little likelihood of having affected the outcome of the trial.[145] All fifty states now have harmless error rules.[146] New York's rule prescribes that "[a]n appellate court must determine an appeal without regard to technical errors or defects which do not affect the substantial rights of the parties."[147]

In summary, the preservation and harmless error doctrines are bottomed on the same concern: retrials are costly and should be awarded only to prevent injustice.

One additional point bears making. Most states recognize a plain error doctrine that allows an appellate court to reverse a criminal judgment even if the claim was not properly preserved.[148] Under federal law, for example, errors that are "plain" ("clear" or "obvious"), that "affect[] substantial rights" and that "seriously affect[] the fairness, integrity or public reputation of judicial proceedings" are reviewable, despite the lack of a contemporaneous objection.[149] New York does not have a plain error rule, but the appellate division's interest of justice jurisdiction serves much the same function.[150] Our appellate division regularly reviews unpreserved errors and reverses criminal judgments where substantial rights have been affected and trial court proceedings have been unfair.[151] Simply stated, New York has created a rational structure for the review of criminal convictions, and an expansive mode of proceeding doctrine is at odds with it.

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[143] *See* Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117, 2127 (2018).

[144] The derisive label "impregnable citadels of technicality" comes from Judge Marcus Kavanagh's article *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A.J. 217, 222 (1925).

[145] *See* Helen A. Anderson, *Revising Harmless Error: Making Innocence Relevant to Direct Appeals*, 17 TEX. WESLEYAN L. REV. 391, 393 (2011).

[146] Chapman v. California, 386 U.S. 18, 22 (1967).

[147] N.Y. CRIM. PROC. LAW § 470.05(1) (McKinney 2019).

[148] *See* Morton Gitelman, *The Plain Error Rule in Arkansas–Plainly Time for a Change*, 53 ARK. L. REV. 205, 217 (2000) (noting that only three states have not recognized a plain error rule).

[149] FED. R. CRIM. P. 52(b); United States v. Olano, 507 U.S. 725, 732, 734 (1993) (citing United States v. Young, 470 U.S. 1, 15 (1985)).

[150] *See* Larry Cunningham, *Appellate Review of Unpreserved Questions in Criminal Cases: An Attempt to Define the "Interest of Justice"*, 11 J. APP. PRAC. & PROCESS 285, 286 (2010).

[151] *See, e.g.*, People v. Kass, 874 N.Y.S.2d 475, 485 (App. Div. 2008).

C. Morrison *Revisited I*

With all this as backdrop, the question remains: In *Morrison*, should the trial judge's failure to apprise defense counsel of the precise contents of Court Exhibit 9 have been treated as a mode of proceeding error warranting a new trial? Consider these five points.

1. *O'Rama* itself was a dubious case in which to invoke the mode of proceeding doctrine. No doubt, the judge should have shared the full contents of the individual juror's note with the lawyers.[152] Jurors are discouraged from reporting their divisions, but if they do, counsel should not be kept in the dark.[153] Knowing the jury's division (or, as in *Morrison*, whether there is a partial verdict) enables a lawyer to determine how best to proceed. Importantly, however, in *O'Rama*, defense counsel *did* protest the judge's refusal to disclose the note's content.[154] Although the protest came late, it came in time for the court to change its ruling. In short, the objection was timely enough, and there was no need to invoke the mode of proceeding doctrine for the Court to reach the merits.

2. In *O'Rama*, the Court devoted only one sentence to whether the failure to respond properly to a jury note constituted a mode of proceeding error.[155] The holding was pure *ipse dixit*. Nowhere addressed was why this trial error was different from almost all others. *O'Rama* errors can affect the outcome of a case, but that does not distinguish them from the scores of errors to which the preservation doctrine and harmless error analysis apply.

3. What is left of the *O'Rama* no-preservation rule makes even less sense. A defendant, it seems, has a fundamental right—one that supposedly strikes at the core of the criminal adjudication process—to spare his lawyer from having to ask the court to read a jury note aloud. Apparently, requiring a lawyer to say, "Judge, may I read the note?" is requiring too much.[156] As it now stands, *O'Rama* makes a mockery of the mode of proceeding doctrine.

4. Here, as elsewhere, a no-preservation-required rule encourages gamesmanship. Judge Robert Smith made the point in his

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[152] *See* People v. O'Rama, 579 N.E.2d 189, 192 (N.Y. 1991).

[153] The standard jury instructions include an admonishment: "[I]n any note that you send me, do not tell me what the vote of the jury is on any count." N.Y. CRIM. JURY INSTR. 2D, FINAL INSTRUCTIONS, JURY DELIBERATION RULES.

[154] *See O'Rama*, 579 N.E.2d at 191.

[155] *See id.* at 192.

[156] *See* People v. Walston, 14 N.E.2d 377, 381 (N.Y. 2014) (Smith, J., concurring) ("[I]f counsel had simply said 'May I see the note, Your Honor?,' the judge probably would have handed it to him, and the problem we now face would not exist.").

concurring opinion in *Walston*:

> When a trial judge makes the mistake of paraphrasing or summarizing a jury note, only a foolish defense lawyer will ask the judge to correct the error. The likelihood that knowing the verbatim contents of the note will enable counsel to get an acquittal or a hung jury is extremely small. But if the error remains uncorrected the lawyer has a near guarantee that any conviction will be reversed.[157]

One might modify Judge Smith's observation slightly: if the note is non-ministerial, the silent lawyer has a *total* guarantee of reversal, not just a "near" one.

5. The fifth point involves Judge Rivera's comment that if the People want to avoid *O'Rama* reversals, they can bring errors to the judge's attention.[158] To be sure, an experienced prosecutor will often alert the judge to a potential error that might favor him at trial but cost him on appeal.[159] But our criminal justice system operates on the premise that "it is defense counsel who is charged with the single-minded, zealous representation of the client and thus, of all the trial participants, it is defense counsel who best knows the arguments to be advanced on the client's behalf."[160] Excusing defense counsel's failure to object because the prosecutor could have done so turns our adversary system on its head.

IV.

A. Reconstruction Hearings

The second component of *Morrison*—that a reconstruction hearing cannot be ordered where compliance with *O'Rama* is not certain from the trial record—is also problematic.[161] Reconstruction hearings are not uncommon in New York, even when mode of proceeding errors are at issue. For example, on three occasions, the Court of Appeals has remitted a case to the trial court to determine whether a defendant was present during a *Sandoval* hearing, where his presence (or absence) was unclear based on the then-existing

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[157] *Id.* at 382.
[158] *See* People v. Parker, 109 N.E.3d 1138, 1147 n.7 (N.Y. 2018).
[159] *Cf.* MODEL RULES OF PROF'L CONDUCT r. 3.8 (AM. BAR ASS'N 1983).
[160] People v. Hawkins, 900 N.E.2d 946, 951 (N.Y. 2008).
[161] *See* People v. Morrison, 109 N.E.3d 1119, 1120 (N.Y. 2018).

record.[162] And the Court has looked favorably on the grant of a reconstruction hearing to determine whether a defendant was present during voir dire questioning of prospective jurors.[163] Indeed, as Judge Garcia noted in his *Morrison* dissent, Chief Judge Lippman referred to a reconstruction hearing as a "very useful exercise" in a concurrence in an *O'Rama* case.[164]

In *Morrison*, the People, in their Court of Appeals brief, made a persuasive case that the judge had shared Court Exhibit 9 with counsel at an off-the-record conference.[165] (There were no on-the-record discussions with counsel about responses to the jury's notes.[166]) The People told the Court this: (i) that, at one point during deliberations, the judge had told the jury that if it "sent out another note . . . *together with the attorneys* we will try our best to answer the questions you ask"; (ii) that, on Thursday, defense counsel took an exception to the judge's response to a note, telling the judge that, as she had "*mentioned at the bench*," the judge should have reread all the elements of the three counts, and not just forcible compulsion; (iii) that one note called for a rereading of an excerpt of a witness's testimony, which, almost certainly, could not have been identified without counsel's participation; (iv) that the trial judge's words to the jury about Court Exhibit 9—"we are hoping you will be able to come to a unanimous verdict on all three of these charges" and "we as a group would like you to keep working"—imply that counsel was aware of the note's contents; and (v) that the judge's reluctance to read the note aloud most likely reflected his unwillingness to have the media learn of the partial verdict, not his desire to keep anything from the lawyers.[167]

Surely, there was enough here to warrant a reconstruction hearing if one were permitted.

The majority relied on two cases—*People v. Walston* and *People v. Silva*—to support its holding that, where a transcript does not show compliance with *O'Rama*, a reconstruction hearing may not be ordered.[168] In neither case, however, was there *any* indication that

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[162] *See* People v. Monclavo, 666 N.E.2d 175, 176 (N.Y. 1996); People v. Michalek, 631 N.E.2d 114, 115 (N.Y. 1994); People v. Odiat, 631 N.E.2d 108, 109 (N.Y. 1993).

[163] *See* People v. Davidson, 675 N.E.2d 1206, 1207 (N.Y. 1996).

[164] People v. Cruz, 927 N.E.2d 542, 545 (N.Y. 2010) (Lippman, C.J., concurring).

[165] *See* Brief for Appellant, *supra* note 3, at 46.

[166] *See id.*

[167] *See* Transcript of Record, *supra* note 14, at 599, 602, 607–08, 615.

[168] *See* People v. Morrison, 109 N.E.3d 1119, 1120, 1121 (N.Y. 2018) (citing People v. Silva, 22 N.E.3d 1022, 1026 (N.Y. 2014); People v. Walston, 14 N.E.3d 377, 380 (N.Y. 2014)).

the note was shared with counsel at an off-the-record conference.[169] Loose dicta in those cases did not compel the novel ruling that reconstruction hearings are unavailable whenever an *O'Rama* error is alleged.[170] To be blunt, one wonders why the *Morrison* majority did not want to know whether Court Exhibit 9 had been shared with counsel, when it seems so likely that it was.[171]

B. Morrison*: What Was Missed*

As noted above, in their brief to the Court of Appeals, the People set forth the circumstantial evidence that indicated Court Exhibit 9 had been shared with counsel at an off-the-record conference.[172] But there is direct evidence. There is a portion of the transcript that was not pointed out to the Court. On Friday, when the jurors sent out their last substantive note (Court Exhibit 13), the judge told them this:

> A number of your notes have seemed to point towards this forcible compulsion . . . element . . . . *From your notes you seem to indicate that you have come to a unanimous agreement, whatever it is, with respect to the second and third counts, but there has been difficulty* . . . . Quite honestly, you have been deliberating longer than the entire trial testimony took. That's not a problem for me . . . . I would urge you to try to refocus your efforts, stick with the criminal allegation that has been made . . . . Don't go down avenues that are only going to distract you from the tasks we've asked you to perform.[173]

Neither lawyer said, "Your Honor, what do you mean by that?"

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[169] *See* Brief for Appellant, *supra* note 3, at 42–43.

[170] The dicta in *Walston* reads, "Where a trial transcript does not show compliance with *O'Rama*'s procedure . . . we cannot assume that the omission was remedied at an off-the-record conference that the transcript does not refer to." *Walston*, 14 N.E.3d at 380. There is a difference, however, between assuming that an off-the-record conference occurred on a silent record and remitting to determine if one occurred where the circumstantial evidence strongly suggests that it did.

[171] Notably, the record on *coram nobis* included an affidavit from the trial judge averring that "it has always been and continues to be [his] practice to disclose all jury notes to trial counsel." *Morrison*, 109 N.E.3d at 1137 n.8. (Garcia, J., dissenting). It also included an affidavit from the prosecutor that he recalled the judge "'hand[ing]' [Court Exhibits 8 and 9] 'to defense counsel' and to the prosecution." *Id.* These affidavits are mentioned in Judge Garcia's dissent, although not formally part of the record before the Court. *See id.*

[172] *See* Brief for Appellant, *supra* note 3, at 46–49.

[173] Transcript of Record, *supra* note 14, at 618–19 (emphasis added).

because both undoubtedly knew what the judge meant. Sadly, it seems certain that *Morrison* was decided on a false premise.

V.

A. The Writ of Coram Nobis

That revelation might seem a good place to stop, but some words about the writ of *coram nobis* should be added. Apparently, Morrison learned about the writ in state prison, but few lawyers know much about it.[174] In 1943, the Court of Appeals resurrected the ancient writ as a means for a convicted defendant to challenge the validity of his conviction collaterally at a time when there was no other avenue for relief.[175] When the criminal procedure law was codified in 1970, Criminal Procedure Law section 440.10 was enacted to do the work that the writ had done.[176] But section 440.10 "allows defendants to challenge the validity of judgments of conviction—not circumstances that occur post-conviction," and so a claim of ineffective assistance of appellate counsel cannot be raised in a 440.10 proceeding.[177] In 1987, in *People v. Bachert*, the Court revived the writ to fill the void.[178] As the Court put it, "The remedy we make available today to address claims of ineffective assistance of appellate counsel is another recognition of the exceptional availability of *coram nobis* to fill yet another interstice of the law and human experience."[179]

Most importantly for present purposes, the *Bachert* Court concluded that the "natural venue" for *coram nobis* review of an ineffective assistance of appellate counsel claim was the appellate court in which "the allegedly deficient representation occurred."[180] The Court wrote this:

> The Appellate Division even has the flexibility, should the

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[174] *See, e.g.*, Lester B. Orfield, *The Writ of Error Coram Nobis in Civil Practice*, 20 VA. L. REV. 423, 423 (1934).

[175] *See* Lyons v. Goldstein, 47 N.E.2d 425, 429, 430 (N.Y. 1943); *see generally* Stanley H. Fuld, Writ of Coram Nobis, N.Y.L.J., June 5, 1947, at 6, col. 1 (describing the history of *coram nobis* doctrine).

[176] *See* N.Y. CRIM. PROC. LAW §440.10 (McKinney 2019).

[177] People v. Syville, 938 N.E.2d 910, 916 n.3 (N.Y. 2010); People v. Bachert, 509 N.E.2d 318, 320 (N.Y. 1987).

[178] *Bachert*, 509 N.E.2d at 321; Abraham Abramowitz, New York's Last Common Law Criminal Procedure: The Writ of Coram Nobis; Criminal Law and Procedure, N.Y.L.J., Mar. 31, 2000, at 35, col. 6.

[179] *Bachert*, 509 N.E.2d at 322.

[180] *Id.*

> need arise, to refer factual disputes for hearings to the nisi prius court or perhaps to judicial hearing officers. That court can also adopt rules as are appropriate and necessary to provide for orderly review of coram nobis motions stemming from claims of ineffective assistance of appellate counsel. Indeed, prompt attention to the adoption of uniform rules would be prudent . . . .[181]

Since *Bachert*, no department of the appellate division has adopted special rules for the review of *coram nobis* applications.

Consistent with *Bachert's* teaching, Morrison filed his *pro se coram nobis* petition in the Fourth Department.[182] Our appellate courts, however, are ill-suited to resolve claims of ineffectiveness of appellate counsel in some cases. Without a hearing, an appellate court may be unable to determine whether the failure to raise an argument on direct appeal was the result of thoughtful lawyering or deficient performance, and appellate courts are not in the business of conducting hearings.[183] As a result, important questions may go unanswered. Did the appellate lawyer choose to forgo a claim because she concluded that raising it would divert attention from more meritorious issues? As the Court of Appeals has written, "Effective appellate representation by no means requires counsel to brief or argue every issue that may have merit."[184] Did she have a firm grasp of the facts and the law when she decided what issues to brief? Or did she not raise an issue because she did not spot it?

B. Morrison *Revisited II*

Morrison is a case in which a hearing should have been held to determine why appellate counsel failed to raise an *O'Rama* claim on direct appeal. There are several possible answers other than ineffectiveness. Counsel may have concluded that Court Exhibit 9 was a ministerial note to which *O'Rama* did not apply. The dissenting justice in the Fourth Department reached that conclusion.[185] Moreover, all five justices found that Court Exhibit 8 was ministerial, and the difference between the two notes was

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[181] *Id.*

[182] *Morrison*, 6 N.Y.S.3d at 925.

[183] *See* MATTHEW BOVA & SCOTT DANNER, N.Y. CTY. LAWYERS ASS'N, REPORT OF THE NYCLA APPELLATE COURTS COMMITTEE ON ESTABLISHING PROCEDURES FOR THE RESOLUTION OF INEFFECTIVE-ASSISTANCE-OF-APPELLATE-COUNSEL CLAIMS 4 (2019).

[184] People v. Stultz, 810 N.E.2d 883, 888 (N.Y. 2004).

[185] People v. Morrison, 50 N.Y.S.3d 673, 676 (App. Div. 2017) (Peradotto, J., dissenting).

slight.[186] Or appellate counsel may have concluded that, if an *O'Rama* claim were raised, it would result in a reconstruction hearing in which *Morrison* was unlikely to prevail. At the time of Morrison's direct appeal (and until *Morrison*), it was common for an appellate department to remit an *O'Rama* claim to the trial court to determine whether a note had been shared with counsel at an off-the-record conference.[187] If an argument would fail under then-existing law, appellate counsel is not ineffective for not raising it.[188] Indeed, counsel may have read the portion of the transcript that was not brought to the Court of Appeals' attention in 2018—the portion that expressly mentions the content of Court Exhibit 9—and concluded that an *O'Rama* claim was frivolous.

Morrison's appellate counsel on direct appeal was an experienced public defender, who advanced two viable claims that were rejected on harmless error grounds.[189] His brief is clearly and intelligently written. No doubt, he knew of the intricacies of *O'Rama* jurisprudence. That Morrison's *coram nobis* petition was granted[190] and we have no idea why his original appellate counsel failed to raise an *O'Rama* claim is another aspect of the case that is dumbfounding.

VI. CONCLUSION

At William Morrison's sentencing in 2007, the prosecutor read a statement from Mrs. Smith's granddaughter.[191] It included these words, directed at Morrison:

> My grandmother read the bible every day. Family was first and foremost, everything to her. . . . She was a quiet person, a person who never complained and never had one bad thing to say about anybody. . . . She came from the old school where sex was not discussed. When my grandmother said she was raped by you, words came out of her mouth we did not know

[186] *Id.* at 675 (majority opinion).

[187] Prior to *Morrison*, the Appellate Divisions routinely ordered reconstruction hearings when the record was unclear as to *O'Rama* compliance. *See* People v. Meyers, 51 N.Y.S.3d 98, 99 (App. Div. 2017); People v. Mitchell, 8 N.Y.S.3d 908, 908 (App. Div. 2015); People v. Williams, 977 N.Y.S.2d 923, 924 (App. Div. 2014); People v. Kahley, 963 N.Y.S.2d 487, 490 (App. Div. 2013); People v. Russo, 723 N.Y.S.2d 917, 918 (App. Div. 2001); People v. Martinez, 586 N.Y.S.2d 975, 975 (App. Div. 1992).

[188] *See* People v. Feliciano, 950 N.E.2d 91, 100–01 (N.Y. 2011).

[189] People v. Morrison, 935 N.Y.S.2d 234, 237 (App. Div. 2011).

[190] *Morrison*, 109 N.E.3d at 1123.

[191] *See* Transcript of Sentencing at 2, People v. Morrison, No. 06-233 (N.Y. Oneida Cty. Ct. 2007).

> she knew. . . . After you did this to my grandmother, she no longer wanted to be here. She asked us numerous times why won't God take me? . . . She lost her dignity and pride from what you did. . . . [O]ne week from today, [my grandmother] turns 91. The best present anyone could give her is knowing you will spend the next 25 years of your life in prison for what you did . . . .[192]

More moving words have rarely been spoken in our courts.

Following the reversal of his conviction, Morrison was permitted to plead guilty to time served.[193] Twelve years (2006 to 2018), it seems, was too long to reassemble the evidence against him. It is hard to conclude that justice was served in Morrison's case. Felix Frankfurter wisely observed that "[t]he history of liberty has largely been the history of observance of procedural safeguards."[194] There is a line, however, between procedural safeguards and technicalities, and *Morrison* is on the far side of the line.

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[192] *See id.* at 3–4.

[193] *See* People v. Morrison, No. 06-233, slip op. at 1 (N.Y. Oneida Cty. Ct. Sept. 17, 2018).

[194] McNabb v. United States, 318 U.S. 332, 347 (1943).