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POINT III

THE TRIAL COURT ERRED AND COMMITTED A MODE OF PROCEEDINGS ERROR WHEN IT GAVE AN INADEQUATE RESPONSE TO A JURY NOTE REQUESTING CLARIFICATION ON THE LEVEL OF KNOWLEDGE

The trial court erred when it failed to give a meaningful response to a jury note requesting clarification on what level of knowledge for possession need be proven by the prosecution. The trial court's response was not only inadequate for the jury to understand the *mens rea* element of the crime charged, but it was misleading in that it differed from the previous instruction. The trial court's insufficient and misleading response to the jury's request constituted a mode of proceedings error and the conviction must be vacated and this case remanded to the trial court.

When a deliberating jury submits a note to the court requesting further instruction or information, the trial court has a responsibility to give meaningful notice of the contents of that note to defense counsel and must provide a meaningful response to the jury's request. *People v. O'Rama*, 78 N.Y.2d 270, 574,

N.Y.S.2d 159, 579 N.E.2d 189 (1991); *People v. Kisoona*, 8 N.Y.3d 129, 831 N.Y.S.2d 738, 863 N.E.2d 990 (2007).

Criminal Procedure Law § 310.30 imposes a duty upon the trial court in answering a deliberating jury's note requesting further instruction with respect to the law and states: *upon such a request, the court must direct that the jury be returned to the courtroom and, after notice to both the people and counsel for the defendant, and in the presence of the defendant, must give such requested information or instruction as the court deems proper.*

The New York Court of Appeals has interpreted this statutory duty to respond to the jury's request for further instruction on the law as imposing a duty to provide a meaningful response to the jury's request. A court's failure to supply meaningful response constitutes error affecting the mode of proceedings, and therefore presents a question of law for appellate review even in the absence of timely objection. *People v. Alcide*, 21 N.Y.3d 687, 976 N.Y.S.2d 432, 998 N.E.2d 1056 (2013) citing *People v. O'Rama*, 78 N.Y.2d 270, 574, N.Y.S.2d 159, 579 N.E.2d 189 (1991).

In this case the jury sent a note from the deliberation room asking for a very specific clarification on the law. The note stated: *We the jury request clarification*

on what knowledge Jose is said to have had. In other words, what knowledge makes Jose guilty? That the contents of the can are generally illegal? That they're narcotics or cocaine specifically? How specific does his knowledge need to be? [emphasis in original]. The trial court responded by reading the note aloud in court and on the record (T328-329) and stating in response: *The People must proved [sic] that Mr. Encarnacion knew the cans contained a narcotic drug. And I instruct you that by law cocaine is a narcotic drug.*

There are two grave insufficiencies in the trial court's response to the jury's question. First, the note asked *How specific does his knowledge need to be?* The court did not answer this question. Second, the trial court's answer varied from its previous instruction on this element of the crime and did not contain a meaningful response to the jury's question. The court did not instruct the jury that his knowledge had to be proven by the prosecution "beyond a reasonable doubt".

Most importantly, the trial court did not specify the definition of "knowledge" in its response to the jury's question. Knowledge of the contents of the bag was the third element of the crime charged. In this case the People were required to prove beyond a reasonable doubt that the defendant knew and was consciously aware that the substance in the cans were cocaine. (T321) The trial

court's original instruction on the element of knowledge (T321) was substantively different than what the court instructed the jury in answer to its question (T329) about what level of knowledge was necessary in this case.

The trial court's original instruction at T321 stated that the defendant must have known and been consciously aware of the contents of the cans. Additionally, the trial court instructed the jury at T321 that knowledge could be proven in a variety of ways. However, there was a remarkable change in the instruction regarding knowledge when the jury asked the question from the deliberation room. In response to the jury's question about how specific does his knowledge need to be and what knowledge makes him guilty, the court stated simply that Mr. Encarnacion had to know the cans contained a narcotic drug.

Additionally, the trial court's failure to specify that the proof must be beyond a reasonable doubt created a substantially different instruction in answer to the jury's question. There is an important and distinct difference between "the prosecution must prove" and "the prosecution must prove beyond a reasonable doubt" that Mr. Encarnacion knew the contents of the bag. The jury asked "*What knowledge makes Jose guilty?*" The only meaningful answer to this is knowledge beyond a reasonable doubt. The trial court's response was misleading as to the

level of proof of that knowledge and effectively changed the level of proof necessary to show that he knowingly possessed a narcotic drug.

The jury asked for clarification of what level of knowledge he had to have in order to find him guilty. The trial court gave a less than meaningful response to that question and, in fact, not only did the court give a misleading answer when it failed to say that his knowledge had to be beyond a reasonable doubt, but it also misstated the law with regard to this element of the crime.

The trial court's erroneous and less than meaningful response to the jury's request for clarification on the law constituted a mode of proceedings error, and Mr. Encarnacion's conviction must be reversed and his case remanded for a new trial.