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Don't Make It a Memory Test: Let Jurors in New York Have Written Copies of the Court's Instructions

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As the country waited for the verdict in former President Donald Trump's criminal case in Manhattan a few weeks ago, pundits and citizens alike were busy speculating about the outcome. And late in the first day of deliberations, they got a glimmer of information: the jury had sent a note out to Justice Juan Merchan with some requests.

Among requests for pieces of testimony to be read back, the jury also asked to re-hear certain parts of the jury instructions. Because the Court and the attorneys were not immediately clear which instructions the jury wanted read back, Justice Merchan decided to dismiss the jury for the day and ask them the next day to clarify which instructions they wanted to re-hear.

But the note alone—requesting clarification of an instruction (or several) from the 55 pages of instructions that Justice Merchan had *read aloud* to the jury before sending them off to deliberate—was enough to set off a storm of tea-leaf-reading about what the jury was focused on and what it meant about their deliberations.

This episode—coming at a pivotal moment in one of the most high-profile trials of the past 25 years—shined a bright light on one of the most curious and bizarre of New York's trial practices: in criminal trials conducted in New York State, judges almost never send the written jury instructions back to the jury room for the jurors to review and consult while they are deliberating. It is a tradition that, viewed in the context of what we ask of our jurors, makes little sense. And it is high time the practice ends.

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"The whole point of jury instructions is to explain the law to a group of laypeople in a manner that is both accurate and understandable," says Elie Honig, CNN Senior Legal Analyst and former federal and state prosecutor. "It's essentially a fiction to pretend that jurors can digest and comprehend jury instructions that often run beyond 50 pages, if jurors are left to rely on their

memory and perhaps handwritten notes based on an hour-long (or more) instruction, without a written copy to consult."

While New York's Criminal Procedure Law ("CPL") is technically silent as to whether a judge is allowed to provide the jury with a written copy of the full charge, the rule in practice for decades is that judges do not do so. In a decision nearly 40 years ago (*People v. Owens*), the New York Court of Appeals ruled that it was reversible error for a judge to send a portion of the jury charge in written form back with the jury over the defendant's objection.

And just a few years later, the Appellate Division held (in *People v. Johnson*) that sending a written copy of the charge back in its entirety over the defendant's objection also amounted to reversible error.

Of course, that leaves room for judges to give written instructions in cases where the defendant consents. And there have been occasional instances in the last few years where a New York State judge allowed written instructions to go back to the jury on the theory that the defendant impliedly consented by failing to object. But this remains far outside the norm, and judges are unlikely to take the risk without a clear change in the law.

The Appellate Division's reasoning in the *People v. Johnson* case gets at the heart of the issue: there, the court held that, because the relevant sections of the CPL (310.20—310.30) are silent as to whether written copies of jury instructions may be provided to a jury, but specify other materials that trial judges may send back to the deliberation room, New York's legislature must have intended to not allow judges to provide a written copy of the charge as well.

Luckily, there is a clear solution: lawmakers in Albany should amend the CPL to expressly allow judges to provide juries with a full, written copy of the jury instructions to consult as they deliberate.

Resorting to legislative change might seem extreme, but there is nothing groundbreaking about sending jury instructions back in written form. Indeed, federal judges have long had discretion to do just that (Wright & Miller, 9C Fed. Prac. & Proc. Civ. § 2555 (3d ed.)) In every one of co-author Mr. Halperin's more than a dozen trials in the Southern District of New York, federal judges sent the written instructions back with the jury when the jury was deliberating—and with good reason. As Mr. Honig notes, "the benefits of sending a written charge back with the jury are plain and vital: we increase the jury's ability to understand and apply the law, fully and accurately. That goes to the core of our criminal justice process."

Plus, allowing jurors to consult written instructions reduces the likelihood of confusion or differing recollections among jurors. When jurors have to rely on their own memories or on their own sparse handwritten notes that some of them might have taken, it seriously risks disagreement or confusion about what a given instruction actually is.

Judges tell jurors that they (the judges) will provide the jury with the law for the counts against the defendant, and that the jury's job is to determine the facts and to apply the law the court gave them to render a verdict. But if the jurors are unclear about the law, that does not help anyone. Giving jurors a copy of the instructions would remove this particular hazard from the deliberation process.

Jury consultant Renato Stabile strongly agrees. Stabile, who has conducted hundreds of mock trials, says that one thing he sees over and over again is jurors struggling to understand jury

instructions. "The legal profession has done a terrible job of making jury instructions accessible to lay jurors," says Stabile, Managing Director at Dubin Research & Consulting. "We are strong advocates of jury instruction reform—simplified language, less repetition, brevity—all of these things would advance the ability of all jurors to participate meaningfully in the deliberative process in a more informed way. But given the complexity of our modern jury instructions, not providing a copy of them to the jury makes their task infinitely more difficult."

As a logical matter, too, the current New York practice makes little sense. Lawyers and the judge spend hours carefully drafting instructions and arguing for inclusion or exclusion of certain pieces. If the wording were not of crucial importance, no one would bother to go through this process—and yet, having spent all that time and energy perfecting the phrasing, it is almost like we collectively throw up our hands. The judge reads the instructions aloud to the jury once and everyone hopes that they retain what is instructed. But jurors currently are not given the best tool to do so—the words themselves.

And what possible downside *could* there be to providing jurors with the written instructions?

As Honig says, "The primary downside I've heard proffered is that jurors might spend too much time scrutinizing and fretting over the verbiage of the charge. But what's wrong with that? A defendant's liberty is at stake, so don't we want jurors scrutinizing the law and being careful about how they apply it?"

This is absolutely on point. The benefits of giving jurors the instructions in the jury room greatly outweigh any possible negatives. It is preposterous to think that a jury could remember 55 pages of sometimes quite complex instructions when they have heard them read aloud once in court. To put it another way, as Stabile points out, "given the premium importance in our system of providing the jury with accurate jury instructions, it seems like a wasted effort to not provide these carefully drafted legal instructions to the jury."

In short, it is hard to imagine a compelling reason to preserve the status quo of that wasted effort. Amending the CPL to expressly allow instructions to go back—thus making it no longer necessary for juries to send out notes asking for the instructions to be read again—might remove a source of fodder for the public and the press. But that is a small price to pay for a much more efficient process and a better shot at accuracy in the application of the law as jurors carry out one of the most important tasks most of them will ever be asked to do.

Finally, we suggest that these same arguments apply equally to civil jury trials in New York State, and that trial judges should send jurors in civil cases the instructions as well. But given the high stakes in criminal cases, it is time to explicitly allow judges in New York to send the written jury instructions back to the jury room in criminal cases. We urge Albany to act soon on this important matter.

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