

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 60

DON WILLIAMS,

Appellant.

20 Eagle Street
Albany, New York
October 5, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

HELEN A. SYME, ESQ.
MONROE COUNTY PUBLIC DEFENDER
Attorney for Appellant
10 N. Fitzhugh Street
Rochester, NY 14614

KAYLAN PORTER, ADA
MONROE COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
Ebenezer Watts Building, Suite 832
47 South Fitzhugh Street
Rochester, NY 14614

Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 60, The People of the
3 State of New York v. Don Williams.

4 Counsel?

5 MS. SYME: Thank you, Your Honor. Can I reserve
6 two minutes for rebuttal?

7 CHIEF JUDGE DIFIORE: Yes, you may.

8 MS. SYME: Thank you.

9 Good afternoon, may it please the court, Helen
10 Syme on behalf of Mr. Williams. The drafters of 310.30 may
11 not have imagined the use of a projector to display copies
12 of statutory text inside a jury deliberation room.
13 However, their imaginations provide no limit to ignore the
14 statute's demands. As Justice Gorsuch said, in *Bostock v.*
15 *Georgia*, "When the...terms of a statute give us one answer
16 and extratextual considerations supply another, it's no
17 contest." And "the written word is law".

18 JUDGE SINGAS: Counsel, do you think display and
19 give are the same thing?

20 MS. SYME: I do in this context. If the - - - if
21 the digital projection here was not giving the jurors a
22 copy of the text, it would allow judges to project the text
23 on the walls of the deliberation rooms without violating
24 the statute. And that's exactly the evil the legislature
25 was trying to prevent here when they enacted this



1 provision.

2 JUDGE WILSON: Well, wait a minute. I think I'm
3 not following. If display and give are the same, which I
4 think is what you said, and the first clause says, that "in
5 the presence of the defendant, the court must give such
6 requested information", which you read to be display. So I
7 don't know how that could be inside the jury deliberation
8 room.

9 MS. SYME: I'm sorry. Could you repeat the
10 question?

11 JUDGE WILSON: Sure. I'm - - - I'm looking - - -
12 I'm not paying attention to the last sentence, for a
13 second, of the statute, right?

14 MS. SYME: Sure.

15 JUDGE WILSON: Of CPL 310.30. I'm looking at the
16 sentence right before. You said give and display are he
17 same. With me so far?

18 MS. SYME: Yes.

19 JUDGE WILSON: Okay. So I could substitute where
20 it says "must give the requested information" to must
21 display the requested information, and you would say that's
22 equivalent, and that sentence says, in the presence of the
23 defendant, must display the requested information. So I
24 don't understand when you say this display could be done
25 inside the jury deliberation room, how that could be done,



1 unless you were going to bring the defendant into the jury
2 deliberation room, which I've never heard of.

3 MS. SYME: Your Honor, with respect to the - - -
4 the first section of the - - - of the statute, there, it's
5 - - - it's an umbrella term which would encompass - - -
6 would encompass the second provision. And because the
7 second provision is there as kind of an added restriction,
8 whether the defendant is in the deliberation room or not, I
9 think this would still violate the commands of 310.30
10 simply because consent wasn't provided.

11 JUDGE CANNATARO: Well, Counsel, I'll refer you
12 to People v. Baker, which is our 2010 case, where the judge
13 used slides instead of an overhead projector, and there,
14 the court held that using the slides were not the same as
15 giving the legal definitions to the jury because they
16 didn't go back to - - - with them to their deliberation.

17 MS. SYME: Your Honor, I would submit that that
18 case is different because it was a prosecutor who displayed
19 the instructions in that case during the argument phase.
20 And the judge instructed the jurors that what's said during
21 closing argument is not the law. The judges specifically
22 said, you must take the law from the court as it's read to
23 you. So I believe that that is - - - that's different.

24 JUDGE GARCIA: Counsel - - - over here. I think
25 Judge Wilson is making a point that give means different



1 things in different contexts. So it's difficult to just
2 read that statute and say, okay, give, here, means this;
3 give - - - but if we look at, kind of, the harm that the
4 statute in our due process cases is looking to address, it
5 seems to me you kind of can break that down into the judge
6 gives - - - gives written instructions, sends them back - -
7 - that are self-selected, emphasizing one thing more than
8 the other and related concerns to that, or the jury gets
9 this material in the jury room without any supervision by
10 the court and starts to muck around with the statutes.

11 None of that mischief, as it would - - - you
12 could call it is present here because there's no objection
13 by counsel that other instructions should be projected and
14 there's no risk that they have this material in the jury
15 room, or they can use it unsupervised by the court.

16 MS. SYME: This should not be a harmless error
17 case. It is reversible error because the - - - the
18 mandates of the statute at the proceeding.

19 JUDGE GARCIA: But I'm not talking about error.
20 I'm just saying if we're going to read the statute with the
21 intent of the legislature, it seems that the legislature
22 was looking to address that potential harm, which we've
23 identified in our cases. And this "give" doesn't raise
24 those same concerns.

25 MS. SYME: I think this "give" does rain - - -



1 raise the same concerns, especially because in this case,
2 it's a partial distribution, just the elements.

3 JUDGE GARCIA: But no objection was made to that,
4 right?

5 MS. SYME: No objection was made to the partial
6 distribution. But that's why the statute requires consent,
7 so that the parties have a say in what should be projected
8 or shouldn't be, based on the request of the jurors.

9 JUDGE SINGAS: Correct. So it wasn't a partial
10 distribution. In essence, they were answering the question
11 that the jury had asked. It wasn't a question of
12 emphasizing or overemphasizing anything other than what the
13 jury requested.

14 MS. SYME: In this case, I do think the secondary
15 format placed additional emphasis on those instructions.
16 However, even where the entire charge is distributed to the
17 jury, in *People v. Johnson*, this court found that it
18 violated the statute and was inappropriate. The fact that
19 it's - - -

20 JUDGE GARCIA: Because they had it back there and
21 could use it back there. And I think that's kind of the
22 trouble we're having. They can't do that here. They may
23 remember it better, but they are not looking at a written
24 distribution, as we've said in *Owens*, I think. They're not
25 looking at that and using the writing without the



1 supervision of the court.

2 And so I think there might be an argument if
3 there had been an objection and certain parts were
4 displayed over that objection. You could say maybe due
5 process or some argument you have about the selection was
6 aggravated by the projection, but it doesn't seem that it's
7 a violation of "give".

8 MS. SYME: The fact that it occurred in the
9 courtroom with the judges supervising would essentially
10 create a nullity for the consent requirement. If the court
11 could do this regardless of - - -

12 JUDGE GARCIA: But they can do it. Like, if the
13 judge gets a request, he can read the statute without
14 consent. You don't need consent to read back, you know - -
15 - if the judge had just read these statutes, he wouldn't
16 need consent. So isn't this just the equivalent of that?
17 So the point is, you don't need consent.

18 JUDGE FAHEY: Counselor, it - - - I'm sorry. Go
19 ahead and answer the judge's question. I didn't mean to
20 interrupt.

21 MS. SYME: I think consent is still necessary in
22 this case because if the legislature intended to carve out
23 an exception for that here, they would have done so, and
24 the fact that they required consent specifically for
25 anything involving statutory text is demonstrative that



1 that's the issue they're trying to address here.

2 JUDGE CANNATARO: Well, couldn't that consent be
3 in this - - - or, I'm sorry - - - that exception be in the
4 statutory text? 310 does say that the court can provide
5 information as it deems proper. And it sort of speaks to
6 this idea that if it happens in the courtroom and the judge
7 is there to oversee its use within the courtroom, as long
8 as that - - - that's deemed proper, consent isn't really a
9 requirement. It's when you get into the jury room, where
10 the judge cannot oversee what's going on, that suddenly,
11 consent seems to make more sense.

12 MS. SYME: The fact that the first provision
13 allows the judge discretion in responding to jury requests
14 does not authorize a specific override of the third
15 provision of 310.30, and that's this court's holding in
16 People v. Johnson. And the fact that the legislature
17 specifically omitted any type of exception for the conduct
18 done - - -

19 JUDGE FAHEY: Well, the judge couldn't take - - -
20 take the statute or part of his charge and hand out written
21 copies to the juror and say, follow along with me, jurors;
22 you can read this. Right?

23 MS. SYME: That's correct.

24 JUDGE FAHEY: But he could do that if there was
25 consent - - -



1 MS. SYME: Yes.

2 JUDGE FAHEY: - - - correct?

3 MS. SYME: That's correct.

4 JUDGE FAHEY: So isn't your argument really that
5 in requiring an objection here is - - - I'm assuming it's
6 part of a preservation argument - - - you're negating the
7 consent requirement? The consent requirement gives the
8 defense an advantage; there's no question about that. And
9 the legislature seemed to define it that way, to give that
10 advantage to them, when you step outside of the statutory
11 protocol that's set out in the CPL.

12 MS. SYME: That's correct. And allowing such
13 overrides, should this occur in the courtroom, or that - -
14 - you know, under the supervision of a judge, essentially
15 overrides that additional protection that the legislature
16 tends to do.

17 JUDGE FAHEY: Well, in some ways, you can argue
18 that it even does more than that because by doing it that
19 way, you're doing what the Owen court particularly and the
20 Boone court particularly said you shouldn't do: you're
21 selecting portions and implying greater importance to them.
22 But I think here, that was partially negated by the fact
23 that the jury is asking about this, so of course, you've
24 got to respond. And that's perfectly reasonable. That
25 doesn't really apply.



1 I think it really comes down to whether or not
2 the written instructions, and whether they're written on a
3 piece of paper or written on a visual thing that we read
4 off the wall - - - that whether or not that reinforces oral
5 instructions as a visualizer would do, that's why it's put
6 there, so that it violates the precepts that are set on
7 Owens, it seems to come down to that for us. Would you
8 agree to that?

9 MS. SYME: Yes, and I think - - -

10 JUDGE FAHEY: So I - - - forgetting to what the
11 result is, it seems to come to turn on that question.

12 MS. SYME: I believe so, as well.

13 CHIEF JUDGE DIFIORE: Thank you, Counsel.

14 MS. SYME: Thank you.

15 CHIEF JUDGE DIFIORE: Counsel?

16 MS. PORTER: Good morning, Your Honors. Kaylan
17 Porter, on behalf of the People.

18 Where the court does not give the jury a copy of
19 statutory text for their use during deliberations, consent
20 is not required.

21 JUDGE WILSON: So let's go to Judge Fahey's
22 example. Could the judge hand out printed copies of the
23 instructions in open court and then collect them before
24 they jury went in?

25 MS. PORTER: Yes, Your Honor. That would still



1 fall under the first provision, and we would be then
2 analyzing whether that was an appropriate exercise of the
3 court's discretion. It's because it happened in the
4 courtroom that's really the definitive factor here.

5 And I know Judge Fahey referenced Boone and the
6 Owens cases - - -

7 JUDGE FAHEY: Yeah.

8 MS. PORTER: - - - in that case they listed out
9 three specific dangers, and all of those dangers applied to
10 the jury taking a copy of the statutory text back with
11 them. None of those dangers apply here. The first two was
12 a selection and repetition of certain portions of the
13 court's charge. Those - - - that danger isn't present
14 because the jury - - -

15 JUDGE FAHEY: I just discussed that with her. I
16 agree with you about that, except on the third point, and I
17 don't agree with you about the third point. The third
18 point is whether written instructions - - - and these are
19 written instructions; the question is how they're inputted,
20 but they're certainly written instructions - - - reinforce
21 oral instructions. And it seems that the legislature made
22 a determination that written instructions do reinforce oral
23 instructions. That's why I'm trying to hone in on that
24 part of it.

25 MS. PORTER: I understand, Judge Fahey. So the



1 language in Boone and Owens, the - - - that third danger
2 was that it - - - those instructions would be reinforced by
3 their physical presence in the deliberation room.

4 JUDGE FAHEY: Um-hum.

5 MS. PORTER: That obviously wasn't the case here.
6 The written text was never physically present in the jury
7 deliberation room. That's uncontested. The fact that it
8 would be - - -

9 JUDGE FAHEY: I hate to get semantical with you,
10 but God help us, I suppose we have to, right? For - - -
11 you're right; it didn't go into the jury room. The
12 question is, whether or not, as - - - as Judge Wilson just
13 said, you can hand them out, and it would be the same
14 thing. And I guess I'm having a hard time distinguishing -
15 - - you're saying that that's okay. Is that right?

16 MS. PORTER: There's nothing in the statute to
17 prohibit that. So the 310.30 - - -

18 JUDGE FAHEY: And you don't think that - - - and
19 you don't think that the case law specifically prohibits
20 that?

21 MS. PORTER: No, Judge Fahey. All of the cases
22 in which this court found there to be a violation of the
23 second provision of 310.30, in every single one of those
24 cases, physical texts went back to the deliberation room.

25 JUDGE WILSON: So if we had a visualizer here,



1 and you had prepared your oral argument, and we put it up
2 there, I'm pretty sure we would all be paying a fair amount
3 of attention to the visualizer and less attention to you.
4 Is that a problem as regards to a jury? Don't we want them
5 focused on the judge, watching the judge, listening to the
6 judge, and not trying to do things at the same time?

7 MS. PORTER: I would say that that would still be
8 a reasonable accommodation that the court would be allowed
9 to exercise its discretion in doing. The only mandate of
10 that first provision of 310.30 is really that the court
11 gives a meaningful response to a jury request. Here, the
12 jury is - - -

13 JUDGE RIVERA: Let me - - - Counsel, let me ask
14 you a different question. Could the judge have given that
15 written copy upfront of all of the instructions at the
16 beginning, right, and then when they come back, only have
17 given the portion they requested - - - that's one example -
18 - - versus not give any written instructions upfront, and
19 then only give the written instruction that's requested?
20 Do you see those as perhaps different in any shape or form?

21 MS. PORTER: That would be distinguished from our
22 case, Your Honor, because that court would be acting sua
23 sponte. And though - - - that was part of the danger that
24 was identified by this court in Owens. Here, that's not
25 the case. The court wasn't acting on its own. The court



1 was responding to a jury request. And under the - - -

2 JUDGE RIVERA: So if the - - - so then if the
3 jury had not requested the display, and the judge did the
4 display, you would say, then, that's reversible error?

5 MS. PORTER: No, that would still fall under the
6 court's discretion under the first provision because it
7 happened in the courtroom. The real distinction between
8 the two provisions of - - -

9 JUDGE RIVERA: I'm sorry, so then why can't a
10 judge give - - - or perhaps I misunderstood you. Why can't
11 the judge at the beginning give all of the instructions in
12 writing and say, read along with me; I'm going to read them
13 out, and then before they go into the - - - to deliberate,
14 take - - - take back the written documents. Or did I
15 misunderstand you?

16 MS. PORTER: No, there would be nothing in the
17 CPL to prohibit that, Your Honor. The - - - really, the
18 distinguishing factor is whether the - - - that text went
19 back to the deliberation room. That - - -

20 JUDGE WILSON: So could the judge just hand out
21 the written instructions and say, when - - - when you
22 finish, let - - - raise your hand and then I'll collect
23 them, and not say anything orally, not - - - not read the
24 instructions out orally at all?

25 MS. PORTER: Under this court's consistent



1 ruling, what it turns on is whether that went back to the
2 deliberation room. If it's all happening in the courtroom,
3 under the court's supervision and guidance, it would be
4 viewed as an - - - it would be viewed as to whether or not
5 it's a - - -

6 JUDGE FAHEY: I'm sorry. May - - - maybe - - -
7 does Owens say that?

8 MS. PORTER: Owens lists out the three specific
9 dangers. The first - - -

10 JUDGE FAHEY: Well, no, I know that it does that.
11 But in Owens now - - - you can correct me if I'm wrong,
12 because you probably know it better, but I thought written
13 instructions on part of the criminal charges that the
14 defendant was accused of were given to the jurors and that
15 - - - and then I think they listed out the elements of the
16 crime. But of course, the court did not give out
17 instructions on the defendant's agency defense, only gave
18 them on that. And - - - and this court said, you can't do
19 that.

20 MS. PORTER: The language of Owens relies on the
21 physical presence in the jury room. It doesn't turn on
22 whether it's written or - - -

23 JUDGE FAHEY: Well, wait a minute. The facts of
24 the case don't support the argument that you're making.
25 It's written instructions, given to the jury, when he's - -



1 - and he's instructing them on a particular element of
2 crime. I forget what the crime was. That's contrary to
3 what you're arguing to me.

4 MS. PORTER: Perhaps I'll be a little bit more
5 clear. So 310 - - -

6 JUDGE FAHEY: Okay.

7 MS. PORTER: - - - 310.30 splits it into two
8 separate provisions. The first provision, a request for
9 further instruction or information, there's a very specific
10 procedure as to how that's to be done in the courtroom.
11 That's exactly what happened here because the entire
12 procedure took place within the courtroom. It doesn't turn
13 on in what manner the court gives that instruction. It's
14 really just as the court deems proper. And the court has
15 significant discretion in determining the scope and the
16 nature of the response.

17 Here, this was an appropriate exercise of
18 discretion under that first provision, and the court
19 complied with the jury's request in that regard.

20 The second provision does have a consent
21 requirement because it involves sending statutory text back
22 into the deliberation room. Where no statutory text went
23 back into the deliberation room, consent is not required.
24 And this court has strictly construed that last consent
25 requirement in all of the cases before it.



1 JUDGE GARCIA: Counsel, could we look at it this
2 way? I agree with you. Owens speaks to physical presence
3 in the jury room of the written instructions, right?
4 Distribution, but the final risk is written instructions
5 physically present in the jury room. That's their
6 language, I believe.

7 That's the statutory argument to me. So whether
8 or not those things go back and you need consent, you know,
9 that's one issue. It seems to me there could be an
10 argument made, going to some of the hypothetical questions
11 that have been asked, where the judge sua sponte hands out
12 certain portions of the charge and has them read them,
13 raise your hand, you could start to get towards a due
14 process issue there, not a statutory violation. But I
15 believe your argument here would be that's not this case.

16 MS. PORTER: That's not this case, because we
17 would be looking at it under the first provision, as to
18 whether the court gave a meaningful response.

19 JUDGE GARCIA: And what's your view on whether or
20 not the due process argument's preserved here?

21 MS. PORTER: It's not preserved, Your Honor. The
22 - - - the objection in this case was very specific to the
23 use of the visualizer. Now, under the first provision of
24 310.30, the court has to give meaningful notice. That's a
25 mode of proceedings error. But whether or not the court



1 gave a meaningful response is subject to a harmless error
2 analysis.

3 So that's what we have here, and so this would
4 fall under a harmless error analysis; preservation would be
5 required. It would only be if this court did find that the
6 second provision applied, and the consent was required
7 would this be per se reversible. But as I've stated, this
8 is about whether the court gave a meaningful response to an
9 expressed jury request happening within the courtroom.

10 JUDGE FAHEY: You know, I think there is validity
11 to your statutory argument and the limits on it. I think
12 that's a reasonable argument. Judge Kaye said something
13 interesting and it was in a case, People v. Martell. And
14 she talked about how Owens should be applied. The cite on
15 that is 91 N.Y.2d 782. Anyway, she said, "Relatedly, we
16 have also held" - - - in Owens - - - "that it is
17 impermissible for a court on its own initiative to
18 distribute written excerpts of its charge to the jury over
19 defendant's objection, concluding that this practice
20 presents the same danger of misuse as when 310.30 is
21 violated."

22 In other words, the danger is the same, even
23 though it doesn't fit that statutory construction, right?
24 And - - - and so, if you limit yourself to 310.30, I think
25 you have a stronger argument. It's when you look to the



1 effects of the case beyond it that your argument becomes
2 more problematic. That's my view of it anyway.

3 MS. PORTER: Your Honor, I mean, we - - - I did
4 cite the Martell case. I do find that the Martell case is
5 pretty instructive. One, some of the language from - - -
6 from Martell is that there's no meaningful distinction
7 between endless readbacks and what happened in this case.
8 And I do think that's - - - well illustrates the court's
9 exercise of discretion under that first provision, that the
10 - - - as appellant has suggested, that the court merely
11 reread and reread the same portions over and over, rather
12 than comply with the jury requests. There's really no
13 meaningful distinction between what happened here and the
14 court doing that. That's a reasonable accommodation.

15 CHIEF JUDGE DIFIORE: Thank you, Counsel.

16 MS. PORTER: Thank you, Your Honors.

17 CHIEF JUDGE DIFIORE: Thank you.

18 Counsel, your rebuttal?

19 MS. SYME: Thank you.

20 This case does not turn on whether the
21 information is provided inside the jury room. In People v.
22 Townsend, the court removed the instructions before the
23 jurors were deliberating and before they could take them
24 back into the deliberation room, and the case was still
25 reversed.



1 And should the legislature have intended such an
2 exception here, they would have written it in the statute.
3 And we're required to assume that they would have written
4 it down. Allowing such ascension - - - such an exception
5 would override the consent requirement and make it a
6 nullity because should the court decide that the
7 instructions should just be given to the jurors inside,
8 consent's not required in the first place, and it's clear
9 the legislature intended that the parties have some say on
10 what written material the jurors are given in this case.

11 So I would ask this court to adopt the rule that
12 says, absent consent, 310.30 prohibits judges from
13 distributing written instructions in any format.

14 CHIEF JUDGE DIFIORE: Thank you, Counsel.

15 MS. SYME: Thank you.

16 (Court is adjourned)

17
18
19
20
21
22
23
24
25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Don Williams, No. 60 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: October 11, 2021

