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MANDATORY PROVISION OF WRITTEN COPIES OF JURY INSTRUCTIONS TO RETIRING JURIES IN CRIMINAL TRIALS IN MASSACHUSETTS

Imagine expecting a first-year law student, whose first and only exposure to the subject of criminal law is a single hour-long lecture, to fully comprehend the course's material. During the lecture, she took notes; however, she is not confident that what she wrote down is what the professor recited. She had never before heard the terms her professor used during the lecture; he might as well have been speaking in a foreign language. The examination, upon which her entire grade is determined, immediately follows the lecture. She cannot consult a casebook, and although she can discuss the material with her peers, it seems as though no one in the class comprehended these new and complex concepts either.

I. INTRODUCTION

Generally, people are not expected to learn a new and complex subject through a single oral lecture.¹ Every learner needs time to process, interpret, and store new information.² The rate of recall and comprehension is typically lower for spoken word than for written text.³ One way to significantly improve a learner's comprehension of new material is with the use of written or visual aids.⁴ While it is generally unreasonable to expect a student to learn a new subject without the aid of any written or visual materials, the Massachusetts judicial system allows for the perpetuation of an analogous unrealistic expectation for jurors who serve on criminal trials.⁵ During trial, jurors are prohibited from researching the law, yet they are expected to apply the law to the facts of the case based only on a single oral recitation of the jury instructions, without the support of a written supple-

¹ See discussion *infra* Part III.B (explaining general expectations for learning new material).

² See discussion *infra* Part III.B (highlighting time needed to process information).

³ See discussion *infra* Part III.B (describing decreased recall rate for spoken word when compared to written text).

⁴ See discussion *infra* Part III.B-D (suggesting use of written or visual aid to increase comprehension of material).

⁵ See discussion *infra* Part IV.F (describing jury instructions procedure in Massachusetts).

ment.⁶

The Massachusetts Rules of Criminal Procedure do not mandate the provision of written copies of jury instructions to jurors for their use during deliberations.⁷ Unlike other states that provide for the distribution of written copies of jury instructions, Massachusetts leaves the decision to the discretion of the trial court judges.⁸ The result is a system that leaves juror comprehension to the preferences of the presiding judge.⁹ Prosecutors and criminal defense attorneys in Massachusetts should request written copies of jury instructions for several beneficial reasons discussed herein, and Massachusetts Rule of Criminal Procedure 24 should be amended so the provision of written copies of jury instructions is mandatory.¹⁰

This note will examine the practice of providing written copies of jury instructions to jurors for their use during deliberations, and will suggest to prosecutors and criminal defense attorneys in Massachusetts to regularly utilize this practice and to advocate for mandating the practice in all criminal jury trials.¹¹ Part II explores the historical development of the modern American jury, beginning with its predecessor, the early English jury.¹² Part III discusses juror confusion, various methods of jury reform aimed at reducing juror confusion, and the practice of providing written copies of jury instructions to jurors.¹³ Part IV presents a state-by-state comparative analysis, which discusses how other states are implementing the practice of providing written copies of jury instructions and demonstrates the trend toward the mandatory provision of written copies of jury instructions.¹⁴ Part V analyzes the practice of providing written copies of jury instructions in Massachusetts, and recommends to prosecutors and criminal defense attorneys in Massachusetts to utilize this practice and to advocate for mandating the practice in all criminal jury trials.¹⁵ Finally,

⁶ See discussion *infra* Parts III. and IV.F (explaining method of delivery of jury instructions in general and specifically in Massachusetts).

⁷ See discussion *infra* Part IV.F (outlining Massachusetts's Rule of Criminal Procedure 24).

⁸ See discussion *infra* Parts IV.C and IV.F (discussing practice in states that make provision mandatory and practice in Massachusetts).

⁹ See discussion *infra* Parts III.C-D (describing practice and its advantages and disadvantages).

¹⁰ See discussion *infra* Parts III. and V. (listing benefits of written copies of jury instructions and advocating for their use).

¹¹ See discussion *infra* Parts III.-V. (discussing practice and arguing for use and mandate).

¹² See discussion *infra* Part II. (developing historical perspective of American jury system for contextual understanding of modern issues).

¹³ See discussion *infra* Part III. (describing juror confusion and methods of jury reform).

¹⁴ See discussion *infra* Part IV. (providing comparative analysis of various states' laws).

¹⁵ See discussion *infra* Part V. (proposing practice should be utilized and should eventually become mandatory).

Part VI concludes that prosecutors and criminal defense attorneys should utilize the practice of providing written copies of jury instructions, and that the practice should be mandatory in all criminal jury trials because it reduces juror confusion.¹⁶

II. THE HISTORICAL DEVELOPMENT OF THE MODERN AMERICAN JURY

a. The American Jury's English Roots: Development of the Early English Jury

To understand how the American jury has evolved into its modern form—and to learn the roots of juror confusion—it is important to understand its early English origins.¹⁷ The original English jury is different from the modern American jury in terms of its role in the trial process.¹⁸ Early English juries played an active role in the trial process.¹⁹ Furthermore, early English jury trials were less adversarial than their modern American counterparts.²⁰ As a result of this elevated level of juror participation, English judges had to exercise a corresponding degree of persuasive judicial control.²¹

While the ancient Greek and Roman empires played a significant role in the English jury's development, the most influential historical event on the English jury system was the Norman conquest of England in 1066; the Norman Inquisition produced the model for the English jury system.²² During the reign of King Henry II, the use of juries for the resolution of private matters grew in such popularity that King Henry II granted access to the practice to the general public.²³ This transition—from exclusive roy-

¹⁶ See discussion *infra* Part IV. (concluding mandatory provision of written copies increases juror comprehension).

¹⁷ See Douglas G. Smith, *The Historical and Constitutional Contexts of Jury Reform*, 25 HOFSTRA L. REV. 377, 390 (1996) (discussing need to discover English heritage to understand modern American jury system).

¹⁸ See *id.* (comparing role of English juries to American juries).

¹⁹ See *id.* (designating role of early English juries as active). Individual jurors had extensive trial experience and were chosen for their special knowledge of a particular case's issues. See *id.*

²⁰ See *id.* at 395 (comparing marginal role of early English lawyers to active role in modern American jury trials).

²¹ See *id.* at 390. While an English judge's control over the jury has significantly decreased, he or she still has some persuasive control over the jury. *Id.* (discussing English judge's ability to provide information to jurors).

²² See Smith, *supra* note 17, at 391-92. The Norman Inquisition originally settled royal matters, where jurors, with specific knowledge, gathered to aide the crown. *Id.* at 392.

²³ See *id.* at 394 (describing transition from royal use to general use). Possible explanations

al use to general use by the public—laid the foundation for the belief that a trial by jury is a right of the citizenry.²⁴ Despite formal approval of the right to a jury, the parameters of the practice were not firmly established in England until after the founding of the American colonies.²⁵

b. Development of the Early American Jury System

The deep-rooted institutional importance of the jury in English law ensured that the concept traveled across the Atlantic Ocean to the British Colonies in America.²⁶ The jury became a “central instrument of governance, assessing legal claims and enforcing legal rights in American communities.”²⁷ The jury was a vehicle for pre-revolutionary Americans to exert political power, as evidenced by some colonies granting the right to a jury trial as part of their charters.²⁸

By 1776, the right to a trial by jury developed into a cherished belief of the American colonists.²⁹ After the American Revolution, the right to a trial by jury was codified in the United States Constitution in several

for the increase in popularity are (1) undesired alternatives to dispute resolution, such as battle; (2) the Magna Carta abolished steep fees associated with conducting an inquisition; (3) Pope Innocent III prohibited clergymen from performing religious ceremonies in connection with disputes; and (4) the economic benefit to the Crown (because the Crown did not pay jurors). *Id.* at 394-395. Further, an outcome via a jury came to be viewed as more equitable and less arbitrary. *Id.* at 395.

²⁴ See *id.* at 394 (describing evolution of demand for juries by public as matter of right). Soon after the shift from exclusive to general use, the Magna Carta granted constitutional protection of a citizen's right to trial by jury. See *id.* at 395.

²⁵ See Smith, *supra* note 17, at 395 (detailing dynamic progression of structure of early English jury system up until formation of colonies). Despite the fluidity of jury structure, several traditional components were mainstays:

(1) a jury composed of twelve members of the community; (2) a requirement of unanimity in the verdict; (3) fairly random selection of jurors based only on their knowledge concerning the issues to be tried; (4) a concomitant reduction in the use of peremptory challenges and extensive voir dire; (5) selection of jurors who possessed greater trial experience where appropriate; and (6) relatively short trials.

Id. at 396.

²⁶ See Smith, *supra* note 17, at 422 (demonstrating importance of jury trials to both societies). The colonists appreciated the practice because it afforded them a way to gain representation and power within the English-run court system. See *id.*

²⁷ Smith, *supra* note 17, at 422 (explaining instrumentality of juries).

²⁸ See Smith, *supra* note 17, at 422 (illuminating importance by inclusion of right in several charters). The denial of “the benefits of trial by jury” was also listed as one of the grievances against King George III in the Declaration of Independence. *Id.* at 424 (citing THE DECLARATION OF INDEPENDENCE para. 19 (U.S. 1776)).

²⁹ See Smith, *supra* note 17, at 386 (elucidating trial by jury is fundamental right in United States since colonial era).

places, including Article III, Section 2; the Sixth Amendment; and the Seventh Amendment.³⁰ Similarly, in Massachusetts, “parties have a right to a trial by jury; and this method of procedure shall be held sacred”³¹ The right to a trial by jury became one of the most treasured features of the newly-formed America, and it continues to be one of the fundamental rights of American citizens.³² However, similar to its English counterpart, early American juries lacked rigid form.³³

c. Evolution Since the Revolution: The Modern American Jury

The modern American jury is very different from its predecessors.³⁴ The early American juror was an active participant in the trial process: jurors asked questions of witnesses and investigated facts.³⁵ The modern American jury is far more passive than its historical ancestor.³⁶ Jurors on a modern American jury cannot speak with each other about the case prior to deliberations, they typically cannot ask questions of witnesses,

³⁰ See Smith, *supra* note 17, at 425. Article III of the United States Constitution provided for a trial by jury for “[t]he Trial of all Crimes” U.S. CONST. art. III, § 2, cl. 3. The Sixth Amendment guarantees “the accused . . . the right to a speedy and public trial, by an impartial jury” U.S. CONST. amend. VI. The Seventh Amendment assures that in “[s]uits at common law . . . the right of trial by jury shall be preserved” U.S. CONST. amend. VII.

³¹ MASS. CONST. pt. I, art. XV (codifying right to trial by jury in Massachusetts).

³² See WILLIAM E. NELSON, AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830 96 (1975) (“For Americans after the Revolution, as well as before, the right to trial by jury was probably the most valued of all civil rights . . . it was the only right universally secured by the first American state constitutions.”); see also *Jacob v. City of New York*, 315 U.S. 752, 752-53 (1942) (“[t]he right of jury trial in civil cases at common law is a basic and fundamental feature A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts.”).

³³ See Smith, *supra* note 17, at 426 (discussing American juries’ early flexibility, despite strict constitutional guarantees). Despite the lack of uniform structure, several consistent characteristics defined the early American jury: composition of twelve jurors, unanimity in rendering a verdict, and a requirement of impartiality. See *id.*

³⁴ See *id.* at 446 (explaining that American jury’s role has changed since its inception).

³⁵ See *id.* at 446, 454 (describing early American jury’s active role in adjudicatory process). Jurors were permitted access to resources to assist them in arriving at their decisions. See *id.* at 454. Throughout the nineteenth century and the beginning of the twentieth century, jurors were allowed to question witnesses and take notes during trial. See *id.* at 455. The role of the early American jury was more comparable to the role of the early English jury than to the modern American jury. See *id.*

³⁶ See *id.* at 491 (distinguishing role of modern American jury from early American and English juries). This passive persona of the jury may be harmful to the judicial process because inactivity may “impede [the jury’s] ability to discover the truth and arrive at just outcomes.” *Id.* at 491. Furthermore, neither the Constitution nor the Federal Rules of Evidence mandate that juries passively observe the trial process. *Id.* at 492.

and they are not universally allowed to take notes during trial.³⁷

The composition of the modern American jury also differs from the early English and early American juries.³⁸ The size of a jury at the trial court level is traditionally twelve; however there is a marginal trend toward the reduction of the size of the jury.³⁹ Another aspect of the compositional evolution of the American jury is the selection of jurors without trial experience or expertise.⁴⁰ The selection process of the early American jury favored quality over randomization.⁴¹ By contrast, today's American jurors are not selected for their expertise and any personal knowledge of the issues at trial are unfavorable.⁴²

Additionally, the levels of control over jurors on a modern American jury have also evolved.⁴³ Unlike today's practice, early English and American law allowed for judges to give a significant amount of guidance to jurors during their deliberations.⁴⁴ Today, judges have one main method of providing guidance to, and having persuasive control over, jurors: jury instructions.⁴⁵ Jury instructions typically include both standard instruc-

³⁷ See *id.* at 491-92, 497-501 (outlining practices that juries use to lesser extent today, if at all, because of passivity).

³⁸ See Smith, *supra* note 17, at 458 (commenting on evolution of structure of early American jury into modern American jury).

³⁹ See *id.* at 426, 458, 472 (citing reduced jury size as proposed structural change). A jury comprised of fewer than twelve people was a "'concept both alien and ominous' to early Americans". *Id.* at 426 (citing Richard S. Arnold, *Trial by Jury: The Constitutional Right to a Jury of Twelve in Civil Trials*, 22 HOFSTRA L. REV. 1, 14 (1993)). However, supporters of the reduction of jury size disagree, advocating for reduction even in criminal cases because it serves judicial economy. *Id.* at 472.

⁴⁰ See *id.* at 458-59 (describing modern American jurors' intentional lack of trial experience and qualifications). The jury selection process is often skewed in favor of less experienced or less educated jurors for two reasons. *Id.* at 460. First, educated candidates may increasingly demonstrate the hardship or inconvenience of performing jury duty because of their professional demands. *Id.*; see also 28 U.S.C. § 1863(b)(5)(A) (2012). Second, lawyers may strike jurors with more education to avoid selecting people experienced in the subject of the lawsuit's subject because they may disregard the arguments or the evidence based on preconceived notions. See Smith, *supra* note 17, at 460.

⁴¹ See Smith, *supra* note 17, at 432 (explaining early American jurors were considered impartial even if specifically qualified).

⁴² See *id.* at 462 (describing prohibition of jurors' personal knowledge).

⁴³ See *id.* at 474 (commenting that modern juries have more control over certain things and less control over others).

⁴⁴ See *id.* at 474-75 (describing amount of judicial guidance jurors previously received). Further compounding the potential for confusion, modern juries do not have to provide the parties with the rationale for their verdicts. *Id.* at 474. Since an explanation is not given, errors of law or evidence may go unnoticed and unresolved. *Id.*

⁴⁵ See *id.* at 441 (describing persuasive effect of jury instructions). In early English and American trials, judges and juries engaged in practical, informal communication, and thus, formal jury charges were typically unnecessary. *Id.* at 475-76.

tions, which are instructions that are used in every criminal case, and non-standard instructions, which are instructions unique to the specific case.⁴⁶

III. JURY INSTRUCTIONS, JUROR CONFUSION, AND JURY REFORM

a. *Jury Instructions: An Important Aspect of Jury Service*

In 1895, the United States Supreme Court set out in *Sparf v. United States*⁴⁷ that part of a trial court judge's role is to provide the jury with accurate and correct instructions on how to apply the law to the facts of the case before them.⁴⁸ During a trial, the court typically provides the jury with instructions at multiple junctures.⁴⁹ The most typical set of instructions are called the "substantive law instructions," and they are delivered to the jury

⁴⁶ See Interview with Judge Linda E. Giles, Associate Justice, Superior Court Department of Massachusetts, in Bos., Mass. (Feb. 6, 2013) (describing types of jury instructions).

⁴⁷ 156 U.S. 51 (1895).

⁴⁸ See *id.* at 92; see also RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 198 (2003) (explaining that jurors do not seek out evidence nor applicable law); John P. Cronan, *Is Any of This Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1193 (2002) (overviewing procedure of jury instructions in criminal trials). In *Sparf v. United States*, Justice Harlan wrote that the court acts appropriately when it resolves questions of law, while juries act appropriately when they resolve questions of fact. See *Sparf*, 156 U.S. at 92. Further, Justice Harlan remarked on the court's duty to "direct the jury thereon." *Id.*

⁴⁹ See Cronan *supra* note 48, at 1193 (discussing when jurors may receive instructions from trial judge). Jury instructions given at different parts of the trial serve several purposes. *Id.* Judges typically give preliminary instructions prior to opening statements to prepare the jurors for their role in the trial and to relay expectations of jury duty. *Id.* These preliminary instructions may include explaining the duty of a juror "to follow the law, to determine the facts, to assess witness credibility, and to apply the law to the facts." *Id.*; see also HON. GREGORY E. MIZE (RET.), PAULA HANNAFORD-AGOR, J.D. & NICOLE L. WATERS, PH.D., NATIONAL CENTER FOR STATE COURTS AND STATE JUSTICE INSTITUTE, THE STATE-OF-THE-STATES SURVEY OF JURY IMPROVEMENT EFFORTS: A COMPENDIUM REPORT 37 (2007), available at http://www.academia.edu/832733/The_state-of-the-states_survey_of_jury_improvement_efforts_A_compendium_report (detailing use of pre-instructions). The State-of-the-States Survey of Jury Improvement Efforts: A Compendium Report lists pre-instruction of juries—a tool that provides an overview of black letter law—as one technique increasing in popularity because it creates a legal context for jurors before they evaluate evidence. See MIZE, HANNAFORD-AGOR & WATERS, *supra*, at 36. Often, judges use preliminary instructions to provide jurors with evidentiary instructions that explain the proper ways to consider and weigh the evidence presented. See Cronan, *supra* note 48, at 1193 (providing examples of basic evidentiary matters sometimes discussed in preliminary instructions). Additionally, judges may instruct jurors prior to recesses that they are prohibited from performing any outside research regarding the case, discussing the case, and from visiting any of the scenes described in the evidence. See *id.* at 1193.

by the judge at the close of evidence and arguments.⁵⁰

The procedures and requirements for jury instructions in criminal trials are set out in various federal and state rules of procedure.⁵¹ State rules of criminal procedure regarding jury instructions often contain similar requirements to the federal rule; however, the procedure for the delivery of jury instructions may vary even among judges within the same courthouse.⁵² Some states elect to mirror Federal Rule of Criminal Procedure 30; others “provide similarly minimal constitutional safeguards.”⁵³ Still other states construct rules with specific parameters.⁵⁴ Despite the relative uniformity of the rules with regard to requirements, the disparate approaches to delivering jury instructions and the little amount of attention paid to jury instructions by attorneys are major causes of juror confusion.⁵⁵

⁵⁰ See Cronan, *supra* note 48, at 1195. For example, substantive law instructions in a criminal case may include: “specific criminal charges, the mens rea necessary for conviction, lesser-included offenses, affirmative defenses, the presumption of innocence, and definitions of other important legal terms . . . [and] reiterat[ation of] important evidentiary instructions.” *Id.* Some judges make it a practice to deliver the substantive instructions to the jury prior to closing arguments to make closing arguments more meaningful to jurors; however, the charge is customarily read after closing arguments. See MIZE, HANNAFORD-AGOR & WATERS, *supra* note 49, at 37 (describing instruction as technique to improve juror comprehension of law detailed in closing arguments). *But see* Interview with Judge Giles, *supra* note 46 (explaining jury charge is last thing jury hears before retiring).

⁵¹ See Cronan, *supra* note 48, at 1195 (pinpointing location of jury instructions procedures). For example, Federal Rule of Criminal Procedure 30 established the jury instruction procedure for federal criminal trials. *Id.*; see also FED. R. CRIM. P. 30. Federal Rule of Criminal Procedure 30 allows the judge to issue instructions at the start of trial, at the end of trial, or both. Cronan, *supra* note 48, at 1195.; see also F FED. R. CRIM. P. 30. It also establishes the required procedure for the creation and delivery of case-specific jury instructions. See FED. R. CRIM. 30. The minimum requirements include (1) the opportunity of any party to request, in writing, instructions on the law at the close of evidence, or earlier, with a copy of the request to every other party; (2) the court’s decision as to what the final jury instructions will be, with notice to all parties prior to closing arguments; (3) the option for the court to instruct the jury prior to or after closing arguments; and (4) the occasion for each party to objection to the instructions before the jury retires. FED. R. CRIM. P. 30 (a)-(d).

⁵² See Cronan, *supra* note 48, at 1195 (outlining jury instruction requirements in federal rules and remarking on jurisdictional differences between procedures); see also Interview with Judge Isaac Borenstein (Ret.), Associate Justice, Superior Court Department of Massachusetts, in Bos., Mass. (Oct. 25, 2012) (remarking that judges within same courthouse may prefer and employ different styles).

⁵³ See Cronan, *supra* note 48, at 1192 n.24. While some state rules of procedure may contain provisions similar to the federal rules, specific requirements and procedures may vary among—and even within—jurisdictions. *Id.* at 1195.

⁵⁴ See LA. CODE CRIM. PROC. ANN. art. 801(b)(1) (2014); TENN. R. CRIM. P. 30(c).

⁵⁵ See Cronan, *supra* note 48, at 1195-96 (describing different delivery methods and neglect by attorneys as sources of increased juror confusion).

b. The Sources of Juror Confusion

The presence and extent of juror confusion regarding jury instructions has been shown anecdotally through cases and empirically through research.⁵⁶ For example, in *Whitaker v. United States*,⁵⁷ the District of Columbia Court of Appeals reversed an inconsistent verdict, based on the conclusion that the jury was confused as to the elements of the crime charged and how to apply the law to the facts of the case.⁵⁸ When jurors do not understand the law that they are expected to apply to the facts because there is confusion regarding the jury instructions, the result is often erroneous verdicts.⁵⁹ Errors are unavoidable if jurors are unable to comprehend the meaning of the law given to them via the judge's instructions.⁶⁰

One explanation for juror confusion is the imbalance between legal

⁵⁶ See Cronan, *supra* note 48, at 1196 (citing cases and studies that demonstrate extent of juror confusion); see also Smith, *supra* note 17, at 475 (detailing several problems with how jury instructions are delivered). The root of juror confusion can be traced to a number of problems with current jury instructions practice, including difficulty understanding legalese, lack of preliminary instructions and written copies of jury instructions, and unaddressed confusion throughout the duration of complex and lengthy trials. See Smith, *supra* note 17, at 475.

⁵⁷ 617 A.2d 499 (D.C. 1992).

⁵⁸ See *id.* at 502-503 (demonstrating why conclusion of juror confusion). The defendant was charged with assault with a deadly weapon ("ADW") and possession of a firearm during a crime of violence ("PFCV") as a result of an altercation that occurred between herself, her niece, her stepdaughter and three other women unknown to them. *Id.* at 500. Since ADW is a predicate offense to PFCV—which is a compound offense—the court reasoned that no jury could logically reach the conclusion that the defendant was guilty of PFCV, but not of ADW, unless it was confused or intentionally failed at its duties as a jury. *Id.* at 501-02. The jury found the defendant guilty of PFCV, but not of ADW; the defendant appealed based on this inconsistent verdict, claiming the jury must have been confused. *Id.* Despite a lack of a report of confusion from the jurors, the court agreed with the defendant's claim that the lack of reported confusion does not mean that the jury was not in fact confused. *Id.* at 502 ("A group of people (such as a jury) may not realize they are lost, and they may still be lost. They will then continue to be lost until they realize their situation or until someone informs them of it."). The court noted, "[i]n general, 'decisions regarding reinstruction of a jury are committed to the discretion of the trial court; absent abuse of that discretion we will not reverse.'" *Id.* at 501 (quoting *Davis v. United States*, 510 A.2d 1051, 1052 (D.C. 1986) (per curiam)). On the contrary, the court reasoned, "[w]here a jury has demonstrated confusion, however, the trial judge may not allow that confusion to continue, but must make an appropriate and effective response." *Id.* (citing *Murchison v. United States*, 486 A.2d 77, 83 (D.C. 1984)). The *Whitaker* court further quoted Chief Justice Rehnquist in *United States v. Powell* to further support its holding: "[i]nconsistent verdicts . . . present a situation where 'error,' in the sense that the jury has not followed the court's instructions, *most certainly has occurred*" *Id.* (quoting *United States v. Powell*, 469 U.S. 57, 65 (1984)). The *Whitaker* court reversed the conviction, holding the trial judge no longer had the discretion to deny the defendant's request to reinstruct the jury because juror confusion was present. *Id.* at 504.

⁵⁹ See JONAKAIT, *supra* note 48, at 198 (citing juror confusion as cause of erroneous verdicts); see also Cronan, *supra* note 48, at 1197 (same).

⁶⁰ See JONAKAIT, *supra* note 48, at 198 (explaining inevitability of errors if jurors lack understanding of law).

accuracy and layperson understanding of legal jargon.⁶¹ When instructing the jury, judges have an obligation to state the law with legal accuracy.⁶² It is understandable why judges strive to create instructions that are impeccable statements of the law: error in instructing the jury is the “single most common cause of reversal” in jury trials and even minor errors in semantics can be grounds for a successful appeal.⁶³ However, legally accurate jury instructions are not always correlative to comprehension by the average juror, who is often chosen to serve on a jury for his or her lack of special knowledge of the case’s issues.⁶⁴

In addition, the traditional method of delivery of jury instructions—oral delivery—is not by itself conducive to comprehension and learning.⁶⁵ Generally, a person’s rate of recall is lower for spoken word than for written text.⁶⁶ People are not typically expected to comprehend a new, complex subject via a single, oral recitation of information.⁶⁷ This is

⁶¹ See Cronan, *supra* note 48, at 1208 (discussing legal accuracy versus understandability).

⁶² See ROBERT G. NIELAND, *PATTERN JURY INSTRUCTIONS: A CRITICAL LOOK AT A MODERN MOVEMENT TO IMPROVE THE JURY SYSTEM I* (1979) (commenting judges have legal obligation to instruct jury with legal accuracy); see also Cronan, *supra* note 48, at 1191, 1208 (describing legal accuracy as source of confusion).

⁶³ See Susan R. Schwaiger, Note, *The Submission of Written Instructions and Statutory Language to New York Criminal Juries*, 56 BROOK. L. REV. 1353, 1358 (1991) (quoting Luther C. Hames, Jr., *Pattern of Jury Instructions*, 27 MERCER L. REV. 291, 291 (1975)) (citing error in instructing jury as top reason for reversal on appeal); see also Laurence J. Severance et al., *Criminology: Toward Criminal Jury Instructions that Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 200 (1984) (discussing legal accuracy as equally important as understandability when drafting jury instructions).

⁶⁴ See NIELAND, *supra* note 62, at 1 (examining judge’s dilemma of creating instructions that are legally accurate and readily comprehensible to laypeople); see also Severance, *supra* note 63, at 199-201 (recognizing two-part problem of legal accuracy and understandability causing juror confusion). The sources of misunderstanding or misinterpretation of instructions by the jury may include, “the syntax of the instructions, the manner of presentation, or the general unfamiliarity of lay[]people with legal terminology.” See Severance, *supra* note 63, at 200. The goal of a judge in setting forth jury instructions should be to balance legal accuracy and understandability, so any juror can comprehend the instructions without confusion. See *id.* at 201. However, oftentimes clarity is sacrificed for legal technicality. See *id.*

⁶⁵ See JONAKAIT, *supra* note 48, at 210 (explaining people learn by repeated exposure and persistent attempts at mastery of new subjects). The traditional delivery of jury instructions is oral; the judge reads the charge to the listening jury before they retire to the deliberation room. See *id.* (describing traditional method of jury instruction delivery).

⁶⁶ See Cronan, *supra* note 48, at 1211 (describing causes for juror confusion). Psycholinguistic studies performed on jurors, or subjects in jury-like conditions in empirical studies, have shown that the “legal jargon and unfamiliar words, abstract terms and expressions, negative construction and negative word modifiers, complex sentences, passive forms, and lack of logical textual organization” often contained in jury instructions lead to juror confusion. See William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 740 (1981).

⁶⁷ See Cronan, *supra* note 48, at 1211. When oral lecture is the primary method of conveying information to a novice audience—a law school lecture, for example—the oral delivery is

because limitations on the ability to assimilate information affects comprehension and recall; if a listener lacks the time necessary to process, interpret, and store new information, he or she will only be able to selectively retain information.⁶⁸ Empirical studies examining jurors' level of retention and comprehension of oral presentations of jury instructions have concluded that at least a portion of jurors do not understand or follow the instructions given.⁶⁹ A juror hearing complex legal jargon for the first time, especially without the aid of written copies of the jury instructions to review during deliberations, may misinterpret the information in ways that the judge and the attorneys did not intend.⁷⁰ Therefore, it is a reasonable conclusion that jurors do not always comprehend jury instructions when oral presentation is the only means of delivery.⁷¹

often supplemented by written or visual materials, such as casebooks, on-screen presentations, or handouts. *Id.* It is an unrealistic goal to expect jurors, who are unfamiliar with the law, not only to remember, but also comprehend the law they are to apply to the facts of the case based exclusively on what they heard one time. *See id.* at 1244; *see also* JURY TRIAL INNOVATIONS 8 (G. Thomas Munsterman, et al. eds., 1997). To expect jurors—armed only with a truncated legal education at best—to fully comprehend complex legal issues at first glance is an unrealistic and unfair prospect. *See* HON. JEROME FRANK, LAW AND THE MODERN MIND 303 (1930); *see also* Cronan, *supra* note 48, at 1209 (“[A]fter years of law school and daily exposure to terms like ‘estoppel’ and ‘preponderance,’ it is doubtful that legal professionals can intuitively gauge the degree to which laypeople understand legal language.”) (quoting Peter Meijes Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 41 (1993)).

⁶⁸ *See* Schwarzer, *supra* note 66, at 741-42 (describing how ability to assimilate affects comprehension and recall in listeners). Studies in the acquisition of semantic information suggest that when a verbal presentation contains concepts and information, the listener will not have adequate time to process all of the information provided. *Id.* From this, listeners must be selective with which pieces of information are retained. *Id.* at 742. Selectivity is expressed in a number of ways: overgeneralization, exclusion of nonessential information, and creation of inferences based on prior knowledge and contextual information. *Id.* Based on this information, the result may be that the listener acquires an understanding of the information different from the intention of the presenter or author. *Id.*

⁶⁹ *See* Schwarzer, *supra* note 66, at 742 (explaining various experimental studies addressing juror comprehension). One study tested 114 experienced jurors, who were read both civil and criminal instructions, as well as a fact pattern. *Id.* The instructions were neither lengthy nor complex, and immediately following the oral presentation of the instructions, a test was administered. *Id.* The mean individual score was forty-six percent correct for the test regarding the civil instructions and fifty-three percent correct for the test regarding the criminal instructions. *Id.* The results painted alarming results: “[e]ighty-five p[er]cent of the jurors missed at least one question on evidence, thirty-seven percent missed two out of three questions on evidence, and eighty-six percent could not choose the correct response relating to proof of guilt.” *Id.*

⁷⁰ *See* Schwarzer, *supra* note 66, at 742 (analogizing listener's ability to comprehend semantics to that of juror).

⁷¹ *See* Schwarzer, *supra* note 66, at 741-42 (reiterating verbal presentation of jury instruction delivery is not conducive to sufficient comprehension). The results of this level of misunderstanding are erroneous verdicts and successful appeals. *See* JONAKAIT, *supra* note 48, at 198 (explaining inevitability of erroneous verdicts because of juror misunderstanding); Severance, *supra* note 63, at 200 (discussing commonality of successful appeals based on erroneous jury instructions).

c. *Jury Reforms that Aim to Improve Juror Comprehension of Jury Instructions*

The evidence of juror confusion has led to reforms to eradicate flaws in the American jury system and an increased focus on improving juror comprehension.⁷² As of 2007, three-quarters of states appointed statewide commissions or taskforces to examine jury operations and recommend methods for improvement.⁷³ These improvement methods include a range of techniques.⁷⁴ They include allowing jurors to take notes during trial; instructing juries prior to the presentation of evidence; allowing jurors to submit written questions to witnesses; allowing jurors to discuss the evidence with each other before final deliberations; allowing jury instructions to be audio recorded; and submitting written copies of jury instructions to jurors for their use during deliberations.⁷⁵

The practice of allowing jurors to take notes during trial is now a widely accepted technique; the majority of trial court judges in both state

⁷² See Cronan, *supra* note 48, at 1235-59 (discussing suggested jury reform techniques to enhance juror comprehension); see also Neil P. Cohen, *Better, Happier Juries: Tennessee Jury Reform Respects Jurors' Time and Provides Them More Resources to do the Job*, 39 TENN. B.J. 16, 18-25 (2003) (highlighting Tennessee Bar Association Commission on Jury Reform's recommendations); JURY TRIAL INNOVATIONS, *supra* note 67, at 7-21 (discussing factors taken into account when maximizing quality decision-making by jurors).

⁷³ See MIZE, HANNAFORD-AGOR & WATERS, *supra* note 49, at 9 (discussing statewide jury improvement efforts). In addition to various jury reform taskforces, a good number of states employ a permanent, formal office dedicated to the oversight of jury operations. *Id.*

⁷⁴ See MIZE, HANNAFORD-AGOR & WATERS, *supra* note 49, at 32-40 (identifying and explaining techniques to increase jury comprehension). Between 2002 and 2006, the National Center for State Courts' Center for Jury Studies published a "State-of-the-States Survey," as part of the National Program to Increase Citizen Participation in Jury Service, to highlight various trial practices meant to reduce juror confusion used across the country. See *id.* at 2-4. The compendium report following the survey described the evolving view of jurors and their ability to comprehend the trial experience:

The traditional view is that jurors are passive receptacles of evidence and law who are capable of suspending judgment about the evidence until final deliberations, of remembering all of the evidence presented at trial, and of considering the evidence without reference to preexisting experience and attitudes. This view has rapidly given way to a contemporary understanding of how adults process information, which posits that jurors actively filter evidence according to preexisting attitudes, making preliminary judgments throughout the trial. This view of juror decision-making has spurred a great deal of support for trial procedures designed to provide jurors with common-sense tools to facilitate juror recall and comprehension of evidence.

Id. at 31.

⁷⁵ See MIZE, HANNAFORD-AGOR & WATERS, *supra* note 49, at 31-40 (listing jury improvement methods).

and federal courts permit jurors to take notes.⁷⁶ Instructing the jury prior to the presentation of evidence is another technique that is growing in popularity.⁷⁷ The use of pattern jury instructions is another example of jury reform that is used to increase both the accuracy of statements of law and juror comprehension.⁷⁸ Similarly, the movement for "Plain Language" jury instructions, which advocates for the re-writing of complex or linguistically flawed jury instructions so they are simpler for the average juror to understand, is gaining prevalence in some trial courts.⁷⁹ Recording the audio of oral delivery of jury instructions, which may be played back at by jurors during deliberations, is another helpful technique for increasing juror comprehension.⁸⁰ Finally, furnishing jurors with printed copies of the jury instructions prior to deliberations is an important tool of juror reform that would increase juror comprehension.⁸¹

d. Written Copies of Jury Instructions for Jurors' Use in the Deliberation Room

One significant and simple way to improve understanding is to supplement oral lecture with a written or visual aid.⁸² In this context, supplementing the judge's oral reading of the jury instructions with written copies of those instructions can help to alleviate the low retention rate and high confusion rate among jurors.⁸³ Many individual judges maintain the

⁷⁶ See MIZE, HANNAFORD-AGOR & WATERS, *supra* note 49, at 32 (citing popularity of note-taking technique). Most courts even incur the cost of providing jurors with the writing material in order to take notes. *Id.* Allowing jurors to take notes during trial is advantageous because the notes serve as a memory aid and they tend to increase juror satisfaction with the trial and the verdict. See Larry Heuer & Steven Penrod, *Juror Notetaking and Question Asking During Trials*, 18 LAW & HUM. BEHAV. 121, 123 (1994).

⁷⁷ See MIZE, HANNAFORD-AGOR & WATERS, *supra* note 49, at 36-37 (stating increasing prevalence of pre-instructions); see also *supra* note 49 and accompanying text.

⁷⁸ See NIELAND, *supra* note 62, at 1-2 (suggesting pattern jury instructions alleviate inaccuracy and misunderstanding). Pattern jury instructions are standardized propositions of law that are concise, accurate and easily understandable. *Id.* at 2.

⁷⁹ See Cronan, *supra* note 48, at 1236 (discussing "plain language" instructions as reform that may increase juror comprehension); see also Interview with Judge Borenstein, *supra* note 52.

⁸⁰ See Interview with Judge Borenstein, *supra* note 52 (discussing use of recorded jury instructions).

⁸¹ See Cronan, *supra* note 48, at 1241-44 (advocating for practice of written copies of jury instructions as way to increase juror comprehension).

⁸² See *supra* note 67 and accompanying text (citing written supplement to oral lecture as tool that significantly increases learning).

⁸³ See Cohen, *supra* 72, at 24 (suggesting that low retention rates can be alleviated by combining oral reading with written handouts). Empirical social science studies have found that rate of retention is low and rate of confusion is high among jurors who have only heard the jury instructions via the judge's oral delivery of them. *Id.* On the contrary, written instructions ensure

practice of delivering written copies of the jury instructions to the jury.⁸⁴ However, this simple tool, which has been shown to increase juror comprehension, is not universally utilized in Massachusetts because judges have the discretion to decide whether or not to use it.⁸⁵

Significant differences in the procedure of the submission of written copies of jury instructions to jurors occur because state rules governing the form of jury instructions differ from state to state and differ from case to case.⁸⁶ Trial judges are more apt to provide written copies of jury instructions to jurors if he or she believes that the case is complex.⁸⁷ Similarly, if a trial is short in length or involves simpler issues, the trial judge may opt not to provide written copies of jury instructions.⁸⁸

However, the advantages of submitting written copies of are clearly demonstrated by the empirical studies on juror comprehension of jury instructions.⁸⁹ The simple visual aid of a written copy of the jury instructions for use in the deliberation room allows for a solution to the study results that show that jurors cannot remember—let alone comprehend—instructions after hearing them only once.⁹⁰ In addition, there is evidence

that jurors have the ability to consider all of the instructions delivered, not simply the instructions they remember. See MIZE, HANNAFORD-AGOR & WATERS, *supra* note 49, at 37 (explaining benefits of providing written copies of instructions to jurors).

⁸⁴ See Cronan, *supra* note 48, at 1243 (discussing non-universal use of written copies of jury instructions). Based on the National Center for State Courts State-of-the-States Survey, at least one copy of written instructions was provided to the jury in more than two-thirds of state jury trials, and nearly three-quarters of federal jury trials; in one-third of jury trials, the court provided a copy for each juror. See MIZE, HANNAFORD-AGOR & WATERS, *supra* note 49, at 37.

⁸⁵ See Cronan, *supra* note 48, at 1243. While many jurisdictions supply written instructions to jurors, not every jurisdiction—nor every judge within a given jurisdiction—utilizes the practice. See *id.* This discrepancy in use of the practice is due in part to its discretionary status in some states. 9C CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2555 (3d ed. 2001) (“If the trial court wishes, it may submit a copy of its instructions to the jury, but this is a matter within the court’s sound discretion and most judges elect not to do so.”).

⁸⁶ See MIZE, HANNAFORD-AGOR & WATERS, *supra* note 49, at 37 (explaining the reason for disparate practices).

⁸⁷ See *id.* (pointing to complexity as factor in decision to use).

⁸⁸ See Interview with Judge Borenstein, *supra* note 52 (discussing his non-use of written copies in District Court jury trials).

⁸⁹ See *Criminal Justice Section Standards—Trial By Jury—Standard 15-4.4 Jury Instructions*, AMERICAN BAR ASSOCIATION (last visited May 21, 2014), http://www.americanbar.org/publications/criminal_justice_section_archive/crimjust_standards_jurytrial_blk.html (“A written copy or audio version of the instructions should be given to the jury when it retires to deliberate.”); *Principles for Juries and Jury Trials – American Jury Project*, AMERICAN BAR ASSOCIATION (last visited May 21, 2014), <http://www.americanbar.org/content/dam/aba/migrated/juryprojectstandards/principles.pdf> (“Each juror should be provided with a written copy of instructions for use while the jury is being instructed and during deliberations.”); see also Schwarzer, *supra* note 66, at 740.

⁹⁰ See Schwarzer, *supra* note 66, at 756 (citing written copies as solution increasing juror

that juries provided with a written copy of the jury instructions deliberate in more efficient and informed ways, and feel more confident about their decisions.⁹¹ From this, less time and court resources are wasted on juries sending questions to judges during deliberations because of increased juror confidence.⁹²

Furthermore, the National Center for State Courts' State-of-the-States Survey results revealed that jurors who were given at least one written copy of jury instructions, in addition to other techniques, tended to deliberate for a longer period of time, indicating increased thoroughness of deliberations.⁹³ A more confident, efficient, and informed jury is one advantageous result of the use of the simple technique of providing written copies of jury instructions in the deliberation room.⁹⁴

As discussed above, the right to a trial by jury is a constitutional guarantee; however, there is no constitutional right to written copies of jury instructions.⁹⁵ A defendant in a criminal case is "entitled to adequate jury instructions on his theory of defense, provided that there is evidence to reasonably support such a theory."⁹⁶ This right has its limitations: a defendant is not entitled to decide the particular form of jury instructions.⁹⁷ However, the guarantee of jury trials as a part of due process includes the right to be tried by competent jurors, and the practice of providing written copies of jury instructions to the jury is constitutionally permissible.⁹⁸

Furthermore, a central feature of the right to due process is the prosecution's obligation to prove each element of the crime charged be-

comprehension).

⁹¹ See Schwarzer, *supra* note 66, at 756-57 (pointing to increased efficiency and confidence).

⁹² See Cronan, *supra* note 48, at 1234-35 (discussing questions to judge).

⁹³ See MIZE, HANNAFORD-AGOR & WATERS, *supra* note 49, at 38 (describing effect of techniques, including written copies, on deliberation length).

⁹⁴ See *supra* notes 68-70 and accompanying text (outlining effect of written copies of jury instructions on jurors).

⁹⁵ See *United States v. Pray*, 869 F. Supp. 2d 44, 50 (D.D.C. 2012) (explaining which constitutional rights criminal defendants are guaranteed with regard to jury instructions); see also Smith, *supra* note 17, at 386 (discussing constitutional right to trial by jury). However, after the ratification of the Fourteenth Amendment, the practice of providing written copies of jury instructions to jurors was viewed as constitutionally acceptable. See Smith, *supra* note 17, at 477 (outlining history of written copies of jury instructions history).

⁹⁶ *Pray*, 869 F. Supp. 2d at 50 (quoting *United States v. Howard*, 245 F. Supp. 2d 24, 39 (D.D.C. 2003)).

⁹⁷ See *id.* at 50 (outlining limitations on criminal defendants' rights with regard to jury instructions).

⁹⁸ See *Tanner v. United States*, 483 U.S. 107, 134 (1987) (Marshall, J., dissenting) ("Every criminal defendant has a constitutional right to be tried by competent jurors."); Smith, *supra* note 17, at 477 (stating that written copies of jury instructions is permitted by Constitution).

yond a reasonable doubt.⁹⁹ If jurors fail to comprehend the law they are expected to apply, there is no way to truly guarantee the satisfaction of the reasonable doubt standard.¹⁰⁰ As the studies discussed above suggest, juror confusion exists when oral delivery is the only means of transmission; however, the practice of providing written copies of jury instructions helps to protect a defendant's due process rights because its consistent use diminishes juror confusion during deliberations.¹⁰¹

In practice, attorneys should utilize the benefits of written copies of jury instructions by requesting the provision of the written copies to the jury either by motion or by request during the jury charge conference.¹⁰² During the jury charge conference, the attorneys present the judge with their proposed jury instructions and make formal objections regarding the instructions.¹⁰³ Attorneys should pay close attention when drafting their proposed jury instructions, and, during the jury charge conference or via written motion, they should formally request the provision of written copies of jury instructions to jurors.¹⁰⁴ If the judge denies the request to provide the jurors with written copies of jury instructions, attorneys should formally object during the jury charge conference or at the hearing on the motion.¹⁰⁵

e. Hurdling the Barriers to Jury Reform

While the above advantages demonstrate the unmistakable benefits of submitting written copies of jury instructions to jurors, judges who opt not to use the technique have legitimate reservations.¹⁰⁶ Judges decline to

⁹⁹ See *Mullaney v. Wilbur*, 421 U.S. 684, 701 (1975) (holding due process requires of prosecution to prove each element beyond reasonable doubt).

¹⁰⁰ See Cronan, *supra* note 48, at 1214-15 (urging methods to increase juror comprehension to help ensure defendants' constitutional guarantees).

¹⁰¹ See Cronan, *supra* note 48, at 1214-15, 1242-43 (remarking how juror confusion threatens constitutional rights, but that written copies can help); *supra* notes 63, 83 and accompanying text (describing studies).

¹⁰² See *Pray*, 869 F. Supp. 2d at 50 (indicating that party requested written copies of additional instructions via motion); Dawn Reddy Solowey, *Avoid The Top 10 Pitfalls In A Jury Charge Conference*, LAW 360 (Mar. 20, 2013, 12:08 PM), http://www.seyfarth.com/dir_docs/publications/Top%2010%20Pitfalls%20In%20A%20Jury%20Charge%20Conference.pdf (providing advice for jury charge conferences).

¹⁰³ See Solowey, *supra* note 102 (describing jury charge conferences).

¹⁰⁴ See Cronan, *supra* note 48, at 1196 (pointing out problem of attorneys' lack of attention when drafting jury instructions); Solowey, *supra* note 102 (outlining best practices for jury charge conferences).

¹⁰⁵ See Solowey, *supra* note 102 (highlighting objection opportunities during jury charge conference).

¹⁰⁶ See Cronan, *supra* note 48, at 1244 (describing logistical burdens practice may have on judges).

send written copies of the jury instructions for a number of reasons.¹⁰⁷ Sometimes, judges believe that the jury will become distracted by the presence of the instructions in the deliberation room and devote all of their focus solely to the legal arguments.¹⁰⁸ They may believe that jurors will rely on one instruction to the detriment of others.¹⁰⁹ Further, judges may fear that the jury will misinterpret the statutory language contained within the instructions, leading to the potential for erroneous verdicts.¹¹⁰ Further, judges may not think that the physical format of the instructions they read are of a quality that is appropriate to hand out to jurors, especially if they recycle instruction language from multiple sources, but do not format the document in a word processor.¹¹¹ Finally, the cost, time, and inconvenience of preparing the clean written copy of jury instructions in busy courtrooms may be cited as a reason to decline to submit written copies of jury instructions to jurors.¹¹²

While these concerns are valid, the benefits of the submission of written copies of jury instructions overcome them.¹¹³ First, the psychological studies cited above conclude that there is a problem with juror comprehension of jury instructions when only a single oral delivery is provided and that juries who are provided with at least one written copy of jury instructions deliberate more efficiently and confidently.¹¹⁴ Next, misinterpretation and undue emphasis are less likely if a complete and accurate charge is uniformly provided in writing and in language that jurors can understand.¹¹⁵ Formatting issues can be remedied by enlisting the help of the at-

¹⁰⁷ See Schwarzer, *supra* note 66, at 756 (delineating fears judges have when considering sending written copies of jury instructions into deliberation room).

¹⁰⁸ See Schwarzer, *supra* note 66, at 756 (elucidating reasons why some judges decline to send instructions into deliberation room). Undue emphasis on materials in the deliberation room is a common fear among judges. See Schwaiger, *supra* note 63, at 1376. The jury may weigh an item in the deliberation room with higher importance than one that is absent. *Id.*

¹⁰⁹ See Schwaiger, *supra* note 63, at 1376 (explaining reservation).

¹¹⁰ See *id.* at 1373 (describing misinterpretation and error as one danger in provision).

¹¹¹ See Interview with Judge Giles, *supra* note 46 (hypothesizing one reservation may be formatting quality). For example, if a judge draws from different sources to piece together his or her jury instructions, he or she may not want to print out unpolished copies and provide to the jurors. *Id.*

¹¹² See Schwarzer, *supra* note 66, at 756.

¹¹³ See Schwarzer, *supra* note 66, at 756-57 (addressing reservations); see also Schwaiger, *supra* note 63, at 1373-79 (explaining how concerns can be quelled).

¹¹⁴ See *supra* notes 63, 83, 91 and accompanying text (describing studies regarding confusion and increased confidence and efficiency with written copies).

¹¹⁵ See Schwaiger, *supra* note 63, at 1373-77 (rebutting dangers). Misinterpretation and undue emphasis are more likely to occur if jurors are given only portions of the charge or portions of statutes to be applied. See *id.* at 1373. Further, the quality of the jury instructions can be addressed and remedied at jury charge conferences. See *id.* at 1375; see also Interview with Judge Borenstein, *supra* note 52. In addition, a complete and balanced copy of the jury instructions is

torneys or law clerks to fix any formatting issues, as well as through the maintenance of organized jury instruction templates on word processors.¹¹⁶ Finally, the proactive time and resources spent in creating and printing clean copies of jury instructions is far less than the retroactive time and resources spent answering juror questions and conducting retrials and appeals.¹¹⁷

There also may be institutional obstacles to overcome in order to make the practice mandatory. First, the threat of reversal is a powerful deterrent for a trial judge when contemplating experimental techniques.¹¹⁸ Second, the desire to maintain the status quo discourages some judges from participating in reforms.¹¹⁹ Finally, the resistance of attorneys to take the lead in advocating for techniques that will increase juror comprehension is another obstacle to reform.¹²⁰ The criminal defense bar may be especially hesitant to allow for the mandatory distribution of written copies of jury instructions because it may alleviate doubt in a juror's mind.¹²¹ Despite these obstacles to reform, the anecdotal and empirical evidence proves that juror confusion is a major issue and that written copies of jury instructions is a simple way to address the problem.¹²²

IV. A COMPARATIVE ANALYSIS OF VARIOUS STATES'

less likely to garner misinterpretation or undue emphasis than the alternatives to written copies: reliance on juror memory or notes. See Schwaiger, *supra* note 63, at 1377.

¹¹⁶ See Interview with Judge Giles, *supra* note 46 (commenting on ease of formatting jury instructions with use of word processor).

¹¹⁷ See Interview with Judge Borenstein, *supra* note 52. The mechanical problem of creating clean, written copies of jury instructions can be overcome by using word processor or by asking the attorneys to create proposed jury instruction documents for the judge or law clerk to synthesize. See Schwarzer, *supra* note 66, at 757; see also Interview with Judge Borenstein, *supra* note 52. In addition, starting the jury instructions process early in the trial and saving template jury instructions for future use may save time and resources. See Interview with Judge Borenstein, *supra* note 52 (describing benefits of creating written copies of jury instructions on word processor).

¹¹⁸ See Cronan, *supra* note 48, at 1216-20 (discussing threat of reversal as discouraging factor in acceptance of jury reform).

¹¹⁹ See *id.* at 1220-21 (explaining many judges' disbelief that juror confusion is major problem).

¹²⁰ See *id.* at 1221 (citing reluctance of lawyers to address problem as roadblock to increased juror comprehension). In addition, lawyers may use juror confusion as a strategy for the benefit of their clients. *Id.* at 1222.

¹²¹ See Interview with Judge Giles, *supra* note 46 (suggesting possible opposition from community of lawyers whose job it is to create doubt). However, there is anecdotal evidence that demonstrates that juries use the written instructions both to acquit and convict. *Id.* (citing occasions where unprompted jurors volunteered that without "reasonable doubt" instruction, they would have convicted).

¹²² See generally Cronan, *supra* note 48, at 1212-35 (discussing problem of juror confusion, obstacles to reform, and proposing amendments to system).

USE OF THE PRACTICE OF DISTRIBUTING WRITTEN COPIES OF JURY INSTRUCTIONS

a. Introduction

Federal case law has developed to provide a judge with the discretion to issue written copies of jury instructions to jurors.¹²³ In *Haupt v. United States*,¹²⁴ the United States Supreme Court held that furnishing a written copy of jury instructions to the jurors in that case was permissible, although they did not elaborate further on whether the practice was permissible in all cases.¹²⁵ Further, in *Hopt v. People*,¹²⁶ the Court approved of Utah law that mandated jury instructions to be reduced to writing.¹²⁷ While the practice is discretionary in federal court, individual states are divided as to whether to mandate or prohibit the provision of written copies of jury instructions to jurors.¹²⁸ The practice of providing written copies of jury instructions to jurors is mandatory in some states.¹²⁹ In other states, the prac-

¹²³ See *id.* at 1243 (stating provision of written copies of jury instructions to jurors is appropriate).

¹²⁴ 330 U.S. 631 (1947).

¹²⁵ See *id.* at 643 (indicating that practice of providing written copies of jury instructions permissible); see also Cronan, *supra* note 48, at 1243 (summarizing pertinent part of case). In *Haupt*, the petitioner was convicted of treason during the post-WWII era because he harbored and aided his son, who was a convicted saboteur for the German Reich. *Haupt*, 330 U.S. at 632-33. The petitioner raised a number of objections, one of which was an objection to the judge's decision to deliver written copies of the jury instructions to the jury. *Haupt*, 330 U.S. at 643. The Court found that, in addition to the petitioner's other logistical complaints regarding the trial, the practice of "allowing the jury to have a typewritten copy of the court's charge" did not "warrant the inference of unfairness or irregularity in the trial." *Haupt*, 330 U.S. at 643.

¹²⁶ 104 U.S. 631 (1881).

¹²⁷ See *id.* at 632, 634-35 (approving state statute requiring charge in writing in first degree murder case).

¹²⁸ See Cronan, *supra* note 48, at 1243 (explaining that individual states are split as to practice).

¹²⁹ See, e.g., ALASKA R. CRIM. P. 30(a) ("The instructions must be reduced to writing and read to the jury and must be taken to the jury room by the jury."); ARIZ. R. CRIM. P. 21.3(d) ("The court's preliminary and final instructions on the law shall be in written form and a copy of the instructions shall be furnished to each juror before being read by the court."); FLA. R. CRIM. P. 3.400(b) ("The court must provide the jury, upon retiring for deliberation, with a written copy of the instructions given to take to the jury room."); IDAHO CRIM. R. 30(b) ("The written instructions, or a copy thereof, shall be given to each juror to take when the jury retires for deliberation."); MO. SUP. CT. R. 28.02(e) ("The original of all numbered instructions and all verdict forms shall be handed to the jury for its use during its deliberation and shall be returned to the court and filed at the conclusion of the jury's deliberation."); WASH. SUP. CT. CRIM. R. 6.15(e) ("After argument, the jury shall retire to consider the verdict. The jury shall take with it the instructions given, all exhibits received in evidence and a verdict form or forms.").

tice is discretionary.¹³⁰ Further, other states prohibited the practice.¹³¹ Finally, some states have specific rules regarding the practice.¹³² Most often, states either mirror the federal rule—leaving the decision to the judge’s discretion—or mandate written copies in criminal cases only.¹³³

b. Federal Rules as a Model for State Law

In federal court, the practice of providing written copies of jury instructions to jurors is left to the discretion of the judge.¹³⁴ Federal Rule of Criminal Procedure 30 does not state anything directly about the practice.¹³⁵ However, federal case law reinforces the rule that judges have the discretionary power to decide whether or not to furnish the jury with written copies of the jury instructions.¹³⁶ Furthermore, a number of federal courts have opined that the practice is not only permissible, but also proper.¹³⁷ Based

¹³⁰ See, e.g., MINN. R. CRIM. P. 26.03(19)(5) (“The instructions may be in writing and may be taken into the jury room during deliberations.”); TEX. CODE CRIM. P. art. 36.18 (“The jury may take to their jury room the charges given by the court after the same have been filed.”); W. VA. R. CRIM. P. 30 (“The court may show the written instructions to the jury and permit the jury to take the written instructions to the jury room.”).

¹³¹ See ALA. R. CRIM. P. 21.1 (“Neither a copy of the charges against the defendant nor the ‘given’ written instructions shall go to the jury room; provided, however, that the court may, in its discretion, submit the written charges to the jury in a complex case.”).

¹³² See Cronan, *supra* note 48, at 1243 (overviewing methods of states with specific rules regarding written copies of jury instructions).

¹³³ See Cronan, *supra* note 48, at 1243 (describing what most states do); see also Schwaiger, *supra* note 63, at 1362 n.36 (same).

¹³⁴ See Cronan, *supra* note 48, at 1243 (describing discretionary nature of federal rule).

¹³⁵ See FED. R. CRIM. P. 30.

¹³⁶ See FED. R. CRIM. P. 30, n.93 (listing case law that designates written copy practice as discretionary). In *United States v. Jones*, while the court acknowledged the increased commonality of the practice, it held that the district court did not abuse its discretion when it elected not to provide written copies of jury instructions to jurors because written instructions were not required. *United States v. Jones*, 353 F.3d 816, 818 (2003). The court found the district court’s decision to be appropriate, given the relative simplicity of case, the court’s observations of jurors’ understanding of the instructions, and defendant’s lack of objection to the oral instructions. *Id.* at 818. In *United States v. Standard Oil Co.*, the court held that the district court did not abuse its discretion when it provided the jury a copy of the jury instructions because the litigation was complex and the oral delivery of the instructions to the jury took longer than an hour. *United States v. Standard Oil Co.*, 316 F.2d 884, 897 (1963). In *United States v. Johnson*, the court held that the district court did not act erroneously when it did not provide written copies of the jury instructions because the defendant did not object to the traditional method of oral delivery, nor did he make a request for written copies to be provided to the jury. *United States v. Johnson*, 466 F.2d 537, 538 (1972).

¹³⁷ See Cronan, *supra* note 48, at 1243 (noting that some federal courts deem practice to be desirable). In *McDaniel v. United States*, the court affirmed the lower court decision not to provide written copies; however, it stated, “it is frequently desirable that instructions which have been reduced to writing be not only read to the jury, but also handed to the jury.” *McDaniel v.*

on these rulings, many states adopt Federal Rule of Criminal Procedure 30 and thus, make the practice discretionary.¹³⁸

c. *Sample of States Where Distribution of Written Copies of Jury Instructions is Mandatory: Colorado and Wisconsin*

A significant portion of states mandates the submission of written copies of jury instructions to jurors for their use in the jury room.¹³⁹ Two of those states are Colorado and Wisconsin.¹⁴⁰

i. Colorado

Colorado is one of the states where distribution of written copies of jury instructions to jurors is mandatory.¹⁴¹ Colorado Criminal Procedure Rule 30 explicitly states that copies of jury instructions must be provided for jurors to take with them when they retire to deliberate.¹⁴² Case law in

United States, 343 F.2d 785, 789 (1965). In *United States v. Perez*, Justice Fay, concurring with the majority opinion, noted "the practice of furnishing a copy of the court's instructions to the jury is both sound and proper." *United States v. Perez*, 648 F.2d 219, 224 (1981). Further, several courts have suggested that furnishing written copies of jury instructions is particularly appropriate in complex cases. See *United States v. Calabrese*, 645 F.2d 1379, 1388 (1981) ("Giving the jury a copy of the instructions is desirable in complex cases" (citations omitted)); see also *Standard Oil Co.*, 316 F.2d at 896 (suggesting as litigation grows in complexity, helpful for jurors to have written copies).

¹³⁸ See Cronan, *supra* note 48, at 1243-44 (explaining that most states either mandate submission or written instructions or mirror discretionary federal rule).

¹³⁹ See, e.g., ALASKA R. CRIM. P. 30(a) ("The instructions must be reduced to writing and read to the jury and must be taken to the jury room by the jury."); ARIZ. R. CRIM. P. 21.3(d) ("The court's preliminary and final instructions on the law shall be in written form and a copy of the instructions shall be furnished to each juror before being read by the court."); FLA. R. CRIM. P. 3.400(b) ("The court must provide the jury, upon retiring for deliberation, with a written copy of the instructions given to take to the jury room."); IDAHO CRIM. R. 30(b) ("The written instructions, or a copy thereof, shall be given to each juror to take when the jury retires for deliberation."); MO. SUP. CT. R. 28.02(e) ("The original of all numbered instructions and all verdict forms shall be handed to the jury for its use during its deliberation and shall be returned to the court and filed at the conclusion of the jury's deliberation."); WASH. SUP. CT. CRIM. R. 6.15(e) ("After argument, the jury shall retire to consider the verdict. The jury shall take with it the instructions given, all exhibits received in evidence and a verdict form or forms.").

¹⁴⁰ See, e.g., COLO. CRIM. P. 30 ("Before argument the court shall read its instructions to the jury . . . and they shall be taken by the jury when it retires."); WIS. STAT. § 972.01 (2014) ("[C]harging the jury and giving instructions . . . shall be the same in criminal as in civil actions . . ."); WIS. STAT. § 805.13(4) (2014) ("The court shall provide the jury with one complete set of written instructions providing the burden of proof and the substantive law to be applied to the case to be decided.").

¹⁴¹ See Cronan, *supra* note 48, at 1243 n.449 (listing states that mandate written copies of jury instructions).

¹⁴² See COLO. CRIM. P. 30. Colorado Rule of Criminal Procedure 30 states, "instructions [to

Colorado—including some cases from almost one hundred and fifty years ago—animates this state rule of procedure.¹⁴³ In fact, Colorado courts have long held that failure to submit written copies of jury instructions to the jury is error by the trial court.¹⁴⁴

For example, in *Gile v. People*,¹⁴⁵ the Colorado Supreme Court reversed the conviction of the petitioner due in part to the error of the trial judge regarding the administration of jury instructions.¹⁴⁶ After the trial judge had provided the written copies of the instructions to the jury, he added subsequent oral instructions, which were not included in the written copy.¹⁴⁷ The court, explaining the purpose of the provision for written copies of jury instructions, stated, “[o]ne object of the statute [mandating the reduction of jury instructions to writing] is that the jury may have all the instructions before them when they retire to consider their verdict” because without copies of the instructions in the deliberation room, “they would be . . . liable to forget them.”¹⁴⁸ This case exemplifies the state of Colorado’s tenet that failure to provide jurors with jury instructions in writing is judicial error.¹⁴⁹

ii. Wisconsin

Like Colorado, Wisconsin also mandates the provision of written copies of jury instructions to jurors.¹⁵⁰ Wisconsin state law regarding jury

the jury] may be read to the jury and commented upon by counsel during the argument, and they shall be taken by the jury when it retires.” COLO. CRIM. P. 30 (emphasis added).

¹⁴³ See COLO. CRIM. P. 30, n.III (listing case names and summaries that explain written copy provision). In *Dorsett v. Crew*, a civil case before the Supreme Court of Colorado, the defendant appealed the decision of the trial court to allow a creditor to collect on a promissory note. *Dorsett v. Crew*, 1 Colo. 18, 18-19 (1864). The court held that the trial court committed fatal error by failing to submit all of the jury instructions to the jury in writing. *Id.* at 21-22.

¹⁴⁴ See *Nieto v. People*, 415 P.2d 531, 533 (1966) (“It was serious error for the trial court to deal with the . . . instruction as it did. All instructions must be submitted to the jury in writing. Failure to do so has always been held in this state to be error.” (citations omitted)).

¹⁴⁵ 1 Colo. 60 (1867).

¹⁴⁶ See *id.* at 61-62 (stating holding and reasoning).

¹⁴⁷ See *id.* at 60-61 (iterating facts of case).

¹⁴⁸ See *id.* at 61 (pinpointing purpose for statutory practice of furnishing written copies).

¹⁴⁹ See *Nieto*, 415 P.2d at 533 (calling failure to provide written copies “serious error”).

¹⁵⁰ See WIS. STAT. § 805.13(4) (2014) (outlining civil procedure in state regarding written copies of jury instructions); WIS. STAT. § 972.01 (2014) (designating state’s corresponding rule of civil procedure as authority for criminal procedure regarding jury instructions). Wisconsin Statute section 805.13(4) states, “[t]he court shall provide the jury with one complete set of written instructions providing the burden of proof and the substantive law to be applied to the case to be decided.” WIS. STAT. § 805.13(4). Wisconsin Statute section 972.01—section 805.13’s criminal counterpart—explicitly states, “charging the jury and giving instructions . . . shall be the same in criminal as in civil actions . . .” WIS. STAT. § 972.01.

instructions obligates trial judges to submit written copies of jury instructions to the jury.¹⁵¹ In 1884, the Supreme Court of Wisconsin held that the practice of allowing a jury to take copies of the court's written instructions with them to the deliberation room was a proper practice, it was not prejudicial to either party, and it benefitted the jury, who did not have to rely solely on their memory of the terms used during the jury charge.¹⁵²

d. Sample of States where Special Rules Govern the Distribution of Written Copies of Jury Instructions: Louisiana and Tennessee

i. Louisiana

Louisiana is a state that mandates submission of written copies of jury instructions to jurors only under special circumstances.¹⁵³ In criminal trials in Louisiana, a written copy of jury instructions must be provided to the jury, but only if both the prosecution and the defendant agree in open court to the practice.¹⁵⁴ In *State v. Henix*,¹⁵⁵ the Court held that the trial court erred in providing written copies of jury instructions to the jury without the consent of both parties.¹⁵⁶

¹⁵¹ See WIS. STAT. § 805.13(4) (2014) (outlining civil procedure in state regarding written copies of jury instructions); WIS. STAT. § 972.01 (2014) (designating state's corresponding rule of civil procedure as authority for criminal procedure regarding jury instructions).

¹⁵² See *Loew v. State*, 19 N.W. 437, 439 (Wis. 1884) (permitting jury to take to room written charge in manslaughter case). Wisconsin has a long tradition of allowing juries to take written copies of jury instructions into the deliberation room, dating back to 1870. See *Wood v. Aldrich*, 25 Wis. 695, 696 (1870) ("The fact that the jury were permitted to take with them the written charge of the judge when they retired, furnished no reason for a new trial . . . [i]f there is no error in it, there seems no reasonable ground for objecting to the jury's being allowed to examine it . . . during their deliberations."). Almost one hundred and fifty years ago, *Wood* addressed the basic rationale undergirding the practice of submitting written copies of jury instructions: "[t]he only result of allowing [the jury] to examine [the instructions] for themselves would seem to be, that they would know more thoroughly its precise terms than they could if compelled to trust entirely to recollection after hearing it read once. This can work no prejudice to either party." *Id.* at 696.

¹⁵³ See *Cronan*, *supra* note 48, at 1243 (citing Louisiana as state that has specific rules).

¹⁵⁴ See *id.* (stating rule). The Louisiana rule of criminal procedure that sets out jury instructions procedure states, "[a]fter such written charge is read to the jury, a copy of the written charge shall be delivered to the jury if such delivery is consented to by both the defendant and the state in open court but not in the presence of the jury." LA. CODE CRIM. PROC. ANN. art. 801(b)(1) (2014).

¹⁵⁵ 73 So. 3d 952 (La. Ct. App. 2011).

¹⁵⁶ See *id.* at 957 (agreeing with defendant's argument that trial court erred regarding written copies of jury instructions). However, the court did not reverse the defendant's conviction of driving while intoxicated because he did not preserve the objection on the trial court record. *Id.* at 958.

Similarly, in *State v. Joseph*,¹⁵⁷ the defendant challenged his armed robbery conviction by claiming error because written copies of jury instructions were submitted to the jury over his objection.¹⁵⁸ The court analyzed the legislative history of Louisiana Code of Criminal Procedure Articles 801 and 808, and concluded that prior to amendments to the rules in 2001, the practice of submitting written jury instructions to jurors was prohibited in Louisiana.¹⁵⁹ The court held that the trial court did err in sending written copies of jury instructions to jurors over the objection of the defendant; however it also held that the error did not warrant reversal.¹⁶⁰

ii. Tennessee

Tennessee is another state that delineates specific procedures regarding the provision of written copies of jury instructions.¹⁶¹ Tennessee mandates state judges to provide written copies of jury instructions in felony criminal cases.¹⁶² The Tennessee Supreme Court notes several reasons for mandating the practice of providing written copies of jury instructions to jurors in felony prosecutions: to alleviate misunderstanding, to secure a sound explanation of the law, to expedite trials, and to avoid the expense and inconvenience appeals and mistrials.¹⁶³ Tennessee case law reflects the

¹⁵⁷ 875 So. 2d 1011 (La. Ct. App. 2004).

¹⁵⁸ See *id.* at 1012, 1014-15 (stating defendant's conviction and claims).

¹⁵⁹ See *id.* at 1015-17 (describing legislative history); see also LA. CODE CRIM. PROC. ANN. art. 808 (2014) (describing procedure for providing jury with more information after it retires).

¹⁶⁰ See *id.* at 1017 (stating holding). Citing case law holding that the submission of written copies of jury instructions is proper, the court held that prior to the prohibition of the practice in Louisiana, written copies of jury instructions were not held to affect a defendant's substantial rights. *Id.* Following this reasoning, the *Joseph* court held harmless error because the practice did not affect the defendant's substantive rights to the point of reversal. *Id.*

¹⁶¹ See Cronan, *supra* note 48, at 1243 (naming Tennessee as one state that employs specific rules).

¹⁶² See *id.* (describing Tennessee rule); see also TENN. R. CRIM. P. 30(c). Subsection (c) of Tennessee Rule of Criminal Procedure 30 states, "[i]n the trial of all felonies . . . every word of the judge's instructions shall be reduced to writing before being given to the jury. The written charge shall be read to the jury and taken to the jury room by the jury when it retires to deliberate." TENN. R. CRIM. P. 30(c). The rule further states, "[t]he jury shall have possession of the written charge during its deliberations." TENN. R. CRIM. P. 30(c).

¹⁶³ See *Manier v. State*, 65 Tenn. 595, 603-04 (1872) (noting importance of practice in achievement of fair trial); see also *Duncan v. State*, 66 Tenn. 387, 388 (1874) ("The primary object of the law is to have the charge so delivered that there can be no misunderstanding between the court and counsel as to the instructions given to the jury, and none by the jury."); *State v. Bungardner*, 66 Tenn. 163, 165 (1874) ("It has always been a most serious practical objection to trial by jury, that, being unlearned in the law, unfamiliar with its technical language and its rules, juries are almost of necessity liable to have but an indistinct recollection of what was given them in charge by the court.").

view that the practice of providing written copies of jury instructions to jurors as more than a useful reform; it is a critical element of criminal trials.¹⁶⁴ In *State v. Gorman*,¹⁶⁵ the Tennessee Supreme Court held that “[i]t was error for the trial judge to violate the requirements of [Tennessee Rule of Criminal Procedure 30(c)] in failing to submit ‘every word’ of his charge to the jury in written form.”¹⁶⁶ Likewise, in *McElhaney v. State*,¹⁶⁷ the court reversed a second-degree murder conviction because the trial judge committed reversible error when he did not fulfill his duty of submitting the jury instructions to the jury in writing.¹⁶⁸

e. States that Prohibit—or Formerly Prohibited—the Provision of Written Copies of Jury Instructions

i. The Modern Trend

In 1979, there were seven states that expressly prohibited the submission of written copies of jury instructions to jurors.¹⁶⁹ However, a number of these states have changed their laws regarding the practice.¹⁷⁰ For example, West Virginia previously prohibited the practice; however, today, the practice is left to the discretion of the trial judge.¹⁷¹ Further demonstrating the trend toward recognizing the benefits of the practice, in *State v. Lutz*,¹⁷² the Supreme Court of Appeals of West Virginia held that it was reversible error for the trial court judge to deny the defendant’s motion to reinstruct the jury after the jury expressed its confusion, requested a written

¹⁶⁴ See *State v. Hamm*, 611 S.W.2d 826, 829-30 (Tenn. 1981) (citing mandatory nature of law). In *Hamm*, the Tennessee Supreme Court reversed the petitioner’s conviction because the trial court failed to follow the rule, which requires “‘every word’ of the oral instruction to go to the jury in written form.” *Hamm*, 611 S.W.2d at 830. Despite the state’s argument that the omitted portion of the oral charge at issue was in substance the same as the instructions that were in the written copy, the court held that the trial judge committed harmful error because the discrepancy in the instructions more probably than not affected the judgment. *Id.*

¹⁶⁵ 628 S.W.2d 739 (Tenn. 1982).

¹⁶⁶ See *id.* at 739 (demonstrating strict adherence to submitting jury charge verbatim to jury in written form).

¹⁶⁷ 420 S.W.2d 643 (Tenn. 1967).

¹⁶⁸ See *id.* at 647 (emphasizing mandatory nature of submission of written charge to jury).

¹⁶⁹ See NIELAND, *supra* note 62, at 1-2 (listing states that prohibited written copies of jury instructions).

¹⁷⁰ See, e.g., LA. CODE CRIM. PROC. ANN. art. 801(b)(1) (2014); PA. R. CRIM. P. 646(B); MINN. R. CRIM. P. 26.03 subdiv. 20(1).

¹⁷¹ See W. VA. R. CRIM. P. 30 (“The court may show the written instructions to the jury and permit the jury to take the written instructions to the jury room.”)

¹⁷² 395 S.E. 2d 478 (W. Va. 1988).

copy of the jury instructions, and the judge denied its request.¹⁷³

ii. Alabama

Unlike other states that have reversed the prohibition on written copies of jury instructions, Alabama partially retains the prohibition.¹⁷⁴ Alabama Rule of Criminal Procedure 21.1 reads, “[n]either a copy of the charges against the defendant nor the ‘given’ written instructions shall go to the jury room; provided, however, that the court may, in its discretion, submit the written charges to the jury in a complex case.”¹⁷⁵ The Alabama Court of Criminal Appeals addressed the exception to the prohibition in *Johnson v. State*.¹⁷⁶ The Court held that the trial court judge did not abuse his discretion when he sent a copy of the written instructions with the jury to the deliberation room because this case, where the defendant was charged with capital murder, was complex and it was in his discretion to send written copies of the jury instructions in complex cases.¹⁷⁷

f. *Massachusetts: A Sample State for the Discretionary Rule*

In Massachusetts, the practice of distributing written copies of jury instructions is merely discretionary.¹⁷⁸ Much like its federal counterpart, there is no mention of the distribution of written copies of jury instructions to juries in Massachusetts Rule of Criminal Procedure 24.¹⁷⁹ Case law supports leaving to the judge’s sound discretion the question of whether to submit written copies of jury instructions.¹⁸⁰ From this designation of discretionary, some trial court judges in Massachusetts regularly provide written copies of jury instructions to jurors, while others do not.¹⁸¹

The Massachusetts Supreme Judicial Court (SJC) deemed the prac-

¹⁷³ See *id.* at 479 (reversing because judge committed reversible error when failed to re-instruct after knowledge of juror confusion).

¹⁷⁴ See ALA. R. CRIM. P. 21.1 (stating rule regarding instructions to jury).

¹⁷⁵ See *id.* (outlining details of rule).

¹⁷⁶ 120 So. 3d 1130 (Ala. Crim. App. 2009).

¹⁷⁷ See *id.* at 1156 (holding no plain error in sending instructions).

¹⁷⁸ See MASS. R. CRIM. P. 24; see also Cronan, *supra* note 48, at 1243 (stating some states leave submission to judge’s discretion).

¹⁷⁹ See MASS. R. CRIM. P. 24(b) (stating jury instructions procedure in criminal cases).

¹⁸⁰ See *Commonwealth v. Walker*, 861 N.E.2d 457, 466 (Mass. App. Ct. 2007) (“The content and manner of delivery of jury instructions is ultimately a matter that must be left to the discretion of the trial judge.”).

¹⁸¹ See Interview with Judge Borenstein, *supra* note 52 (stating that he did regularly though not all Massachusetts Superior Court judges do).

tice of submitting jury instructions to the jury in writing as permissible.¹⁸² Furthermore, the SJC held that a judge may utilize this practice without the consent of the parties.¹⁸³ Similarly, in *Commonwealth v. Guy*,¹⁸⁴ the defendant appealed his first-degree murder conviction, claiming in part that the judge erred in providing written copies of the jury instructions without the consent of both parties.¹⁸⁵ The SJC held that a trial court judge does not need the consent of both parties before he or she submits the instructions to the jury in writing because it is within his or her sound discretion, as long as the procedure is reasonable.¹⁸⁶ However, with over 950 gross criminal appeals in Massachusetts in fiscal year 2013 and error in instructing the jury as the most common reason for appeal, reasonableness is not enough; a change from the discretionary to the mandatory provision of written copies of jury instructions in Massachusetts is warranted and necessary.¹⁸⁷

V. ANALYSIS

It should be mandatory for all trial court judges in Massachusetts to prepare and submit written copies jury instructions to jurors for their use during deliberations of criminal trials because the practice is successful at reducing juror confusion.¹⁸⁸ The right to a trial by jury has a deep-rooted and precious place in this country's history.¹⁸⁹ Jury trials are not only a cornerstone of American society, but are also a fundamental constitutional

¹⁸² See *Commonwealth v. Dilone*, 431 N.E.2d 576, 581 n.2 (Mass. 1982) ("We would endorse any reasonable procedure by which all or portions of a judge's charge agreed to by the parties are made available in writing to a jury.").

¹⁸³ See *Commonwealth v. DiBenedetto*, 693 N.E.2d 1007, 1013 (Mass. 1998) (holding judge did not err in providing instructions in writing). In *Commonwealth v. DiBenedetto*, the defendants appealed their first-degree murder convictions in part because of the judge's use of a blackboard as an illustrative tool during the jury charge, claiming that when delivering his instructions to the jury, the judge overemphasized the elements of murder. *Id.* The SJC found that the defendants did consent to the use of the blackboard as a form of providing written instructions to the jury; however, even if they had not consented to the blackboard, the trial court judge did not err because its use was a reasonable procedure for delivering the charge to the jury. *Id.*

¹⁸⁴ 803 N.E.2d 707 (Mass. 2004).

¹⁸⁵ See *id.* at 718 (describing defendant's claim regarding written jury instructions).

¹⁸⁶ See *id.* at 718-19 (stating holding).

¹⁸⁷ See *Appeals Court Case Statistics*, MASS.GOV, <http://www.mass.gov/courts/court-info/appealscourt/about-the-appeals-court/appeals-court-case-statistics.html> (last visited May 22, 2014) (listing Massachusetts Appeals Court statistics); *supra* note 63 and accompanying text (discussing error in instructing juries as common reason for appeal).

¹⁸⁸ See *supra* Part III.B.-D (explaining juror confusion and written copies of instructions as method of quelling confusion).

¹⁸⁹ See *supra* notes 17, 25-32 and accompanying text (discussing importance of right to trial by jury in American jurisprudence).

guarantee.¹⁹⁰ In order for a criminal defendant's constitutional due process rights to be fulfilled, he or she must be tried by a competent jury.¹⁹¹

There are many trial practices that can help insure that a jury deciding a defendant's fate is competent; one of those practices is effectively instructing of the jury.¹⁹² Instructing the jury is an important aspect of trial and there are numerous procedures trial judges may use in order to effectively instruct on the substantive law.¹⁹³ The Federal Rule of Criminal Procedure 30 lays out requirements that aim to achieve effective instruction.¹⁹⁴

Despite the recognized importance of juror competence and comprehension, empirical studies and anecdotal cases have demonstrated that juror confusion over jury instructions is a prevalent problem in the American jury system.¹⁹⁵ There are a number of ways to reduce juror confusion, including allowing jurors to take notes, writing jury instructions in "plain language," and utilizing pattern jury instructions.¹⁹⁶ One method has proven to reduce juror confusion to such a degree that some state legislatures have codified the practice in their rules of criminal procedure: the submission of written copies of instructions to jurors for their use during deliberations.¹⁹⁷

The advantages of providing written copies of jury instructions to jurors are numerous.¹⁹⁸ The oral delivery of instructions is aided by a written copy, so jurors have the ability to retain and comprehend more information contained within the jury charge.¹⁹⁹ With written copies of jury instructions, jurors deliberate more efficiently and thoroughly, they feel more

¹⁹⁰ See *supra* notes 30-31 and accompanying text (citing United States and Massachusetts Constitutions where right to trial by jury is codified).

¹⁹¹ See *supra* notes 98-100 and accompanying text (explaining that written copies of jury instructions is one method of ensuring defendant's constitutional rights).

¹⁹² See *supra* notes 98-100 and accompanying text (discussing jury instructions as vehicle for ensuring constitutional rights).

¹⁹³ See *supra* notes 49-50 and accompanying text (identifying methods of instructing jury and what certain instructions include).

¹⁹⁴ See FED. R. CRIM. PROC. 30 (setting out jury instructions requirements); see also *supra* note 51 and accompanying text (identifying Federal Rule of Criminal Procedure 30 as indicator of procedure regarding jury instructions).

¹⁹⁵ See *supra* notes 56, 66, 83, 117 and accompanying text (providing anecdotal and empirical information about jury confusion).

¹⁹⁶ See Part III.C (describing multiple methods of jury reform).

¹⁹⁷ See Part III.D (identifying written copies of jury instructions as method to reduce juror confusion).

¹⁹⁸ See Parts III.D and E (demonstrating that written copies are effective tool and listing ease and advantages of practice).

¹⁹⁹ See *supra* notes 83, 93 and accompanying text (describing slowing effect written copies have on jurors' processing mechanisms).

confident with their verdicts, and they enjoy jury service more.²⁰⁰ Court time and resources are wasted less frequently when written copies of jury instructions are utilized because jurors ask less questions of the court, erroneous verdicts are less likely occur, and appeals and mistrials are reduced.²⁰¹ Finally, written copies of jury instructions aid in the protection of a criminal defendant's due process rights because they elevate a jury's competency and reduce its confusion.²⁰²

Some trial court judges have reservations about providing written copies of jury instructions to jurors.²⁰³ These reservations may account for why the practice is discretionary in some states, such as in Massachusetts.²⁰⁴ However, these concerns are quieted by the benefits of this powerful tool.²⁰⁵ If a complete set of balanced and accurate jury instructions are delivered to jurors in writing during every criminal jury trial, jurors will be less likely to misinterpret the instructions, overemphasize portions of the jury charge, overemphasize their notes, and be confused.²⁰⁶ Any inconvenience that may be experienced when preparing the written copy can be alleviated via the use of jury instruction templates, word processors, and an early schedule for jury instruction construction.²⁰⁷

As discussed above, attorneys should utilize the benefits of written copies of jury instructions by requesting the provision of the written copies to the jury either by motion or by request during the jury charge conference.²⁰⁸ During the jury charge conference, the attorneys present the judge with their proposed jury instructions and make formal objections regarding the instructions.²⁰⁹ Attorneys should pay close attention when drafting their proposed jury instructions, and, during the jury charge conference or via written motion, they should formally request the provision of written copies

²⁰⁰ See *supra* notes 89-93 and accompanying text (explaining advantages of written copies).

²⁰¹ See *supra* notes 71, 89-93 and accompanying text (identifying benefits of written copies and citing juror confusion as cause of erroneous verdicts).

²⁰² See *supra* notes 98-100 and accompanying text (advocating for use of written copies to help guarantee constitutional rights).

²⁰³ See *supra* Part III.E (identifying perceived disadvantages of practice).

²⁰⁴ See MASS. R. CRIM. P. 24 (making rule discretionary); see also *supra* Part III.E. (reasoning why practice may not be universal).

²⁰⁵ See *supra* Part III.E (addressing perceived disadvantages).

²⁰⁶ See *supra* Parts III.D-E (citing major advantages of practice).

²⁰⁷ See *supra* notes 112-13 and accompanying text (providing solutions to reduce inconvenience).

²⁰⁸ See *Pray*, 869 F. Supp. 2d at 50 (indicating that party requested written copies of additional instructions via motion); Solowey, *supra* note 102 (providing advice for jury charge conferences).

²⁰⁹ See Solowey, *supra* note 102 (describing jury charge conferences).

of jury instructions to jurors.²¹⁰ If the judge denies the request to provide the jurors with written copies of jury instructions, attorneys should formally object during the jury charge conference or at the hearing on the motion.²¹¹

Massachusetts Rule of Criminal Procedure 24 does not mention the submission of written copies of jury instructions.²¹² Case law holds that the practice is discretionary; however, this creates inconsistency in juror comprehension among jurors and the level of juror confusion depends on which judge is presiding.²¹³ Many states explicitly mandate the practice in their various rules of criminal procedure; thus, juror comprehension in those states is increased by way of the mandatory and uniform nature of the practice.²¹⁴ Based on the large body of research concluding that an oral delivery of jury instructions is not conducive to either recall or comprehension, the conclusion can be drawn that jury confusion exists in the courtrooms in Massachusetts that do not employ the practice of providing written copies of jury instructions to jurors for their use during deliberations.²¹⁵

One simple way to decrease juror confusion in criminal jury trials in Massachusetts is to mandate the submission of at least one written copy of jury instructions to jurors for their use during deliberations.²¹⁶ For trial court judges who have already incorporated the practice into their criminal jury trial procedure, little or no change will occur; however, for those judges who have not yet incorporated the practice, their courtroom procedure should only be minimally disturbed.²¹⁷ Further, this practice is applicable to civil jury trials as well, and can be just as easily implemented.²¹⁸ However, without increased requests for this practice by attorneys, increased objections when the practice is not used, and an addition to Massachusetts Rule of Criminal Procedure 24 mandating the practice, the risk of juror

²¹⁰ See Cronan, *supra* note 48, at 1196 (pointing out problem of attorneys' lack of attention when drafting jury instructions); Solowey, *supra* note 102 (outlining best practices for jury charge conferences).

²¹¹ See Solowey, *supra* note 102 (highlighting objection opportunities during jury charge conference).

²¹² See *supra* Part IV.F (outlining practice in Massachusetts); see also MASS. R. CRIM. P. 24 (detailing rule).

²¹³ See *supra* Part IV.F (discussing cases holding practice discretionary).

²¹⁴ See *supra* Part IV. (describing various state procedures).

²¹⁵ See *supra* notes 65-68 and accompanying text (discussing diminished rate of recall and retention of information if only oral delivery).

²¹⁶ See *supra* Part III.D (explaining practice of written copies of jury instructions as way to reduce juror confusion).

²¹⁷ See Interview with Judge Borenstein, *supra* note 52 (opining that practice was not difficult to adopt).

²¹⁸ See Interview with Judge Borenstein, *supra* note 52 (advocating for extension of mandatory practice to civil jury trials).

confusion in Massachusetts will continue to exist.²¹⁹

VI. CONCLUSION

The right to a trial by jury is one of the most cherished rights of American and Massachusetts citizens. In order to ensure that this right remains effective as the Massachusetts judicial system evolves, prosecutors, criminal defense attorneys, and the Massachusetts Legislature must take steps to reduce the problem of juror confusion. Juror confusion arises when jurors, who are legal novices, do not fully understand the law they are given during the jury charge. The result is erroneous convictions, appeals, and mistrials.

One simple, cost-efficient, and effective method of increasing juror comprehension is to provide juries in criminal jury trials with written copies of the jury instructions for their use during deliberations. Some judges in Massachusetts already utilize this important practice; however, not all juries are afforded the benefit of increased comprehension, and not all defendants enjoy the benefit of a competent jury because Massachusetts Rule of Criminal Procedure 24 deems the practice to be discretionary. Jury service is critical piece of the Massachusetts judicial system. The citizens of Massachusetts deserve to have a judicial system that does everything in its power to enable juries to be as informed as possible. Attorneys should regularly request the practice of providing written copies of jury instructions to jurors for their use during deliberations, they should object when the practice is not used, and the Massachusetts Legislature should mandate the practice via Massachusetts Rule of Criminal Procedure 24.

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²¹⁹ See *supra* Part III.D (citing written copies of jury instruction will reduce rates of juror confusion).