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LOST IN TRANSLATION: NEW MEXICO’S NON-ENGLISH SPEAKING JURORS AND THE RIGHT TO TRANSLATED JURY INSTRUCTIONS

By Kyle P. Duffy*

INTRODUCTION

Is it less efficient to allow non-English speaking citizens to participate in the jury system? Yes. Does it require more effort from judges and staff? Yes. Does it require more rules and jury instructions? Yes. The question remains whether less efficiency, more effort, and more instructions justify the systematic exclusion of non-English speaking citizens from our jury system. New Mexico has answered the question “no.”

- The Honorable Justice Edward L. Chávez¹

New Mexico is the only state in the country that constitutionally protects every citizen’s right to serve on a jury despite his or her ability to speak the English language.² This right is embodied in Article VII, Section 3 of our state constitution, which states that “[t]he right of any citizen of the state to . . . sit upon juries, shall never be restricted, abridged or impaired on account of . . . inability to speak, read or write the English or Spanish languages.”³ The New Mexico Supreme Court has adopted safeguards in order to implement Article VII, Section 3 and protect the right of non-English speaking (“NES”) jurors to fully participate in the judicial process. However, these rights are not absolute and must be weighed against other factors, such as the rights of the defendant and cost constraints. In *State v. Ortiz-Castillo*, the New Mexico Court of Appeals held that a NES citizen’s ability to serve as a juror was not “impaired” when the trial court refused to provide him with instructions written in Spanish since he had an interpreter accompany him to the jury room during deliberations.⁴ This Note addresses the issue of when it may be necessary to provide

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1. Edward L. Chávez, *New Mexico’s Success with Non-English Speaking Jurors*, 1 J. CT. INNOVATION 303, 315–16 (2008).

2. See Jasmine B. Gonzales Rose, *Language Disenfranchisement in Juries: A Call for Constitutional Remediation*, 65 HASTINGS L. J. 811, 820 (2014).

3. N.M. CONST. art. VII, § 3. While Article VII, Section 3 is written to apply to those who cannot speak, read, or write English or Spanish, the New Mexico Supreme Court has “construe[d] the provision to require reasonable accommodation for a language barrier posed by competency only in a language other than English.” *State v. Rico*, 2002-NMSC-022, ¶ 11, 52 P.3d 942.

4. See *State v. Ortiz-Castillo*, 2016-NMCA-045, ¶¶ 17–18, 370 P.3d 797.

written translated instructions for an NES juror in order to avoid “impairing” his or her constitutional right to fully participate.

Part I will begin by exploring the unique history of New Mexico and its protections for jurors who cannot speak English. This part will also give a brief overview of the development of jury instructions and the modern practice of providing jurors with a set of written instructions.

Part II will discuss the seminal case *State v. Rico*, in which the New Mexico Supreme Court first addressed some of the specific procedural measures a trial court must take in order to safeguard the rights of potential NES jurors. This Part will also summarize the facts, background, and analysis of *Ortiz-Castillo*, the recent New Mexico Court of Appeals opinion that addressed whether NES jurors are entitled to a translated copy of the jury instructions.

Part III will investigate some of the major benefits of providing written instructions that the *Ortiz-Castillo* court did not fully consider and how a lack of instructions may “impair” an NES juror’s ability to fully participate. This Part will begin by briefly reviewing some of the previous legal scholarship testing the benefits of written instructions. Next, this Part will analyze some of the intrinsic benefits of presenting material in a written format. This Part will rely heavily on studies and research from the field of cognitive psychology, which focuses on the mental processes involved when individuals are presented with new material such as jury instructions. These studies demonstrate that presenting new information in a written form can have a significant impact on an individual’s comprehension, attention, and short-term recall of jury instructions. This part will also discuss the inherent limitations of contemporaneous oral interpretations and the resulting clarity that may be achieved by providing court officials with time to translate written instructions. In addition, this part will address how NES jurors are effectively prevented from serving as foreperson without a written set of translated instructions.

Part IV will outline some of the factors that trial courts should consider in the future when determining if an NES juror’s ability to fully participate will be “impaired” without written translated instructions. Unlike the *Ortiz-Castillo* court’s broad conclusion, these factors will take into account the specific costs and issues presented in each case and allow the trial court to better determine if written translated instructions are necessary.

Finally, Part V will discuss the cost implications of providing written instructions in multiple languages. Admittedly, this will place a large burden on an already strained state budget.⁵ However, some long-term cost saving measures can be implemented, such translating the New Mexico Civil and Criminal Uniform Jury Instructions en masse. Despite the costs, this Note concludes that courts may be constitutionally mandated to provide written translated jury instructions in order to avoid impairing the NES citizen’s right to fully participate.

5. See N.M. JUDICIARY ADMIN. OFFICE OF THE COURTS, NEW MEXICO LANGUAGE ACCESS REPORT AND PLAN JULY 1, 2015–JUNE 30, 2017, at 23 (2015) [hereinafter LANGUAGE ACCESS REPORT] (“The operating budget for FY16 is \$3,158,200 and the estimated need is \$3,433,600.”).

I. BACKGROUND

A. NES Citizens Ability to Participate as Jurors

As mentioned earlier, New Mexico is the only state with a constitutional provision protecting NES citizen's right to serve on juries. In contrast, all federal courts and most state courts exclude NES citizens from jury service.⁶ This unique constitutional protection was the result of New Mexico's history as a Spanish territory and its large population of Spanish speaking citizens. Almost none of the population understood any English when the territory of New Mexico was annexed from the Republic of Mexico in 1846.⁷ The New Mexico Supreme Court first recognized the need to protect Spanish-speaking population's right to serve in the seminal case *Territory v. Romine*, where the jury panel was composed entirely of Mexicans who only spoke Spanish.⁸ The court rejected the appellant's claim that he was entitled to a jury who understood English, stating that "[a]part from the impracticability of obtaining English speaking juries, it would have been manifestly unjust to the great majority of the people of the territory, had such a requirement as to language been made."⁹

Although the population has since changed drastically, New Mexico still has a large number of NES citizens. Approximately half of state's population is Hispanic.¹⁰ Nearly one out of every ten persons in the New Mexico speak English less than "well" and one out of twenty do not speak any English.¹¹ However, the NES population of New Mexico includes much more than just Spanish speakers. Court interpreters in New Mexico have been used to assist veniremen and jurors who speak languages such as: Apache, Arabic, American Sign Language, Cantonese, Chinese, Farsi, French, German, Gujarati, Hindi, Italian, Japanese, Keres, Korean, Laotian, Navajo, Tagalog, Russian, and Vietnamese.¹²

NES citizens serve on juries every year, although some districts are more heavily impacted than others. For example, the largest district court in New Mexico, located in Albuquerque, only required interpreters for 30 out of 4,533 potential jurors from July 2007 to April 2008.¹³ However, other judicial districts closer to the Mexican border have a higher rate of NES juror service.¹⁴ Within a three-month period in 2008, the Third Judicial District Court in Las Cruces had 114 NES jurors appear for voir dire, and eleven jury trials went all the way to a verdict with NES

6. See Rose, *supra* note 2, at 815.

7. See *Territory v. Romine*, 1881-NMSC-010, 2 N.M. 114.

8. See *id.*

9. *Id.*

10. See *Quick Facts New Mexico*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045215/35,00> (last visited Oct. 3, 2016).

11. See CAMILLE RYAN, U.S. CENSUS BUREAU, LANGUAGE USE IN THE UNITED STATES: 2011, at 11 (2013), <https://www.census.gov/prod/2013pubs/acs-22.pdf>.

12. See Chávez, *supra* note 1, at 308. "Spanish is the most common language requiring interpreters, representing about 57 percent of non-English speaking jurors. Vietnamese is in second place, representing approximately 20% of the demand for court interpreter services." *Id.*

13. *Id.* This constitutes 0.662% of the eligible juror population in the judicial district. *Id.*

14. *Id.*

jurors.¹⁵ There have even been reports of as many as four NES citizens serving on the same jury panel in recent years.¹⁶

B. Procedural Safeguards for NES Jurors in New Mexico

New Mexico defines an NES person as anyone who: (1) cannot speak or understand the English language; (2) speaks only or primarily a language other than the English language; or (3) has a dominant language other than English, which inhibits that person's comprehension of the proceedings or communication with counsel or the presiding judicial officer[.]¹⁷

In 2000, the Committee of the Chief Justice for Improvement of Jury Service in New Mexico recommended that the Administrative Office of the Courts ("AOC") provide suggestive guidelines for state courts to follow when working with NES jurors.¹⁸ On November 15, 2000, the AOC published the *Non-English Speaking Juror Guidelines* ("NES Guidelines").¹⁹ The guidelines include provisions relating to topics such as drafting questionnaires to potential jurors, informing them of the right to an interpreter, guarding the presence of interpreters in the jury room, and balancing a juror's need for interpreting services against the constraints of the court.²⁰

Most of the NES Guidelines' provisions remain suggestive and are not binding on trial courts, although some of the provisions have subsequently been interpreted as mandatory by the New Mexico Supreme Court.²¹ One of the non-mandatory provisions particularly relevant to this Note is Section II(H), which addresses the need for interpretation of jury instructions.²² This provision states in part, "[C]ourts are encouraged to draft written, Spanish translations of the jury instructions with the assistance of a court interpreter. Alternatively, the court interpreter assigned to assist NES jurors during deliberations may provide an oral translation of the jury instructions."²³ Additionally, Section III(B)(2) provides that "[w]ritten materials that are submitted to the jury for consideration during trial or jury deliberations should be orally translated by a certified court interpreter or translated in writing by a certified court interpreter."²⁴

15. *Id.*

16. See Fernanda Santos, *As the Demand for Court Interpreters Climbs, State Budget Conflicts Grow as Well*, N.Y. TIMES (June 14, 2014), http://www.nytimes.com/2014/06/15/us/as-the-demand-for-court-interpreters-climbs-state-budget-conflicts-grow-as-well.html?_r=1.

17. NMSA 1978 § 38-10-2(C) (1985); see also Chávez, *supra* note 1, at 304.

18. See *State v. Pacheco*, 2007-NMSC-009, ¶ 30, 155 P.3d 745.

19. See Chávez, *supra* note 1, at 307.

20. See ADMIN. OFFICE OF THE COURTS, NON-ENGLISH SPEAKING JUROR GUIDELINES [hereinafter NES GUIDELINES] (located in appendix of Chávez, *supra* note 1, at 317).

21. See *Pacheco*, 2007-NMSC-009, ¶ 32.

22. NES GUIDELINES, *supra* note 20, at § II(H).

23. *Id.*

24. *Id.* at § III(B)(2).

C. Evolution of Jury Instructions

Jury instructions have developed into one of the most important features of the American legal system. They are used as a tool to guide jurors in the deliberative process and ultimately decide the outcome of every jury trial. Jury instructions tell the jurors how to evaluate evidence presented at trial and determine the credibility of witnesses.²⁵ They also define elements of the crimes or charges and specify the requisite standards of proof necessary to find the defendant guilty.²⁶

American judges originally did not instruct jurors on the law; jurors were simply expected to use common sense.²⁷ However, as the country developed and the laws became more complex, judges began giving instructions to help lay people understand the legal concepts.²⁸ During this period, judges would often draft new sets of instructions for each jury trial, which often resulted in inconsistent and faulty instructions that would lead to reversal upon appeal.²⁹

Beginning in the 1930's, many of the states started adopting standard pattern jury instructions to eliminate the need to write new instructions for each jury trial.³⁰ New Mexico did not implement uniform instructions until 1962, for civil instructions, and 1972 for criminal instructions.³¹ Yet the primary purpose of these original pattern jury instructions was not to make the instructions more comprehensible, but to adopt language to which higher courts or the legislature had "given its stamp of approval."³² These instructions often quoted verbatim the wording of statutes or appellate opinions, which were intended to be read by lawyers and other judges, not the average citizen.³³ Consequently, jurors experienced great difficulty comprehending the meaning of many of the pattern instructions.³⁴ One prominent study found that jurors on average only understood one half of standard uniform instructions.³⁵

In the late 1970's and early 1980's, states began to charge committees with re-drafting jury instructions into plain language.³⁶ This was primarily accomplished by removing legal jargon, avoiding double negatives, using the active voice, and

25. See Peter W. English & Bruce D. Sales, *A Ceiling or Consistency Effect for the Comprehension of Jury Instructions*, 3 PSYCHOL., PUB. POL'Y, & L. 381, 382 (1997).

26. See *id.*

27. Peter Tiersma, *The Rocky Road to Legal Reform: Improving the Language of Jury Instructions*, 66 BROOK. L. REV. 1081, 1083 (2000).

28. See *id.*

29. See Jeannine Turgeon & Elizabeth A. Francis, *Improving Pennsylvania's Justice System Through Jury System Innovations*, 18 WIDENER L. J. 419, 422 (2009).

30. See *id.* at 423.

31. See Civ. History NMRA; Crim. Foreword NMRA.

32. Tiersma, *supra* note 27, at 1084.

33. See *id.*

34. See Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCHOL., PUB. POL'Y, & L. 589, 591 (1997).

35. See Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306, 1316 (1979).

36. See Nancy S. Marder, *Bringing Jury Instructions into the Twenty-First Century*, 81 NOTRE DAME L. REV. 449, 475 n.105 (2006).

writing in short sentences.³⁷ Undoubtedly, the plain language movement significantly improved the average juror's ability to comprehend the law and their role as fact-finder.³⁸

Despite this, many studies focusing on re-drafted plain language instructions found that jurors still struggle with comprehension.³⁹ Some commentators believe that re-writing jury instructions is a pointless task, as it is the law itself which is incomprehensible.⁴⁰ For instance, many instructions necessitate the use vague terms or abstract concepts with no references to how it applies to the specific facts of the case.⁴¹ Other instructions contain several subparts that must be considered together in order to be properly understood.⁴² There are also instructions that necessitate separate instructions just to define terms contained in the first instruction.⁴³ Research also indicates that instructions regarding traditional criminal instructions such as presumption of evidence, circumstantial evidence, state of mind, and the standard of proof are especially difficult for jurors to comprehend.⁴⁴ As a result, even the current plain language jury instructions present difficulties for juror comprehension.

D. Development of Written Instructions

Written jury instructions have become a valuable tool used by most modern courts. Historically, written instructions were actually avoided in order to prevent

37. See *id.* at 477.

38. See English & Sales, *supra* note 25, at 383.

39. See John P. Cronan, *Is Any of this Making Sense? Reflecting on Guilty Pleas to Aid Criminal Juror Comprehension*, 39 AM. CRIM. L. REV. 1187, 1238-39 (2002) (referring to several prominent studies on the effectiveness of plain language reform); English & Sales, *supra* note 25 at 383; Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 LAW & SOC'Y REV. 153, 194 (1983) ("While our findings demonstrate the value of using psycholinguistic principles to rewrite pattern jury instructions, the measures reveal that considerable numbers of errors in comprehension and application remain even with the revised instructions."); J. Alexander Tanford, *The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 82 (1990); Richard L. Wiener et al., *Comprehensibility of Approved Jury Instructions in Capital Murder Cases*, 80 J. APPLIED PSYCHOL. 455, 464 (1995).

40. See Tanford, *supra* note 39, at 102.

41. See *id.* at 82; see e.g., UJI 14-5060 NMRA (describing the standard of reasonable doubt as "a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act in the graver and more important affairs of life.").

42. See e.g., UJI 13-832 NMRA (instructing jury on good faith and fair dealing in breach of contract cases); UJI 13-1420 NMRA (instructing jury on *res ipsa loquitur* in products liability cases); UJI 13-1827 NMRA (instructing jury on necessary considerations for giving punitive damages); UJI 14-5101 NMRA (instructing jury on definition of mental disease for insanity defense); UJI 14-5160 NMRA (instructing jury on entrapment through unfair inducement).

43. See e.g., UJI 13-801 NMRA (giving definition of "contract" as: "a legally enforceable promise. . . . In order for a promise . . . to be legally enforceable, there must be an offer, an acceptance, consideration, and mutual assent."); UJI 13-805 NMRA (giving definition of "offer"); UJI 13-807 NMRA (giving definition of "acceptance"); UJI 13-814 NMRA (giving definition of "consideration"); UJI 13-816 NMRA (giving definition of "mutual acceptance").

44. See Tanford, *supra* note 39, at 92.

jurors who could read from having an unfair advantage over illiterate ones.⁴⁵ However, as the population of the country became more literate and instructions became more complex, jurisdictions gradually began to integrate the use of written instructions along with orally charging the jury.⁴⁶

Written jury instructions are now used in the majority of trials across the country, although some jurisdictions utilize this tool significantly less than others.⁴⁷ New Mexico has used written instructions since its territorial days.⁴⁸ Under New Mexico law, it is mandatory for the judge to send back written instructions in every civil and criminal trial, although the parties may waive this requirement in a civil trial.⁴⁹ New Mexico courts also typically send back individual sets of instructions for each jury member in approximately half of the time.⁵⁰

II. NES JUROR JURISPRUDENCE

A. *State v. Rico*

In *State v. Rico*, the New Mexico Supreme Court first addressed the steps that trial courts must take before dismissing a potential juror on account of his or her inability to understand English. *Rico* involved two separate criminal trials where members of the venire were dismissed because they spoke a language other than English and there was no interpreter available.⁵¹ In each case, there was no indication that the trial judges made any attempt to make alternative arrangements for the NES jurors.⁵² The parties alerted the judges of the procedural safeguards adopted by the New Mexico Supreme Court and the AOC, yet the courts still excused the potential

45. See Turgeon & Francis, *supra* note 29, at 442; see generally Annotation, *Propriety and Prejudicial Effect of Sending Written Instructions with Retiring Jury in Civil Case*, 91 A.L.R.3d 336 (1979).

46. See Turgeon & Francis, *supra* note 29, at 442.

47. Thirty-four states send back at least one written copy of instructions for over 70% of trials. See NAT'L CTR. FOR ST. CTS., STATE RANKINGS OF JUDGE & ATTORNEY SURVEY RESULTS (2007), <http://www.ncsc-jurystudies.org/State-of-the-States-Survey.aspx> (follow "% of trials in which at least 1 copy of written instructions given to the jurors" on right hand side of page). Twenty-six states send back at least one written copy of instructions back for over 90% of trials. See *id.*

48. See *State v. Greenlee*, 1928-NMSC-020, ¶ 27, 269 P. 331 ("Since 1880 it has evidently been the legislative policy that there should be an authoritative record to which the jurors might refer to avoid misapprehension or differences of opinion, and to which courts and counsel might refer to determine alleged error."); see also *Territory v. Perea*, 1879-NMSC-001, 1 N.M. 627 ("We are of the opinion that the only proper mode in giving instructions as a charge to a trial jury, and particularly in regard to the higher grades of crime, denominated felonies, is for the district court to give in writing all that it deems necessary or even proper to say to the jury in its charge.").

49. See Rule 1-051 NMRA; Rule 5-608 NMRA.

50. See NAT'L CTR. FOR ST. CTS., JUDGE AND ATTORNEY SURVEY (2007), <http://www.ncsc-jurystudies.org/State-of-the-States-Survey/Results-by-State.aspx> (follow "Judge and Attorney" located next to "New Mexico"). Although some New Mexico district judges give individual copies in every trial. See Telephone Interview with Raymond Z. Ortiz, Chief Dist. Court Judge, N.M. First Judicial Dist. (Oct. 28, 2016).

51. *State v. Rico*, 2002-NMSC-022, ¶¶ 1-2, 52 P.3d 942.

52. See *id.* ¶ 13.

jurors.⁵³ Upon appeal, the New Mexico Court of Appeals filed orders certifying both defendants' appeals to the supreme court.⁵⁴

Despite the State conceding reversible error, the New Mexico Supreme Court accepted the cases due to the "substantial public interests" presented.⁵⁵ After first determining that the defendants had standing to assert the rights of the dismissed veniremen, the court examined the language of Article VII, Section 3.⁵⁶ The court admitted "[i]t is an unusual constitutional provision and, as these cases illustrate, it will not always be easy to implement."⁵⁷ Yet the court also noted that the right of NES citizens to serve on juries is not absolute, and must be balanced against other constitutional rights, such as the defendant's right to a speedy trial and a fair and impartial jury.⁵⁸ In addition, the court recognized that trial courts are often constrained by "various practical barriers to faithful enforcement" such as scheduling interpreters and securing funding.⁵⁹

Nonetheless, the court held that "these considerations neither dilute the protection provided in Article VII, Section 3, nor permit excusal without a reasoned explanation on the record."⁶⁰ Consequently the court held that trial courts must "make every reasonable effort to accommodate a potential juror for whom language difficulties present a barrier to participation in court proceedings."⁶¹ The reasonable efforts that a trial court must make depend on the circumstances of each individual trial, including, but not limited to:

the steps actually taken to protect the juror's rights, the rarity of the juror's native language and the difficulty that rarity has created in finding an interpreter, the stage of the jury selection process at which it was discovered that an interpreter will be required, and the burden a continuance would have imposed on the court, the remainder of the jury panel, and the parties.⁶²

The court emphasized that "inconvenience alone will not suffice" and the trial court judge must demonstrate that accommodating the NES juror will create a "substantial burden" or otherwise violate another constitutional protection before excusing him or her.⁶³ The court acknowledged the large burden placed on trial courts, especially those in more rural areas of the state, yet the court concluded that the burden is "constitutional in origin and must be evaluated in that light."⁶⁴

53. *See id.* ¶ 3.

54. *See id.* ¶ 4.

55. *Id.* ¶¶ 4–5.

56. *See id.* ¶¶ 6–7.

57. *Id.* ¶ 7.

58. *See id.* ¶¶ 5, 10.

59. *Id.* ¶ 10.

60. *Id.* ¶ 11.

61. *Id.*

62. *Id.* ¶ 12.

63. *Id.*

64. *Id.* ¶ 17.

B. *State v. Ortiz-Castillo*

The issue of what more a trial court must do to accommodate an NES juror was not addressed until *State v. Ortiz-Castillo* in 2016 by the New Mexico Court of Appeals. In *Ortiz-Castillo*, a Spanish-speaking man was selected to serve on the jury panel and the court provided him with an interpreter throughout the trial.⁶⁵ After the close of the presentation of evidence and shortly before the court read the jury instructions, the defendant requested that the Spanish-speaking juror be provided with a copy of the jury instructions written in Spanish.⁶⁶ The defendant argued that a lack of written translated instructions would make it less likely that the Spanish-speaking juror would seek to serve as foreperson or fully participate in deliberations.⁶⁷ Despite this, the court denied the defendant's request on the basis that there would be an interpreter available during deliberations to assist the juror.⁶⁸ However, the court decided to delay the distribution of individual copies of written instructions until after the court orally charged the jury so that "all of the jurors w[ould] be in the same position with respect to hearing the instructions from the court."⁶⁹

When the jury was released for deliberations, each juror was given individual copy of the jury instructions⁷⁰ and two interpreters accompanied the NES juror to the jury room.⁷¹ After being convicted, the defendant appealed on the grounds that the district court's refusal to provide written instructions in Spanish to the NES juror amounted to a violation of the juror's right to fully participate under Article VII, Section 3.⁷²

In a brief six-page opinion, the New Mexico Court of Appeals addressed the petitioner's claim and ultimately concluded that there was no violation of Article VII, Section 3. The court first noted that the New Mexico Supreme Court had already seemingly determined that providing interpreters instead of translated written instructions was sufficient, as evidenced by its approval of the NES Guidelines.⁷³ The court referred specifically to Section II(H), which stated in part: "courts are encouraged to draft written, Spanish translations of the jury instructions with the assistance of a court interpreter. Alternatively, the court interpreter assigned to assist NES jurors during deliberations may provide an oral translation of the jury instructions."⁷⁴

The court then independently analyzed the language of Article VII, Section 3, which states: "[t]he right of any citizen of the state to . . . sit upon juries, shall never be restricted, abridged or impaired on account of . . . inability to speak, read or

65. See *State v. Ortiz-Castillo*, 2016-NMCA-045, ¶ 3, 370 P.3d 797.

66. See State of New Mexico's Answer Brief at 22, *Ortiz-Castillo*, 2016-NMCA-045 (No. 33,837).

67. See Defendant-Appellant Brief in Chief at 12, *Ortiz-Castillo*, 2016-NMCA-045 (No. 33,837).

68. See *Ortiz-Castillo*, 2016-NMCA-045, ¶ 3.

69. State of New Mexico's Answer Brief, *supra* note 66, at 23 (quoting the trial transcript).

70. See *id.*

71. See *Ortiz-Castillo*, 2016-NMCA-045, ¶ 15.

72. See *id.* ¶ 6. The defendant also appealed on two separate issues that were ultimately denied in a memorandum opinion on February 3, 2016. See *id.* ¶ 1.

73. See *id.* ¶ 7.

74. *Id.* (quoting NES GUIDELINES, *supra* note 20, at § II(H)).

write the English or Spanish languages.”⁷⁵ In its analysis, the court first determined that the facts of the case “implicate[d] the potential for impairment of jury service as opposed to potential for restriction or abridgment.”⁷⁶ Consequently, the court focused on the meaning of the word “impair” as the New Mexico constitutional drafters intended.⁷⁷ In doing so, the court adopted the plain language meaning of “impair” as “to do harm to[,]” to ‘damage[,]’ and to ‘lessen[.]’⁷⁸ Based on this plain language definition, the court held that “to violate the New Mexico Constitution, a governmental entity must implement a system whereby the ‘inability to speak, read or write the English or Spanish languages’ somehow harms the ability of an individual to serve on a jury.”⁷⁹

Next, the court analyzed the general purpose of written instructions and whether the lack of written instructions impaired or harmed the ability of an NES citizen to fully participate in the deliberative process.⁸⁰ Based on a review of precedential cases, the court determined that “the general purpose of written jury instructions is to assist the jury during deliberations.”⁸¹ The court acknowledged that legal scholarship has indicated that written instructions are beneficial for juror comprehension, retention, and application of the judge’s instructions.⁸² Despite this, the court determined that the proper inquiry was not whether written instructions were helpful, but whether an absence of written instructions “impaired” an NES juror’s ability to fully participate when he was provided with the services of an interpreter as an alternative.⁸³

Without further explanation or analysis, the court concluded that, “[i]f the purpose of written jury instructions is to limit the need for absolute recall memory of oral instructions given in the court room, we are unable to say that the presence of the interpreters in the jury room does not mitigate any potential impairment.”⁸⁴ However, the court conceded, “Were data available showing that jury instructions

75. N.M. CONST. art. VII, § 3; *see also Ortiz-Castillo*, 2016-NMCA-045, ¶ 8.

76. *See Ortiz-Castillo*, 2016-NMCA-045, ¶ 8. The court did not provide any reasoning as to why the facts of the case did not also implicate the potential for “restriction” or “abridgment.” Merriam-Webster defines “abridge” in the legal field as: “to diminish or reduce in scope.” *Abridge*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/abridge> (last visited Nov. 17, 2016). Merriam-Webster defines “restrict” in the legal field as: “to subject to bounds or limits.” *Restrict*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/restrict> (last visited Nov. 17, 2016).

77. *See Ortiz-Castillo*, 2016-NMCA-045, ¶¶ 8–10.

78. *Id.* ¶ 10 (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY 1131 (unabr. ed. 1993)).

79. *Id.* (quoting N.M. CONST. art. VII, § 3).

80. *Id.* ¶ 11.

81. *Id.* In coming to this conclusion, the court cited the following New Mexico Supreme Court cases: *Territory v. Lopez*, 1884-NMSC-012, ¶ 10, 2 P. 364 (“[I]nstructions, under our statute, must be in writing, and should properly enunciate the law on the subject.”); *State v. Greenlee*, 1928-NMSC-020, ¶ 27, 269 P. 331 (“Since 1880 it has evidently been the legislative policy that there should be an authoritative record to which the jurors might refer to avoid misapprehension or differences of opinion. . . .”); and *Haynes v. Hockenhull*, 1964-NMSC-087, ¶ 14, 393 P.2d 444 (“The purpose of instructing the jury is to make the issues that they are to determine plain and clear.”). *See Ortiz-Castillo*, 2016-NMCA-045, ¶ 11.

82. *See Ortiz-Castillo*, 2016-NMCA-045, ¶ 12.

83. *See id.* ¶ 13.

84. *Id.* ¶ 16.

serve a purpose that cannot be resolved through translation by a court interpreter in the jury room, our analysis could differ.”⁸⁵

III. ANALYSIS

It is the position of this Note that the *Ortiz-Castillo* court’s holding was based on a limited understanding of the benefits that written instructions can provide that cannot be replicated through an interpreter. Despite briefly referencing some legal scholarship highlighting the benefits of written instructions, the court attributed all of these benefits to the elimination of absolute recall of the judge’s reading of the instructions.⁸⁶ However, this ignores the many benefits written instructions can provide. The court admitted that its analysis might have been different if there was evidence that written instructions “serve a purpose that cannot be resolved through translation by a court interpreter in the jury room.”⁸⁷ This Part will review previous legal research on written instructions and explore some of the inherent benefits of written instructions that the Court of Appeals did not acknowledge in order to expand trial courts’ analysis of “impairment.”

A. Previous Legal Scholarship on General Benefits of Written Instructions

There have been several prominent studies concluding that the use of written jury instructions significantly helps juror comprehension. One study by Forsten observed sixteen sets of mock juries and found that subjects provided “with written instructions [versus those with oral instructions] made fewer explicit comments about confusion, spent less time inappropriately applying the law, wasted less time trying to ascertain the meaning of the instructions, and concentrated more on relevant facts and proper application of the law.”⁸⁸ Another study conducted by Prager, Deckelbaum, and Cutler found that participants who received a written copy of jury instructions scored approximately 43% higher on a comprehension test than those who only heard instructions verbally.⁸⁹ Another prominent study by Kramer & Koenig had 600 actual jurors fill out a questionnaire about the applicable substantive law and found that jurors who received written copies of the instructions answered questions approximately 17% more accurately than those who did not.⁹⁰

However, there are other studies that indicate that the use of written material does little to aid juror comprehension. One study by Rose & Ogloff had a total of 72 undergraduate participants complete an application test after reading a sample trial fact pattern and concluded that providing written instructions had little effect on

85. *Id.* ¶ 17.

86. *See id.* ¶¶ 12–13.

87. *See id.* ¶ 17.

88. Robert F. Forsten, *Sense and Non-Sense: Jury Trial Communication*, 1975 BYU L. REV. 601, 610 (2013).

89. Irene Glassman Prager et al., *Improving Juror Understanding for Intervening Causation Instructions*, 3 FORENSIC REP. 187, 191 (1989) (figure calculated from difference of values in Table 1 for revised instructions).

90. *See* Geoffrey P. Kramer & Dorean M. Koenig, *Do Jurors Understand Criminal Jury Instructions? Analyzing the Results of the Michigan Juror Comprehension Project*, 23 U. MICH. J. L. REFORM 401, 426–27 n.51 (1990).

improving juror comprehension.⁹¹ Another study by Reifman, Gusick, and Ellsworth surveyed 224 actual jurors by sending out a questionnaire after their jury service.⁹² The study divided the jurors who received written or taped instructions at trial from those who received only oral instructions by the judge and found that there was no statistically significant difference between the groups in terms of comprehension.⁹³ Another study by Heuer & Penrod surveyed 550 actual jurors who were either given instructions orally or provided with written instructions.⁹⁴ While the jurors who received written instructions believed that they were quite helpful in terms of aiding comprehension, the researchers found “little evidence” that the written instructions actually increased juror understanding.⁹⁵

Yet these latter studies may not be entirely accurate due to the varying methodologies used. For instance, the Rose & Ogloff study used mock juries who only read a trial fact pattern.⁹⁶ Some researchers have criticized this method because it does not adequately mimic how actual juries perform due to the brief nature of the experiments and lack of seriousness that can be impressed on jurors in actual trials.⁹⁷ One common criticism applicable to the Reifman, Gusick, & Ellsworth and Heuer & Penrod studies is that the questionnaires used to test juror comprehension were not sent out until a significant time after the trials ended.⁹⁸ This could have led to test subjects forgetting some of the information.⁹⁹ Furthermore, the Reifman, Gusick, and Ellsworth study combined the groups of jurors who received tape-recorded instructions with those who received written instructions.¹⁰⁰ This is a particularly important distinction, as the primary issue focused on in this Note is whether written instructions offer benefits that verbal interpretations cannot.

In addition, the general incomprehensibility of the instructions used in the studies may have skewed their results. The Rose & Ogloff study involved the use of Canada’s CRIMJI instructions, which are “typically more voluminous and complex” than plain language jury instructions used in the United States.¹⁰¹ The Reifman,

91. See V. Gordon Rose & James R. P. Ogloff, *Evaluating the Comprehensibility of Jury Instructions: A Method and an Example*, 25 L. & HUM. BEHAV. 409, 417–18, 426–27.

92. See Alan Reifman et al., *Real Jurors’ Understanding of the Law in Real Cases*, 16 L. & HUM. BEHAV. 539, 543 (1992).

93. See *id.* at 551.

94. See Larry Heuer & Steven D. Penrod, *Instructing Jurors: A Field Experiment with Written and Preliminary Instructions*, 13 L. & HUM. BEHAV. 409, 416–18 (1989).

95. *Id.* at 420. Nonetheless, the study did find that providing written instructions reduced juror disputes. *Id.* at 429.

96. See Rose & Ogloff, *supra* note 91, at 426.

97. See Bradley Saxton, *How Well do Jurors Understand Jury Instructions? A Field Test Using Real Juries and Real Trials in Wyoming*, 33 LAND & WATER L. REV. 59, 75–76 (1998). However, this criticism is equally applicable to the Forsten and Prager, Deckelbaum, and Cutler studies, which also used mock juries. See Forsten, *supra* note 88, at 607; Prager et al., *supra* note 89, at 190.

98. See Lieberman & Sales, *supra* note 34, at 627. In contrast, the jurors in Kramer & Koenig’s study filled out questionnaires immediately after the trial. *Id.*

99. See *id.* at 627.

100. Reifman et al., *supra* note 92, at 544.

101. See Richard Jochelson & Michelle Bertrand, *Canada’s Inscrutable Jury Research: Do Canadian Juries Understand Judicial Charges?*, ROBSON CRIM LEGAL BLOG (Oct. 3, 2016), <http://www.robsoncrim.com/single-post/2016/10/03/Canadas-Inscrutable-Jury-Research-Do-Canadian-Juries-Understand-Judicial-Charges>.

Gusick, and Ellsworth study also used standard instructions that the participants felt were incomprehensible at the outset.¹⁰² Therefore, the results do not exclude the possibility that the instructions were incomprehensible for other reasons so the form of presentation may not have as much of an impact.¹⁰³ After all, “[i]f a person does not speak ‘a foreign language, it will not matter if they are given written or verbal instructions in that foreign tone.’”¹⁰⁴

B. Benefits of Written Instructions

Despite the mixed results of studies on the utility of providing written jury instructions discussed above, other areas of study, particularly cognitive psychology, reveal just how helpful translated written instructions can be. Data gathered from a variety of sources confirm that providing information in a written form can increase the ability of the individual to comprehend, concentrate, and remember the presented material. This Section will explore these benefits and whether an NES juror will be “impaired” without a translated set of instructions.

1. Assistance with Comprehension

i. Aid During Deliberations

Studies have shown that many individuals learn new information more effectively when it is presented visually, as opposed to orally. This is an important consideration for trial courts, because a juror must comprehend the law in order to be able to apply it correctly to the facts, and as mentioned earlier, jurors still struggle with understanding instructions despite the plain language revisions.¹⁰⁵

It is well known that learning styles vary between individuals. “Whether by listening, reading, writing, or some combination, jurors will have different ways in which to grasp the information presented in the instructions. Some people learn best by listening to a presentation, some by reading the words on the page, and some by taking notes.”¹⁰⁶

Visual (i.e. via reading) and auditory (i.e. via listening) methods of learning share much in common. Both reading and listening are active processes that involve concentrating in order to gain meaning.¹⁰⁷ They involve a complex, yet seemingly

102. See Reifman et al., *supra* note 92, at 552.

103. See Bethany K. Dumas, *Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues*, 67 TENN. L. REV. 701, 737–38 (2000).

104. *Id.* (quoting Lieberman & Sales, *supra* note 34, at 628).

105. Another issue, outside the scope of this Note, is the impact that confused jurors have on the defendant’s right to a fair trial. Oftentimes, juror misunderstanding works against the interest of the defendant. One study found that participants who were more confused about the jury instructions were the most likely to impose the death penalty on the defendant. See Wiener, *supra* note 39, at 463. This issue may be even more pronounced in civil cases, as juries who fail to understand technical defenses are more likely to return verdicts for the party with the burden of proof. See Lieberman & Sales, *supra* note 34, at 591.

106. Marder, *supra* note 36, at 500.

107. See Christine Burns-Piscitelli et al., *Listening and Silent Reading a Comparison Between Listening to Text and Silently Reading: Selected Features and Their Impact on Students’ Comprehension*, THE LITERACY LOOKING GLASS, <http://www.reading.ccsu.edu/TLL-G/Vol5No1FA06/ChristineBurns-PiscitelliGroup.html> (last visited Oct. 29, 2016). In addition, brain-imaging studies focusing on the higher-

automatic set of tasks. The individual must first generate a string of content words and syntactic markers for each sentence from auditory or visual inputs.¹⁰⁸ Then they must “identify the concept corresponding to each content word by retrieving the appropriate semantic information, and use this information together with the syntactic structure of the sentence to generate a relational structure linking these conceptual categories.”¹⁰⁹ Lastly, the individual “must store the resulting conceptual and relational structure” in order to access the newly learned material later.¹¹⁰

However, despite the similarities of the two processes, many individuals learn new information better when it is presented in a written format.¹¹¹ Psychologists have found that individuals can understand a greater amount of material by reading texts rather than listening to lectures.¹¹² Some researchers believe this is because readers are able to focus more on the text, actively monitor their understanding, adjust their rate of reading, and apply individual comprehension strategies independently.¹¹³ However, NES jurors who are dependent on the oral presentation of instructions are largely unable to take advantage of these processing tools, as oral translations are linear processes with a limited ability to rewind, pause, or slow down.¹¹⁴

Providing written instructions also allows for jurors to re-read instructions as many times as they like without having to ask for assistance. It is common knowledge that individuals learn new subjects best by repeated exposure.¹¹⁵ Research has also confirmed that repetition of jury instructions leads to a better

order cognitive processes involved in listening and reading have established that the two processes involve the activation of a comparable network of areas of the brain. See AUGUSTO BUCHWEITZ ET AL., BRAIN ACTIVATION FOR READING AND LISTENING COMPREHENSION: AN FMRI STUDY OF MODALITY EFFECTS AND INDIVIDUAL DIFFERENCES IN LANGUAGE COMPREHENSION 2 (2009), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3081613>. See generally M. Vigneau et al., *Word and Non-word Reading: What Role for the Visual Word Form Area?*, 27 NEUROIMAGE 694 (describing the similarities and differences of reading and listening in terms of brain activation). However reading seems to activate the left hemisphere of the brain greater than listening. See BUCHWEITZ ET AL., *supra*, at 8.

108. See Carl H. Frederiksen, *Acquisition of Semantic Information from Discourse: Effects of Repeated Exposures*, 14 J. VERBAL LEARNING & VERBAL BEHAV. 158 (1975).

109. *Id.*

110. *Id.*

111. See KENNETH S. GOODMAN & YETTA M. GOODMAN, A WHOLE-LANGUAGE, COMPREHENSION-CENTERED READING PROGRAM 2 (1981), <http://eric.ed.gov/?id=ED210630> (last visited Oct. 29, 2016) (“Reading is a process of prediction, selection, confirmation and self-correction. Effective reading produces coherent meaning.”); RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 211 (2003).

112. See SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 146 (1988). Numerous studies have confirmed this finding. See e.g., TOMOKAZU NAKAYAMA & AKIRA IWATA, DIFFERENCES IN COMPREHENSION: VISUAL STIMULUS VS. AUDITORY STIMULUS 6 (2012), http://libir.josai.ac.jp/il/user_contents/02/G0000284repository/pdf/JOS-18801919-0601.pdf; Wesley A. Many, *Is There Really Any Difference: Reading vs. Listening?*, 19 READING TEACHER 110, 112–13 (1965); Burns-Piscitelli et al., *supra* note 107, at 20.

113. See Burns-Piscitelli et al., *supra* note 107, at 20.

114. See BUCHWEITZ ET AL., *supra* note 107, at 10 (“Auditory information is presented sequentially, while reading allows for backtracking, if necessary”).

115. See JONAKAIT, *supra* note 111, at 210.

understanding.¹¹⁶ Yet the trial setting may simply be too condensed to allow for sufficient repeated exposures to the new concepts a juror must learn.¹¹⁷ Taking this into consideration, it is important for jurors to be able to repeatedly access the instructions with as few obstacles as possible.

Admittedly, an NES juror can request for an instruction to be re-read by the interpreter as many times as he likes. Yet in reality, some might feel self-conscious and refrain from asking for more than one or two repetitions. Additionally, the interpreter may have to wait to repeat the instructions, as he or she cannot simultaneously interpret the instructions for the NES juror while attempting to convey the other jurors' deliberations.¹¹⁸ These obstacles may lessen the NES juror's ability to fully process the instructions. Therefore, providing NES jurors with written instructions would give them the ability to repeatedly review the instructions without restriction in order to improve his or her ability to meaningfully comprehend them.

ii. Aid During the Oral Charges

In addition to aiding the juror during deliberations, providing a copy of written translated instructions during oral charges and closing arguments will help NES jurors follow along more effectively and process the instructions. In New Mexico, the judge reads the jury instructions before closing arguments.¹¹⁹ The duration of oral charges range from case to case, but the majority usually last 15-30 minutes.¹²⁰ However, it is not uncommon for the oral charges for more complex trials can take over an hour.¹²¹ After the judge instructs the jury, both parties give closing arguments and often review the instructions with the jury.¹²²

Assisting the jurors during oral charges is especially important, as this is the first time they are introduced to the instructions, and may be the only opportunity for the jurors to review the instructions in their entirety. While the trial court in *Ortiz-Castillo* elected not to distribute individual written instructions until after the judge delivered the oral charges,¹²³ other courts in the future may not make the same election, as it is within the judge's discretion.¹²⁴

It is generally accepted that the most effective communication happens when multiple sensory faculties are involved in the learning experience.¹²⁵ Specific research on the presentation of jury instructions has also demonstrated that using

116. See Forsten, *supra* note 88, at 616 (reviewing one study and concluding that "after repeated exposure[,] jurors are willing to listen more carefully to instructions and information in order to clarify points.").

117. See JONAKAIT, *supra* note 111, at 210.

118. While the trial court in *Ortiz-Castillo* may have eliminated this limitation by sending back two interpreters with the NES juror, this might not always be the case if there are not two or more interpreters available. See *State v. Ortiz-Castillo*, 2016-NMCA-045, ¶ 15, 370 P.3d 797.

119. See Telephone Interview with Raymond Z. Ortiz, *supra* note 50.

120. See Forsten, *supra* note 88, at 625.

121. See Telephone Interview with Raymond Z. Ortiz, *supra* note 50.

122. See *id.*

123. See State of New Mexico's Answer Brief, *supra* note 66, at 23.

124. See Telephone Interview with Raymond Z. Ortiz, *supra* note 50.

125. See Cronan, *supra* note 39, at 1255 (quoting David U. Strawn & Raymond W. Buchanan, *Jury Confusion: A Threat to Justice*, 59 JUDICATURE 478, 480 (1976)).

visual aids accompanying oral instructions improves juror comprehension of the presented material.¹²⁶ Although most of this research focused on the benefit of animations accompanying the judge's oral charges, written instructions can also act as a visual aid for jurors in which they can follow along and annotate. In addition, the structure of the written instructions can help jurors realize when the judge or the attorneys are referring to different instructions and how they are related.¹²⁷ While other jurors may have written instructions to follow along, the NES juror will be unable to take advantage of these benefits. Therefore, NES jurors may be "impaired" without having a translated copy of the instructions to follow along to the judge's oral charges and closing arguments.

2. *Aiding Concentration*

In addition to improving comprehension, providing written instructions will help NES jurors pay more attention to the instructions during oral charges and deliberations. When an individual's mind wanders, concept encoding is superficial, comprehension is compromised, and memory is impaired.¹²⁸ Consequently, it is important to consider the issues NES jurors face in terms of their ability to pay attention and the positive effect written instructions may have.

Jurors in general can have a difficult time paying attention to the judge's reading of the instructions in the courtroom. The instruction process closely resembles a classroom lecture and can last for over an hour.¹²⁹ Moreover, some judges simply read the instructions to the jury in a monotone voice with little inflection or enthusiasm.¹³⁰ Jurors, unaccustomed to listening to extended periods of lecture on the law, naturally have difficulty maintaining their attention for this period.¹³¹

Another factor that negatively impacts the ability of jurors to concentrate is the subject matter of the material. Individuals are less likely to pay as much attention to materials that they do not find subjectively interesting.¹³² While some trials might involve "exciting" subjects, many trials, especially civil cases, involve numerous

126. See Neil Brewer et al., *Improving Comprehension of Jury Instructions with Audio-Visual Presentation*, 18 APPLIED COGNITIVE PSYCHOL. 765, 773 (2004) ("[V]ery poor comprehension was shown by a community sample of jury-eligible participants when provided with a judge's verbal (audio) instructions. . . . [however,] the audio-visual format produced a marked improvement in comprehension"); Firoz Dattu, *Illustrated Jury Instructions: A Proposal*, 22 L. & PSYCHOL. REV. 67, 82 (1998) ("Studies of learning oral prose consistently show that the addition of relevant pictures has a substantial positive effect." (quoting W. Howard Levie & Richard Lentz, *Effects of Text Illustrations: A Review of the Research*, 30 EDUC. COMM. & TECH. J. 195, 225 (1982))).

127. See Saxton, *supra* note 97, at 110. ("A number of the jurors [in the study] who made general comments on their questionnaires also suggested that jurors could better follow the judges' instructions if each juror had a copy of the instructions to which that juror could refer.").

128. See Jonathan Smallwood et al., *When Attention Matters: The Curious Incident of the Wandering Mind*, 36 MEMORY & COGNITION 1144, 1145 (2008).

129. See Cronan, *supra* note 39, at 1255.

130. See Saxton, *supra* note 97, at 112–13. Interpreters will often try to mimic the tone and inflection of the speaker and thus NES jurors may also receive a monotonous reading of the instructions. See Telephone Interview with Margarita B. Montalvo, Language Access Specialist (Oct. 23, 2016).

131. See Cronan, *supra* note 39, at 1255.

132. See Peter Dixon & Marisa Bortolussi, *Construction, Integration, and Mind Wandering in Reading*, CAN. J. EXPERIMENTAL PSYCHOL. 1, 5–6 (2013).

instructions on relatively uninteresting topics such as proximate cause and negligence. Even those trials involving more “exciting” subjects, such as murder, involve relatively mundane topics in which jurors may not be particularly interested. Moreover, listening to another person read material can actually diminish the listener’s interest in the presented material.¹³³

In addition to these obstacles, the dialog of other jurors in the jury room can be a source of distraction that decreases the juror’s ability to concentrate. This may be especially problematic for NES jurors who are trying to pay attention to an interpreter’s verbal interpretations. Therefore, it is particularly important to give NES jurors tools to help them pay attention to the instructions in the jury room.

Reading aloud or silently can substantially decrease an individual’s propensity to have his or her mind wander while attempting to concentrate on presented materials.¹³⁴ Studies have shown that individuals experience mind wandering as much as 43% of the time when listening to lectures comparable to the oral charges given by the judge.¹³⁵ In contrast, people who read materials only experience mind wandering as little as 9% of the time on average.¹³⁶ One theory for this difference is that reading utilizes a greater amount of bodily involvement, such as oculomotor activity, which is not involved in listening.¹³⁷ This increased bodily involvement makes the activity more cognitively effortful and provides the mind with more cues to signal when the mind is becoming distracted.¹³⁸ Therefore NES jurors’ ability to concentrate on the judge’s oral charges and the instructions used during deliberations may be “impaired” without a written set of translated instructions.

3. Increasing Short-term Memory

Another major benefit of written instructions that the *Ortiz-Castillo* court did not fully consider is that they can have a substantial impact on jurors’ ability to remember the concepts necessary to correctly understand and apply the law to the facts of the case. The New Mexico Court of Appeals acknowledged that written instructions helps jurors by eliminating the need for absolute recall of the judge’s oral charges.¹³⁹ Nevertheless, the court believed the NES juror was not “impaired” because he had an interpreter who could repeat instructions in the jury room.¹⁴⁰

133. See Trish L. Varao Sousa et al., *The Way We Encounter Reading Material Influences How Frequently We Mind Wander*, 4 FRONTIERS PSYCHOL. 1, 5 (2013) (“[P]articipants’ interest in the material also showed no difference between reading silently and aloud, though simply listening, once again, resulted in less interest than when reading aloud.”).

134. See e.g., Kristopher Kopp & Sidney D’Mello, *The Impact of Modality on Mind Wandering During Comprehension*, 30 APPLIED COGNITIVE PSYCHOL. 29, 37 (2016); see also Varao Sousa et al., *supra* note 133, at 2 (reviewing studies on mind wandering during reading silently or listening).

135. See Varao Sousa et al., *supra* note 133, at 2.

136. See *id.* Although other studies have found greater amounts of mind wandering comparable to that experienced during listening. See *Id.*

137. See *id.* at 6.

138. See *id.*

139. See *State v. Ortiz-Castillo*, 2016-NMCA-045, ¶¶ 11–12, 16, 370 P.3d 797.

140. See *id.* ¶ 16.

However, this ignores the other benefits that written instructions can have on memory that may not be as effectively conveyed through oral interpretations.

Studies show that jurors may have difficulty remembering the structure and contents of the instructions presented during the judge's reading.¹⁴¹ Jurors often lack the time needed to sufficiently process and store the series of concepts presented in a lecture format such as the instruction process.¹⁴² Consequently, they must selectively reduce the amount of information being received.¹⁴³ In doing so, jurors may overgeneralize, eliminate information thought to be unimportant, or rely on inferences based less on the presented information and more on prior knowledge.¹⁴⁴

This is an especially troubling phenomenon, as it could lead to jurors basing their verdict on preconceived notions of justice rather than the allowed evidentiary standards and legal elements. Research shows that jurors experience the most difficulty understanding and applying instructions that contradict their intuitions or preconceived ideas on the legal process and its rules.¹⁴⁵ Consequently, jurors are prone to misremember or ignore instructions that conflict with their preconceptions on the law, such as limiting instructions for prior convictions, which can have a substantial impact on the verdict.¹⁴⁶

Although providing an interpreter may eliminate the need for absolute recall of the judge's charges, this ignores the possibility that jurors may only review the instructions in their entirety only once when the judge is giving the oral charges. Juries, after a long trial, may be anxious to start deliberating on the substantive claims or charges and forego reviewing all of the instructions read by the judge in the courtroom. Therefore, it is important that jurors correctly remember the judge's oral charges or seemingly subsidiary, yet crucial, issues such as limiting instructions.

In addition to the difficulty remembering the judge's oral charges, NES jurors may also have difficulty recalling the specific elements of substantive instructions on the charges or claims during deliberations. Many instructions are in and of themselves lengthy and can require supplemental instructions that must be interpreted as well.¹⁴⁷ It can be especially difficult for an NES juror to mentally store all the information contained in special verdict forms, which are often much longer than UJI's.¹⁴⁸ Furthermore, the interruptions of other jurors' discussions while an NES juror is trying to listen to the interpreter may also reduce his or her ability to recall the list of elements.¹⁴⁹

141. See Cronan, *supra* note 39, at 1211 ("Studies show that the capacity of jurors to process, store, and recall semantic information is limited. This obstacle is compounded by the sheer volume of the instructions and the fact that most jurors are unaccustomed to receiving what resembles a lengthy classroom lecture.").

142. See William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 CAL. L. REV. 731, 741-42 (1981).

143. See *id.* at 742.

144. See *id.*

145. See Saxton, *supra* note 97, at 110; see also Severance & Loftus, *supra* note 39, at 194.

146. See Duane T. Wegener et al., *Flexible Corrections of Juror Judgments: Implications for Jury Instructions*, 6 PSYCHOL., PUB. POL'Y, & L. 629, 645 (2000).

147. See e.g., UJI 14-959 NMRA (using the term "great mental anguish"); UJI 14-980 NMRA (providing definition of "great mental anguish").

148. See e.g., UJI 13-302F NMRA (providing examples of special verdict forms).

149. Frederiksen, *supra* note 108, at 159.

With these issues in mind, courts should utilize any tool reasonably available to increase the juror's ability to recall the instructions and their substantive elements, such as giving the NES juror a set of translated written instructions. Research has generally demonstrated that auditory learning is inferior to visual learning in terms of memory and recall.¹⁵⁰ Reading aloud or silently, as opposed to listening, can produce significantly better results when it comes to short-term memory recall.¹⁵¹ Consequently, individuals remember more information when they read the material rather than listen to lectures.¹⁵²

Research has also shown that memory of information presented verbally declines significantly faster than memory of information presented visually.¹⁵³ One study found that participants' memory of information presented verbally declined by over 30% in a timespan of just over thirty seconds after listening.¹⁵⁴ Yet the participants' memory of information presented visually only declined by half that amount in the same timespan.¹⁵⁵ With such a drastic loss of memory in such a short period of time, it is possible that NES jurors will forget elements presented at the beginning of an instruction before the interpreter even finishes reading the instruction. Therefore, an NES juror's ability to store the information necessary to reach an informed verdict may be "impaired" without having access to written translated instructions.

4. Providing More Time for a Clearer Translation

Another benefit of written instructions that the *Ortiz-Castillo* court failed to consider is that they may be a more accurate representation of the legal language than oral interpretations. Providing written instructions may result in a more faithful translation, as the translator will not have to translate instructions in real time, unlike

150. See Michael A. Cohen et al., *Auditory Recognition Memory is Inferior to Visual Recognition Memory*, 106 PNAS 6008 (2009) ("In every situation . . . auditory memory proved to be systematically inferior to visual memory."). But see Walter Kintsch & Ely Kozminsky, *Summarizing Stories After Reading and Listening*, 69 J. EDUC. PSYCHOL. 491, 497 (1977) (concluding that there is a relatively small difference in memory and comprehension of materials presented orally or written). However, the Kintsch & Kozminsky study was performed on college level students with relatively simple narratives. See *id.* The researchers admitted that "[o]ne might also expect differences in favor of reading for very difficult texts, for which a well-established schema is not available or the content is unfamiliar." *Id.* at 498. This latter scenario is more applicable to juries, which can be composed of relatively uneducated individuals who must read complex legal ideas.

151. See Varao Sousa et al., *supra* note 133, at 4 ("Planned *t*-test analyses revealed significant differences such that Listening led to worse performance than Reading Aloud . . . and . . . Reading Silently [on the memory test]"); see also Richard W. Stevens, *To Teach Plain English Techniques, Use Jury Instructions*, 2 T.M. COOLEY J. PRAC. CLINICAL L. 177, 182 (1998) ("A person's rate of recall and comprehension of spoken words is lower than the recall and comprehension of written words.").

152. See KASSIN & WRIGHTSMAN, *supra* note 112, at 146.

153. See James Bigelow & Amy Poremba, *Achilles' Ear? Inferior Human Short-Term and Recognition Memory in the Auditory Modality*, 9 PLOS ONE 1, 4 (2014).

154. See *id.* While this study used stimuli such as animal sounds or pictures, the results can be extrapolated to the context of listening to or reading instructions, as they both involve either visual or auditory memory.

155. See *id.*

oral interpretation.¹⁵⁶ Although this may not be an issue for many instructions, some more complex instructions may be difficult for the interpreter to interpret accurately in real time.¹⁵⁷ Often, these instructions focus on the substantive law and are the most determinative in the case. Therefore, courts should consider the complexity of the instructions in deciding whether a lack of written translated instructions will “impair” the NES juror’s ability to fully participate.

Interpretation is an extremely complex process. “To interpret is initially to comprehend perfectly the message so as to be able to detach it from its verbal support and to reconstitute it subsequently with all its nuances in another language.”¹⁵⁸ All of this must be done in a matter of seconds. The interpreter’s experience, language competence, training, memory, and skills will have a large impact on the resulting language given to the NES juror.¹⁵⁹ Interpreters certified to serve in New Mexico courts must complete a rigorous 26-week long program and pass written and oral examinations.¹⁶⁰ However, interpreters, no matter how experienced, can never perfectly translate one language to another due to the inherent differences between languages.¹⁶¹

With these fundamental limitations of interpretation, providing written instructions may significantly aid the interpreter in giving the NES juror a more accurate translation. Giving translators time to review the English instructions and type out a translated copy will allow for exponentially more time to comprehend the carefully calculated legal language and decide on the most appropriate wording.¹⁶² Therefore the use of written translated instructions may result in the NES juror receiving a clearer depiction of the instructions.

5. Inability to Serve as Foreperson

Despite the defendant raising the issue in his brief and at trial,¹⁶³ the *Ortiz-Castillo* court did not consider the issue that NES jurors will be effectively prevented from serving as foreperson without a set of translated written instructions. The possibility of serving as foreperson is an important right, which should be available

156. As discussed later, the instructions may need to be translated by a translator, which requires a different certification from the one required for courtroom interpreters. See discussion *infra* Part V.

157. See e.g., UJI 13-302F NMRA (providing examples of special verdict forms).

158. Elena M. de Jongh, *Foreign Language Interpreters in the Courtroom: The Case for Linguistic and Cultural Proficiency*, 75 MOD. LANGUAGE J. 285, 288 (1991).

159. See SANDRA BEATRIZ HALE, THE DISCOURSE OF COURT INTERPRETING: DISCOURSE PRACTICES OF THE LAW, THE WITNESS AND THE INTERPRETER 4 (2004).

160. See *Court Interpreter Credentialing*, N.M. CTR. LANGUAGE ACCESS, <http://nmcenterforlanguageaccess.org/cms/en/training/court-interpreter-certification> (last visited Oct. 29, 2016) (outlining the requirements an individual must complete to attain interpreter certification); *Certificate Programs*, N.M. CTR. LANGUAGE ACCESS, <http://nmcenterforlanguageaccess.org/cms/en/training/certificate-programs> (last visited Oct. 29, 2016) (describing the certification program).

161. See Aras Ahmed Mhamad et al., *The Endless Challenges of Translation*, FAIR OBSERVER (Oct. 24, 2015), <https://www.fairobserver.com/culture/endless-challenges-of-translation-75098/>.

162. See HALE, *supra* note 159, at 3 (“Whereas with written translation there is time to read a text repeatedly to fully comprehend it, and subsequently make a number of drafts before the final translated version, with interpreting the entire process of listening, comprehending and converting takes but a few seconds, at the most, minutes.”).

163. See Defendant-Appellant Brief in Chief, *supra* note 67, at 12.

to every qualified juror. Therefore, courts should consider the desire of the NES juror to serve as foreperson in their analysis of whether a lack of written translated instructions “impairs” his or her ability to fully participate in the deliberative process.

Although in theory all jurors have equal rights during deliberations, the foreperson almost always enjoys more power than the rest of the jury members. “Most juries operate on the assumption that the foreperson is single-handedly responsible for organizing talking turns, announcing breaks, counting and keeping record of votes, keeping deliberation on topic, etc.”¹⁶⁴ Several studies have found that jury foremen talk significantly more than other jurors, which can influence the other members of the jury.¹⁶⁵ For better or worse, the foreperson can also have a significant effect of the verdict simply by controlling discussions and giving jurors with strong opinions at opposing ends unequal talking time.¹⁶⁶

Juries in New Mexico are responsible for selecting their own foreperson.¹⁶⁷ While juries can approach foreperson selection differently, they invariably begin with one juror nominating herself or another juror. Studies show that juries tend to select the foreperson within the first few minutes of retiring for deliberations.¹⁶⁸ An NES juror who is already on unequal ground in terms of comprehension of the task of deliberations without a copy of the instructions may hesitate to nominate himself and therefore miss out on the opportunity to serve as foreperson.

Furthermore, the NES juror may simply be unable to adequately serve as foreperson and guide discussions without a translated set of instructions. For reasons discussed above, he or she may be less familiar with the structure of the instructions and consequently how to guide discussions and take a vote.¹⁶⁹ Although it would theoretically be possible for an NES juror to serve as foreperson without written instructions, he or she would have to ask the interpreter to tell him each instruction before he could even begin discussing it with the other jurors. Consequently, other jurors may hesitate to vote for the NES juror due to the added time it would take to have the interpreter convey each instruction.

This not only serves as a disservice to the NES juror, but can also disadvantage the jury as a whole. There is anecdotal evidence that providing NES jurors with a written translated copy of instructions can help them lead the jury’s discussions and clarify points of confusion. One New Mexico court interpreter recalled her experience with an NES juror:

At [the NES juror’s] request, I did not interpret the instructions to him in the jury room. Having his copy in Spanish, he preferred to read them quietly, as did the others. I welcomed his request, since it . . . gave [the NES juror] a better chance to scrutinize the instructions without my having to whisper in his ear while he struggled to concentrate. With his own copy of the instructions in

164. Traci Feller, *What the Literature Tells Us About the Jury Foreperson*, 22 JURY EXPERT 42, 46 (2010).

165. *See id.* (reviewing studies on the selection of jury forepersons).

166. *See id.* at 47.

167. *See* UJI 13-2009 NMRA; UJI 14-6020 NMRA.

168. *See* Feller, *supra* note 164, at 45 (reviewing several studies on the selection of jury forepersons).

169. *See* discussion *supra* Part III.B.1.

Spanish, he enjoyed the same advantage as the other jurors. He was able to consult them whenever he thought necessary, and would actively guide the other jurors whenever they had misunderstood the instructions or were falling off track. Had the instructions not been written in Spanish[,] his participation, which turned out to be very valuable, would have been impaired. . . . [The NES juror] was the only juror who did not complain about points in the instructions not being clearly formulated and, in fact, he was able to clarify some issues to his fellow jurors.¹⁷⁰

Although providing a translated written copy of jury instructions will by no means fully eliminate the difficulties an NES juror might have in terms of serving as foreperson, it will at least give him or her a better opportunity to serve in a position of leadership. Therefore, trial courts should consider the NES juror's ability and desire to possibly serve as foreperson before deciding to forgo providing written translated instructions.

IV. RECOMMENDATIONS

With the data discussed above showing the various benefits of written instructions that cannot be adequately remedied by oral interpretations, courts should expand their analysis of "impairment." Instead of making a blanket determination that providing an interpreter in place of written translated instructions will not "impair" an NES juror, trial courts should take into consideration other factors relevant to the trial and the individual NES juror. However, as the New Mexico Supreme Court held in *State v. Rico*, NES jurors do not have an absolute right under Article VII, Section 3 to be free from impairment.¹⁷¹ Consequently, the trial court should weigh need for translated instructions against the cost and difficulty of providing them.

First, trial courts should consider the complexity and length of the instructions submitted to the jury. The greater the complexity of the instructions, the greater the need may be to provide the NES juror a written copy in order to help him or her process the information. As discussed above, many individuals comprehend, remember, and pay attention to instructions significantly better when they are able to read it. Additionally, translators will be able to provide more accurate language by having more time to translate the complex instructions into writing. While it may be infeasible to translate every instruction given to the jury, the court could allow for some of the more important and or complex instructions to be translated in written form.

Second, trial courts should consider the NES juror's interest in serving as foreperson. Despite the fact that the ultimate determination of the foreperson is left to the jury, the court should inquire before deliberations if the NES juror is interested in possibly serving as a foreperson. This could be done relatively informally sometime after the jurors have gotten a feel for the case but before the end of the trial in order to give the court enough time to translate the instructions. If the NES juror

170. Margarita B. Montalvo, *Interpreting for a Non-English-Speaking Juror: A New Challenge in New Mexico*, THE ATA CHRONICLE, June 2001, at 21.

171. See *State v. Rico*, 2002-NMSC-022, ¶ 5, 52 P.3d 942.

responds in the affirmative, the court should take this into consideration in determining the need to provide translated written instructions.

Finally, the trial court should weigh these factors against the added time, costs, and difficulty of providing a written translation in each case. For example, some languages, like Navajo, may be especially difficult to translate into a written form, weighing heavily against providing translated instructions. However, others languages, like Spanish, may be relatively easy to translate.¹⁷² Additionally, the trial court should inquire as to whether the courtroom interpreter is also a certified translator who could translate the instructions relatively quickly without delaying the trial.¹⁷³ This may not even cost any extra resources, as courts often schedule more than one interpreter to be present during trial, and one interpreter may translate the instructions while he or she is not interpreting.¹⁷⁴ Depending on these cost considerations, the trial court should decide whether translating all or part of the instructions is necessary to satisfy Article VII, Section 3.

V. COSTS OF IMPLEMENTATION

Admittedly, providing translated written instructions for NES jurors will not come cheap. The state budget is already overburdened.¹⁷⁵ In New Mexico, court interpreters are paid out of a pooled fund used to also pay jurors and witnesses called the Jury Witness Fee Fund.¹⁷⁶ The fund's specific expenditures for language access services increased from \$1,391,400 in 2009 to approximately \$3,158,200 in 2016.¹⁷⁷

In order to provide written translated copies of jury instructions, the state may be responsible for hiring translators in addition to interpreters. Interpreters currently contract with the state at a rate of \$46 per hour.¹⁷⁸ However, many court interpreters may be technically unqualified to translate jury instructions into writing.¹⁷⁹ Interpreters and translators require different skills and certifications due

172. This will also be substantially easier if the New Mexico Uniform Jury Instructions are translated en masse. See discussion *infra* Part V.

173. As discussed later, the instructions may need to be translated by a translator, which requires a different certification from the one required for courtroom interpreters. See discussion *infra* Part V. One interpreter who was also a certified translator was able to translate all of the instructions over her lunch break. See Telephone Interview with Margarita B. Montalvo, *supra* note 130.

174. See Rule 1-103(E)(7) NMRA. However, one of the primary purposes of having more than one interpreter present is to prevent fatigue and reduce the risk of imprecise interpretation. See E-mail from Raymond Z. Ortiz, Chief Dist. Court Judge, N.M. First Judicial Dist., to author (Feb. 8, 2017, 5:36PM MST) (on file with author). Consequently, having an interpreter translate instructions on their "break" may reduce the accuracy of her interpretations by not giving her sufficient time to recuperate. See *id.*

175. See Santos, *supra* note 16.

176. See Rule 1-103(F) NMRA.

177. LANGUAGE ACCESS REPORT, *supra* note 5, at 23. Yet the estimated need for 2016 was \$3,433,600. *Id.*

178. N.M. JUDICIARY ADMIN. OFFICE OF THE COURTS, STATE OF NEW MEXICO ADMINISTRATIVE OFFICE OF THE COURTS PROFESSIONAL SERVICES AGREEMENT, Attachment C at 1 (2016) <https://languageaccess.nmcourts.gov/fiscal-info.aspx>.

179. A search of the New Mexico Translators & Interpreters Association for individuals certified to translate English to Spanish revealed only sixteen members in New Mexico. See *The Directory*, N.M. TRANSLATORS & INTERPRETERS ASS'N., <http://nmtia.net/thedirectory/> (last visited Feb. 4, 2017).

to the nature of translating written material versus real-time oral interpretation.¹⁸⁰ The New Mexico Center for Language Access, which certifies interpreters in New Mexico, does not offer any certifications for translators.¹⁸¹ Therefore, the state may need to contract out for certified translators. Certified translators typically charge anywhere from 16 to 25 cents per translated word and can be hired locally or online.¹⁸² Consequently, the added cost at the trial level would depend on the amount of words in the translated instructions. Alternatively, the New Mexico Center for Language Access could implement a program whereby certified court interpreters are also certified as translators in order to avoid contracting out.

Another factor to consider is the financial impact on the parties themselves. Requiring written translated instructions may drive up the costs of litigation for the parties involved, as attorneys may choose to hire language experts to confirm the accuracy of the translated instructions. Additionally, the cost of appeals may increase, as the parties and the appellate courts may need to hire language experts to review the instructions to determine their accuracy.

However, all of these costs can be substantially eliminated if the Criminal and Civil Uniform Jury Instructions are translated en masse by the state. Translating the UJI's will significantly decrease the burden on the parties and the court, as the great majority of instructions are standard and only superficially tailored to each trial.¹⁸³ Translating the UJI's en masse will also largely eliminate any additional appellate costs if the New Mexico Supreme Court approves them.

Undoubtedly, it would be too large of an undertaking to translate the civil and criminal UJI's into every language spoken by an NES citizen in New Mexico. However, the New Mexico Supreme Court should at least consider compiling a Spanish version of the UJI's, as it is the language spoken by the vast majority of NES jurors.¹⁸⁴ This could be done by commissioning a group of language experts, translators, and bilingual lawyers and judges. Although the cost of the commission would be substantial, it would most likely pay off in the long run, as there is little evidence that the Spanish-speaking population will decrease substantially any time

180. Translators must have excellent written skills in order to provide an accurate translation or the style and content of the original source document. *See Translation vs. Interpretation*, TRANSLATIONCENTRAL, http://www.translationcentral.com/translation_vs_interpretation.php (last visited Nov. 27, 2016); *see also The Difference Between Translation and Interpreting*, LANGUAGE SCIENTIFIC, <http://www.languagescientific.com/the-difference-between-translation-and-interpreting/> ("Interpreting and translation are two closely related linguistic disciplines. Yet they are rarely performed by the same people. The difference in skills, training, aptitude and even language knowledge are so substantial that few people can do both successfully on a professional level.") (last visited Oct. 29, 2016).

181. Instead, translators are certified nationally by the American Translators Association. *See FAQs*, N.M. TRANSLATORS & INTERPRETERS ASS'N., <http://nmtia.net/faq/> (last visited Oct. 29, 2016).

182. *See* E-mail from Margarita Montalvo, Language Access Specialist, to author (Jan. 31, 2017, 4:23PM MST) (on file with author). Although some translators may charge considerably less. *See Average Rates Charged for Translations*, PROZ.COM, <http://search.proz.com/employers/rates> (aggregating the average price charged per word of translators who have registered with the website) (last visited Oct. 29, 2016).

183. *See* Rule 1-051(D) NMRA.

184. *See* Chávez, *supra* note 1, at 308 ("Spanish is the most common language requiring interpreters, representing about 57 percent of non-English speaking jurors.").

soon.¹⁸⁵ For other languages, the instructions can be translated as needed for each trial with an NES juror. Nonetheless, costs would remain relatively low, as trials with NES jurors who do not speak Spanish represent a very small percentage of trials annually.¹⁸⁶

CONCLUSION

This Note has attempted to shed more light on the benefits of written instructions that may not be adequately conveyed through oral interpretations. Without access to written translated instructions, the NES juror's ability to comprehend, retain, and focus on the information vital to rendering an informed verdict may be "impaired." In addition, the NES juror will be further precluded from potentially serving as foreperson or guiding discussions during deliberations. These are important and necessary considerations, as the drafters of the New Mexico Constitution have chosen to protect its citizens from being "impaired" on account of their inability to understand English.

Despite the New Mexico Court of Appeal's holding in *Ortiz-Castillo*, trial courts should take into account the above mentioned obstacles that NES jurors will face before deciding to forgo providing written translated instructions. Admittedly, this will place a greater burden on an already underfunded judiciary; as the New Mexico Supreme Court aptly observed, "It is an unusual constitutional provision and . . . it will not always be convenient to implement."¹⁸⁷ Nonetheless, this issue is "constitutional in origin and must be evaluated in that light."¹⁸⁸

185. See Mark Hugo Lopez & Ana Gonzalez-Barrera, *What is the Future of Spanish in the United States?*, PEW RESEARCH CENTER (Sept. 5, 2013), <http://www.pewresearch.org/fact-tank/2013/09/05/what-is-the-future-of-spanish-in-the-united-states/>.

186. As mentioned earlier, the largest district court only required court interpreters for 30 out of 4,533 potential jurors from July 1, 2007 through April 1, 2008, representing only 0.662 percent of the local juror population. See Chávez *supra* note 1, at 308. Most likely only a fraction of these jurors spoke a language other than Spanish. Of these 30 potential jurors, only three were selected to serve for trial. *Id.* at 310.

187. See *State v. Rico*, 2002-NMSC-022, ¶ 7, 52 P.3d 942.

188. *Id.* ¶ 17.