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If an Interpreter Mistranslates in a Courtroom and There is No Recording, Does Anyone Care?: The Case for Protecting LEP Defendants’ Constitutional Rights

Lisa Santaniello*

INTRODUCTION

One of the most valuable and influential pieces of evidence in any criminal trial is the testimony of witnesses. Accurate testimony is critical for any defendant, but limited-English proficiency (LEP) defendants face an additional challenge that English-speaking defendants do not: LEP defendants are often entirely dependent on the court-appointed interpreter to communicate with the court, the fact finder, and their attorney, as well as understand the allegations and evidence presented against them. Because of this, the court-appointed interpreter’s job is critical. They have the responsibility to faithfully and accurately translate testimony for the court and place LEP defendants on equal footing with native English speakers.¹ Unsurprisingly, significant problems occur when an interpreter mistranslates the defendant’s testimony and no one in the courtroom notices. While courts typically treat the interpretation of testimony as an evidentiary issue, errors in interpretation may impinge key constitutional rights. Further, the trial court’s failure to record non-English trial testimony and appellate courts’ abdication of responsibility to review these errors *de novo* compounds the harm of the interpreter’s mistranslation.

This Comment explores when and how appellate courts review errors in court interpretation, addresses the significant deficiencies of current responses by courts, and suggests ways courts can better defend the constitutional rights of LEP defendants and defendants relying on the testimony of LEP witnesses. In particular, this Comment reviews how appellate courts assess mistranslation in three specific circumstances: (1) when an interpreter mistranslates testimony by the defendant, if he or she elects to take the stand; (2) when an interpreter mistranslates the testimony of an LEP witness in a criminal trial; and (3) when an interpreter, providing simultaneous translation of the

* I would like to thank Professor Rountree for her invaluable insight on criminal process and Meredith Hurley, Kathleen DeAmico, and Erika Dirk for their aid and advice throughout the editing process. I owe the inspiration for this Comment to Judge Sheila Finnegan, who gave me the opportunity to witness the challenges and rewards of court interpretation firsthand. Lastly, I must thank my mother, my tireless editor, who shares my fascination with language, and my father for his unwavering support and encouragement. All errors are my own.

¹ In court interpreter scholarship, “interpretation” and “translation” sometimes describe two distinct functions. However, in this Comment, I use the terms interchangeably to refer to when an interpreter makes an error while translating live testimony in a courtroom. Thus “misinterpretation” refers to mistakes made while translating one language into another, not to any legal interpretation errors.

courtroom proceedings for the defendant, mistranslates something said by a witness, an attorney, or the judge.

Part I reviews who has the right to an interpreter and who bears the costs of interpreting services for criminal defendants in federal courts and state courts in California, Illinois, and Texas. These states were chosen because of their volume and diversity of criminal matters, their high number of non-English speakers, and the variety of languages spoken in these jurisdictions.² Part II highlights the problems with treating interpretation errors as evidentiary issues and courts' failure to preserve them on the record. These factors lead appellate courts to apply deferential standards of review and to abdicate their duty to protect core constitutional rights. Part III offers examples of courts' approaches to interpreter mistranslations, drawing from federal appellate courts and the state courts of California, Illinois, and Texas in order to identify the root causes of the courts' deficient protection of LEP defendants' constitutional rights. Part IV offers practical and effective solutions that courts, both at the trial and appellate level, could adopt to remedy this problem and protect LEP defendants' basic constitutional rights. Lastly, this Comment will address concerns regarding the costs of implementing these suggestions and propose economical solutions.

I. BACKGROUND: WHO HAS A RIGHT TO AN INTERPRETER AND AT WHAT COST?

Before addressing appellate courts' treatment of errors in interpretation, it is useful to understand when courts are required to appoint interpreters. As an initial matter, the right to an interpreter is a statutory or constitutional guarantee in both the federal court system and in California, Illinois, and Texas state courts.³ These statutes reflect state and federal courts' recognition that an interpreter is required to protect LEP defendants' basic constitutional rights. As developed below, however, this recognition is not reflected in

² See JUDICIAL COUNCIL OF CAL., 2017 COURT STATISTICS REPORT: STATEWIDE CASELOAD TRENDS, 2006–2007 THROUGH 2015–2016 (2017), 20 <http://www.courts.ca.gov/documents/2017-Court-Statistics-Report.pdf> (“California’s court system serves a population of more than 39 million people—about 12 percent of the total U.S.

population”); http://popup.ncsc.org/CSP/CSP_Intro.aspx (select “criminal” at the top of the page, then select “statewide criminal caseloads and rates” as the “chart/table” and “Illinois” or “California” on the left side) (In Illinois, 286, 567 criminal cases were filed in 2016; In California, 1,364,529 cases were filed in 2016); TEX. JUDICIAL BRANCH, ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY, FISCAL YEAR 2017, 31 (2017) <http://www.txcourts.gov/media/1441398/ar-fy-17-final.pdf#page=111> (reporting that, in Texas, 6,649,919 criminal cases were filed in 2017); *Language Diversity in the U.S.: Most Multilingual States*, ACCREDITED LANGUAGE SERVICES (Sept 14., 2016), <https://www.accreditedlanguage.com/2016/09/14/language-diversity-in-the-us-most-multilingual-states/> (indicating that Texas, Illinois, and California rank among the top ten most multilingual states, with California and Texas claiming the first and second spot, respectively); see also Christopher Ingraham, *Millions of U.S. Citizens Don’t Speak English to One Another. That’s Not a Problem*, WASH. POST: WONKBLOG (May 21, 2018) https://www.washingtonpost.com/news/wonk/wp/2018/05/21/millions-of-u-s-citizens-dont-speak-english-to-each-other-thats-not-a-problem/?utm_term=.1942d0e83aef (compiling and analyzing data showing California, Texas, and Illinois are three of the most linguistically diverse states with 10–35.2% of U.S. citizens eighteen years of age and older speaking a language other than English at home).

³ 28 U.S.C. § 1827 (2012); CAL. CONST. art. I, § 14; 725 ILL. COMP. STAT. 140/1 (1993); TEX. CODE CRIM. PROC. ANN. art. 38.30(a) (West 2015)

courts' treatment of claims of interpreter error, since courts rarely acknowledge the constitutional implications of mistranslations. This discrepancy is difficult to rationalize because, if the absence of an interpreter violates constitutional rights, significant errors in translation could similarly violate those same rights. Nonetheless, courts hesitate to recognize this basic principle.

A. *Interpretive Services in Federal Court*

In federal court the right to an interpreter is statutory. The Court Interpreter Act⁴ provides an interpreter in “judicial proceedings instituted by the United States” where the defendant or a witness “(A) speaks only or primarily a language other than the English language; or (B) suffers from a hearing impairment”⁵ Under the Act, the court can appoint an interpreter *sua sponte*, upon a determination that the individual’s language or hearing difficulty would “inhibit [their] comprehension of the proceedings . . . communication with counsel, or the presiding judicial officer, or . . . inhibit such witness’ comprehension of questions and the presentation of such testimony.”⁶

The Act also contains an audio recording provision.⁷ In addition to putting the federal judiciary on notice that it should prepare for and permit electronic sound recordings, the provision reflects an understanding that this record may be necessary.⁸ A court may order audio recording if, “[u]pon the motion of a party, the presiding judicial officer” determines it reasonable.⁹ “In making this determination, the presiding judicial officer shall consider, among other things, the qualifications of the interpreter and prior experience in interpretation of court proceedings”¹⁰

Finally, the Court Interpreter Act contains a provision that supplies funding for interpretive services. The Act instructs the Director of the Administrative Office of the United States Courts to pay funds into the federal judiciary to establish the program and provide for qualified interpreters on behalf of the defendant in proceedings instituted by the United States government.¹¹ In contrast, section (g)(3) of the Act specifies that the Attorney General, using funds from the Department of Justice, must pay for interpretive services utilized on behalf of government witnesses.¹² Section (g)(4) adds that parties to cases not initiated by the federal government who wish to use the services of a court interpreter must bear the cost.¹³ Section (d)(1) of the Act articulates that an interpreter is provided to ensure the defendant can understand the proceedings, the presentation of testimony, and to allow the defendant to communicate with his or her attorney as well as the judge.¹⁴ Although the Act does not explicitly categorize the potential harms as constitutional, the purpose of the Act reflects concern for LEP defendants’ confrontation

⁴ § 1827(d)(1).

⁵ *Id.*

⁶ *Id.*

⁷ § 1827(d)(2).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ § 1827(g)(1).

¹² § 1827(g)(3).

¹³ § 1827(g)(4).

¹⁴ § 1827(d)(1).

clause right,¹⁵ right to counsel,¹⁶ and right to aid in his or her own defense.¹⁷ As will be addressed in Part II, federal courts' treatment of interpretation errors as evidentiary does not comport with the Court Interpreter Act's allusion to constitutional harms.

Although the Court Interpreter Act implicitly recognizes that the absence of an interpreter impinges constitutional rights,¹⁸ this Comment will demonstrate federal courts do not acknowledge that interpreter errors may have the same effect. However, the presence of the audio recording provision suggests a path to assuring constitutional rights—recording non-English testimony for comparison with the interpreter's translation. As discussed below, recording both the interpreted and original statements enable defendants to show reviewing courts precisely how the erroneous interpretation violated their right to a fair trial.

B. *Interpretive Services in California State Court*

In California, the right to an interpreter is guaranteed by the state constitution.¹⁹ While the California constitution enumerates this right in a section called “felony prosecution,” California courts expanded the right to cover defendants in all criminal matters, including lesser misdemeanor charges.²⁰ Article I, § 14 provides, “A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings.”²¹ Corresponding California Supreme Court cases elucidate

¹⁵ See Siobhan C. Murphy & Daniel Gilman, *Sixth Amendment at Trial*, 88 GEO. L.J. 1442, 1448 (2000) (“The Sixth Amendment Confrontation Clause provides a criminal defendant the right to directly encounter hostile witnesses, the right to cross-examine adverse witnesses, and the right to be present at any stage of the trial that would enable the defendant to effectively cross-examine adverse witnesses.”)

¹⁶ See Brooks Holland, *A Relational Sixth Amendment During Interrogation*, 99 J. CRIM. L. & CRIMINOLOGY 381, 388 (2009) (quoting U.S. CONST. amend. VI and *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963)) (“The Sixth Amendment to the U.S. Constitution provides that ‘[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence’ By the early twentieth century, the Supreme Court had ‘construed this [amendment] to mean that in federal courts counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived.’ ”).

¹⁷ Timothy P. O'Neill, *Vindicating the Defendant's Constitutional Right to Testify at Criminal Trial: The Need for an on-the-Record Waiver*, 51 U. PITT. L. REV. 809, 820 (1990) (“[T]he right of the defendant to testify ‘has sources in several provisions of the Constitution’ [It is] a fundamental part of the adversary system and [is] thus guaranteed by the due process clause of the fourteenth amendment.”)

¹⁸ See *Court Interpreter's Act: Hearing on H.R. 10228, H.R. 10129, and S. 1315 Before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary*, 95th Cong. 4–6 (1978) (statement of Rep. Fred Richmond, sponsoring witness of the Bilingual, Hearing, and Speech Impaired Court Interpreter's Act) (“[The Bilingual, Hearing, and Speech Impaired Court Interpreter's Act] would insure [sic] that a qualified interpreter be present whenever a person who does not communicate in English is involved in a Federal court proceeding. Unfortunately, with the deaf community, this communication problem has long been overlooked because it is invisible. Our legal system has not lived up to the basic American ideal of equal justice and fairness to all. Deaf and non-English-speaking Americans have been denied the fundamental right to a fair trial due to their inability to understand the court proceedings. The Constitution guarantees every American access to the Federal courts through the fifth and sixth amendments. If language-handicapped Americans are not given the constitutionally established access to understand and participate in their own defense, then we have failed to carry out a fundamental American premise—fairness and due process for all.”).

¹⁹ CAL. CONST. art. I, § 14.

²⁰ *Id.*

²¹ *Id.*

this provision, clarifying that the right to an interpreter has constitutional justifications, including “rights to due process, to confrontation, to effective assistance of counsel, and to be present at trial.”²² While defendants do not bear the cost of their interpreters in California courts, they must demonstrate “an affirmative showing of need”²³ The burden of “affirmative showing of need” is discharged by demonstrating an inability to understand English. A mere statement of being unable to understand English, coupled with a request for an interpreter is not necessarily sufficient to trigger appointment of an interpreter.²⁴

While in California the right to an interpreter is more explicitly tied to the constitution, in practice, appellate courts overwhelmingly treat interpreter errors as evidentiary issues, accord significant deference to the trial judge, and thereby abdicate their responsibility to secure the rights of LEP defendants. Particularly troubling are California appellate courts’ inquiries into LEP defendants’ needs for interpretation services and admonitions against use of interpreters for courtroom gamesmanship.²⁵ As will be reviewed at greater length, these interrogations are both unfair and beyond appellate courts’ proper scope.

C. *Interpretive Services in Illinois State Court*

Unlike California’s implicit recognition of the right to an interpreter for misdemeanor criminal defendants, Illinois law explicitly recognizes this right.²⁶ The relevant Illinois statute, 725 Ill. Comp. Stat. Ann. 140/1, provides:

[w]henever any person accused of committing a felony or misdemeanor is to be tried in any court of this State, the court shall upon its own motion or that of defense or prosecution determine whether the accused is capable of understanding the English language and is capable of expressing himself in the English language so as to be understood directly by counsel, court or jury.²⁷

If the trial court judge determines that the defendant is “incapable of so understanding or so expressing himself,” an interpreter “whom [the defendant] can understand and who

²² *People v. Romero*, 187 P.3d 56, 73 (Cal. 2008) (citing *People v. Rodriguez*, 728 P.2d 202, 205 (1986)).

²³ *In re Raymundo B.*, 203 Cal. App. 3d 1447, 1453 (Cal. Ct. App. 1988); *see also* *People v. Sanchez*, No. H043523, 2017 WL 2982391, at *2 (Cal. Ct. App. July 13), *review denied* (Sept. 20, 2017) (requiring defendant to demonstrate an affirmative showing of need because only defendants who show they do not understand English are entitled to an interpreter).

²⁴ *Raymundo B.*, 203 Cal. App. 3d at 1453 (requiring “[c]onclusive proof” of the inability to understand English in order for an interpreter to be appointed. The *Raymundo* court found by clear and convincing evidence that the defendant, a juvenile, spoke and understood English, and that, even though an interpreter had been appointed for the defendant in the past, this was not sufficient proof of his need.).

²⁵ *See* *People v. Partida*, 122 P.3d 765, 766 (Cal. 2005) (specific and contemporaneous objection is needed to prevent abuse of interpreter services as a trial strategy); *People v. Sokau*, 188 Cal. Rptr. 3d 857, 862 (Cal. Ct. App. 2015) (formal objection needed to prevent defense counsel from engaging in gamesmanship).

²⁶ 725 ILL. COMP. STAT. 140/1 (1993).

²⁷ *Id.*

understand[s] him” will be appointed.²⁸ In its Language Access Policy, the Illinois Supreme Court clarified the qualifications for certified interpreters, qualified interpreters, registered interpreters, and unregistered interpreters, in descending order of credentials.²⁹ The court’s policy is that “[w]henever a foreign language interpreter is appointed by the court, a certified or qualified interpreter shall be provided if one is available.”³⁰ A certified interpreter is one who “is certified and in good standing by the federal courts or by a state having a certification program”³¹ However, the Illinois Supreme Court permits use of an unregistered interpreter “if the court made reasonable efforts to obtain a certified, qualified or registered interpreter [and one] was not reasonably available, or if good cause is otherwise shown.”³²

In addition to the standards pronounced by the Illinois Supreme Court, at least one circuit court devised its own interpreter qualifications. The Twenty-Second Judicial Circuit Court of Illinois provides that official court interpreters can be staff or contractual interpreters, but must adhere to a standard of conduct, which includes impartiality, confidentiality, and disclosure of any conflicts of interest.³³ Despite Illinois courts’ willingness to accept varying levels of interpreter competency, like federal and California courts, in Illinois, “[t]he appointment of an interpreter in a felon or misdemeanor [sic] where incarceration may result is at county expense regardless of whether the defendant is indigent.”³⁴

The Seventh Circuit, reviewing Illinois statute 140/1, affirmed that the right to an interpreter flows from the state constitutional right to due process.³⁵ The court held that, even for the lowest level misdemeanors, “Illinois law requires the court to ‘determine whether the accused is capable of understanding the English language and is capable of expressing himself in the English language so as to be understood directly by counsel, court or jury.’”³⁶ This is because criminal defendants have a due process right to understand “what is said at trial and to communicate with counsel” and an interpreter is necessary to guard this right.³⁷ Due process is assured because, mistranslations notwithstanding, an interpreter enables the defendant to communicate with his or her counsel and understand the proceedings.³⁸

D. *Interpretive Services in Texas State Court*

Texas guarantees an interpreter in criminal proceedings where it is “determined that a person charged or a witness does not understand and speak the English language . . .

²⁸ *Id.*

²⁹ ILL. SUPREME COURT, LANGUAGE ACCESS POLICY 3 (2016 ed.), http://www.illinoiscourts.gov/CivilJustice/LanguageAccess/Language_Access_Policy.pdf.

³⁰ *Id.* at 5.

³¹ *Id.*

³² *Id.*

³³ ILL. 22D JUD. CIR. CT. R. 10.14(d)–(e).

³⁴ *Id.* at 10.14(a).

³⁵ *United States v. Jimenes*, 852 F.3d 631, 633 (7th Cir. 2017) (citing *Mendoza v. United States*, 755 F.3d 821, 828 (7th Cir. 2014)).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

.³⁹ This determination, left to the discretion of the trial court, may be sua sponte or prompted by motion of either party.⁴⁰ However, unlike the federal court system where interpreters must be certified or qualified, in Texas courts an interpreter is not “required to have specific qualifications or training” but only “sufficient skill in translating and familiarity with the use of slang.”⁴¹ The Texas Criminal Code provides that interpreters are paid from the general fund of the county.⁴²

Although the right to an interpreter is guaranteed by statute or constitution in federal court and the state courts of California, Illinois, and Texas, the most pressing problem arises in courts’ review of claims of errors in interpretation. The problem is that LEP defendants’ constitutional rights cannot be protected merely by assuring a right to an interpreter when there are no viable safeguards in place to monitor and review the interpreters’ performances. With safeguards absent, courts are unable to redress constitutional deprivations resulting from mistranslations.

II. THE PROBLEMS: RECOGNIZING ERRORS IN INTERPRETATION AS CONSTITUTIONAL ISSUES AND PRESERVING THEM FOR APPEAL

There are two problems with courts’ current treatment of errors in interpretation. First, courts misclassify errors in interpretation as evidentiary matters and therefore apply a deferential standard of review. Second, the mistranslation does not appear on the record. The court reporter includes only English testimony in the court transcript, and the proceedings are rarely audio recorded.

In the typical court setting, the interpreter is the only court-appointed actor present who understands both the LEP defendant and the English proceedings. Although occasionally there are multiple interpreters present in the courtroom, such as when they are performing different functions or switching shifts, there is no statute requiring this practice in California, Illinois, Texas, or the federal courts. Consequently, errors in interpretation go unnoticed because no one is responsible for monitoring the interpreter’s work.⁴³

Furthermore, even when errors in translation *are* caught at the trial court level, it is not because of a procedural safeguard, but instead through happenstance and serendipity.⁴⁴ For example, the LEP criminal defendant may know enough English to

³⁹ TEX. CODE CRIM. PROC. ANN. art. 38.30(a) (West 2015).

⁴⁰ *Id.*

⁴¹ Kan v. State, 4 S.W.3d 38, 41 (Tex. App. 1999) (citing art. 38.30); *see also* Martins v. State, 52 S.W.3d 459, 473 n.12 (Tex. App. 2001) (citing art. 38.30(a)) (“Article 38.30(a) . . . provides that a defendant can nominate another person to serve as an intermediary between himself and the interpreter in the event that the only available interpreter is not considered to possess adequate interpreting skills for the particular situation or the interpreter is not familiar with the use of slang.”).

⁴² Art. 38.30(b).

⁴³ *See, e.g.,* People v. Nunez-Sharp, No. B264843, 2017 WL 1007583, at *16 (Cal. Ct. App. Mar. 15), *review denied* (June 14, 2017) (“Although the trial court corrected that error, it is reasonable to assume there were additional errors that went unnoticed.”).

⁴⁴ *See, e.g.,* United States v. Santos, 397 F. App’x 583, 588 (11th Cir. 2010) (interpreter admitted to mistranslation); People v. Aguirre, No. B231368, 2012 WL 3332366, at *4 (Cal. Ct. App. Aug. 15, 2012) (other interpreters identified and called attention to mistranslation); Gonzalez v. State, 752 S.W.2d 695, 698 (Tex. App. 1988) (bilingual defense attorney identified translation issues).

identify and raise issues of mistranslation, or another interpreter performing a different role in the courtroom may catch the error. Unsurprisingly, neither of these “mechanisms” adequately protect the constitutional rights of LEP defendants.

A. *Misclassification of Interpretation Errors as Evidentiary Matters*

Only official translations provided by the court interpreter are admitted as evidence.⁴⁵ In most cases, non-English testimony is not reviewed or preserved. As a result, when a defendant claims the interpreter mistranslated testimony, reviewing courts overwhelmingly treat the error as evidentiary.⁴⁶ As discussed below, this response misunderstands the nature of the interpreter’s error and ignores its impact on a defendant’s constitutional rights. Further, misclassifying interpretation errors as evidentiary has severe consequences: it triggers doctrines requiring timely and specific objections at trial and permits a highly deferential standard of review on appeal.⁴⁷

In addition to obscuring the significance of mistranslations, treating them as evidentiary issues accords unwarranted deference to trial court determinations. Unlike other evidentiary issues, LEP defendants cannot rely upon the trial court adversarial system to uncover and rectify deficiencies in interpretation. The trial court judge’s position within the court system does not confer an inherent advantage when rectifying an error in interpretation, since what is required is a comparison between the LEP defendant’s non-English testimony and the English translation. Therefore, deference to the trial court is simply not logical in this context.

1. The Objection Requirement

Courts require trial attorneys to make timely and specific objections to evidentiary issues; otherwise, they are procedurally defaulted and may not be raised on appeal.⁴⁸

⁴⁵ See NINTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS 3.19 (NINTH CIRCUIT JURY INSTRUCTIONS COMM. 2010) (instructing jury to rely only on English interpretation of testimony and to disregard non-English testimony even if they understood it); *Hernandez v. New York*, 500 U.S. 352, 379 (1991) (official translation alone is evidence). See also CRIMINAL JURY INSTRUCTIONS § 121 (JUDICIAL COUNCIL OF CALIF. 2018) (“An interpreter will provide a translation for [the jury] at the time that the testimony is given. [The jury] must rely on the translation provided by the interpreter, even if you understand the language spoken by the witness.”); *People v. Cabrera*, 230 Cal. App. 3d 300, 304 (1991) (juror committed misconduct by relying on her personal translation of non-English testimony rather than the interpreter).

⁴⁶ See, e.g., Charles M. Grabau & Llewellyn Joseph Gibbons, *Protecting the Rights of Linguistic Minorities: Challenges to Court Interpretation*, 30 NEW ENG. L. REV. 227, 260, 288 (1996) (“If the interpreter is incompetent, the judge is likely to be presented with evidentiary problems . . . Courts have, for evidentiary purposes, considered a court interpreter to be a witness, an expert witness, an agent, or an officer of the court.”); Will Turner, *Qué Dijo? The Plain Error Rule’s Effective Denial of Due Process to Non-English-Speaking Criminal Defendants*, 3 ALA. C.R. & C.L. L. REV. 141, 150–51 (2013) (“The eradication of the plain error rule in this context would be a beginning towards ensuring due process to non-English-speaking defendants . . . [T]he [de novo review] rule would protect defendants from having their language barrier define the results of their trial.”).

⁴⁷ See, e.g., *United States v. Gonzales*, 179 F. App’x 362, 363 (6th Cir. 2006) (applying plain error standard of review); *United States v. Joshi*, 896 F.2d 1303, 1310 (11th Cir. 1990) (requiring contemporaneous objections to mistranslations).

⁴⁸ See, e.g., FED. R. EVID. 103(a)(1) (“A party may claim error . . . only if . . . a party, on the record timely objects . . . and states the specific ground.”); CAL. EVID. CODE § 353(a) (providing that a trial court

Because courts consider errors in translation as evidentiary issues, this same requirement is in force. However, as a result of misclassifying the error, appellate courts require attorneys to object to unrecognizable errors in translation that often no one in the courtroom is qualified to identify. Interpreters are used when the trial court determines the defendant and other court actors do not share a common language. Incongruously, those same court actors are required to identify and call the court's attention to errors the interpreter makes in a language they do not speak. When they fail to do that, the defendant has little chance for a remedy.⁴⁹

On some level, courts recognize the absurdity of expecting attorneys to object to mistranslations in a foreign language. This implicit recognition reveals itself in two ways: first, courts impute the objection requirement from the attorney to the criminal defendant; second, courts consistently deny ineffective assistance of counsel claims based on attorneys' failure to object to errors in interpretation.⁵⁰ Both responses reveal courts' awareness that, in some ways, interpreter error is not a standard evidentiary issue and requires different treatment. However, these responses by the court only exacerbate the problem.

By putting the onus on the criminal defendant to object to mistranslations, appellate courts conclude that if no objection is made and the defendant does not raise this issue during trial, more deference should be paid to the trial court.⁵¹ This skepticism fuels appellate courts' propensity for finding any error harmless and their reluctance to reverse a conviction.⁵² By doing this, appellate courts abdicate their responsibility to protect constitutional rights in two ways. First, relying on criminal defendants to object to mistranslations only protects the constitutional rights of defendants who are proficient enough with English to recognize mistranslations. This conclusion is at odds with the purpose of providing court interpretation: constitutional protections should not depend on English proficiency.

“finding shall not be set aside . . . unless . . . [t]here appears of record an objection . . . so stated as to make clear the specific ground of the objection”); ILL. R. EVID. 103(b)(1) (providing that a “contemporaneous trial objection . . . must be made to preserve a claim of error for appeal”); TEX. R. APP. PROC. 33.1(a)(1) (requiring that, in order for a party to appeal, the trial court record must reflect a “timely request, objection, or motion”); TEX. R. EVID. 103(a)(1) (providing that a party must timely object or move to strike evidence and state specific ground for such request); *People v. Partida*, 122 P.3d 765, 768 (Cal. 2005) (interpreting California Evidence Code § 353 and holding that “[i]n accordance with this statute, we have consistently held that the ‘defendant’s failure to make a timely and specific objection’ on the ground asserted on appeal makes that ground not cognizable”) (quoting *People v. Seijas*, 114 P.3d 742, 749 (Cal. 2005)); *People v. Ramos*, 920 N.E.2d 504, 508 (Ill. App. Ct. 2009) (“It is axiomatic that a defendant must object contemporaneously . . . in order to preserve issues for [appellate] review.”).

⁴⁹ See, e.g., FED. R. EVID. 103(a)(1).

⁵⁰ See Gregory G. Sarno, Annotation, *Ineffective Assistance of Counsel: Use or Nonuse of Interpreter at Prosecution of Foreign Language Speaking Defendant*, 79 A.L.R. 4th 1102, § 9 (1990) (summarizing cases where counsel was not ineffective despite use of an incompetent interpreter or failure to object to use of an incompetent interpreter).

⁵¹ See *Turner*, *supra* note 46, at 142 (“When criminal defendants fail to object to inadequate interpretation at trial, reviewing courts will apply the plain error standard of review.”).

⁵² See *id.* at 143 (“[A] defendant’s failure to object to inadequate interpretation at trial triggers heavy presumptions against that defendant from obtaining relief on appeal under both the Court Interpreters Act and *Strickland*.”).

Second, relying on the defendant to come forward with errors in interpretation requires the defendant to police the work of an interpreter, who is compensated by the federal or state government. This further burdens LEP defendants with a task their English-speaking counterparts do not face. While LEP criminal defendants should be encouraged to point out any mistranslations they recognize, their right to an appeal should not hinge on their ability to monitor the interpretation of a professional in court, particularly when their liberty hangs in the balance.⁵³

Courts' subliminal recognition of this absurdity also appears in their treatment of *Strickland* ineffective assistance of counsel claims.⁵⁴ Defendants pursue a *Strickland* claim by demonstrating that their counsel's deficient performance prejudiced their defense.⁵⁵ Despite the fact that ineffective assistance of counsel is justifiably raised in response to attorneys' failure to object to evidentiary issues⁵⁶—and errors in interpretation are categorized as evidentiary issues—very few claims on this basis are successful.⁵⁷ Paradoxically, an attorney's failure to object to mistranslation is insufficient to support an ineffective assistance of counsel claim, but it is sufficient to bar the defendant from appealing and redressing the deprivation of his or her constitutional rights.⁵⁸ By rejecting *Strickland* ineffective assistance of counsel claims, courts acknowledge that it is unreasonable to require an attorney to object to errors in translation of a foreign language. However, by applying a more deferential standard of review on appeal for unpreserved errors, appellate courts hold the wrong actor responsible: the criminal defendant.

2. A Deferential Standard

There are cogent reasons why appellate courts typically show deference to trial courts' evidentiary and factual determinations. Trial courts excel at assessing facts in addition to weighing and resolving evidentiary issues. However, these skills do not give the trial court an advantage when reviewing issues of misinterpretation, which are constitutional, legal issues. Therefore, deference is improper. Typically, appellate courts review evidentiary issues for abuse of discretion. "Abuse of discretion has been defined variously as 'exceeding the bounds of reason or disregard of the rules or principles of law or practice'"⁵⁹ Appellate courts apply this level of deference when the trial judge's decision depended on "first-hand observations of the litigants and the evidence" or

⁵³ See *Guevara v. United States*, 77 A.3d 412, 424 (D.C. 2013) (finding that where defendant does not object, the standard of review is elevated to clear error).

⁵⁴ See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (finding ineffective assistance of counsel where attorney's "conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.>").

⁵⁵ *Id.*

⁵⁶ Donald F. Roeschke, Annotation, *Strategies for Enforcing the Right to Effective Representation*, 46 AM. JUR. TRIALS 571, § 4.5 (2018).

⁵⁷ Sarno, *supra* note 50.

⁵⁸ See, e.g., *People v. Ramos*, 920 N.E.2d 504, 508 (Ill. App. Ct. 2009); *People v. Costales*, 520 N.E.2d 421, 424 (Ill. App. Ct. 1988) (affirming trial court's finding that defendant did not need an interpreter and therefore denying defendant's ineffective assistance of counsel claim premised on interpreter's errors).

⁵⁹ 7 Wayne R. LaFave et. al., Annotation, *Criminal Procedure*, 7 Crim. Proc. § 27.5(e) (4th ed. 2017) (quoting *State v. Adams*, 879 P.2d 513, 516 (Haw. 1994)).

involved “issues about which the trial judge has a greater understanding than an appellate judge.”⁶⁰ As will be discussed, misinterpretation is not this type of issue.

When attorneys do not object to translation deficiencies, some appellate courts elevate their deference to plain error.⁶¹ Applying this standard, “an appellate court can correct an error not raised at trial only if there is (1) error, (2) that is plain, (3) that ‘affects substantial rights,’ and (4) ‘seriously affects the fairness, integrity, or public reputation of judicial proceedings.’”⁶² When a defendant appeals an unpreserved issue, appellate courts’ reluctance to overturn the trial court’s decision “may well surpass whatever caution an appellate judge would exercise before overturning a lower court decision reviewed for abuse of discretion.”⁶³ Reviewing claims of interpreter mistranslation for plain error improperly penalizes criminal defendants for their attorneys’ limited foreign language skills and permits the infringement of key constitutional rights. Therefore, appellate courts’ deference is again improper.

Although errors in translation occur during the trial, often they are not immediately recognized. Appellate courts assume that since trial judges hear witness testimony, as opposed to reading a transcript, they can better identify mistranslations. This erroneous conclusion likely stems from the deference accorded to “trial court findings regarding credibility”⁶⁴ With regard to credibility, appellate courts give deference “because the trial judge is in the best position to evaluate a witness’s demeanor and tone of voice as well as other mannerisms that bear heavily on one’s belief in what the witness says.”⁶⁵ Critically, however, the skills needed to assess credibility are not the same as those required to identify errors in interpretation. Missing this distinction, appellate courts assume that when an interpreter mistranslates, there is some outward manifestation of that error—perhaps a hiccup in the flow of interpretation or demonstrated confusion by the witness, attorney, or interpreter. Because of this assumption, appellate courts afford substantial deference to trial judges’ evidentiary determinations which includes interpreted witness testimony. However, the trial judge has no clear advantage over an appellate court in identifying, examining, and remedying errors in interpretation. In fact, when an interpreter is used “[i]t is almost impossible for a trial judge to tell whether an interpretation is accurate unless the judge is bilingual and can monitor the interpreter’s

⁶⁰ *Id.*

⁶¹ *See, e.g.,* United States v. Santos, 397 F. App’x 583, 586 (11th Cir. 2010) (reviewing claimed error in interpretation for plain error since defendant failed to object at trial); United States v. Edouard, 485 F.3d 1324, 1340–43 (11th Cir. 2007) (finding that the trial court did not err in failing to appoint an interpreter and where the issue is not preserved by contemporaneous objection the proper standard of review is plain error); People v. Molina, 418 N.E.2d 826, 829 (Ill. App. Ct. 1981) (demonstrating that a claim of misinterpretation is waived if defendant fails to object unless it constitutes plain error); *see also* Jonathan S. Masur & Lisa Larrimore Ouellette, *Deference Mistakes*, 82 U. CHI. L. REV. 643, 678 (2015) (“[W]hen the appealing party has failed to raise and preserve the issue at trial, all these types of questions are reviewed only for plain error, a[] . . . more deferential standard.”); Turner, *supra* note 46, at 142 (“When criminal defendants fail to object to inadequate interpretation at trial, reviewing courts will apply the plain error standard of review.”).

⁶² LaFave et. al., *supra* note 59, § 27.5(d) (quoting Johnson v. United States, 520 U.S. 461, 462 (1997)).

⁶³ Masur & Ouellette, *supra* note 61, at 680.

⁶⁴ United States v. Weissman, 195 F.3d 96, 99 (2d Cir. 1999) (quoting Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623, 634 (2d Cir. 1996)).

⁶⁵ *Id.* (quoting *Donato*, 96 F.3d at 634).

performance.”⁶⁶ Even if the judge happens to speak or understand the witness’s non-English testimony, the “bilingual judge, although well intentioned, is not competent to determine an interpreter’s abilities.”⁶⁷

To identify misinterpretations, a comparison between what the defendant actually said and the interpreter’s English translation of that word or phrase is necessary. The trial court has no clear advantage in performing this comparison. However, an appellate court, reviewing a full record, could determine whether the error occurred and whether it was significant enough to impinge on constitutional rights.

B. *Errors Are Not Preserved for Review*

In addition to appellate courts’ improper classification of these errors as evidentiary issues, another significant deficiency in courts’ treatment of interpreted testimony is procedural: errors in interpretation do not appear on the record and therefore are not preserved for an appeal.⁶⁸ As noted, the evidence in a trial is the English-translated testimony provided by the interpreter.⁶⁹ In fact, juries are instructed to disregard non-English testimony, even if they can understand it.⁷⁰ The LEP defendant or LEP witness’s own testimony is not preserved by the court; it is not captured by the court reporter, and it is not typically recorded by the court.⁷¹ Therefore, when a criminal defendant claims an error was made and wishes to point to the error in the trial transcript, he or she cannot.

As noted by the Illinois Appellate Court in *People v. Tamayo*, a case where a defendant brought a post-conviction claim for deficient translation, there was no evidence on the record to support or refute the defendant’s claim of mistranslation.⁷² The *Tamayo* court determined that an evidentiary hearing on this issue was warranted because all that could be ascertained from the record was the presence of an interpreter, with no information about the quality or sufficiency of the translation.⁷³ While the *Tamayo* court’s response is insufficient to guard LEP defendants’ rights, particularly because the burden is on the defendant to make a “substantial showing that his constitutional rights ha[d]been violated,” the court’s recognition of the trial record’s insufficiency is noteworthy.⁷⁴

⁶⁶ Debra L. Hovland, *Errors in Interpretation: Why Plain Error Is Not Plain*, 11 LAW & INEQ. 473, 479 (1993).

⁶⁷ Grabau & Gibbons, *supra* note 46, at 298.

⁶⁸ *United States v. Villa-Gomez*, 400 F. App’x 104, 105 (7th Cir. 2010) (“[A claim of interpreter mistranslation] necessarily would be frivolous if made on direct appeal because there is no record support for it”) (citing *United States v. Johnson*, 248 F.3d 655, 663 (7th Cir. 2001); *United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985)).

⁶⁹ NINTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS § 3.19 (NINTH CIRCUIT JURY INSTRUCTIONS COMM. 2010) (instructing jury to rely only on English interpretation of testimony and disregard non-English testimony even if they understood it); *Hernandez v. New York*, 500 U.S. 352, 379 (1991) (stating that jurors must accept official translation of testimony provided by court interpreter even if they understand non-English testimony).

⁷⁰ NINTH CIRCUIT MODEL CRIMINAL JURY INSTRUCTIONS § 3.19.

⁷¹ *See, e.g.*, 28 U.S.C. § 1827(d)(2) (2012) (noting that a sound recording of a judicial proceeding is available only on motion of a party and with the judge’s consent); *see also* Grabau & Gibbons, *supra* note 46, at 294 (“The court reporter does not maintain a record of non-English testimony.”).

⁷² *People v. Tamayo*, No. 3-14-0368, 2016 WL 6603592, ¶ 24 (Ill. App. Ct. Nov. 8, 2016).

⁷³ *Id.*

⁷⁴ *Id.* at ¶ 15.

Significantly, because mistranslations are not “record errors,” meaning, errors that appear on the record forwarded for appellate review, they cannot be argued on direct appeal.⁷⁵ Since the criminal defendant cannot raise this issue on direct appeal, he or she is left to raise it on collateral review.⁷⁶ Collateral review “means a judicial reexamination of a judgment or claim in a proceeding outside of the direct review process.”⁷⁷ On collateral review defendants may bring the appellate court’s attention to errors not captured by the trial record.⁷⁸ But, relegating appeals of mistranslation to collateral review is problematic because at this stage of the post-conviction proceedings, the defendant is not constitutionally guaranteed the right to an attorney.⁷⁹ Moreover, in the federal context, the criminal defendant also bears the heavy burden of proving the “error ‘had [a] substantial and injurious effect or influence in determining the jury’s verdict,’ ” rather than whether it “was harmless beyond a reasonable doubt.”⁸⁰

Forcing an LEP defendant to argue the issue of mistranslation on collateral review is fundamentally improper because it penalizes the criminal defendant for the error of a court-appointed interpreter—an individual who is compensated by the state or federal government. By limiting the defendant’s opportunity to appeal this issue and therefore severely restricting the availability of assistance by appointed counsel, the criminal defendant is held responsible for the interpretation error. Paradoxically, the criminal defendant is penalized for an error precipitated by a government-paid interpreter that, by the court’s own admission, the defendant was substantially incapable of recognizing.

III. THE PROBLEMS IN CONTEXT

The federal courts and state court systems in California, Illinois and Texas are overwhelmingly predisposed to find misinterpretation harmless error;⁸¹ however, these jurisdictions vary on the standard of review applied and whether the error is treated as legal or factual.⁸² Some federal circuits, like the Seventh, treat the error as constitutional and review it de novo.⁸³ Others, like Texas state courts, treat errors in interpretation as categorically factual and apply an abuse of discretion standard.⁸⁴ All jurisdictions examined require contemporaneous and specific objections to errors in translation in

⁷⁵ See Helen A. Anderson, *Revising Harmless Error: Making Innocence Relevant to Direct Appeals*, 17 TEX. WESLEYAN L. REV. 391, 391 (2011) (“On direct appeal, courts will look at claims of trial error, and evaluate those claims and their ‘harmlessness’ based only on the trial record.”).

⁷⁶ *Id.*

⁷⁷ Brian R. Means, Annotation, *Federal Habeas Manual*, FED. HABEAS MANUAL § 9A:74 (2018) (citing *Wall v. Kholi*, 562 U.S. 545, 553 (2011)).

⁷⁸ Anderson, *supra* note 75, at 399–400 (challenges involving evidence outside the trial record have to be brought on collateral review).

⁷⁹ *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

⁸⁰ *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946) and *Chapman v. California*, 386 U.S. 18, 24 (1967)).

⁸¹ Turner, *supra* note 46, at 141.

⁸² See, e.g., *United States v. Leiva*, 821 F.3d 808, 811 (7th Cir. 2016) (treating accuracy of interpretation as an issue of law); *Lee v. State*, No. 05-02-01119-CR, 2003 WL 21142887, at *2 (Tex. App. May 19, 2003) (treating accuracy of interpreter translation as an issue of fact).

⁸³ *Leiva*, 821 F.3d at 811.

⁸⁴ *Gonzalez v. State*, 752 S.W.2d 695, 698 (Tex. App. 1988).

order to preserve them for appeal; however, some impute this requirement to the criminal defendant⁸⁵ and others refuse to waive the objection requirement even when the interpreter admits to the error.⁸⁶ Several courts, including those in California and Illinois, focus on the LEP defendant's need for interpretation rather than on the errors of interpretation,⁸⁷ and other jurisdictions consider interpretation as an undeserved advantage.⁸⁸ All these variations impact the ability of an LEP criminal defendant to receive relief from the damage inflicted by interpreters' errors; many of these variations essentially prevent defendants from redressing deprivations of their constitutional rights.

A. *Interpretation Errors in Federal Courts*

As discussed earlier, federal appellate courts' treatment of appeals based on interpreter error is inconsistent both in categorization and review. Some circuits view claims of interpreter error as constitutional and review them de novo while others treat these errors as evidentiary and apply a deferential standard of review. Federal courts' inconstant treatment of these errors appears irreconcilable when interpretation in criminal cases is contrasted against review of interpretation errors in deportation proceedings. Despite the fact that deportees have fewer constitutional rights than criminal defendants, deportees benefit from an easier path to redressing these errors. While all jurisdictions examined require criminal defendants to object contemporaneously to errors in interpretation, the issue is considered preserved when deportees offer other evidence of interpretation issues, including non-responsive answers. Holding LEP criminal defendants to a higher standard requires them to identify mistranslations in a language the court acknowledges they do not understand. When these defendants, understandably, fall

⁸⁵ See *Valladares v. United States*, 871 F.2d 1564, 1165–66 (11th Cir. 1989) (finding it significant that defendant did not object to the adequacy of interpretation at trial and noting courts treat this “as a factor weighing against a finding of abuse of discretion . . .”); *United States v. Hernandez*, 994 F. Supp. 627, 630 (E.D. Pa. 1998), *aff'd*, 248 F.3d 1131 (3d Cir. 2000) (holding defendant waived the issue of misinterpretation by failing to object during trial, despite recognizing the role of the interpreter in helping the defendant understand the proceedings); *People v. Harris*, 433 N.E.2d 343, 347 (Ill. App. Ct. 1982) (concluding defendant is barred from claiming interpretation error since he did not object during trial); *Kan v. State*, 4 S.W.3d 38, 43 (Tex. App. 1999) (holding defendant waived issue of interpretation error by failing to raise it during trial) (internal citation and quotations omitted).

⁸⁶ See, e.g., *People v. Koch*, 618 N.E.2d 647, 654 (Ill. App. Ct. 1993) (although interpreter admitted to misinterpreting testimony and defendant claimed these errors damaged his credibility with the jury, the court held misinterpretations were immaterial and therefore did not warrant reversal of defendant's conviction).

⁸⁷ See, e.g., *People v. Sokau*, 188 Cal. Rptr. 3d 857, 860 (Cal. Ct. App. 2015) (despite defendant's expression of need and the court's acknowledgement that the trial was a credibility contest, it concluded the defendant spoke and understood sufficient English to make any interpreter errors superfluous); *People v. Clark*, 12 N.E.3d 708, 715 (Ill. App. Ct. 2014) (finding defendant altogether incredible because she requested an interpreter despite working a job the court assumed required “a working knowledge of English”).

⁸⁸ See e.g., *People v. Partida*, 122 P.3d 765, 768 (Cal. 2005) (demonstrating that the objection requirement prevents the defendant from purposefully failing to object to interpretation at trial and “gamb[ing] on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal”); *Gonzalez v. United States*, 697 A.2d 819, 823 (D.C. 1997) (“To allow a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse.” (quoting *Redman v. United States*, 616 A.2d 336, 338 D.C.1992)).

short of this standard, their chance for success on appeal dwindles and their constitutional rights are compromised.

1. The Seventh Circuit

The Seventh Circuit in *United States v. Leiva* reviewed an appeal from a conviction for conspiracy to possess and use counterfeit credit cards.⁸⁹ Defense counsel objected to the use of one of the interpreters, noting the interpreter was summarizing the defendant's testimony and did not seem to be providing real time translation.⁹⁰ According to the trial transcript, the interpreter fumbled with defendant's testimony several times, demonstrating clear confusion.⁹¹ Both the trial judge and the attorneys recognized the translation problems stemmed from the interpreter's lack of familiarity with the defendant's Cuban dialect.⁹² After the defendant himself expressed difficulty with the interpreter, his counsel made a motion to have the proceedings audio recorded as per provision § 1827(d)(2) of the Court Interpreter's Act.⁹³ At the close of trial, the defendant was sentenced to 60–82 months in prison, as well as two years of supervised release.⁹⁴

The *Leiva* court first analyzed the defendant's constitutional claim and then his statutory claim under the Court Interpreter's Act.⁹⁵ The Court confirmed that the defendant had “a constitutional right to competent translation of his testimony at trial” and a due process right to testify on his behalf.⁹⁶ If a criminal defendant is “unable to understand the proceedings due to a language difficulty,” his due process right is also infringed.⁹⁷ Distinguishing between claims of improper translation and improper function of the court interpreter, the Seventh Circuit wrote “the due process claim focuses on the translation itself; the [Court Interpreter Act] claim focuses on the court's actions or omissions regarding the interpreter and her ability to translate.”⁹⁸

The Court unequivocally held that the defendant's constitutional claims deserved de novo review.⁹⁹ However, it held that deference was due to the district court in its application of the statutory provision.¹⁰⁰ Therefore, the Seventh Circuit reviewed the trial court's unwillingness to replace the problematic interpreter for abuse of discretion, but reviewed the constitutional issue de novo.¹⁰¹ Ultimately, the Court held that due process is denied where “the accuracy and scope of a translation at a hearing or trial is subject to grave doubt.”¹⁰² While the *Leiva* court concluded that the error was harmless since it did not render the trial fundamentally unfair, the Seventh Circuit's application of de novo

⁸⁹ *United States v. Leiva*, 821 F.3d 808, 811 (7th Cir. 2016).

⁹⁰ *Id.* at 814.

⁹¹ *Id.*

⁹² *Id.* at 816.

⁹³ *Id.*

⁹⁴ *Id.* at 816–17.

⁹⁵ *Id.* at 819.

⁹⁶ *Id.*

⁹⁷ *Id.* at 819 (quoting *Mendoza v. United States*, 755 F.3d 821, 827 (7th Cir. 2014)).

⁹⁸ *Id.*

⁹⁹ *Id.* (citing *United States v. Lee*, 795 F.3d 682, 685 (7th Cir. 2015)).

¹⁰⁰ *Id.* at 819–20.

¹⁰¹ *Id.* at 819.

¹⁰² *Id.* at 820 (citing *United States v. Cirrincione*, 780 F.2d 620, 634 (1985)).

review is instructive, as is its choice to bifurcate the inquiry.¹⁰³ In contrast to state courts, particularly those in Texas that insist errors in translation are issues of fact, the *Leiva* court readily recognized the claimed error was constitutional.

Although federal courts rarely find constitutional rights are violated by an interpreter's poor performance, the Seventh Circuit has recognized numerous ways in which due process could be denied by deficient translation. In *United States v. Cirrincione* the Seventh Circuit enumerated the harms, holding that a

defendant in a criminal proceeding is denied due process when: (1) what is told him is incomprehensible; (2) the accuracy and scope of a translation at a hearing or trial is subject to grave doubt; (3) the nature of the proceeding is not explained to him in a manner designed to insure [sic] his full comprehension; or (4) a credible claim of incapacity to understand due to language difficulty is made and the district court fails to review the evidence and make appropriate findings of fact.¹⁰⁴

While the Seventh Circuit outpaces other courts by acknowledging that deficient translation can implicate constitutional rights, a recurring issue is accommodating an LEP defendant's constitutional right to communicate with his or her attorney when LEP witnesses take the stand. In *United States v. Johnson*, the interpreter translating the proceedings for the defendant was also called upon to translate the testimony of LEP witnesses.¹⁰⁵ Defense counsel proposed taking breaks during examination of these witnesses so he could communicate, through the interpreter, with the defendant.¹⁰⁶ On appeal, the Seventh Circuit held this was not an abuse of discretion because defense counsel devised the solution, and the trial court merely agreed to it.¹⁰⁷

This case is in stark contrast to a line of California appellate court cases discussed below, including *People v. Carreon*, which unequivocally denounced this practice as denying a defendant's confrontation clause right.¹⁰⁸ California courts imply that nothing short of an interpreter at the shoulder of the defendant during the entire trial will satisfy this constitutional guarantee.¹⁰⁹ The Seventh Circuit explicitly rejected this contention, holding "a defendant does not have a due process right to have an interpreter continuously seated at the defense table."¹¹⁰

The Seventh Circuit's holding in *Johnson* is additionally troubling because it absolves the trial judge of any responsibility for the fairness of the proceedings.¹¹¹ The law is clear, however, that the judge—not counsel—is ultimately responsible for the

¹⁰³ *Id.*

¹⁰⁴ *Cirrincione*, 780 F.2d at 634.

¹⁰⁵ *United States v. Johnson*, 248 F.3d 655, 659 (7th Cir. 2001).

¹⁰⁶ *Id.* at 660.

¹⁰⁷ *Id.* at 661, 663.

¹⁰⁸ *People v. Carreon*, 151 Cal. App. 3d 559, 573 (1984).

¹⁰⁹ *Id.*

¹¹⁰ *Mendoza v. United States*, 755 F.3d 821, 828 (7th Cir. 2014) (citing *Johnson*, 248 F.3d at 664)).

¹¹¹ *Johnson*, 248 F.3d at 661.

fairness of proceedings.¹¹² As noted by the court in *People v. Romero*, just because parties stipulate to a certain function of the interpreter does not mean that the judge does not commit reversible error by permitting it.¹¹³

2. Other Federal Courts

In contrast to the Seventh Circuit's acceptance of the constitutional implications of errors in interpretation, most federal courts treat these errors as evidentiary issues and consequently fail to assure defendants' constitutional rights. A prototypical example is the Eleventh Circuit's response in *United States v. Joshi*.¹¹⁴ The *Joshi* court, like most others, demanded contemporaneous objections to interpretation in order to preserve errors for appeal.¹¹⁵ However, aggravating the problem, the *Joshi* court disregarded inquiries about the quality of translation made by the prosecutor and trial judge, implicitly concluding that a claim of mistranslation is only credible if noted by the defense.¹¹⁶ Assessing the trial court's instruction that the interpreter use word-for-word interpretation as a "scrupulous effort . . . to insure [sic] that Joshi was receiving adequate translation," the Eleventh Circuit held Joshi was not denied due process.¹¹⁷

While most federal courts have not consistently recognized that interpreters' mistranslations can impinge constitutional rights, unexpectedly, the Ninth Circuit recognized this exact principle in deportation proceedings, where constitutional protections are more limited.¹¹⁸ Claims of deficient interpretation arise in the deportation context because non-citizens are assured due process.¹¹⁹ In *Perez-Lastor v. I.N.S.*, the Ninth Circuit recognized that, since individuals facing deportation have a right to interpretation and translation services, "an incorrect or incomplete translation is the functional equivalent of no translation."¹²⁰ Although most courts do not extend this comparison to criminal cases, it is readily applicable. Interpretation errors are the same, whether they occur in a criminal case or deportation proceeding. They are born out of the same courtroom pressures and language differences, and the consequences for criminal defendants are arguably more severe. Therefore, interpretation errors in criminal cases should be treated with the same gravity as they were by the *Perez-Lastor* court. Within the immigration context, the Ninth Circuit recognized three different manifestations of error that indicate incompetent translation: "First, direct evidence of incorrectly translated words Second, unresponsive answers by the witness [And] third[,] . . . the witness's expression of difficulty understanding what is said to him."¹²¹ While these factors should apply in the criminal context, numerous federal courts ignore multiple

¹¹² See *Johnson v. Hill*, 274 F.2d 110, 116 (8th Cir. 1960) ("The trial judge, in the first instance, has the responsibility and duty to so supervise and conduct litigation proceedings as to afford all parties a fair and impartial trial to the end that justice is served.").

¹¹³ *People v. Romero*, 187 P.3d 56, 73 (Cal. 2008).

¹¹⁴ *United States v. Joshi*, 896 F.2d 1303, 1310 (11th Cir. 1990).

¹¹⁵ *Id.* (citing *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989)).

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Perez-Lastor v. I.N.S.*, 208 F.3d 773, 778 (9th Cir. 2000).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.* (citations omitted).

indicia of improper translation and recognize only the third manifestation: the LEP defendant's own expression of difficulty with the interpretation.

The District Court for the Eastern District of Pennsylvania is one of the courts that only credits the third indication of mistranslation.¹²² Denying defendant's motion for a new trial in a drug possession case, the court in *United States v. Hernandez* relied heavily on the fact that the defendant herself did not object to the translation and therefore considered the matter waived.¹²³ In this way, the District Court, and the Third Circuit, affirming the District Court without opinion, approved of this imputation of objection from attorney to defendant.¹²⁴ The *Hernandez* court, citing to *Valladares v. United States*, adopted the Eleventh Circuit's holding that unless the defendant makes difficulties with the interpreter known, the right to appeal on the basis of inadequate interpretation should be waived, as to prevent abuse of appellate courts.¹²⁵

The significant error in the district court's opinion is that it disregarded the possibility that the actions of the interpreter could render the trial fundamentally unfair without causing confusion discernable to the defendant or others present. Instead, the court emphasized that because no confusion resulted from the interpreter's multiple mistranslations, the trial was not unfair.¹²⁶ However, mistranslations can be both significant and subtle, without recognizable confusion but with significant impact on the trier of fact. The Eleventh Circuit, as well as state courts in California and Illinois, have all fallen into this trap. In *United States v. Santos*, the Eleventh Circuit reviewed an instance where an interpreter mistranslated "medical assistant" as "physician's assistant" in a case about Medicare fraud.¹²⁷ The interpreter admitted to mistranslation during the trial, but the district court did not permit the defendant to call another interpreter.¹²⁸ Instead the parties stipulated to the corrected testimony and the jury was instructed accordingly.¹²⁹ Although the Court acknowledged that the district court likely erred, it found there was no abuse of discretion because the error was harmless.¹³⁰ While *Santos* involved a trial judge's decision regarding permissible evidence, and thus had a more evidentiary than constitutional basis, the judge's decision to exclude this evidence was problematic; the mistranslation could have given the jury a false impression about the veracity of the defendant even though the stipulation corrected the record.¹³¹

¹²² *United States v. Hernandez*, 994 F. Supp. 627, 630 (E.D. Pa. 1998), *aff'd*, 248 F.3d 1131 (3d Cir. 2000).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* (citing *Valladares v. United States*, 871 F.2d 1564, 1565–66 (11th Cir. 1989)). The assertion that the objection requirement is necessary to prevent abuse of the courts will be discussed at greater length in Part IV of this Note since, upon closer look, it is clear in this context that purposeful failure to object could not be part of a viable trial strategy.

¹²⁶ *Id.* at 629.

¹²⁷ *United States v. Santos*, 397 F. App'x 583, 588 (11th Cir. 2010).

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ However, in comparison to the *Sokau* and *Clark* decisions discussed later in this Comment, this situation is not quite as egregious. In *Santos*, at least a stipulation was submitted to the jury to correct the misinterpretations. Although it is possible that jurors disregarded the stipulation and were influenced by the mistranslation, we must assume that the jury abides by the instructions of the trial judge in performing its duty. *United States v. Shenberg*, 89 F.3d 1461, 1472 (11th Cir. 1996).

As a decision in the Sixth Circuit demonstrates, defendants are unlikely to be successful when appealing a trial court's denial of their motion to record the non-English testimony, particularly when the court is applying a plain error standard. The defense attorney in *United States v. Gonzales* argued before the Sixth Circuit that the trial court should have recorded translated testimony presented at trial.¹³² The attorney argued that the district court erred by not, *sua sponte*, recording the testimony of the Spanish-speaking interpreter.¹³³ Because of this alleged error, Gonzales contended that "a post-trial review of the entire record [could not] be made to check for potential errors, thus violating [his] right to a fair trial and due process."¹³⁴ The Court, applying a plain error standard, dismissed this argument as meritless, pointing to the clear statutory language of the Court Interpreter Act.¹³⁵ The Act is unambiguous—the District Court may decide to record the proceedings when a motion is made by a party. Disposing of the defense attorney's argument, the Court noted the defendant had not formally moved for recording during the trial and thus the argument was "belated" and unsupported by any contention of error, "plain or otherwise."¹³⁶ However, the Sixth Circuit did admit that Gonzales's argument for recording translated testimony was alluring from a public policy perspective.¹³⁷

These decisions reflect federal courts' inconsistent categorization and treatment of errors in interpretation. Cases from the Seventh Circuit suggest a willingness to treat these errors as constitutional and perform *de novo* review.¹³⁸ However, the vast majority of circuit courts treat errors in interpretation as evidentiary and therefore limit LEP defendants' chances for the error to be rectified.¹³⁹ Despite the Ninth Circuit's recognition that deficient interpretation is equivalent to no interpretation, and therefore implicates defendants' right to due process, this reasoning has not been extended to the criminal context.¹⁴⁰ Furthermore, in criminal cases, federal courts only accept the LEP defendant's expression of difficulty with the interpretation as evidence of misinterpretation.¹⁴¹ This standard illogically requires a defendant, whom the court has found cannot speak or understand English, to monitor and raise issues with English translation. These requirements have a devastating impact on an LEP defendant's chances to redress his or her constitutional rights.

¹³² *United States v. Gonzales*, 179 F. App'x 362, 363 (6th Cir. 2006).

¹³³ *Id.*

¹³⁴ *Id.* at 364.

¹³⁵ *Id.*

¹³⁶ *Id.* at 365.

¹³⁷ *Id.*

¹³⁸ *See United States v. Leiva*, 821 F.3d 808, 811 (7th Cir. 2016) (reviewing the trial court's application of Court Interpreter Act for abuse of discretion but the misinterpretation *de novo*).

¹³⁹ *See, e.g., United States v. Joshi*, 896 F.2d 1303, 1310 (11th Cir. 1990) (requiring contemporaneous objection to preserve errors of interpretation as is necessary to preserve other evidentiary errors).

¹⁴⁰ *Perez-Lastor v. I.N.S.*, 208 F.3d 773, 778 (9th Cir. 2000).

¹⁴¹ *See, e.g., United States v. Hernandez*, 994 F. Supp. 627, 630 (E.D. Pa. 1998), *aff'd*, 248 F.3d 1131 (3d Cir. 2000) (finding that the issue of misinterpretation was waived because defendant did not make an objection during trial).

B. Interpretation Errors in State Courts

Although federal courts do not uniformly acknowledge the constitutional harms resulting from interpreter mistranslation, California, Illinois and Texas state courts are even more predisposed to treat interpreter error as evidentiary. Because of this, these state courts rigorously require objections to preserve the issue and apply a clear error or abuse of discretion standard on review, limiting LEP criminal defendants' chances of success. Some courts restrict LEP defendants' chances even further by requiring that they identify the mistranslation in the record, despite the fact that there is typically no record of non-English testimony. Lastly, LEP defendants bringing their claims in state court face the risk that the appellate court will skeptically assess whether they truly required interpreter services. If the court concludes they misrepresented their need, the use of the interpreter may actually damage the LEP defendants' overall credibility and doom their appeal.

1. California State Court

Like other jurisdictions examined, California courts demand specific and contemporaneous objections in order to preserve claims of inaccurate translation for appellate review.¹⁴² One of the more extreme examples of this is *People v. Aguirre*.¹⁴³ Three interpreters were present at the trial for battery and serious bodily injury that occurred during a soccer match.¹⁴⁴ While one interpreter was translating a witness's testimony, the two other interpreters noticed an error.¹⁴⁵ They alerted defense counsel to the interpreter's failure to translate the witness's statement that the victim had picked up dirt just prior to the altercation.¹⁴⁶ This evidence would have supported the defendant's theory of the victim's aggressive tendency.¹⁴⁷ However, the defense attorney did not immediately make an objection.¹⁴⁸ He later claimed that because of his limited Spanish language proficiency, he did not initially understand the significance of what the interpreters told him.¹⁴⁹ When the attorney objected later in the trial, the court refused to correct the error because it was not raised immediately.¹⁵⁰ On appeal, the reviewing court affirmed Aguirre's conviction.¹⁵¹

Similar to *Aguirre*, the court in *People v. Sokau* stringently required formal objections to the quality of interpretation.¹⁵² In *Sokau*, the California appellate court

¹⁴² See *People v. Partida*, 122 P.3d 765, 768 (Cal. 2005) (interpreting California Evidence Code § 353 and holding that “[i]n accordance with this statute, we have consistently held that the ‘defendant's failure to make a timely and specific objection’ on the ground asserted on appeal makes that ground not cognizable”) (quoting *People v. Seijas*, 114 P.3d 742, 749 (Cal. 2005)).

¹⁴³ *People v. Aguirre*, No. B231368, 2012 WL 3332366 (Cal. Ct. App. Aug. 15, 2012).

¹⁴⁴ *Id.* at *4.

¹⁴⁵ *Id.* at *1.

¹⁴⁶ *Id.* at *4.

¹⁴⁷ *Id.* at *3.

¹⁴⁸ *Id.* at *4.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at *3.

¹⁵¹ *Id.* at *1.

¹⁵² *People v. Sokau*, 188 Cal. Rptr. 3d 857, 859 (Cal. Ct. App. 2015), review denied (Oct. 14, 2015). Interestingly, an overwhelming number of cases reviewing errors in interpretation are designated as unpublished or uncitable by courts, particularly in California.

affirmed the defendant's conviction for assault with a deadly weapon, holding the defendant waived the issue of interpretation error because defense counsel failed to make a formal objection to the interpretation.¹⁵³ The court reached this conclusion despite counsel's request for the court to instruct the interpreter to translate in the first person and the interpreter's subsequent violation of the court's order several dozen times.¹⁵⁴ Reviewing the record, the majority concluded that despite the defendant's request for an interpreter, he was sufficiently fluent in English such that the interpreter's errors could not have unfairly affected his trial.¹⁵⁵ Drawing a bright line, the court held that unless counsel formally objects to the translation, the issue is waived, and to decide otherwise would permit defense counsel to engage in gamesmanship.¹⁵⁶ Reading between the lines, this statement reveals the court's belief that defense counsel may decline to immediately object as part of a trial strategy. The baselessness of this concern will be addressed in Part IV of this Comment.

While the *Sokau* majority recognized the numerous errors in translation, most notably, the interpreter's failure to translate in first person, it concluded "[n]othing of substance was lost in the translation and appellant's defense was conveyed to the jury."¹⁵⁷ Troublingly, the majority reached this conclusion while admitting that the trial was a credibility contest, thereby ignoring the likelihood that the interpreter's deficient translation impacted the jury's assessment of the defendant's credibility.¹⁵⁸ Even further, the majority seemed to treat the use of an interpreter as a leg-up for the defendant rather than a mechanism for placing an LEP defendant on equal footing with a native-English speaker. Because the majority speculated that the trial court and prosecutor made reasonable inferences that the defendant was actually conversant in English, it discounted the importance of the defendant's own request for an interpreter and implied expression of his own comfort and proficiency in English.

The dissent highlighted these problems with the majority's reasoning, including its focus on the defendant's English proficiency rather than the interpreter's numerous mistranslations.¹⁵⁹ The dissent also emphasized the potential damage of the interpreter's confusing testimony, specifically because credibility was critical in this trial.¹⁶⁰ In particular, it noted that when the interpreter erroneously testified in the third person during the prosecution's attempted impeachment, it "may have caused jurors to incorrectly conclude [the defendant] had given inconsistent testimony."¹⁶¹ While the dissent maintained that some manner of objection was still required to preserve this issue for appellate review, it concluded defense counsel more than met this requirement by bringing the issue to the trial court's attention, particularly considering the trial judge's many on-record admonishments of the interpreter.¹⁶²

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 860.

¹⁵⁵ *Id.* at 861.

¹⁵⁶ *Id.* at 860.

¹⁵⁷ *Id.* at 861.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at 862 (Gilbert, P.J., dissenting).

¹⁶⁰ *Id.* at 870.

¹⁶¹ *Id.* at 865.

¹⁶² *Id.* at 868.

Like the Seventh Circuit in *Johnson*, a handful of California appellate courts also tackled the issue of whether an interpreter's performance may violate a defendant's confrontation clause right. However, in contrast to the Seventh Circuit, California appellate courts found reversible error when the defendant's interpreter was also used by the court for witness examination.¹⁶³ For example, the court in *People v. Carreon* denounced this practice because using the interpreter to translate for witnesses left the defendant without an interpreter during some of the accuser's most damaging testimony.¹⁶⁴ The court held this error impacted the defendant's constitutional rights because the defendant was "effectively precluded from ever having the benefit of a defense interpreter during the examination of the witness who delivered the most crucial and devastating evidence against him."¹⁶⁵ Examining other California appellate court decisions, along with cases from the Fifth Circuit and United States Supreme Court, the *Carreon* court held "denial of interpreter services impairs not only the defendant's due process rights, but also his rights to confront adverse witnesses, to the effective assistance of counsel, and to be present at his own trial."¹⁶⁶ The court further held that implied waiver of the right to an interpreter was impossible under these circumstances, since "a withdrawal of the services of the interpreter . . . would be so potentially harmful . . ."¹⁶⁷

Despite California courts' recognition that interpreters protect LEP defendants' confrontation clause right, this error is only reversible "where it appears to have materially affected the regularity of the accused's trial and conviction."¹⁶⁸ In contrast to the challenge LEP defendants face in alleging interpretation errors, it is not as difficult for LEP defendants denied interpreter services to prove material impact. They can simply point to the English record of the witness's interpreted testimony and argue their inability to understand that testimony, and therefore participate in their defense, was significant. All that is required is "informed speculation that . . . [his or her] right to effective representation was denied . . ."¹⁶⁹

2. Illinois State Court

Like California courts, Illinois state courts fall into two familiar traps: first, failing to recognize that even if mistranslations do not confuse the fact finder, they may impact their assessment of the defendant's credibility, and second, critically examining the defendant's need for interpretive services under the implicit assumption that an interpreter provides an undeserved leg-up for defendants.

People v. Clark illustrates both pitfalls.¹⁷⁰ In *Clark*, an Illinois appellate court reviewed defendant's claim that "the court-appointed interpreter deprived her of a fair trial, due process, and her fifth amendment right against self-incrimination."¹⁷¹ Despite being convicted in a bench trial, the defendant claimed the "judge became frustrated with

¹⁶³ See, e.g., *People v. Carreon*, 151 Cal. App. 3d 559, 576 (1984).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 567 (citations omitted).

¹⁶⁷ *Id.* at 573.

¹⁶⁸ *Id.* at 574 (citations omitted).

¹⁶⁹ *Id.* at 575.

¹⁷⁰ *People v. Clark*, 12 N.E.3d 708, 715 (Ill. App. Ct. 2014).

¹⁷¹ *Id.* at 714.

the interpreter” who made several interpretation errors, including summarizing testimony, which made the defendant appear less credible and resulted in her conviction.¹⁷² The appellate court held the defendant waived her right to claim this error because she failed to object at trial or raise the issue in a post-trial motion.¹⁷³

Straying from the subject of the appeal—whether the interpreter mistranslated testimony—the appellate court probed, at length, into whether the defendant actually needed the assistance of a court interpreter. In light of defendant’s occupation—a receptionist—a profession which the *Clark* court assumed required English proficiency, and her conversations with the interpreter concerning the translations, the trial court “found [the defendant’s] credibility was placed in doubt by her assertion that she could not speak English well enough to testify in court without an interpreter.”¹⁷⁴ The trial court weighed this evidence of the defendant’s need for an interpreter against her request for an interpreter and concluded she was not a credible witness.¹⁷⁵ Therefore, Clark’s use of an interpreter had a negative, not positive, impact on the trier of fact’s assessment of her case.

Like the majority in *People v. Sokau*,¹⁷⁶ the *Clark* court relied upon an unsupported contention that an interpreter provides a defendant with a competitive advantage in court.¹⁷⁷ The veracity of this assumption is refuted in theory and practice. From a practical perspective, the *Clark* and *Sokau* courts’ prejudice demonstrate the risk of using an interpreter.¹⁷⁸ Even assuming a prejudice-free fact finder, experts believe credibility is assessed in numerous ways beyond simply what a witness says.¹⁷⁹ In fact, courts agree that tone of voice and mannerisms impact credibility.¹⁸⁰ “Vocal expressions contribute to perceptions about the witness . . . [and] include[] phrasing, pausing, and interruptions.”¹⁸¹ All of these vocal expressions are difficult even for an extremely effective interpreter to mimic. The result is that some of the LEP defendant’s vocal expressions are literally lost in translation, or, even worse distorted and altered through the interpreter’s presentation.

¹⁷² *Id.*

¹⁷³ *See id.* (While Illinois appellate courts may review unpreserved claims of error for plain error, the appellate court found this issue waived because the defendant “failed to raise plain error on appeal”) (citing *People v. Hillier*, 237 Ill.2d 539, 545–46 (2010)).

¹⁷⁴ *Id.* at 715.

¹⁷⁵ *See id.* (“The trial court was able to assess [the defendant’s] demeanor on the witness stand, including her interactions with the interpreter, to determine her credibility.”).

¹⁷⁶ *People v. Sokau*, 188 Cal. Rptr. 3d 857, 861 (Cal. Ct. App. 2015).

¹⁷⁷ *Clark*, 12 N.E.3d at 715.

¹⁷⁸ *See id.* (finding the defendant unreliable, in part, because the court believed her request for an interpreter was undermined by evidence of her English proficiency); *Sokau*, 188 Cal. Rptr. 3d at 861 (despite numerous interpretation problems, including persistently translating in the third person, court found nothing of substance was lost and defendant may not have truly required interpretation services in the first place).

¹⁷⁹ CYNTHIA R. COHEN, VERDICT SUCCESS, LLC, DEMEANOR, DECEPTION AND CREDIBILITY IN WITNESSES 4 (2013),

https://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac_2013/33_de_meanor_deception.authcheckdam.pdf.

¹⁸⁰ *United States v. Weissman*, 195 F.3d 96, 99 (2d Cir. 1999) (“[T]he trial judge is in the best position to evaluate a witness’s demeanor and tone of voice as well as other mannerisms that bear heavily on one’s belief in what the witness says.”) (quoting *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 634 (2d Cir. 1996)).

¹⁸¹ COHEN, *supra* note 179.

Another element of credibility lost in interpretation is the “[c]ongruence between verbal and nonverbal behavior.”¹⁸² This is the temporal connection between nonverbal perceptions like posture, gestures, facial expression and verbal perceptions such as voice, and expression.”¹⁸³ The temporal relationship between verbal and nonverbal perceptions is severed when an interpreter is used. Posture and expressions emanate from the LEP witness, while verbal perceptions come from the interpreter. For example, if a LEP witness grimaced while saying a word or phrase the jury might miss the full meaning of this expression after it is interpreted into English. This demonstrates that rather than offering a competitive advantage, use of an interpreter is, at most, a crutch for an LEP defendant, and, at worst, a significant detriment to credibility. Despite the dearth of evidence that an interpreter offers any competitive advantage to an English-speaking defendant, California and Illinois courts persistently shift the rhetoric from errors in interpretation to need for interpretation.

In another Illinois case, *People v. Koch*, the appellate court fell into a similar trap, ignoring the impact of interpreters on witness credibility and focusing narrowly on intelligibility of interpretation.¹⁸⁴ The *Koch* court found “[a] defendant has no cause to complain where an interpreter's presentation of testimony is understandable, comprehensible and intelligible, and if it is not understandable, the unintelligibility of the translated testimony will warrant reversal only when it is rooted in the ineffectiveness of the interpreter.”¹⁸⁵ While *Koch* alleged that errors committed by his Polish language interpreter “cast a negative light on his testimony, [and] thus damag[ed] his credibility before the trier of fact,” the appellate court disagreed, pointing to the substantial deference paid to trial courts’ determination in these matters.¹⁸⁶

Rather than recognizing that errors may go unnoticed or unrectified in the trial court, the *Koch* court affirmed the lower court, concluding that the assessment of the interpreter’s performance may depend on “factors such as inflection and emphasis . . . which cannot be adequately divined from the transcript” Given that many of the factors that bear on interpreter competency are not preserved for review “[appellate courts] must be particularly averse to second-guess a trial court’s determination that an interpreter adequately translated the testimony”¹⁸⁷ Ironically, in *Koch*, the interpreter admitted his own ineffectiveness, thereby affirming any problems with the testimony were attributable to the interpreter.¹⁸⁸ However, the appellate court, finding all errors insignificant or immaterial, affirmed defendant’s conviction.¹⁸⁹

As the *Koch* case demonstrates, in Illinois courts, an interpreter’s admission of error is not necessarily sufficient to trigger appellate court review of mistranslation when the issue was not preserved by a contemporaneous objection. For example, in *People v. Harris* a defendant appealed his conviction, claiming “his right to confrontation was denied by virtue of the translator’s confessed paraphrasing of questions and answers

¹⁸² *Id.* at 5.

¹⁸³ *Id.*

¹⁸⁴ *People v. Koch*, 618 N.E.2d 647, 655 (Ill. App. Ct. 1993).

¹⁸⁵ *Id.* (citations omitted).

¹⁸⁶ *Id.* at 654.

¹⁸⁷ *Id.* at 655.

¹⁸⁸ *Id.* at 654.

¹⁸⁹ *Id.* at 656–57.

during the complainant's testimony."¹⁹⁰ The appellate court held that Harris was estopped from raising this claim because he did not object to the interpreter's summary-style translation during the trial and "[t]here was no hint . . . [he] was dissatisfied with, or could not understand, the testimony being translated back."¹⁹¹ Although Harris claimed the interpreter's error was unnoted until the interpreter himself admitted it in chambers, the appellate court found this explanation unconvincing. Speculating on trial court proceedings, the appellate court held, "we believe it would have been obvious to even non-Spanish speaking persons that the interpreter and [the complainant] were engaged in conversation back and forth rather than question-answer dialogue."¹⁹²

In *Harris*, the appellate court far exceeded its role in evaluating a record, particularly since it admitted the record did not reflect what questions were paraphrased.¹⁹³ The court presumptively concluded that while the error was not visible on the record, it would have been obvious if it truly occurred. An appellate court simply has no basis to make that determination. Speculation on either the need for an interpreter or the function of the interpreter is beyond the proper role for appellate courts when LEP defendants' testimony is not present on the record.

Although all jurisdictions examined have a contemporaneous objection requirement, Illinois courts' stance has particularly harsh consequences because it is imposed even when the interpreter admits his or her error. Illinois appellate courts also assume conflicting positions when reviewing interpreters' performance. On one hand, they refuse to second-guess the trial court's conclusion, recognizing that factors such as inflection and emphasis are absent from the record and prevent a complete and accurate review of the interpretation. However, on the other hand, Illinois courts assume that if the interpreter committed a damaging error, it would be identifiable through the trial court record. This illogical reasoning makes it particularly difficult for LEP defendants to succeed on appeal. This difficulty is compounded by Illinois courts' failure to recognize that mistranslations may impact the jury's assessment of the defendant's credibility, even if the errors are corrected or involve collateral issues. Lastly, Illinois appellate courts are hesitant to reverse trial courts on this issue because of their subtle assumption that interpretation services provide a competitive advantage to defendants rather than merely positioning LEP defendants on equal footing with native English speakers.

3. Texas State Court

In contrast to the Seventh Circuit in *Leiva*, where the interpretation was reviewed as a legal issue,¹⁹⁴ Texas appellate courts flip the inquiry and consider the "[c]ompetency of an interpreter [as] a question of law while the accuracy of an individual translation is a question of fact."¹⁹⁵ Then, courts review competency for abuse of discretion.¹⁹⁶ As a result, Texas appellate courts refuse to entertain claims of inaccurate translation on direct

¹⁹⁰ *People v. Harris*, 433 N.E.2d 343, 346 (Ill. App. Ct. 1982).

¹⁹¹ *Id.* at 347.

¹⁹² *Id.* (internal quotations omitted).

¹⁹³ *Id.* at 346.

¹⁹⁴ *United States v. Leiva*, 821 F.3d 808, 819 (7th Cir. 2016).

¹⁹⁵ *Lee v. State*, No. 05-02-01119-CR, 2003 WL 21142887, at *2 (Tex. App. May 19, 2003) (citing *Garcia v. State*, 887 S.W.2d 862, 875 (Tex. Crim. App. 1994), *cert. denied*, 514 U.S. 1021 (1995)).

¹⁹⁶ *Id.*

appeal, do not acknowledge its constitutional underpinnings, and overwhelmingly find no abuse of discretion occurred.

These problems appear in *Qualls v. State*, where the defendant appealed his capital conviction for murder and theft on twenty-one points of error, including inadequate interpretation.¹⁹⁷ The court held the applicable standard “is whether the jury could have been misled by any discrepancies or improper translations.”¹⁹⁸ The court affirmed *Qualls*’ conviction, concluding no “inaccuracies were presented which could have misled the jury” and the trial court did not abuse “its discretion by not appointing [another] interpreter.”¹⁹⁹ Other courts, including the Seventh Circuit in *Leiva*,²⁰⁰ would apply different standards of review to those two alleged errors and review the alleged inaccuracies de novo; however, the *Qualls* court implied that both the trial court’s decision to not appoint a new interpreter and the resulting inaccurate interpretation are reviewed for abuse of discretion.²⁰¹

Unlike the Pennsylvania district court in *United States v. Hernandez*,²⁰² the *Qualls* court broadly assessed whether the jury could have been misled by the lapses in proper interpretation rather than whether the jury could be confused by errors in interpretation.²⁰³ The former, more comprehensive inquiry appears designed to catch situations referenced earlier, where the jury was misguided by mistranslations but not confused by misinformation. However, even this improved analysis is too narrow because it ignores the possibility that misinterpretations had an outcome-determinative impact on the jury’s assessment of the defendant’s credibility.²⁰⁴

The *Qualls* court’s analysis is not without faults, the most glaring of which was its decision to review errors in interpretation for abuse of discretion, even where the defense attorney made frequent objections.²⁰⁵ Compounding the risk of an unfair trial, there was no agreed-upon mechanism to record non-English testimony. In *Qualls*, the defense attorney, after objecting to mistranslation, requested the interpretation be recorded.²⁰⁶ Although the trial court agreed, no action was taken by the court or counsel, and no recording was made.²⁰⁷

Similar to *Qualls*, the *Gonzalez v. State* appellate court showed significant deference to the trial judge’s determination that the jury’s verdict was not misled by interpretation errors.²⁰⁸ The *Gonzalez* court reviewed the trial court’s decision not to

¹⁹⁷ *Qualls v. State*, No. A14-92-01162-CR, 1994 WL 19609, at *7 (Tex. App. Jan. 27, 1994) (Defendant contended that the interpreter mistranslated the testimony of a witness to the alleged theft. The interpreter translated the witness’s testimony as “[the victim] was quite upset because [the defendant] had robbed him or robbed something from him.” On appeal, defendant alleged that the interpreter added the reference to the robbery.).

¹⁹⁸ *Id.* (citing *Vindel v. State*, 537 S.W.2d 264, 265 (Tex. Crim. App. 1976)).

¹⁹⁹ *Id.*

²⁰⁰ *Leiva*, 821 F.3d at 819.

²⁰¹ *Qualls*, 1994 WL 19609, at *7.

²⁰² *United States v. Hernandez*, 994 F. Supp. 627, 629 (E.D. Pa. 1998), *aff’d*, 248 F.3d 1131 (3d Cir. 2000).

²⁰³ *Qualls*, 1994 WL 19609, at *7.

²⁰⁴ *See Gonzalez v. State*, 752 S.W.2d 695, 698 (Tex. App. 1988).

²⁰⁵ *Qualls*, 1994 WL 19609, at *7.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at *6.

²⁰⁸ *Gonzalez*, 752 S.W.2d at 697.

appoint a new interpreter for abuse of discretion.²⁰⁹ However, the court extended the inquiry, reviewing whether “there [were] any inaccuracies or improper translations that could have misled the jury” for abuse of discretion as well.²¹⁰ In this case, the defendant benefited from his bilingual attorney’s ability to monitor the interpreter’s translation and raise errors immediately.²¹¹ Unsurprisingly, the appellate court held that the jury was not misled because all claimed errors in interpretation were caught during the trial, and the jury was instructed on the correct translation.²¹²

Implicit in this holding is the court’s conclusion that unless the jury was misled, the trial could not have been fundamentally unfair. The court ignored the possibility that a jury could be influenced not just by what was said during the trial, but how it was said. The standard of review applied by the appellate court is particularly problematic because it conflates the issue of replacing the interpreter with the issue of the interpreter’s errors, reviewing them with equal deference. Declining to perform a thorough review of the implications of the interpreter’s errors, the court ignored the possibility that the numerous interpretation difficulties could have impacted the defendant’s perceived credibility and therefore the jury’s verdict.

Like other jurisdictions examined, Texas courts require specific and timely objections.²¹³ However, Texas courts also dismiss defendants’ appeals because of failure to point to specific evidence of mistranslation. *Vindel v. State* is example of this problem.²¹⁴ There, the Texas Court of Criminal Appeals summarily affirmed the defendant’s conviction because the record failed “to reflect any showing or claim of actual bias[,] . . . any claim to any specific inaccuracy[,]” or “an objection to the interpreter during the trial.”²¹⁵ Incomprehensibly, appellate courts, including the *Vindel* court, do not explain how defendants can fulfill this requirement when trial courts fail to record non-English testimony, as occurred in *Qualls v. State*,²¹⁶ and non-English testimony has not been preserved for review.

Another significant problem, hinted at in *Lee v. State*, is Texas courts’ treatment of translation errors as factual rather than legal issues.²¹⁷ As a result, appellate courts reflexively apply a deferential standard of review and decline to consider this claim of error on direct appeal. For example, the appellate court in *Kan v. State* rejected the defendant’s claim of inaccurate translation, concluding that “[t]he accuracy of the translation was a fact question properly addressed to the trial court. [An appellate court]

²⁰⁹ *Id.*

²¹⁰ *Id.* at 698 (citations omitted).

²¹¹ *Id.* at 699.

²¹² *Id.*

²¹³ See TEX. R. APP. PROC. 33.1(a)(1) (providing that, in order to appeal, the trial court record must reflect a “timely request, objection, or motion”); TEX. R. EVID. 103(a)(1) (providing that a party must timely object or move to strike evidence and state specific ground for doing so).

²¹⁴ *Vindel v. State*, 537 S.W.2d 264, 265 (Tex. Crim. App. 1976).

²¹⁵ *Id.*

²¹⁶ *Qualls v. State*, No. A14-92-01162-CR, 1994 WL 19609, at *7 (Tex. App. Jan. 27, 1994).

²¹⁷ See *Lee v. State*, No. 05-02-01119-CR, 2003 WL 21142887, at *2 (Tex. App. May 19, 2003) (“Competency of an interpreter is a question of law while the accuracy of an individual translation is a question of fact.”) (citing *Garcia v. State*, 887 S.W.2d 862, 875 (Tex. Crim. App. 1994)).

cannot review this issue because there is no legal issue presented; it is a factual question which ultimately only the jury can answer²¹⁸

The *Kan* court also considered this issue waived due to the defendant's failure to allege inaccuracies in the trial court.²¹⁹ The court did not recognize claims of error in interpretation as constitutional, and therefore, necessarily legal issues. Further, the appellate court was seemingly blind to the challenges of addressing misinterpretations during the trial. The reviewing court's suggestion that a jury could determine sufficiency of translation appears outlandish when one recognizes that it is necessary for the reviewer of the translation to have extensive knowledge of the foreign language, which is impossible to guarantee with a jury.²²⁰ In contrast, however, if the error was preserved on the record, an appellate court could review it and, after being briefed by the parties, determine if the error implicated constitutional rights.

In contrast to federal courts' treatment of interpretation errors, particularly the *Leiva* court's de novo review²²¹ and the *Perez-Lastor v. I.N.S.* court's recognition of the constitutional harms of deficient interpretation in the immigration contexts,²²² state courts in California, Illinois and Texas are more likely to treat the error as an issue of fact and apply a deferential standard of review. While California courts provide the strongest protections of LEP defendants' confrontation clause rights, requiring that an interpreter remain by the defendant's side,²²³ California and Illinois courts frequently detour from reviewing the consequences of the interpreter's error and conclude the LEP defendant did not truly require interpretive services.²²⁴ As evident through the *Koch*²²⁵ and *Harris*²²⁶ cases, Illinois appellate courts maintain a strict objection requirement, even when the interpreter confesses his or her error. Texas courts take the most stringent view of this requirement, and demand defendants point to the specific interpretation error in the record, while not specifying how defendants could satisfy this requirement without a reliable mechanism to record non-English testimony.²²⁷

IV. THE SOLUTION: RECORDING TESTIMONY TO PRESERVE FOR THE RECORD

There are two ways in which appellate courts can modify their review of mistranslations and assure LEP criminal defendants' constitutional rights. First, appellate courts should expand the record to include the non-English testimony of the defendant or witness testifying on his or her behalf. Second, appellate courts should treat errors in

²¹⁸ *Kan v. State*, 4 S.W.3d 38, 43 (Tex. App. 1999) (internal citation and quotations omitted) (citing *Garcia*, 887 S.W.2d, at 875).

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *United States v. Leiva*, 821 F.3d 808, 819 (7th Cir. 2016).

²²² *Perez-Lastor v. I.N.S.*, 208 F.3d 773, 778 (9th Cir. 2000).

²²³ *People v. Carreon*, 151 Cal. App. 3d 559, 573 (1984).

²²⁴ *See, e.g., People v. Sokau*, 188 Cal. Rptr. 3d 857, 862 (Cal. Ct. App. 2015) (Gilbert, P.J., dissenting); *People v. Clark*, 12 N.E.3d 708, 715 (Ill. App. Ct. 2014).

²²⁵ *People v. Koch*, 618 N.E.2d 647, 654 (Ill. App. Ct. 1993).

²²⁶ *People v. Harris*, 433 N.E.2d 343, 347 (Ill. App. Ct. 1982).

²²⁷ *See Vindel v. State*, 537 S.W.2d 264, 265 (Tex. Crim. App. 1976) (finding no reversible error because the record did not show any specific inaccuracy in interpretation).

translation as constitutional errors and review them *de novo* to ascertain whether the error was harmless beyond a reasonable doubt.

A. *Expanding the Record to Include Non-English Testimony*

If the defendant's testimony was included in the record, along with the interpreter's English translation, the error would be considered a record error and consequently reviewable on direct appeal. Errors in interpretation should be remedied on direct appeal rather than through post-conviction motions. This would permit criminal defendants to take advantage of their last opportunity for constitutionally-assured counsel.²²⁸ Further, raising this error on direct appeal places the burden on the government to prove the error was harmless beyond a reasonable doubt.²²⁹ The government should be held to this *Chapman* standard²³⁰ because the interpretation error, entirely beyond the control of the defendant or counsel, has a potentially determinative impact on the jury's conviction beyond a reasonable doubt.

One potential solution is for the trial court to record the proceedings in their entirety per section (d)(2) of the Court Interpreter Act.²³¹ However, this measure would likely be insufficient because it is limited to federal cases and left to the discretion of the trial court. Further limiting the potential of this solution is the fact that appellate courts review district court's failure to record proceedings for plain error, giving defendants little recourse.²³² Notably, the statutory requirement that district courts be prepared to record the interpretation affirms that federal courtrooms are technologically equipped to do so. A modest change to the Court Interpreter Act would require *all* proceedings with interpreters to be recorded, protecting defendants' constitutional rights, at least in federal cases.

In state courts, another relatively simple change is necessary. Court reporters frequently record testimony to aid themselves in compiling a transcript of the trial.²³³ When transcribing proceedings where interpreters are used, the court reporter could place a recording device near the defendant or witness to capture their testimony. Developments in technology make it easy and inexpensive for the court reporter to record the defendant's non-English testimony in all cases where testimony is provided through an interpreter.²³⁴ This testimony would then be preserved for the record, even if it is not

²²⁸ See *Douglas v. California*, 372 U.S. 353, 357 (1963) (defendants must have benefit of counsel during their only appeal as of right regardless of the merits).

²²⁹ *Chapman v. California*, 386 U.S. 18, 24 (1967).

²³⁰ See *id.* (“[C]onstitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless.”).

²³¹ 28 U.S.C. § 1827(d)(2) (2012).

²³² See *United States v. Gonzalez-Flores*, 572 F. App'x 790, 791 (11th Cir. 2014) (finding trial court did not plainly err by not recording Spanish testimony since there is no absolute requirement it do so).

²³³ See Don Zupanec, *Access to Court Reporter's Backup Tapes*, FED. LITIGATOR, Feb. 2008, at 14, 14. (noting that motions to compel production of court reporters' backup tapes are usually denied; however, creation of backup tapes is routine practice).

²³⁴ See *Guidelines for Professional Practice*, NAT'L COURT REPORTERS ASS'N, https://www.ncra.org/home/professionals_resources/NCRA-Code-of-Professional-Ethics/cope---guidelines-for-professional-practice (last visited Sept. 20, 2018) (“The latest innovation involves technology that has been developed for computer-aided translation (CAT) software, which allows for the

considered evidence. The direct appeal lawyer could contrast the testimony of the defendant with the inaccurate translation and present the error on appeal.

Comparison to defendants utilizing American Sign Language (ASL) is instructive here. In the California case, *People v. Younghanz*, a defendant claimed that the “failure to videotape the victim’s sign language testimony deprived him of a complete record for adequate consideration on appeal” and “right to a literal translation of a witness’s testimony.”²³⁵ The court agreed; however, it denied relief as they found Younghanz was fluent in sign language.²³⁶ In another ASL case from Texas, the appellate court noted that “[t]he entire trial was videotaped, and all of the cassettes of the translations were entered into evidence for the appellate courts.”²³⁷

These accommodations made for ASL defendants and witnesses have an obvious counterpart in the testimony of LEP individuals. Just as the *Younghanz* court noted that a complete record would not exist without the videotaped testimony of the ASL victim, without the audio recording of an LEP defendants’ testimony, a complete record is impossible.

B. *The Appropriate Standard of Review*

The next barrier to assuring LEP defendants’ constitutional rights is the standard of review applied by appellate courts. As evident from Part II of this Comment, most courts apply an extremely deferential standard of review—either abuse of discretion or plain error. However, because misinterpretations are constitutional errors appearing on the record, appellate courts should review the full record, de novo, to determine whether any constitutional right was impinged and then determine whether the government shouldered its burden of proving the error was harmless beyond a reasonable doubt.

Since errors in interpretation can affect defendants’ due process right, the right to effective assistance of counsel, the right to present a defense, and the right to testify on their own behalf, they are constitutional errors. Constitutional errors are reviewed de novo when on the record.²³⁸ Since, with an audio or audio-visual recording, the testimony of the defendant would appear on the record, appellate courts could review the issue de novo and provide the criminal defendant full constitutional protection.

Courts should also adopt the reasoning of *Leiva* and perform a bifurcated review of these errors.²³⁹ Following the Seventh Circuit, courts should review the trial court’s application of the Court Interpreter Act or state statutory provision for abuse of discretion, because the trial judge is in the best position to determine when an interpreter should be used, what style of translation the interpreter provides, and when interpretation breaks should be taken. However, errors in interpretation should be reviewed de novo, as

simultaneous digital audio recording of judicial proceedings, often referred to as ‘audio synchronization,’ and more commonly known as ‘backup audio media.’”)

²³⁵ *People v. Younghanz*, 156 Cal. App. 3d 811, 818–19 (1984) (citing CAL. EVID. CODE § 751(a)).

²³⁶ *Id.*

²³⁷ *Linton v. State*, 275 S.W.3d 493, 499 (Tex. Crim. App. 2009).

²³⁸ *See Brecht v. Abrahamson*, 507 U.S. 619, 642 (1993) (Stevens, J., concurring) (citing *Kotteakos v. United States*, 328 U.S. 750, 764 (1946) for the proposition that constitutional errors deserve de novo review); *Mass. Nat’l Bank v. Shinn*, 57 N.E. 611, 612 (N.Y. 1900) (noting that an unpreserved question of grave public policy will be considered de novo).

²³⁹ *United States v. Leiva*, 821 F.3d 808, 819 (7th Cir. 2016).

was done in *Leiva*, because constitutional errors deserve a more comprehensive review and the trial judge is not in a better position within the court system to recognize and redress these errors.²⁴⁰ After reviewing the constitutional error, *de novo*, the appellate courts could perform a *Chapman* standard analysis, as is proper on direct appeal of legal issues on the record.²⁴¹

C. Application to Federal and State Courts

With these proposed changes, trial and appellate courts would use court interpreters more equitably. At the trial court level, both in state and federal court, the judge would be responsible for assuring that non-English testimony is recorded and preserved for the record. The judge would make clear that the defendant, his or her attorney, and knowledgeable listeners should draw attention to any suspected mistranslation. All possible efforts should be made to identify and rectify these errors during the trial.

At the close of trial, if the defendant is convicted, a record should be compiled, including an audio or audio-video file of all non-English trial testimony. If the direct appeal attorney suspects mistranslation at this point, a second interpreter should be appointed by the court to review and compare the audio file with the court reporter's transcript of the translated testimony. If errors are found, the direct appeal lawyer could highlight these constitutional errors in a brief to the appellate court. The appellate court would receive a complete record, including the audio or audio-video file, and could make its own determination about the quality of the translation by relying on parties' briefing. Performing its review, the appellate court would first consider, *de novo*, whether any error impinged constitutional rights. Assuming there is an indication that constitutional rights were violated, the court would then turn to the prosecution's briefs on appeal and determine whether it met its *Chapman* burden of proving the error was harmless beyond a reasonable doubt. If the government cannot satisfy this burden, the appellate court would reverse the defendant's conviction.

While this procedure would successfully identify and redress mistranslations that currently go undetected, courts will likely be resistant and view this change as opening the appellate courts to abuse or presenting the possibility for sandbagging.²⁴² In *People v. Partida*, the California appellate court explained its hesitancy to do away with an objection requirement to preserve issues of mistranslation for appeal.²⁴³ The court maintained that this "requirement is necessary in criminal cases because a contrary rule would deprive the People of the opportunity to cure the defect at trial and would permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a

²⁴⁰ See *United States v. Mosley*, 759 F.3d 664, 667 (7th Cir. 2014) (noting that "constitutional arguments are reviewed *de novo*." (citing *United States v. Robinson*, 14 F.3d 1200, 1202 (7th Cir. 1994)); *Hovland*, *supra* note 66, at 479 ("It is almost impossible for a trial judge to tell whether an interpretation is accurate"); *Turner*, *supra* note 46, at 150–51 (noting that commentators have suggested that "the even more stringent" *de novo* standard of review "provides defendants with greater substantive protections").

²⁴¹ *Chapman v. California*, 386 U.S. 18, 24 (1967).

²⁴² See *Wainwright v. Sykes*, 433 U.S. 72, 103 (1977) (Brennan, J., dissenting) (arguing that defendants should be able to seek habeas review of unpreserved constitutional issues because "no rational lawyer would risk the 'sandbagging' feared by the Court").

²⁴³ *People v. Partida*, 122 P.3d 765, 766 (Cal. 2005).

conviction would be reversed on appeal.”²⁴⁴ Other courts agree and reveal their reluctance to permit appeal of non-preserved errors in interpretation stems from concern of abuse of the right to direct appeal.²⁴⁵ For example, the District of Columbia Court of Appeals aired its concern that this policy would permit the criminal defendant to abuse the system and appeal based on frivolous claims of inaccurate translation.²⁴⁶

At first blush these arguments seem reasonable. Perhaps, without an objection requirement, defendants and their lawyers would refrain from objecting to errors as a trial strategy. However, viewed in context, the concern is specious. An appeal for a criminal defendant often means more time in custody, a result that would not outweigh the benefit of simply correcting recognized mistranslations immediately and potentially being acquitted. The Second Circuit recognized the absurdity of the contention that failure to object to misinterpretation could be part of a viable trial strategy. In *United States ex rel. Negron v. New York* the court concluded,

we need not decide on this record whether Negron's lawyer by his silence could effectively have waived Negron's right to appropriate access to the proceedings by means of adequate translation. There is no indication that [the attorney's] failure to ask for an interpreter to assist Negron was any part of his trial strategy. Nor could the motive for such an otherwise self-defeating strategy have been to deviously set up the case for reversal on appeal.²⁴⁷

Another anticipated concern associated with these changes is that it would drastically increase the number of appeals on this issue. Perhaps defendants, grasping at straws after conviction, would claim mistranslation where none appeared. While the number of appeals may increase, it is speculative to assume the increased number of appeals would reflect frivolous appeals. After all, under current law, this claim is almost impossible to bring on direct appeal. Errors in interpretation are largely invisible.²⁴⁸

²⁴⁴ *Id.* at 768 (internal quotations omitted) (quoting *People v. Rogers*, 579 P.2d 1048, 1052 (Cal. 1978)); see also *People v. Aguirre*, No. B231368, 2012 WL 3332366, at *3 (Cal. Ct. App. Aug. 15, 2012) (stating that the objection requirement prevents gamesmanship by defendant).

²⁴⁵ See, e.g., *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989) (“To allow a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse.”); *Hunter v. United States*, 606 A.2d 139, 144 (D.C. 1992) (requiring timely and specific objections, the court held that “[l]itigants should not be permitted to keep some of their objections in their hip pockets and to disclose them only to the appellate tribunal”) (citing *Palmer Constr. Co. v. Patouillet*, 42 A.2d 273, 274 (D.C. 1945)).

²⁴⁶ See *Gonzalez v. United States*, 697 A.2d 819, 823 (D.C. 1997) (adopting *Valladares* rationale that objection requirement prevents defendants’ abuse of interpretation services).

²⁴⁷ *United States ex rel. Negron v. New York*, 434 F.2d 386, 390 (2d Cir. 1970) (internal citation omitted) (citing *Wilson v. Bailey*, 375 F.2d 663 (4th Cir. 1967)).

²⁴⁸ See Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1036 (2007) (“The difficulty here, and in all instances of interpretive failure, is that the existence of the failure is not directly knowable by either the lawyer or the client, as neither possesses the linguistic abilities to verify the integrity of the interpretation. As a result of this black box problem, errors in interpretation can only be inferred circumstantially, and even then, only their existence and not their cause can be readily appreciated.”);

Therefore, the number would necessarily increase. Because of this, it is difficult to surmise the number of cases involving errors in interpretation because, without mechanisms for detection, they go unnoticed, and constitutional rights are impinged. On the other end of the spectrum, even if a small number of cases are impacted by these proposed changes, they should still be made because they are crucial to safeguarding constitutional rights. Besides, appellate courts retain the right and ability to summarily dismiss frivolous claims. In this context, the proclivity of appellate courts to find errors harmless would guard against any abuse resulting from these proposed changes.

To the extent there is concern over the cost of appointing a second interpreter to review the record before direct appeal, these considerations must be subordinate to the protection of constitutional rights. Further, just as technology permits courts and court reporters to easily and inexpensively record the non-English testimony, similar advances permit computer programs to aid direct appeal lawyers in identifying potential errors before incurring the cost of a second interpreter.²⁴⁹ In this way, the second interpreter could have a more limited role. Rather than reviewing the trial court record in its entirety, direct appeal lawyers could point the interpreter to specific portions of the record where they suspect an error was made.

CONCLUSION

While federal and state courts review misinterpretations under different standards, their responses are uniform in one significant way—they are deficient in protecting defendants' constitutional rights. Their deficiencies come in different forms. Some courts require criminal defendants to object to misinterpretations of a language they do not understand. Others take the timely and specific objection requirement beyond its logical purpose and require an objection even when the court interpreter admits to the error. Several courts reviewing claims of misinterpretation question the defendant's need for an interpreter, and, in doing so, go beyond the proper scope of appellate review. Perhaps the

Joshua Karton, *Lost in Translation: International Criminal Tribunals and the Legal Implications of Interpreted Testimony*, 41 VAND. J. TRANSNAT'L L. 1, 8 (2008) ("It is not known how many errors in translation make their way into the record.").

²⁴⁹ See, e.g., Lydia D. Johnson, *What Does Justice Have to Do with Interpreters in the Jury Room?*, 84 UMKC L. REV. 941, 984 (2016) (listing various courtroom-ready language-translation technologies, including "speech recognition software [that] not only decodes speech in a foreign language, but also accomplishes this task in real time in a voice that sounds like the recipient's or the interpreter's."); Lisa C. Wood, *Translation Protocols: The Time Has Come*, 29 ANTITRUST 67, 69 (2015) ("Bilingual attorneys or other consultants can be used . . . initially to avoid the expensive exercise of certified translations of all documents. Informal translations can be used to identify key documents and issues, and then software can be used to search foreign language documents for additional key documents to be translated in full [T]ranslation firms can help with this culling process."); see also Tom Simonite, *Software Translates Your Voice into Another Language*, MIT TECH. REV. (Mar. 9, 2012), <https://www.technologyreview.com/s/427184/software-translates-your-voice-into-another-language/> (noting the value of new technology that replicates tone, voice, and emphasis while translating spoken word into another language although not addressing its application in the courtroom).

most damaging deficiency of all is that the majority of jurisdictions reviewed consider misinterpretation a question of fact. Even though deficient interpretation is the functional equivalent of no interpretation and implicates core constitutional rights, courts persist in reviewing the error for abuse of discretion. In this context, deference is improper because the trial judge is substantially incapable of identifying and rectifying errors in interpretation and has no advantage over an appellate court review of a complete record. Therefore, in showing deference, appellate courts fail in their duty to uphold constitutional rights.

Although the changes proposed in this Comment are significant, they are not out of proportion with the harm done to LEP defendants embroiled in criminal trials. Once errors in interpretation are examined, it is clear that numerous constitutional rights are risked when an interpreter commits an error of misinterpretation. In order to truly remedy these issues, non-English testimony must be captured. The fact that courts can achieve this easily and inexpensively makes this response all the more urgent and necessary. Once these errors are preserved for the record, appellate courts should recognize that deference is not reasonable and review these claims *de novo*, to assure any error was harmless beyond a reasonable doubt. With these changes, both appellate and trial courts will give LEP defendants a chance at securing justice in the criminal court system and prevent infringement of their constitutional rights.