
When Justice Is Lost in the "Translation": Gonzalez v. United States, and "Interpretation" of the Court Interpreters Act of 1978

Mollie M. Pawlosky

Follow this and additional works at: <https://via.library.depaul.edu/law-review>

Recommended Citation

Mollie M. Pawlosky, *When Justice Is Lost in the "Translation": Gonzalez v. United States, and "Interpretation" of the Court Interpreters Act of 1978*, 45 DePaul L. Rev. 435 (1996)
Available at: <https://via.library.depaul.edu/law-review/vol45/iss2/6>

This Notes is brought to you for free and open access by the College of Law at Via Sapientiae. It has been accepted for inclusion in DePaul Law Review by an authorized editor of Via Sapientiae. For more information, please contact digitalservices@depaul.edu.

**CASE NOTE: WHEN JUSTICE IS LOST IN THE
“TRANSLATION”: *GONZALEZ V. UNITED
STATES*, AN “INTERPRETATION” OF THE
COURT INTERPRETERS ACT OF 1978**

INTRODUCTION

Recognized as the land of opportunity by the people of nations around the world, the United States has become a haven for large numbers of immigrants.¹ While these people may share a vision of obtaining the American dream, or escaping a troubled homeland, they often do not share a common language, neither with each other, nor with the country accepting them.²

Natural born English speakers from the United States have differing opinions regarding those who cannot speak English, ranging from patience and acceptance to an unyielding belief that English should be the official or the only language spoken in the United States.³ The purpose of this note is to provide a realistic account of the experience of the non-English speaking defendant in the United States legal system. It has been estimated that more than ten percent of the United States population speak a language other than English in their home.⁴ As the largest bilingual population in the United States consists of

1. Between 1987 and 1990, 2,296,859 foreign-born people ages 18 and older emigrated to the United States. 1990 Census of Population and Housing: The Foreign-Born Population in the United States, PB 20.

2. Between 1987 and 1990 alone, 944,611 adults entering the United States from Spanish speaking countries including Mexico, Cuba, Dominican Republic, Haiti, Jamaica, Trinidad/Tabago, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Colombia, Ecuador, Guyana, and Peru, spoke English “not well” or “not at all.” *Id.*

3. See generally Note, “Official English”: *Federal Limits on Efforts to Curtail Bilingual Services in the States*, 100 HARV. L. REV. 1345 (1987) [hereinafter *Official English*] (discussing recent movements in various states to declare English as the state’s official language or to enact “English only” statutes).

4. Michael B. Shulman, Note, *No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 VAND. L. REV. 175, 178 n.14 (1993) (quoting BILL PIATT, ONLY ENGLISH? 28 (1990)).

Spanish/English speakers,⁵ this Note focuses specifically on people who speak Spanish as their native tongue.⁶

The inability to communicate in or comprehend English may be especially damaging to the non-English speaker when the individual is charged with a crime.⁷ Those who do not adequately understand English are denied real justice under the law if they are not guaranteed that they will be able to comprehend judicial proceedings.⁸ In recognition of the plight that non-English speakers suffer when immersed in judicial proceedings, Congress enacted the Court Interpreters Act in 1978.⁹ Congress created the Act in order to alleviate the problems which arise when non-native English speakers become defendants in federal courts.¹⁰

The Ninth Circuit recently interpreted the Act in *Gonzalez v. United States*.¹¹ The *Gonzalez* court rejected the argument that a certified interpreter was required by the Act even though the court acknowledged that the defendant had difficulty comprehending English.¹² This Note analyzes the appropriateness of the *Gonzalez* decision in light of precedent and statutory history, and examines the possible ramifications of the court's refusal to appoint an interpreter.

The Background section provides an overview of the development, trends and problems of a defendant's right to a court-appointed interpreter. First, in Part I.A, the Note examines federal cases antedating

5. H.R. REP. NO. 889, 100th Cong., 2d Sess. 58-59 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5982, 6010.

6. Though the cases in this Note deal mainly with Spanish speaking defendants, the Court Interpreters Act applies to all non-English speakers, as well as deaf individuals. 28 U.S.C. § 1827(d)(1)(A)-(B) (1988).

7. Among professional court interpreters, the Nuremberg Trials are acknowledged as the birth of the profession of court interpreting. ELENA M. DE JONGH, *AN INTRODUCTION TO COURT INTERPRETING: THEORY & PRACTICE* 2-3 (1992). Interpreters simultaneously translated German, English, French, and Russian. *Id.* at 3. "After 217 days of trial, the transcribed proceedings totalled over four million words, amounting to 16,000 pages." *Id.* (citing *TRIAL AT NUREMBERG* (United Artists Television 1964)).

8. 123 CONG. REC. S11,353 (1977) (statement of Sen. DeConcini).

9. 28 U.S.C. § 1827.

10. H.R. REP. NO. 1687, 95th Cong., 2d Sess. 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4652, 4652. Before proceeding further, it should be noted that this Note deals primarily with interpretation, not translation. Though often used interchangeably, the meanings of the two words differ: "translation deals with the written word . . . [while] interpretation . . . allows two or more persons who do not speak the same language to communicate orally. Interpreters listen to a source language speaker, process the information, and convey it in a target language to the listener(s)." DE JONGH, *supra* note 7, at xvi, 35-36; Debra L. Hovland, *Errors in Interpretation: Why Plain Error is Not Plain*, 11 *LAW & INEQUALITY* 473, 474 n.3 [(citing *Translation Service* (Bar Ass'n of San Francisco, Cal.), Oct. 21, 1991, at 4.)]

11. 33 F.3d 1047 (9th Cir. 1994).

12. *Id.* at 1050-51.

the Act which recognized that an interpreter may be necessary to safeguard the constitutional rights of non-English speaking defendants. Some cases appear to indicate that a constitutional cause of action exists today, even after the enactment of the statute,¹³ thus allowing defendants to pursue constitutional as well as statutory claims.¹⁴ The constitutional approach, which grants discretion to the trial court,¹⁵ seems to exist as a separate and distinct option which supplements the statutory approach. In contrast to the discretionary standard inherent in the constitutional approach, the Act requires an interpreter to be appointed under certain circumstances.¹⁶ This Note demonstrates that the two approaches are often inappropriately combined, rather than recognized as separate causes of action. The goal of the Background section is, in part, to untangle the web of confusing jurisprudence regarding the right to a court-appointed interpreter.¹⁷

13. Among all of the cases cited in this Note, no authority was found to support the proposition that a constitutional claim survived the enactment of the statute. However, neither was any case located that explains how the statutory cause of action replaced the constitutional claim. This lack of guidance from courts interpreting the newly-enacted Act inevitably led to the confusing body of law that exists today regarding the right to a court interpreter.

14. See, e.g., *Gonzalez*, 33 F.3d at 1048 (“Gonzalez claim[ed] that he was denied his right to a qualified court interpreter under the . . . Act . . . and that the lack of adequate interpretation . . . deprived him of certain Fifth and Sixth Amendment rights . . .”); *United States v. Mayans*, 17 F.3d 1174, 1180-81 (9th Cir. 1994) (finding that the lower court’s failure to ascertain the defendant’s ability to speak English in a forum other than the primary hearing violated the statute and the defendant’s constitutional rights); *United States v. Shin*, 953 F.2d 559, 561 (9th Cir. 1992) (recognizing a statutory right under the Act, but pointing out that there is a constitutional right as well); *United States v. Sanchez*, 928 F.2d 1450, 1454-56 (6th Cir. 1991) (analyzing first the defendant’s claims under the Act and then progressing to a Sixth Amendment claim analysis regarding the appointment of an interpreter, which the court ultimately rejected); *United States v. Lim*, 794 F.2d 469, 470 (9th Cir. 1986) (“Several circuits have held that a defendant whose fluency in English is so impaired that it interferes with his right to confrontation or his capacity, as a witness, to understand or respond to questions has a constitutional right to an interpreter.”).

15. See *Perovich v. United States*, 205 U.S. 86, 91 (1907) (“This is a matter largely resting in the discretion of the trial court . . .”).

16. See *United States v. Bennett*, 848 F.2d 1134, 1140 (11th Cir. 1988) (“The Court Interpreters Act was enacted in 1978 to require the federal courts to appoint interpreters in certain cases.”); see also H.R. REP. NO. 1687, *supra* note 10, at 3, *reprinted in* 1978 U.S.C.C.A.N. at 4654 (“There are currently four relevant Federal statutes . . . [h]owever, the language in these provisions make [sic] the appointment of interpreters discretionary, not mandatory . . .”).

17. The Ninth Circuit’s *Mayans* opinion exemplifies this confusion. The case purports to interpret the Act and begins by citing a large portion of the statute. *Mayans*, 17 F.3d at 1179. The opinion then states that *Mayans* was claiming both statutory and constitutional violations. *Id.* However, in beginning its analysis, the court states that the use of interpreters is within the trial court’s discretion, and as authority, cites cases decided both before and after the Act took effect. *Id.* (citing *United States v. Lim*, 794 F.2d 469 (9th Cir. 1986) and *United States v. Carrion*, 488 F.2d 12 (1st Cir. 1973)). Nowhere does the court acknowledge either that cases decided after the Act should be decided differently than common law cases, or that the method for determining a statutory violation differs from that which determines a constitutional violation. *Id.*

After clarifying the precedent regarding the separate statutory and constitutional tests for determining whether a defendant is entitled to an interpreter, this Note discusses the Court Interpreters Act. Part I.B first discusses the legislative history of the Act and then surveys cases decided prior to *Gonzalez* which interpreted the Act. Part I.B notes four common characteristics of these cases: the importance of the defendant's failure to object; the reliance upon what the Note shall refer to as "biographic" factors, such as how long the defendant has resided in the United States; inappropriate use of non-qualified "interpreters;" and the reliance on the appraisals of anyone other than the judicial official to judge how well the defendant speaks English. The Background concludes by examining the public policies that justify Congress' recognition of the right to an interpreter. Specifically, Part I.C explores the problems which arise when a defendant is unable to speak English and the duties of a court interpreter.

The Note then analyzes the Ninth Circuit's opinion in *Gonzalez*. The Case Analysis section discusses the majority and dissenting opinions, and concludes that both the trial and appellate courts incorrectly applied the Act in determining whether *Gonzalez* was entitled to an interpreter.

Finally, in the Impact section, the Note addresses the likely consequences of *Gonzalez*. The Note explores how *Gonzalez* may increase the already significant probability that a non-English speaking defendant will not receive due process when called to court as a defendant. This Note concludes that the *Gonzalez* opinion fails to provide the protection Congress intended to give non-English speaking defendants.

I. BACKGROUND

In large cities such as New York City, Washington, D.C., and Chicago, and in states such as California, Texas, and Florida, a significant portion of the population primarily speaks Spanish;¹⁸ many of these Spanish speakers experience difficulty in understanding English.¹⁹

On a day-to-day basis, these people may function adequately in society, aided in part by governmental regulations which mandate that

18. In 1980, more than one third of those persons living in the United States who spoke languages other than English lived in three states: California, Texas, and Florida. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SUPPLEMENTARY REPORT: PROVISIONAL ESTIMATES OF SOCIAL, ECONOMIC AND HOUSING CHARACTERISTICS 14-19 (1982).

19. *Id.*

services be provided in languages other than English.²⁰ Some have difficulties with English, but can converse in broken or conversational English.²¹ However, broken English and poor comprehension are inadequate in certain settings, such as where a Spanish speaker is accused of a crime and finds himself or herself in either state or federal court.²² The following section examines early federal common law, the first governmental action that attempted to protect the interests of a Spanish speaking criminal defendant.²³

A. *Federal Common Law Approach to Court Interpreters*

1. *The Perovich Discretion Standard*

Initially, federal courts held that the appointment of an interpreter was within the discretion of the trial court. An early United States Supreme Court case, *Perovich v. United States*,²⁴ was the first opinion by the Court that specifically addressed the appointment of an interpreter.²⁵ In *Perovich*, the defendant was found guilty of first degree murder and sentenced to death.²⁶ Although the Court dedicated most of its opinion to addressing the absence of a *corpus delicti*,²⁷ the absence of an interpreter was briefly discussed. The entirety of the Court's analysis regarding the absence of an interpreter was as follows:

20. See *Official English*, *supra* note 3, at 1345 n.3 (explaining how California developed sweeping governmental programs to assist non-English speakers).

21. See *supra* note 2 (discussing the number of immigrants entering the United States between 1987 and 1990 from Spanish speaking countries who spoke English "not well" or "not at all").

22. Congress has recognized that the most pressing problem faced by the courts concerning interpretation is maintaining a sufficient number of certified Spanish interpreters. See H.R. REP. NO. 889, *supra* note 5, at 58, reprinted in 1988 U.S.C.C.A.N. at 6020; see also DE JONGH, *supra* note 7, at 18, 20 (citing a study by Court Administrative Division, Administrative Office of the United States Courts entitled *Interpreter Use in U.S. District Courts, 1980-1990, Spanish*, which reported that from 1980 to 1990, 23,394 of 24,438 interpreters used by United States District Courts aided Spanish speakers, while in 1990 alone Spanish speaking interpreters comprised 61,397 of 66,431 interpreters used by these courts).

23. The Court Interpreters Act applies in civil as well as criminal proceedings. See 28 U.S.C. § 1827(a) (stating that the Act applies in "judicial proceedings instituted by the United States"); 28 U.S.C. § 1827(j) ("The term 'judicial proceedings instituted by the United States' as used in this section refers to all proceedings, whether criminal or civil . . ."). However, this Note will discuss the Act in the context of criminal cases only.

24. 205 U.S. 86 (1907).

25. See Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. REV. 1, 1-2 (1990) ("[T]he absence of any United States Supreme Court decision defining and delineating the right to court interpreters undoubtedly adds to the uncertainty.").

26. *Perovich*, 205 U.S. at 89.

27. *Id.* at 89-91. *Corpus delicti* is "the body of (material substance) upon which a crime has been committed." BLACK'S LAW DICTIONARY 344 (6th ed. 1990).

One [assignment of error] is that the court erred in refusing to appoint an interpreter when the defendant was testifying. This is a matter largely resting in the discretion of the trial court, and it does not appear from the answers made by the witness that there was any abuse of such discretion.²⁸

The Court did not cite any precedent, provide any rationale for the conclusion, nor include any analysis of the "answers made by the witness."²⁹ The Court also did not specify what language the individual spoke.³⁰ Despite the Court's scanty analysis, and the lack of any published rationale for the Court's decision, *Perovich* was widely cited by early federal courts for the proposition that it is within the discretion of the trial court to appoint an interpreter.³¹

Although the *Perovich* court did not define the limits of the trial court's "discretion," later cases that refer to the discretion standard employ a test articulated in *United States v. Martinez*.³² The test requires the trial court to balance the defendant's rights to confrontation and effective assistance of counsel against the public's interest in the economical administration of criminal law.³³ The *Perovich* approach was employed by state as well as federal courts, and many states continue to use *Perovich* as authority for their decisions addressing the defendant's constitutional right to a court-appointed interpreter.³⁴ Although frequently cited, the *Perovich* standard has not been applied uniformly throughout its evolution.

28. *Perovich*, 205 U.S. at 91.

29. *Id.*

30. *Id.*

31. See, e.g., *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980) (holding that balancing a defendant's right to confrontation against the public's interest in the economical administration of criminal law was in the sound discretion of the trial judge); *United States v. Carrion*, 488 F.2d 12, 14-15 (1st Cir. 1973) (citing *Perovich* as authority for the proposition that since the need for a court interpreter hinges upon various factors, the trial court will be granted wide discretion); *United States v. Rodriguez*, 424 F.2d 205, 206 (4th Cir. 1970) (holding that the use of an interpreter is a matter within the sound discretion of the trial court); *United States v. Desist*, 384 F.2d 889, 901 (2d Cir. 1967) (explaining that *Perovich* allowed discretion because the trial court could evaluate the defendant's ability to understand and express himself in English); *United States v. Sosa*, 379 F.2d 525, 527 (6th Cir. 1967) (allowing discretion when the trial judge stated that he understood Spanish); *Suarez v. United States*, 309 F.2d 709, 712 (5th Cir. 1962) (holding that the use of the interpreter was within the trial judge's discretion). But see *United States v. Frank*, 494 F.2d 145, 158 (2d Cir. 1974) (pointing out that there have been some reversals for refusal to appoint an interpreter, despite the *Perovich* holding).

32. 616 F.2d 185, 188 (5th Cir. 1980).

33. *Id.*; see also *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989) (citing *Martinez*, 616 F.2d at 188).

34. See, e.g., *Luna v. Black*, 772 F.2d 448, 451 (8th Cir. 1985) (affirming the trial court's denial of an interpreter during a trial held in state court); *In re QLJ*, 458 A.2d 30, 31-32 (D.C. 1982) (holding that a decision to appoint an interpreter is committed to the sound discretion of the trial court); *Flores v. State*, 406 So. 2d 58, 59 (Fla. Dist. Ct. App. 1981) (stating that whether an

2. *The Constitutional Approach*

Subsequent to the *Perovich* decision and contemporaneous with its progeny, federal courts began to acknowledge that the presence of an interpreter who provides accurate and complete translations may be necessary to protect the defendant's constitutional rights in criminal trials.³⁵ If an accused could not understand a witness' testimony, the right to confront witnesses would be meaningless and cross-examination would be severely hampered.³⁶

The Second Circuit, in *United States ex rel. Negron v. New York*,³⁷ was one of the first federal circuits to explicitly hold that the Sixth Amendment³⁸ requires that non-English speaking defendants be informed of their right to simultaneous interpretation of court proceedings at the government's expense.³⁹ The *Negron* court likened a defendant who does not speak English and does not have an interpreter to a defendant who is not present at his or her own trial.⁴⁰ The court therefore held that "regardless of the probabilities of his guilt, *Negron's* trial lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment."⁴¹

interpreter is required is within the sound discretion of the trial judge); *State v. Faafti*, 513 P.2d 697, 699 (Haw. 1973) (explaining that it is within the trial judge's discretionary power to appoint an interpreter); *Commonwealth v. Garcia*, 399 N.E.2d 460, 470 (Mass. 1980) (explaining that the assessment of a defendant's level of fluency is uniquely in the province of the trial judge); *People v. Atsilis*, 231 N.W.2d 534, 535 (Mich. Ct. App. 1975) (holding that the question whether an interpreter is needed is a matter for the trial judge's discretion); *State v. Saldana*, 246 N.W.2d 37, 39 (Minn. 1976) (stating that the appointment of an interpreter is within the discretion of the trial court); *State v. Topete*, 380 N.W.2d 635, 636 (Neb. 1986) (citations omitted) (holding that whether an interpreter is appointed is a matter resting largely within the discretion of the trial court).

35. See, e.g., *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973) (acknowledging a constitutional right to an interpreter when a defendant was indigent and had obvious difficulty with the English language); *Gonzalez v. Virgin Islands*, 109 F.2d 215, 217 (3d Cir. 1940) (recognizing that an accused who is unfamiliar with the language of the court may be entitled to have the witnesses' testimony interpreted under the constitutional right to confront witnesses).

36. *Carrion*, 488 F.2d at 14.

37. 434 F.2d 386 (2d Cir. 1970).

38. The right to confrontation of one's accusers is protected by the Sixth Amendment. U.S. CONST. amend. VI.

39. *Negron*, 434 F.2d at 389-91 (ruling that denial of an interpreter for the defendant violated his Sixth Amendment right to confront witnesses).

40. *Id.* at 389.

41. *Id.* Finding that federal case law regarding the constitutional right to an interpreter at a criminal trial was scarce, the *Negron* court referred to state court opinions, which acknowledged a constitutional right to an interpreter rather than relying on cases established under *Perovich*. *Id.* at 389 n.6 (citing *Terry v. State*, 105 So. 386 (Ala. Ct. App. 1925); *Garcia v. State*, 210 S.W.2d 574 (Tex. Crim. App. 1948); *State v. Vasquez*, 121 P.2d 903 (Utah 1942)). The *Terry* court held that

[T]he accused must not only be *confronted* by the witnesses against him, but he must be accorded all necessary means to know and understand the testimony given by said wit-

The line of cases that followed *Perovich* and *Negron* intertwined the *Perovich* standard of discretion and the *Negron* constitutional approach. Therefore, when the Act was enacted, federal courts cited the *Perovich* and *Negron* decisions interchangeably, even though *Perovich* barely discussed the issue of appointing interpreters and *Negron* did not cite *Perovich* as authority.⁴² The combination of the two lines of cases resulted in a heavy reliance by subsequent appellate courts on the trial court's discretion, as was done in *Perovich*,⁴³ and a minimal focus on the due process rights discussed at length in *Negron*.⁴⁴ As will be discussed in subsequent sections, the case law became increasingly entangled with the enactment of the Court Interpreters Act.

3. *The Recognition of a Need for an Improved Federal Statute*

The patchwork quality of the federal case law may have been exacerbated by federal statutes dealing with the appointment of court interpreters. As of 1978, four such statutes existed.⁴⁵ As a common denominator, all of the statutes made the appointment of an interpreter discretionary rather than mandatory.⁴⁶ Testimony during subcommittee hearings on the need for a federal solution indicated that many federal convictions decided under these statutes were reversed on due process grounds in cases where an interpreter was not appointed, even though the defendant's knowledge of English was either

nesses . . . Mere confrontation of the witnesses would be useless, bordering on the farcical, if the accused could not hear or understand their testimony.

Terry, 105 So. at 387.

42. See, e.g., *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973) (citing *Negron* to establish the proposition that the necessity for an interpreter had been elevated to a right in some circumstances, and then citing *Perovich* to support the proposition that the trial court should be granted wide discretion in determining whether an interpreter is necessary).

43. See *United States v. Rodriguez*, 424 F.2d 205, 206 (4th Cir. 1970) ("Use of an interpreter is a matter within the sound discretion of the trial court.") (citation omitted); *Guerrero v. Harris*, 461 F. Supp. 583, 586 (S.D.N.Y. 1978) (citations omitted) ("While there is a scarcity of judicial authority fully discussing the right to a court appointed interpreter . . . it is clearly within the court's discretion to decide whether an interpreter is necessary.").

44. See *Negron*, 434 F.2d at 389 (quoting the holding of the district court judge, the court stated, "Negron's trial lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment").

45. H.R. REP. NO. 1687, *supra* note 10, at 3, *reprinted in* 1978 U.S.C.C.A.N. at 4654. The four Federal statutes were Rule 28(b) of the Federal Rules of Criminal Procedure, the Criminal Justice Act of 1964 (18 U.S.C. § 3006A(e)), Rule 43(f) of the Federal Rules of Civil Procedure, and Rule 604 of the Federal Rules of Evidence. See generally DE JONGH, *supra* note 7, at 7-8 (explaining that the problem with Rule 28(b) was that the Rule was not mandatory, and many judges were not qualified to select an interpreter as the Rule allows; further explaining how Rule 604 demonstrated that the federal district courts regarded interpreting as a specialized activity requiring special knowledge).

46. H.R. REP. NO. 1687, *supra* note 10, at 3, *reprinted in* 1978 U.S.C.C.A.N. at 4654.

minimal or nonexistent.⁴⁷ Moreover, while deliberating over the possibility of a new federal statute, a House subcommittee examined examples of cases in which judges were reluctant to exercise their discretionary powers.⁴⁸

Even when an interpreter was appointed, the qualifications of the interpreter were often problematic.⁴⁹ No certification was required, and the courts often selected an interpreter based only on the interpreter's own representation of competence in a foreign language.⁵⁰ It was not uncommon for courts to call on janitors, judges' secretaries, or library clerks, so long as they were able to communicate with both the defendant and the court.⁵¹ The lack of any mechanism to verify the abilities or accuracy of interpreters led to serious problems.⁵² For example, in *Virginia v. Edmonds*,⁵³ a case in which a deaf woman had been raped, the interpreter incorrectly interpreted the victim's comments, telling the court that the victim said "made love" instead of "forced intercourse" and "short blouse" instead of "blouse."⁵⁴ Cases such as *Edmonds* did not go unnoticed by the national legislature.

The courts' failure to appoint qualified interpreters became a major concern in the early 1970s.⁵⁵ Congressional leaders asserted that more needed to be done for the large portion of United States residents that did not speak English, or spoke English poorly.⁵⁶ A statutory mandate for the provision of, and access to, qualified, certified interpreters for a broader spectrum of people than were covered under the old

47. *Id.* at 4, reprinted in 1978 U.S.C.A.N. at 4654 (citing United States *ex rel.* Navarro v. Johnson, 365 F. Supp. 676 (E.D. Pa. 1973); Parra v. Page, 430 P.2d 834 (Okla. Crim. App. 1967)).

48. *Id.* (citing affidavit testimony of Sy DuBow, Legal Director of the National Center for Law and Deaf, and of Gary Hinckley, rendered on Aug. 2, 1978).

49. All of the witnesses testifying before House subcommittee hearings on the issue of court interpreters agreed that a key provision to new legislation would be the requirement that the Administrative Office of the U.S. Courts initiate a certification procedure to insure that only qualified interpreters were used in federal courts. *Id.*

50. *Id.*

51. Seltzer v. Foley, 502 F. Supp. 600, 606-08 (S.D.N.Y. 1980) (providing examples of why the selection of these individuals was problematic for the justice system).

52. *Id.*

53. See H.R. REP. NO. 1687, *supra* note 10, at 5, reprinted in 1978 U.S.C.A.N. at 4655 (citing the unpublished trial court opinion of *Virginia v. Edmonds*, which was decided in 1978).

54. *Id.*

55. See DE JONGH, *supra* note 7, at 10 ("[B]y 1977, over forty states and the federal government had rules, procedures or decisions that affected witnesses who had a limited understanding of the English language. However, in many cases, the interpretation was done by persons whose ability as interpreters could not be measured."). Several bills were introduced in Congress, including H.R. 4096, H.R. 2243 and the Bilingual Courts Act, all of which were precursors to the Court Interpreters Act. *Id.*

56. See 123 CONG. REC. S37,215 (1977) (providing an excerpt of Senate Judiciary Report No. 95-569).

scheme was needed.⁵⁷ Advocates of a statutory solution testified in favor of the Bilingual Courts Act at subcommittee hearings.⁵⁸ One such advocate was J. Stanley Pottinger, Assistant Attorney General for the Civil Rights Division of the Department of Justice, who urged the legislature to recognize that the ability to comprehend the language of the court is an indispensable element of equality and efficiency in the courts.⁵⁹ Congressional proponents of a federal solution contended that additional access to interpreters was not necessitated solely by a sense of "fundamental fairness," but by the Sixth Amendment guarantees of right to counsel and right to confrontation.⁶⁰ They explained that only through the aid of simultaneous interpretation will a party be able to communicate with counsel and effectively aid in the cross examination of witnesses.⁶¹ The efforts of the proponents of a statutory solution were eventually rewarded.

B. The Federal Statutory Solution

Faced with inappropriate federal statutes, inconsistent federal case law which recognized a constitutional right to an interpreter but eviscerated the right by giving broad discretion to the trial court, and strong lobbying for a statutory solution, Congress enacted the Court Interpreters Act⁶² in 1978. The Act reads in pertinent part:

(d)(1) The presiding judicial officer . . . shall utilize the services of the most available certified interpreter, or when no certified interpreter is reasonably available, as determined by the presiding judicial officer, the services of an otherwise qualified interpreter, in judicial proceedings instituted by the United States, if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party (including a defendant in a criminal case), or a witness who may present testimony in such judicial proceedings—(A) speaks only or primarily a language other than the English language . . . so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit such witness' comprehension of questions and the presentation of such testimony.⁶³

57. *Id.*

58. 123 CONG. REC. S11,353 (1977) (statement of Sen. DeConcini).

59. *Id.*

60. *Id.*

61. *Id.*

62. 28 U.S.C. § 1827.

63. *Id.*

The Act was signed by President Carter and became law on October 28, 1978.⁶⁴ However, the applicable provisions recited above did not become active until January 26, 1979.⁶⁵

1. *The Court Interpreters Act*

The Act was intended to serve two principal purposes: to ensure that a party comprehends the proceedings and can communicate with his or her counsel or the presiding judicial official, and to ensure that parties on the witness stand understand the questions directed to them.⁶⁶ The Act imposed upon the presiding judicial officer an affirmative duty to determine whether a witness or defendant understands the proceedings, a duty arising as soon as the officer recognizes that the defendant speaks only or primarily a language other than English.⁶⁷

The blending together of these statutory provisions created a two-prong test to be utilized to determine whether a court is correctly applying the Act.⁶⁸ First, it must be determined whether the judicial officer realizes that the defendant or witness speaks only or primarily a language other than English.⁶⁹ Second, once this realization is made, a factual inquiry should be undertaken to determine whether the party's comprehension of the proceedings or communications with his or her counsel is inhibited.⁷⁰ The Act does not prescribe how the judicial officer will initially determine that the party speaks primarily a language other than English, nor how the officer will determine if the party comprehends the proceeding despite any language difficulties.⁷¹

In addition to delineating when an interpreter should be provided, other provisions in the Act mandate that a *certified* court interpreter

64. 28 U.S.C. § 1827. See Carlos A. Astiz, *A Comment on Judicial Interpretation of the Federal Court Interpreters Act*, 14 JUST. SYS. J. 103 (1990) (commenting on the long and arduous legislative process of enacting the Act).

65. Astiz, *supra* note 64, at 103; see 28 U.S.C. § 1827 (providing that the Act "shall take effect ninety days after the date of the enactment").

66. 28 U.S.C. § 1827(d).

67. *Id.* The judge has the ultimate responsibility to determine whether or not an interpreter is required under the legislation. H.R. REP. NO. 1687, *supra* note 10, at 6, reprinted in 1978 U.S.C.C.A.N. at 4657. These provisions apply when the defendant is hearing impaired as well. 28 U.S.C. § 1827(d)(1)(B).

68. See *United States v. Tapia*, 631 F.2d 1207, 1209-10 (5th Cir. 1980) (generally outlining a two-tier analysis to decide whether the defendant should have been appointed an interpreter).

69. See Piatt, *supra* note 25, at 5 (noting that courts ordinarily will not appoint an interpreter unless requested to do so).

70. *Id.*; see also *Tapia*, 631 F.2d at 1209 (holding that when the defendant required an interpreter at the arraignment, the court should have inquired whether failure to have an interpreter with him during the proceedings inhibited the defendant's comprehension of the proceedings).

71. 28 U.S.C. § 1827.

must be used unless one is not "reasonably available,"⁷² and that when a certified interpreter is not "reasonably available," an "otherwise competent" interpreter must be appointed.⁷³ Even though the "otherwise competent" interpreter is not certified, courts are now provided with guidelines to follow when choosing an "otherwise competent" interpreter, to ensure that the highest standards of accuracy are maintained in all judicial proceedings, even when a certified interpreter is unavailable.⁷⁴ Reporting on the Act, the United States House of Representatives acknowledged that formal methods may be necessary to determine whether an interpreter is required, even though proceedings may be minimal.⁷⁵

Finally, the Act gives the Director of the Administrative Office of the United States Courts the authority to oversee the newly-created certification process, and provides for the certification of interpreters through a federally administered examination.⁷⁶

Before exploring the certification procedure, the following section examines how the federal circuit courts have applied the provisions of the Act that address the circumstances under which a court-appointed interpreter will be required.

2. *The Importance of United States v. Tapia*

The Fifth Circuit was one of the first federal circuits to address the Act, and the first circuit to address a case appealing a trial court's denial of an interpreter, in *United States v. Tapia*.⁷⁷ Tapia was convicted of moving and conspiring to move aliens into the United States in violation of federal law.⁷⁸ Tapia's court-appointed counsel was bilingual in English and Spanish.⁷⁹ Although Tapia was arraigned through an interpreter and testified through an interpreter at trial, he contended that no interpreter was provided to him to interpret the testimony given in English by a principal government witness and the officers that had arrested him.⁸⁰ Conscious of the paucity of cases in-

72. 28 U.S.C. § 1827(d)(1); see Shulman, *supra* note 4, at 180, 182-83 (explaining that courts have interpreted the phrase "reasonably available" in a number of ways).

73. 28 U.S.C. § 1827(d)(1).

74. 28 U.S.C. § 1827(b)(2). The requirement for guidelines was added to the Act in 1988 with the enactment of Public Law 100-702. See DE JONGH, *supra* note 7, at 14-15 (discussing the enactment of the Judicial Improvements and Access to Justice Act of 1988).

75. H.R. REP. NO. 1687, *supra* note 10, at 4, reprinted in 1978 U.S.C.C.A.N. at 4657.

76. 28 U.S.C. § 1827. See *infra* notes 258-80 and accompanying text (discussing the federal certification examination).

77. 631 F.2d 1207 (1980).

78. *Id.* at 1208.

79. *Id.* at 1209.

80. *Id.*

terpreting the statute, the court “hope[d] to give some guidance to the courts below” regarding compliance with the Act.⁸¹ However, because the record was unclear as to whether Tapia was provided an interpreter at trial, the court remanded the case for findings of fact required by the Act, and carefully instructed the lower court as to the proper procedure to be used in determining whether an interpreter should be provided.⁸²

The appellate court held that the lower court first had to determine whether the interpreter sat beside Tapia during the trial.⁸³ If the lower court found that the interpreter was not sitting at Tapia’s side interpreting the proceedings for him, the court was to inquire whether the interpreter’s absence inhibited Tapia’s comprehension of the proceedings or prevented him from assisting his counsel.⁸⁴

The government argued that the use of an interpreter was discretionary, and that no constitutional right to a court-appointed interpreter existed.⁸⁵ Interestingly, the appellate court seemed to agree that the appointment of an interpreter was discretionary, even *after* the 1978 Act, but nonetheless held that the Act required certain findings on the record before such discretion could be exercised.⁸⁶ Thus, the trial court, on its own motion, should have inquired whether Tapia’s comprehension of the proceedings and communications with his counsel were inhibited,⁸⁷ because the trial court was aware that Tapia was arraigned through an interpreter, but had not used an interpreter during part of his trial.⁸⁸ Any indication that a criminal defendant spoke primarily a language other than English triggered the court’s duty to make this motion.⁸⁹ The appellate court did not comment on Tapia’s attorney’s failure to object during the proceedings to the absence of an interpreter, but focused instead on the duties of the judge.⁹⁰ Moreover, the appellate court prescribed the correct standard of review of a trial court’s exercise of discretion: if there was

81. *Id.* at 1208.

82. *Id.*

83. *Id.*

84. *Id.* at 1210.

85. *Id.*

86. *Id.*

87. *Id.* Although the Fifth Circuit remanded with instructions that the lower court determine if Tapia’s comprehension was “inhibited,” the appellate court did not explain how this determination must be made, or even provide suggestions to the lower court. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

error, the reviewing court was to determine whether the error rendered the trial "fundamentally unfair."⁹¹

Although the *Tapia* opinion provided clear instructions to be followed on remand, the court neither distinguished the previously recognized constitutional right of action from the newer statutory right, nor explained why it mingled statutory and common law analyses.⁹² Instead, the court purported to interpret the Act, but agreed that the discretion standard still existed, and cited pre-Act cases as authority.⁹³ Even though the court failed to clarify the difference between the constitutional and statutory causes of action, the instructions by the *Tapia* court were used consistently in subsequent, pre-*Gonzalez* cases involving the issue of whether an interpreter should have been provided.⁹⁴

3. *Cases decided during the period between United States v. Tapia and Gonzalez v. United States*

Since *Tapia*, eight of the twelve federal circuits have interpreted the Act.⁹⁵ However, not all circuits have decided cases where no interpreter was provided. Other issues which have arisen under the statute include whether one interpreter was sufficient for multiple defendants,⁹⁶ whether an interpreter was adequately skilled to translate proceedings,⁹⁷ and whether a defendant waived his right to an interpreter

91. *Id.*

92. *Id.*

93. *Id.* at 1209 (citing *Suarez v. United States*, 309 F.2d 709 (5th Cir. 1962); *United States v. Sosa*, 379 F.2d 525 (7th Cir. 1967)).

94. See *infra* notes 102-74 and accompanying text (discussing subsequent appellate cases relying on *Tapia*).

95. These circuits are the First, Second, Fifth, Sixth, Ninth, Tenth, Eleventh, and the District of Columbia.

96. See, e.g., *United States v. Yee Soon Shin*, 953 F.2d 559, 561 (9th Cir. 1992) (holding that the Act does not require separate interpreters for each defendant in multi-defendant cases); *United States v. Sanchez*, 928 F.2d 1450, 1454 (6th Cir. 1991) (holding that "[t]here is nothing in the language of the Act or in the legislative history which requires every defendant in a multi-defendant criminal action be provided with his own individual interpreter"); *United States v. Bennett*, 848 F.2d 1134, 1140 (11th Cir. 1988) (holding that the district court's appointment of a single interpreter satisfied the requirements of the Act); *United States v. Lim*, 794 F.2d 469, 471 (9th Cir. 1986) (holding that communication with counsel and comprehension of proceedings were not inhibited by sharing a court interpreter).

97. See, e.g., *United States v. Lopez*, No. 93-3316, 1993 U.S. App. LEXIS 32103, at *10 (6th Cir. Dec. 7, 1993), *cert. denied*, 1994 U.S. LEXIS 3056 (Apr. 18, 1994) (approving the services of an uncertified interpreter because of the defendant's failure to object at trial); *United States v. Paz*, 981 F.2d 199 (5th Cir. 1992) (holding that the trial court had not abused its discretion by choosing an uncertified interpreter, because the defendant had not objected to the interpreter during the proceedings); *United States v. Lam Kwong-Wah*, 924 F.2d 298, 309 (D.C. Cir. 1991) (finding that the defendant had been provided an accurate translation, largely by relying on the defendant's failure to object at trial); *United States v. Villegas*, 899 F.2d 1324, 1349 (2d Cir. 1990)

in compliance with the statute.⁹⁸ The Ninth Circuit also heard a case in which the defendant alleged that the court interpreter deliberately translated the trial court's advice inaccurately.⁹⁹ Thus, only three circuits—the Fifth, Sixth and Ninth—have decided cases in which the appellant requested review of a lower court's decision that no interpreter was needed at a judicial proceeding.¹⁰⁰ *Gonzalez* was only the sixth ruling of a federal appeals court on this issue since the Act took effect in 1979.¹⁰¹ In order to understand how the circuit courts' approaches to the issue of court-appointed interpreters has developed over the last fourteen years, the following section examines the four cases decided in the period between *Tapia* and *Gonzalez*.

(holding that the interpretation was adequate by focusing on the defendant's failure to make a timely objection); *United States v. Joshi*, 896 F.2d 1303, 1310 (11th Cir. 1990) (holding that "[a] reviewing court is unlikely to find that a defendant received a fundamentally unfair trial due to an inadequate translation in the absence of contemporaneous objections to the quality of the interpretation"); *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989) (finding significance in appellant's lack of objection to adequacy of the interpreter at trial).

Two interesting cases in which proper objections were made are *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988), *cert. denied*, 492 U.S. 908 (1989), and *United States v. Urena*, 27 F.3d 1487 (10th Cir. 1994). In *Moya-Gomez*, the defendant made numerous complaints during the proceedings regarding his inability to understand the interpreter. 860 F.2d at 739-40. The district court rejected the complaints and the defendant's request that a new interpreter be appointed. *Id.* Without independently evaluating the interpreter's skills, the district court judge expressed his belief that the "business about the interpreter" was a "red herring," and that "[t]he interpreter [was] doing a marvelous job" in his opinion. *Id.* at 740. In *Urena*, the defendant's attorney requested a different interpreter because he had interviewed the witness before with a different interpreter and had received a much more detailed response than that given by the court-appointed interpreter. 27 F.3d at 1492. Despite the defendants' objections in both *Urena* and *Moya-Gomez*, the appellate courts both held that no abuse of discretion was found. *Urena*, 27 F.3d at 1493; *Moya-Gomez*, 860 F.2d at 740.

98. *See, e.g.*, *United States v. Moon*, 718 F.2d 1210, 1230-32 (2d Cir. 1983).

99. *Chacon v. Wood*, 36 F.3d 1459, 1460 (9th Cir. 1994). The defendant alleged that the interpreter had been barred and dismissed from the county court for negligence and coercion of Spanish origin clients. *Id.* at 1462. In response, the appellate court reversed and remanded the case, instructing the lower court to consider the merits of Chacon's claim that his guilty plea was involuntary because of the alleged interference of the interpreter. *Id.* at 1470.

100. *Gonzalez v. United States*, 33 F.3d 1047 (9th Cir. 1994); *United States v. Mayans*, 17 F.3d 1174 (9th Cir. 1994); *United States v. Catalano*, No. 91-50372, 1992 U.S. App. LEXIS 20942 (9th Cir. Sept. 3, 1992); *United States v. Markarian*, 967 F.2d 1098 (6th Cir. 1992); *United States v. Torres Perez*, 918 F.2d 488 (5th Cir. 1990); *United States v. Tapia*, 631 F.2d 1207 (5th Cir. 1980).

101. In *United States v. Torres*, No. 94-1113, 1995 U.S. App. LEXIS 264 (6th Cir. Jan. 4, 1995), *cert. denied*, 1995 U.S. LEXIS 4416 (June 26, 1995), a case decided after *Gonzalez*, the Sixth Circuit examined a case where continuous interpretation was provided by an interpreter starting with the second day of a trial. *Id.* at *17. The defendant appealed his guilty verdict, claiming that he was deprived of a fundamentally fair trial because, during the first day of trial and jury selection, no interpreter was present. *Id.* at *15. This Note will not examine *Torres* for two reasons. First, the Note focuses on cases where the defendant was deprived of an interpreter for the entirety of the trial. Second, this Note seeks justification for the procedure used by the *Gonzalez* court. Cases adjudicated after *Gonzalez* cannot provide authority for the *Gonzalez* opinion.

a. *United States v. Perez*

The first federal appeal of a trial court's denial of a court-appointed interpreter after the *Tapia* decision did not arise until ten years after *Tapia*. In *United States v. Perez*,¹⁰² Perez was arrested for purchasing the chemicals and glassware needed to produce methamphetamine.¹⁰³ Perez indicated at his initial appearance before the magistrate that he had "some difficulty" with English.¹⁰⁴ The magistrate inquired whether Perez understood the proceedings up to that point, to which Perez responded, "I understand everything so far."¹⁰⁵ The magistrate did not provide Perez with an interpreter, but told him to stop the proceedings if he was confused.¹⁰⁶

At Perez's detention hearing, the magistrate again failed to provide an interpreter, having ascertained that Perez had an adequate mastery of English.¹⁰⁷ At this hearing, Perez testified that he had lived in the United States for nineteen years.¹⁰⁸

Again no interpreter was appointed at the plea hearing, and the presiding judge made no inquiry into the defendant's competency in English.¹⁰⁹ Perez pleaded guilty to one count of conspiracy to manufacture and distribute the drug, and two counts of distribution.¹¹⁰

On appeal to the United States Court of Appeals for the Fifth Circuit, Perez contended that his plea was involuntary, arguing that he lacked an adequate understanding of English to plea voluntarily.¹¹¹ Perez's claim dealt primarily with the requirements for a guilty plea.¹¹² Therefore, the court did not elaborate on either the statutory or constitutional right to an interpreter, but rather focused mainly on whether the court was put on notice of Perez's difficulty with English.¹¹³

The Fifth Circuit followed the procedure introduced in *Tapia*.¹¹⁴ The court stated that if the trial court had notice that Perez spoke only or primarily a language other than English, a factual inquiry should

102. 918 F.2d 488 (5th Cir. 1990).

103. *Id.* at 489.

104. *Id.*

105. *Id.*

106. *Id.* at 489-90.

107. *Id.* at 490.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 490-91.

114. See *Perez*, 918 F.2d at 490 (citing *United States v. Tapia*, 631 F.2d 1207, 1207 5th Cir. 1980)). This factual inquiry could be comprised of brief questioning of the party by the judge.

have been undertaken to determine his ability to comprehend English.¹¹⁵

Giving significant weight to Perez's assurances to the magistrate at the initial hearing that he understood the proceedings,¹¹⁶ the Fifth Circuit held that the trial court had not been put on notice.¹¹⁷ Reasoning that Perez had told the magistrate that he understood "everything so far," the appellate court held that the trial judge at the plea hearing did not have notice of Perez's problems with English,¹¹⁸ thereby imputing to the trial judge the knowledge held by the inquiring magistrate. Therefore, the Fifth Circuit essentially held that a factual inquiry is unnecessary, absent a defendant's affirmative assertion that he does not understand the proceedings of a plea hearing.¹¹⁹

b. *United States v. Markarian*

The next federal court to hear an appeal of a case in which no interpreter was provided during a judicial proceeding was the Sixth Circuit in *United States v. Markarian*.¹²⁰ Markarian was convicted of conspiracy to possess with intent to distribute more than 100 grams of heroin.¹²¹ The success of the government's case against Markarian hinged on the testimony of a man named Hartounian, who claimed he and Markarian were both involved in a heroin conspiracy.¹²² Markarian claimed that an interpreter should have been provided, not for himself, but for Hartounian.¹²³ After his trial, Markarian submitted the trial court transcript to an expert who concluded that Hartounian was incapable of testifying competently in English.¹²⁴ Although Markarian did not object at trial, on appeal, he claimed that the judge should have made a motion for an interpreter.¹²⁵

The Sixth Circuit noted that the presiding officer at the trial court was a bilingual judge who paid "special attention" to situations where translators may play a role and did not think that an interpreter was necessary.¹²⁶ Satisfied by the "special attention" given by the lower court, the Sixth Circuit held that an interpreter had not been neces-

115. *Id.*; H.R. REP. NO. 1687, *supra* note 10, at 7, reprinted in 1978 U.S.C.C.A.N. at 4657.

116. *Perez*, 918 F.2d at 490-91.

117. *Id.*

118. *Id.* at 491.

119. *Id.*

120. 967 F.2d 1098 (6th Cir. 1992).

121. *Id.* at 1099.

122. *Id.*

123. *Id.*

124. *Id.* at 1103.

125. *Id.* at 1103-04.

126. *Id.* at 1104.

sary for the witness in this case.¹²⁷ Similar to the Ninth Circuit in *Tapia*, the *Markarian* court used, without explanation, the pre-Act "broad discretion" standard in applying the Act.¹²⁸ Moreover, the *Markarian* court followed the lead of the *Tapia* court by failing to clearly define the difference between pre- and post-Act jurisprudence.

c. *United States v. Catalano*

The third federal appeals court after *Tapia* to rule on an instance where no interpreter was provided during a judicial proceeding was the Ninth Circuit in *United States v. Catalano*.¹²⁹ Catalano was convicted of distribution and conspiracy to distribute cocaine.¹³⁰ In a brief opinion, the court dedicated only two paragraphs to discussing the absence of an interpreter.¹³¹ The court held that the lower court record was "replete with instances where [the defendant] communicated extensively and exclusively in English."¹³² The record showed that Catalano conversed in English with an English-speaking undercover agent and two FBI agents, and that Catalano testified at his sentencing hearing in English.¹³³ Accordingly, the Ninth Circuit held that Catalano's situation did not trigger the statute because Catalano had no primary reliance on a foreign language.¹³⁴

Even though the *Catalano* court only briefly addressed the appointment of a court interpreter, the Ninth Circuit followed the puzzling reasoning of the *Tapia* and *Markarian* courts. Catalano did not denominate his right to a court-appointed interpreter as either a statutory or constitutional right.¹³⁵ In its discussion, the court referred to the Act, but then applied the *Perovich* discretion standard without explaining why this pre-Act doctrine was being used in connection with the statute.¹³⁶ The case cited by the *Catalano* court, *United States v. Salsedo*,¹³⁷ makes no reference to the Act, even though *Salsedo* was

127. *Id.*

128. *Id.*

129. No. 91-50372, 1992 U.S. App. LEXIS 20942 (9th Cir. Sept. 3, 1992).

130. *Id.* at *1.

131. *Id.* at *2-3.

132. *Id.* at *2.

133. *Id.*

134. *Id.*

135. *Id.* at *1.

136. *Id.* at *2.

137. 607 F.2d 318, 320 (9th Cir. 1979).

decided after the Act was enacted¹³⁸ and cites as authority a case decided prior to the Act's enactment.¹³⁹

d. *United States v. Mayans*.

Until 1994, although the courts were consistent in their application of the statute, no federal appellate court had either explicitly acknowledged a statutory right to an interpreter separate from the existing constitutional right, or explained how the approaches would differ. The methodology employed by the courts resulted in findings that the statutory requirements had been satisfied, even when no interpreter was present. This began to change with *United States v. Mayans*,¹⁴⁰ the last federal appellate case before *Gonzalez* to address the complete denial of a court-appointed interpreter.

Pablo Mayans was convicted of one count of conspiracy to distribute and possess with intent to distribute cocaine and two counts of possession of cocaine.¹⁴¹ In this case, the trial judge withdrew an interpreter that Mayans had used throughout the trial.¹⁴² Mayans took the stand and testified through his interpreter that he was born in Cuba, had been in the United States since 1971, and spoke English.¹⁴³ At that time, the district judge broke in with, "Let's try it in English," having observed that Mayans lived in the United States longer than he had lived in Cuba and that testimony took "twice as long" with an interpreter.¹⁴⁴ When Mayans' attorney objected that Mayans could not express himself in English, the judge responded by repeatedly asking counsel to "try it."¹⁴⁵ Mayans' attorney withdrew Mayans as a witness and requested a sidebar, a request which the judge denied.¹⁴⁶

After the government's rebuttal case, Mayans' attorney moved to reopen the defendant's case and put Mayans on the stand.¹⁴⁷ The court refused, explaining that Mayans had been in the United States longer than he was in Cuba and that his brother had testified without an interpreter without any problems.¹⁴⁸ The defense then moved for a

138. *Salsedo*, 607 F.2d at 318, was decided October 29, 1979, and the Act became effective in January of 1979. Astiz, *supra* note 64, at 103.

139. *Salsedo*, 607 F.2d at 320 (citing *United States v. Barrios*, 457 F.2d 680, 682 (9th Cir. 1972)).

140. 17 F.3d 1174 (9th Cir. 1994).

141. *Id.* at 1177.

142. *Id.* at 1177-78.

143. *Id.*

144. *Id.* at 1178 (quoting Tr. at 1190).

145. *Id.* (quoting Tr. at 1191).

146. *Id.*

147. *Id.*

148. *Id.*

mistrial based on Mayans' denial of an interpreter, which motion was denied.¹⁴⁹ Finally, the prosecutor advised the court that to avoid creating grounds for appeal, the government would not object to reopening the case and allowing Mayans to testify with an interpreter.¹⁵⁰ Although the court refused, the judge asked Mayans (through an interpreter) whether he agreed with his attorney's decision to withdraw him as a witness.¹⁵¹ Mayans stated that he agreed with the decision.¹⁵²

On appeal, Mayans claimed that the removal of the interpreter violated both the Act and the Fifth Amendment.¹⁵³ The Ninth Circuit addressed his claims separately, and in doing so, became the first federal appellate court to explicitly acknowledge the separate statutory and constitutional rights to an interpreter.¹⁵⁴ The court's analysis began in the same manner as that of the *Tapia* court and its progeny: the court cited the statute, but then mentioned the "wide discretion" of the trial court in applying the statute.¹⁵⁵ However, unlike previous decisions, the *Mayans* court could not review the lower court's determination because the trial judge never conclusively held that Mayans did not need an interpreter.¹⁵⁶ After the attorney withdrew Mayans, the judge complained that he had not been given the chance to make a determination as to whether Mayans had difficulty speaking English.¹⁵⁷ Thus, the appellate court surmised that the trial judge did not regard as conclusive the facts that Mayans had lived in the United States for twenty years and that Mayans' brother had testified without difficulty, even though the trial court judge apparently found these facts significant.¹⁵⁸

The Ninth Circuit acknowledged Mayans' attorney's claim that Mayans could not express himself in English.¹⁵⁹ Because this statement was not contradicted in the trial record, the court held that a trial court must satisfy itself through *personal observation* that a defendant has no difficulty speaking English *before* an interpreter is withdrawn.¹⁶⁰ This requirement obviously was not satisfied. If Mayans' English was so weak that he needed an interpreter, this fact

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 1179.

154. *Id.* at 1179-81.

155. *Id.* at 1179.

156. *Id.* at 1179-80.

157. *Id.* at 1180.

158. *Id.*

159. *Id.*

160. *Id.*

would not have emerged until after Mayans had shown confusion or miscomprehension on the stand.¹⁶¹ By that time, the damage sought to be avoided by the interpreter statute already would have been done.¹⁶² In addition, the Ninth Circuit pointed out that Mayans' miscomprehension might never have been recognized, in which case he could have made damaging responses to questions he misunderstood, and his audience might have taken his responses to be accurate.¹⁶³

The Ninth Circuit therefore held that the lower court erred in insisting on evaluating Mayans' language skills during the course of the trial itself and in front of the jury.¹⁶⁴ The trial court was required to make a determination of Mayans' linguistic abilities, but the forum chosen by the lower court was too risky.¹⁶⁵ The court found that making the determination as to the need for an interpreter in such an inappropriate forum "clearly undermined the purpose of the interpreter statute," and held that the Act had been violated.¹⁶⁶

Unlike previous courts that examined only the defendant's statutory right to an interpreter, the *Mayans* court also analyzed Mayans' constitutional claim.¹⁶⁷ The court acknowledged that various cases recognized a Sixth Amendment right to an interpreter when a defendant needed an interpreter to understand those testifying against him.¹⁶⁸ The court then held that the withdrawal of an interpreter who assists the defendant in delivering testimony clearly implicates the defendant's Fifth Amendment right to testify on his own behalf.¹⁶⁹

In this case, the lower court lacked the information to contradict Mayans' claim that an interpreter was still needed.¹⁷⁰ Mayans had to choose between participating in the risky in-court experiment proposed by the trial judge and abstaining from testifying.¹⁷¹ As a result, the Ninth Circuit held that Mayans' Fifth Amendment rights had been violated.¹⁷² The Ninth Circuit created a bright line rule: once a defendant is entitled to an evaluation of his need for an interpreter, the

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.* at 1180-81 (citing *United States v. Lim*, 794 F.2d 469, 470 (9th Cir. 1986); *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989)).

169. *Id.* at 1181.

170. *Id.*

171. *Id.*

172. *Id.*

evaluation must be made outside the presence of the jury.¹⁷³ The court then remanded the case with instructions to follow this rule.¹⁷⁴

4. Federal District Court Cases Interpreting the Act

Cases where the Act is discussed at the trial level are rare as well. Roughly one dozen federal district court cases have addressed the Act at the time this Note was being prepared.¹⁷⁵ Few cases involved a complete denial of a court-appointed interpreter.¹⁷⁶ Additionally,

173. *Id.*

174. *Id.*

175. See *United States v. Sanchez*, Crim. No. 91-00148, 1994 U.S. Dist. LEXIS 16725 (E.D. Pa. Nov. 16, 1994); *Pedraza v. Phoenix*, No. 93 Civ. 2631, 1994 U.S. Dist. LEXIS 5959 (S.D.N.Y. May 6, 1994); *Costa v. Williams*, 830 F. Supp. 223 (S.D.N.Y. 1993); *United States v. Mosquera*, 816 F. Supp. 168 (E.D.N.Y. 1993); *Shahid Naqvi v. Oudensha America, Inc.*, No. 88 C 6966, 1991 U.S. Dist. LEXIS 502 (N.D. Ill. Jan. 16, 1991); *Hrubic v. United States*, 734 F. Supp. 60, 67 (E.D.N.Y. 1990); *United States v. Bernal Medina*, No. 82-224/318, 1988 U.S. Dist. LEXIS 5067 (D.C. N.J. May 24, 1988); *Gomez v. Myers*, 627 F. Supp. 183 (E.D. Tex. 1985); *Seltzer v. Foley*, 502 F. Supp. 600 (S.D.N.Y. 1980).

176. One case dealing with a complete denial was *Pedraza v. Phoenix*, No. 93 Civ. 2631, 1994 U.S. Dist. LEXIS 5959 (S.D.N.Y. May 6, 1994), which, unlike *Perez* or *Markarian*, was a civil dispute. *Id.* at *1-2. In *Pedraza*, Pedraza filed an action pursuant to 42 U.S.C. § 1983. He then moved for translations of all motions into Spanish, and for an interpreter to be appointed to assist him at trial. *Id.* at *1. The right to a court-appointed interpreter was hardly addressed in *Pedraza*, as the non-English speaker had initiated the civil suit, and the statute only applies in instances where the non-English speaker is a defendant in federal court. *Id.* (citing *United States v. Mosquera*, 816 F. Supp. 168, 175 (E.D.N.Y. 1993), for the proposition that the Sixth Amendment rights such as confrontation are only conferred on criminal defendants), and 28 U.S.C. § 1827, which requires the court to appoint an interpreter when a *criminal defendant* speaks a language other than English).

Cases not involving a complete denial of a court-appointed interpreter addressed the following issues: whether a wife could act as an impartial interpreter, *United States v. Sanchez*, Crim. No. 91-00148, 1994 U.S. Dist. LEXIS 16725, at *5 (E.D. Pa. Nov. 16, 1994) (approving the use of a wife, based largely on the defendant's failure to object); whether a Spanish speaking interpreter was appropriate for a Portuguese defendant, *Costa v. Williams*, 830 F. Supp. 223 (S.D.N.Y. 1993) (approving the use of such an interpreter); whether a court could order that an indictment and documents be translated into Spanish before service to defendants, *United States v. Mosquera*, 816 F. Supp. 168, 177 (E.D.N.Y. 1993) (requiring that prosecutors supply defendants with translations of indictments, written plea agreements, and presentence reports); whether a defendant waived his right to object to an interpreter, *Delgado v. Walker*, 798 F. Supp. 107, 114-15 (E.D.N.Y. 1992) (holding that a defendant's failure to alert the trial court to any problems waived the right to object to the interpreter's ability); whether a witness has a legal right to an interpreter at a deposition, *Shahid Naqvi v. Oudensha America, Inc.*, No. 88 C 6966, 1991 U.S. Dist. LEXIS 502, at *6 (N.D. Ill. Jan. 16, 1991) (holding that the plaintiff had sufficient English skills to proceed without an interpreter); whether multiple defendants could be forced to share an interpreter, *Castellon v. Whitley*, 739 F. Supp. 526, 527-28 (D. Nev. 1990) (holding that one interpreter was sufficient); whether an interpreter must be provided for out-of-court plea negotiations, *United States v. Bernal Medina*, No. 82-224/318, 1988 U.S. Dist. LEXIS 5067, at *6 (D.N.J. May 24, 1988) (holding that the Act does not apply to discussions taking place outside of court); whether a party may file a complaint in Spanish, *Gomez v. Myers*, 627 F. Supp. 183, 185 (E.D. Tex. 1985) (holding that rule forbidding complaints in Spanish would deny access because of illiteracy in the English language); and whether the examination administered to certify inter-

some federal district court cases that address the denial of an interpreter unexplainably deviate from the procedures outlined in the federal appellate courts and conflict with other district courts.

This conflict may be illustrated by comparing *Hrubec v. United States*¹⁷⁷ with *Giraldo-Rincon v. Dugger*.¹⁷⁸ In *Hrubec*, Jaroslav Hrubec was convicted of conspiracy to possess cocaine with intent to distribute, importation of cocaine, and possession of cocaine with intent to distribute.¹⁷⁹ Hrubec claimed a violation of the Act because the court had failed to inquire into his need for a Czech interpreter at trial.¹⁸⁰ The court recognized that a criminal defendant is entitled to an interpreter if he cannot understand the proceedings against him.¹⁸¹ The court then acknowledged that other jurisdictions interpreted the statute as imposing a mandatory duty on the trial court "to inquire as to the need for an interpreter when a defendant has difficulty with English."¹⁸²

The *Hrubec* court proceeded with its analysis by noting that if a defendant's primary language is not English, the court is not necessarily required to inquire whether an interpreter is needed.¹⁸³ According to the *Hrubec* court, the court's duty to investigate arises only when, in addition to English not being the defendant's primary language, the defendant's language difficulties "inhibit [the party's] comprehension of the proceedings or communication with counsel or the presiding judicial officer."¹⁸⁴ Relying on the findings of a magistrate and the transcripts of the case, the court concluded that Hrubec had no language difficulties impairing his comprehension and, therefore, the Act had not been violated.¹⁸⁵

Not all courts have reached the same conclusion as the *Hrubec* court. In *Giraldo-Rincon v. Dugger*,¹⁸⁶ Giraldo-Rincon challenged his conviction of trafficking in cocaine and conspiracy to traffic in cocaine.¹⁸⁷ The district court held that "[p]etitioner's request for an interpreter, through counsel, at the beginning of trial was sufficient to

preters tested applicants appropriately, *Seltzer v. Foley*, 502 F. Supp. 600 (S.D.N.Y. 1980) (finding that the examinations were reasonably developed and properly administered).

177. 734 F. Supp. 60 (E.D.N.Y. 1990).

178. 707 F. Supp. 504 (M.D. Fla. 1989).

179. *Hrubec*, 734 F. Supp. at 61-62.

180. *Id.* at 67.

181. *Id.* (citing *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970)).

182. *Id.* (citing *Valladares v. United States*, 871 F.2d 1564, 1565 (11th Cir. 1989)).

183. *Id.*

184. *Id.* (citing 28 U.S.C. § 1827).

185. *Id.*

186. 707 F. Supp. 504 (M.D. Fla. 1989).

187. *Id.* at 507.

require the trial court to conduct an inquiry into petitioner's finances and ability to speak and understand English."¹⁸⁸ This view of the Act contradicts *Hrubec*, which stated that knowledge of nonfluency alone is *not* enough to require an inquiry into the need for an interpreter.¹⁸⁹ This disunity epitomizes the confusing status of the Court Interpreters Act before the *Gonzalez* decision.¹⁹⁰

Gonzalez marked only the seventh time that *any* federal court had interpreted the Act in a situation where the appellant was requesting a review of the lower court's denial of a court-appointed interpreter during a judicial proceeding.¹⁹¹ Because cases interpreting the Act are relatively scarce, any trends that have appeared in judicial analysis must be noted in order to evaluate the development of this area of law. Therefore, the next section of this Note will discuss significant trends that characterize the cases decided prior to *Gonzalez*.

188. See *id.* at 508 (citations omitted) (referring to *United States ex rel. Negron v. New York*, 434 F.2d 386, 390-91 (2d Cir. 1970), which held that a court that had been put on notice of defendant's severe language difficulty must advise the defendant of the right to an interpreter at state expense). This coincides with the *Tapia* holding that any indication that a criminal defendant spoke primarily a language other than English triggered the court's duties. 631 F.2d 1207, 1209 (5th Cir. 1980). Ironically, *Giraldo-Rincon*, although decided in 1989, makes no mention of the Act but merely addresses a defendant's constitutional right to an interpreter. 707 F. Supp. at 506-07. Accordingly, the court relies heavily upon pre-Act cases. *Giraldo-Rincon*, 707 F. Supp. at 506-08 (citing *United States v. Carrion*, 488 F.2d 12, 15 (1st Cir. 1973) *cert. denied*, 416 U.S. 907 (1974); *Negron*, 434 F.2d at 389-91). Post-Act cases were cited, but only to the extent that they addressed the constitutional right to an interpreter. See *id.* at 507-08 (citing *Tapia*, 631 F.2d at 1210; *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981)).

189. *Hrubec v. United States*, 734 F. Supp. 60, 67 (E.D.N.Y. 1990) ("[T]he fact that a defendant's primary language is something other than English does not *ipso facto* create the duty to inquire of the need for an interpreter.").

190. Unfortunately, at least some confusion survived the *Gonzalez* opinion as well. See *infra* notes 422-28 (discussing *Huitron v. United States*, No. 94-55805, 1995 U.S. App. LEXIS 1937 (9th Cir. Jan. 25, 1995), decided after *Gonzalez*, in which the court reverted to the tangled jurisprudence of mixing the statutory and constitutional approaches).

191. See *supra* note 100 (listing the six prior cases in which an appellant requested review of a lower court's decision that no interpreter was needed at a judicial proceeding). Fairly recently, cases have arisen in which a defendant contested the lower court's denial of a court interpreter, yet the Court Interpreters Act was not addressed in the court's opinion. In *United States v. Rosa*, an interpreter was not present during a hearing in which a defendant waived his right to a jury. 946 F.2d 505, 507-08 (7th Cir. 1991). The defendant subsequently protested the absence of an interpreter. *Id.* at 507. The appellate court determined that the defendant responded appropriately, and that the presence of an interpreter was up to the discretion of the trial court. *Id.* at 508. The appellate court made no reference to the Act.

Additionally, immigration cases in which an interpreter has been denied have been examined at the federal appellate level. See *Tejeda-Mata v. Immigration & Naturalization Serv.*, 626 F.2d 721, 726-27 (9th Cir. 1980). The courts see immigration cases as civil, not criminal, in nature, so not all of the principles of due process apply; therefore, most immigration cases do not address the Act. *Id.* However, even in immigration hearings, the party deserves a full and fair hearing, and the denial of simultaneous translations of testimony can be an abuse of discretion. *Id.*

5. Trends in Court Interpreters Act Case Law

Several trends can be extracted from the pre-Gonzalez cases applying the Act. First, courts place great weight on a defendant's failure to object. Second, courts have found various personal characteristics of the defendants significant. Third, some courts rely on non-appointed Spanish speakers present in the courtroom. Fourth, courts rely on others' appraisals of the defendant's ability to understand English rather than making their own appraisals.

a. Importance of a defendant's failure to object

Though the scarcity of case law interpreting the Act renders its scope uncertain, courts have consistently found one factor to be important: whether the defendant made an objection at trial.¹⁹² Objections relate to such issues as the quality of interpretation,¹⁹³ whether multiple defendants should receive more than one interpreter,¹⁹⁴ and the complete absence of an interpreter.¹⁹⁵ The attitude of the courts generally has been that, "[t]o 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."¹⁹⁶ Of the nearly forty cases interpreting various nuances of the Act prior to the *Gonzalez* decision, fifteen courts found significant

192. See, e.g., *United States v. Paz*, 981 F.2d 199 (5th Cir. 1992) (holding that the trial court had not abused its discretion by choosing an uncertified interpreter, because the defendant did not object to the interpreter during the proceedings); *United States v. Lam Wong-Wah*, 924 F.2d 298, 309 (D.C. Cir. 1991) (finding that the defendant had been provided an accurate translation of the proceedings, largely by relying on the defendant's failure to object); *United States v. Villegas*, 899 F.2d 1324, 1349 (2d Cir. 1990) (holding that the interpretation was adequate by focusing on the defendant's failure to make a timely objection); *United States v. Joshi*, 896 F.2d 1303, 1310 (11th Cir. 1990) (holding that "[a] reviewing court is unlikely to find that a defendant received a fundamentally unfair trial due to an inadequate translation in the absence of contemporaneous objections to the quality of the interpretation"); *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989) (finding significance in appellant's lack of objection to adequacy of the interpreter at trial). *Contra United States v. Urena*, 27 F.3d 1487 (10th Cir. 1994) (finding no abuse of discretion despite defendant's request for a new interpreter); *United States v. Moya-Gomez*, 860 F.2d 706 (7th Cir. 1988), *cert. denied*, 492 U.S. 908 (1989) (finding no abuse of discretion despite objection).

193. See, e.g., *United States v. Ou Sin Saepanh*, No. 90-10627, 1993 U.S. App. LEXIS 6080, at *1 (9th Cir. Mar. 10, 1993); *Valladares*, 871 F.2d at 1566; *United States v. Bernal Medina*, Crim. No. 82-224/318, 1988 U.S. Dist. LEXIS 5067, at *6 (D.N.J. May 24, 1988).

194. See, e.g., *United States v. Lim*, 794 F.2d 469, 471 (9th Cir. 1986).

195. See, e.g., *United States v. Torres*, No. 94-1113, 1995 U.S. App. LEXIS 264, at *21 (6th Cir. Jan. 4, 1995); *United States v. Martinez*, 616 F.2d 185, 1987 (5th Cir. 1980).

196. *Valladares*, 871 F.2d at 1566.

that the defendant did not object during the lower court proceedings.¹⁹⁷

When the defendant fails to object in the lower court, the alleged error is reviewed under the clear error standard.¹⁹⁸ This means that the court looks for an "error which, when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity, or public reputation of judicial proceedings."¹⁹⁹ Thus, a reviewing court is unlikely to find that, as a result of an inadequate interpretation, a defendant received a fundamentally unfair trial, the standard articulated in *Tapia*,²⁰⁰ in the absence of a contemporaneous objection to the quality of the interpretation.²⁰¹

b. Inclusion of biographic information of the defendant

Another noteworthy trend in cases interpreting the Act is that courts often include in their opinions biographical data on the defend-

197. See *Torres*, 1995 U.S. App. LEXIS 364, at *21 ("Furthermore, defendant did not object to the absence of an interpreter prior to the time he requested an interpreter . . ."); *United States v. Gonzalez*, 33 F.3d 1047, 1051 (9th Cir. 1994) ("[T]o allow a defendant to remain silent . . . would be an open invitation to abuse."); *United States v. Lopez*, No. 93-3316, 1993 U.S. App. LEXIS 32103, at *11 (6th Cir. Dec. 7, 1993) ("Lopez failed to object to the interpreter . . ."); *Ou Sin Saephanh*, 1993 U.S. App. LEXIS 6080, at *1 ("[D]efendant did not challenge the adequacy of translation . . ."); *United States v. Paz*, 981 F.2d 199, 200 (5th Cir. 1992) ("No objection was made during any of the proceedings below concerning the court interpreter."); *United States v. Markarian*, 967 F.2d 1098, 1104 (6th Cir. 1992) ("No one made a motion for an interpreter at trial."); *United States v. Yee Soon Shin*, 953 F.2d 559, 561 (9th Cir. 1992) ("Because appellants did not object, the district court did not abuse its discretion . . ."); *United States v. Sanchez*, 928 F.2d 1450, 1456 (6th Cir. 1991) ("Neither voiced any objection."); *United States v. Torres Perez*, 918 F.2d 488, 490 (5th Cir. 1990) (requiring *Torres Perez* to indicate that he failed to understand the questions); *United States v. Joshi*, 896 F.2d 1303, 1310 (11th Cir. 1990) ("The record does not indicate a single objection by Joshi . . ."); *Valladares*, 871 F.2d at 1566 (footnote omitted) ("It is also significant that the appellant made no objection to the adequacy of his interpreter at trial."); *Bernal Medina*, 1988 U.S. Dist. LEXIS 5067, at *6 ("[P]etitioner expressed no dissatisfaction with the services performed by this interpreter."); *United States v. Lim*, 794 F.2d 469, 471 (9th Cir. 1986) ("[T]here was no objection at the time of trial . . ."); *United States v. Martinez*, 616 F.2d 185, 187 (5th Cir. 1980) ("At no point was any objection raised . . ."); *Costa v. Williams*, 830 F. Supp. 223, 224 (S.D.N.Y. 1993) ("Petitioner . . . provides no explanation for his own failure to protest inability to communicate . . ."). These cases addressed all aspects of the Act, including cases questioning the lack of an interpreter and those questioning the abilities of an interpreter.

198. FED. R. CRIM. P. 52(b).

199. *United States v. Lopez*, 923 F.2d 47, 50 (5th Cir. 1991).

200. See *supra* text accompanying note 91 (discussing *Tapia's* requirement that error render the trial "fundamentally unfair").

201. See, e.g., *Joshi*, 896 F.2d at 1310 (showing that the court gave the defendant various opportunities to object to the translation, yet the record did not indicate a single objection).

ants, such as the defendant's occupation,²⁰² education,²⁰³ and period of residence in the United States,²⁰⁴ without or before assessing whether the defendant actually understands English. Obviously, many judicial opinions include facts regarding the parties; however, in the court interpreter cases, the biographical information does not appear at the beginning of the opinion where facts usually appear, but rather consistently appears within the courts' analyses of the defendant's claim to an interpreter.²⁰⁵ It is questionable whether inclusion of this information is appropriate.²⁰⁶

c. Reliance on non-appointed Spanish speakers in the courtroom

Many courts also examine whether another Spanish speaker was involved in the proceedings, even if the other Spanish speaker was not formally designated as an interpreter. In referring to the role of non-appointed Spanish speakers at trial, the courts take one of two approaches. Some courts include references to Spanish speaking participants without explaining what their role in the proceedings should be.²⁰⁷ Other courts have specifically relied on the presence of non-appointed Spanish speaking participants to act as interpreters for the defendants.²⁰⁸

The first group is comprised of cases such as *United States v. Tapia*, in which the appellate court "conceded" that court-appointed counsel

202. See, e.g., *Paz*, 981 F.2d at 201 n.3 (noting that Paz was a receptionist in the United States for three years); *Valladares*, 871 F.2d at 1565 (noting that the defendant operated two businesses in the United States, employing forty to fifty people); *United States v. Tapia*, 631 F.2d 1207, 1209 (5th Cir. 1980) (noting that Tapia had worked in three states).

203. See, e.g., *Paz*, 981 F.2d at 201 (noting that Paz was in the process of getting her GED).

204. See, e.g., *Valladares*, 871 F.2d at 1565 (mentioning that the defendant had lived in the United States for 17 years); *Tapia*, 631 F.2d at 1209 (acknowledging the fact that the defendant had lived in the United States for 18 years).

205. See, e.g., *Paz*, 981 F.2d at 201 (noting biological characteristics in the "Discussion" section of the opinion).

206. In some cases, the court openly acknowledges that it has used this data to analyze the defendant's ability to speak English. See *United States v. Mayans* 17 F.3d 1174, 1178 (9th Cir. 1994); *Valladares*, 871 F.2d at 1565. In *Mayans*, as soon as he found that the defendant had been in the United States longer than he was in Cuba, the trial judge decided that the defendant ought to "try it in English." 17 F.3d at 1178. Similarly, in *Valladares*, the district court determined that the appellant had a "working knowledge of English" due to his citizenship, time in the United States and employment. 871 F.2d at 1565.

207. See, e.g., *United States v. Tapia*, 631 F.2d 1207, 1209 (5th Cir. 1980) (stating that the district court should determine whether the failure to have an interpreter with Tapia throughout the trial, when he was arraigned through an interpreter, inhibited his understanding of the proceedings and communications with his attorney).

208. See, e.g., *United States v. Sanchez*, Crim. No. 91-00148, 1994 U.S. Dist. LEXIS 16725, at *4-5 (E.D. Pa. Nov. 16, 1994) (discussing the defendant's contention that the court at his resentencing hearing erroneously "drafted" his common law wife to translate the proceedings for him).

was bilingual in English and Spanish.²⁰⁹ The appellate court did not explain how the fact that the attorney was bilingual figured in the court's analysis.²¹⁰ In contrast, the second group of cases openly rely upon non-court-appointed Spanish speakers during the proceedings.²¹¹ For example, in *United States v. Sanchez*,²¹² the court allowed the defendant's common law wife, a non-court-appointed party, to act as an interpreter,²¹³ holding that "there was no evidence . . . that indicated that defendant's ability to understand English based both on his own knowledge *and* the assistance of his common law wife . . . was so deficient as to "inhibit" comprehension" ²¹⁴ Surprisingly, the *Sanchez* case did not mention any problems of bias which could result by using a spouse or other non-court-appointed interpreter. Courts had recognized such problems even before the Act, generally concluding that "it was not good policy to use a relative of any of the parties or witnesses in the trial of the case as an interpreter" ²¹⁵

The last trend apparent in pre-*Gonzalez* case law is closely related to the courts' acknowledgement of the presence of an "unofficial" Spanish speaker. It is the court's tendency to rely on individuals other than the defendant or the court to appraise the defendant's ability to speak English.

209. *Tapia*, 631 F.2d at 1209.

210. See also *United States v. Markarian*, 967 F.2d 1098, 1104 (6th Cir. 1992) (explaining that the district judge was "himself bilingual" and indicated that he paid special attention to "this question," without identifying the specific languages the judge spoke or explaining anything that the district judge did during the hearing to exhibit his "special attention"); *Valladares*, 871 F.2d at 1565 (emphasizing that a Spanish speaking attorney was present with the appellant during trial); *United States v. Bennett*, 848 F.2d 1134, 1140 (11th Cir. 1988) (pointing out that only one defendant had a court appointed attorney who was fluent in Spanish); *Giraldo-Rincon v. Dugger*, 707 F. Supp. 504, 508 (M.D. Fla. 1988) (finding that "Petitioner's attorney . . . was fluent in Spanish [and a] second attorney was also fluent in Spanish . . .").

211. See Piatt, *supra* note 25, at 8 (citing cases in which the judicial officer was satisfied that the defense counsel understood the testimony, even though the defendant did not).

212. *Crim. No. 91-00148*, 1994 U.S. Dist. LEXIS 16725 (E.D. Pa. Nov. 16, 1994).

213. *Id.* at *5 (citing Tr. of Resentencing Hr'g at 4). In Part III.A.3, *infra*, it will be seen that the *Gonzalez* court used this approach. In *Gonzalez*, the court requested that the record reflect that Gonzalez had been assisted by his wife, who evidently spoke some English. 33 F.3d 1047, 1050 (9th Cir. 1994). The *Gonzalez* opinion does not specifically state that Gonzalez's wife spoke English and Spanish. Gonzalez's wife had not been appointed as an interpreter, certified or otherwise. *Id.* at 1050-51.

214. *Sanchez*, 1994 U.S. Dist. LEXIS 16725, at *6 (emphasis added).

215. *Lujan v. United States*, 209 F.2d 190, 192 (10th Cir. 1953). In this case, the court, when unable to find another interpreter, went so far as to name another individual as a "counter-interpreter" to avoid problems with bias. *Id.*

d. Reliance on the appraisals of others to determine the defendant's comprehension of English

In some cases, courts have accepted someone else's appraisal of the defendant's ability to speak English without making their own assessment. These cases can be divided into instances where the court has accepted the defendant's own assessment of his or her ability to comprehend English,²¹⁶ and instances where the court has accepted a third party's appraisal of the defendant's ability to speak English.²¹⁷ The courts tend to treat all evaluations conclusively.²¹⁸

The trends cited above will be discussed further in the Analysis section of the Note.²¹⁹ However, to determine whether these trends are developing in a manner that effectuates the goals of the statute, one must remember that the motivation behind the statute is to improve the access to, and quality of, court interpreters.²²⁰ Understanding the

216. See, e.g., *Gonzalez*, 33 F.3d at 1050 ("Gonzalez: I understand. I understand."); *United States v. Lopez*, No. 93-3316, 1993 U.S. App. LEXIS 32103, at *2-3 (6th Cir. Dec. 7, 1993) ("[B]oth Lopez and his counsel assured the court that they were completely satisfied with the abilities of the interpreter . . ."); *United States v. Torres Perez*, 918 F.2d 488, 489 (5th Cir. 1990) ("I understand everything so far.").

217. See e.g., *United States v. Paz*, 981 F.2d 199, 201 (5th Cir. 1992) ("When the trial court asked if Paz could 'understand the proceedings today,' her attorney responded that she could."); *United States v. Catalano*, No. 91-50372, 1992 U.S. App. LEXIS 20942, at *2 (9th Cir. Sept. 3 1992) (finding that "the court record is replete with instances where Catalano communicated extensively and exclusively in English" because Catalano testified at a suppression hearing in English); see also *United States v. Sanchez*, Crim. No. 91-00148, 1994 U.S. Dist. LEXIS 16725, at *5 (E.D. Pa. Nov. 16, 1994) ("The Court based its understanding [that defendant possessed a working knowledge of English] . . . on defense counsel's representation at the resentencing hearing that defendant does indeed possess a working knowledge of English."); *Hrubec v. United States*, 734 F. Supp. 60, 62 (E.D.N.Y. 1990) (noting that at a hearing to determine whether the defendant understood the proceedings, "[a]ll of the Government witnesses [a probation officer and three attorneys] testified that, during their various dealings with Hrubec, they had no trouble understanding Hrubec and had no trouble making themselves understood by him"); *Valdaraes v. United States*, 871 F.2d 1564, 1565 (11th Cir. 1989) ("A Government witness . . . also testified that he had communicated with appellant in English."); *United States v. Moya-Gomez*, 860 F.2d 706, 740 (7th Cir. 1988), cert. denied, 492 U.S. 908 (1989) (citing Tr. of Nov. 24, 1986 at 403) (noting that "five of the first eight witnesses who have testified . . . said under oath on the witness stand that they have conversed with [the defendant] in English" and including the statement of a deputy sheriff that he had heard defendant conversing in English with another inmate).

218. See *Paz*, 981 F.2d at 201 ("[T]he district court asked Paz's counsel if Paz understood the proceedings and asked Paz if she understood her plea agreement. Both answered in the affirmative. In these circumstances, the district court was not required to *sua sponte* also make a separate, express finding that Paz understood the English language."); *United States v. Torres Perez*, 918 F.2d 488, 490-91 (5th Cir. 1990) ("Perez twice assured the magistrate that he understood the proceedings and did not require an interpreter. The district judge was not put on notice to the contrary either directly or indirectly.")

219. See *infra* notes 374-383 and accompanying text (explaining why reliance on the defendant's biographic background is inappropriate, using *Gonzalez* as an example).

220. See *supra* text accompanying notes 66-67 (discussing the purposes of the Act).

problems Spanish speakers face inside the courtroom and the duties of the interpreter is necessary to evaluate how well courts are meeting the goals of the Act. To aid in this evaluation, an overview of court interpretation and the problems of non-English speakers inside the courtroom follows.

C. *Non-English Speaking Defendants and Court Interpreting*

1. *The Non-English Speaker's Need for Interpreting in the Courtroom*

In addressing the problems facing Spanish speakers when they appear as defendants in criminal proceedings, one must avoid oversimplification and the incorrect assumptions that there is only one Spanish language and that the language is monolithic.²²¹ An infinite variety of linguistic features exists for the language spoken by approximately 250 million people from the Rio Grande to the tip of South America, as well as in Europe.²²² Regional dialects may result in different words being used for the same object, as well as differences in pronunciation.²²³ The incorrect interpretation and substitution of one word for a similar but different word has led to troublesome judicial decisions.

In one case involving worker's compensation benefits for a back injury, a Salvadoran interpreter interpreted "cintura" as "waist" rather than "lower back" as the Mexican-dialect worker intended.²²⁴ When the worker was questioned by the judge, the worker denied having any other injury than to his back. Consequently, the worker lost the hearing because the judge found his statements to be inconsistent and evasive.²²⁵

In another case, a prosecution for narcotics violations, the Cuban defendant was taped during a phone conversation in which he said, "Hombre, ni tengo diez kilos!"²²⁶ The defendant claimed that to him,

221. ROSEANN DUEÑAS GONZÁLEZ, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, THE FEDERAL COURT INTERPRETER CERTIFICATION EXAMINATION MANUAL 5 (1994-96). Rather than being monolithic, most interpreters admit that their process of learning Spanish is lifelong; they must "zealously" and "continuously" work on maintaining and improving their proficiency. *Id.*

222. Earl L. Rees, *Qué Problema! How Accurate is that Translation?*, 6 CRIM. JUST. 18 (1991).

223. DE JONGH, *supra* note 7, at 81-83.

224. Hovland, *supra* note 10, at 473 (citing WASHINGTON (STATE) OFFICE OF THE ADMINISTRATOR FOR THE COURTS, COURT INTERPRETER TASK FORCE INITIAL REPORT & RECOMMENDATIONS 21 (1986)).

225. *Id.*

226. Shulman, *supra* note 4, at 176 (citing Alain L. Sanders, *Libertad and Justicia for All*, TIME, May 29, 1989, at 65).

the words meant, "Man, I don't even have ten cents," but the words were translated as, "Man, I don't even have ten kilos."²²⁷ The defendant was convicted, in part as a result of the incorrect interpretation.²²⁸

The errors in interpretation in both of the above cases probably were not willful.²²⁹ The incorrect interpretation in the first case likely resulted from a difference of association—a Salvadoran and a Mexican were using a word that had two subtly different meanings depending on the geographic origin of the speaker.²³⁰ Similarly, the error in the second case probably resulted from the interpreter's literal interpretation of a word — when the interpreter should have placed the word in context and realized that the defendant was using "kilo" as slang.²³¹ By examining cases such as these, the challenges involved in interpretation become more apparent.

However, an ability to recognize different dialects or geographic variations of Spanish will not alone be sufficient for a court interpreter. The interpreter must understand the court proceedings and the language of the court.²³² For immigrants coming to the United States, Roman or civil law codes constitute another fundamental difference that may inhibit comprehension.²³³ Spanish is spoken in twenty-one countries, each of which has its own statutes, precedents, and codes of procedure.²³⁴ This complicates even simple interpretation, because the interpreter must define one legal system in terms of another.²³⁵

Even where the American legal system closely resembles one with which a Spanish speaking defendant is familiar, the Hispanic-American's general distrust and fear of law enforcement officials may inhibit

227. *Id.*

228. *Id.*

229. See generally Hovland, *supra* note 10, at 475-76 (explaining various errors in interpretation that do not result from malice or negligence on the part of the interpreter: choosing not to interpret profanity, leaving out words and phrases that the interpreter does not understand, encouraging the witness to be brief, or imposing the interpreter's own bias of the proceedings on the interpretation); see also Juan F. Perea, *Hernandez v. New York: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1, 23-24 (1992); David L. Lewis, Book Review, *The Bilingual Courtroom: Court Interpreters in the Judicial Process*, 9 CRIM. JUST. 48 (1994) (both explaining that interpreters may clarify a nonsensical answer rather than merely interpret, attempting to avoid raising fears regarding the interpreter's skill in interpreting).

230. DE JONGH, *supra* note 7, at 81-83.

231. Shulman, *supra* note 4, at 176 n.3 (citing Alain L. Sanders, *Libertad and Justicia for All*, TIME 65 (May 29, 1989)).

232. DE JONGH, *supra* note 7, at 87-88.

233. Rees, *supra* note 222, at 22. Spanish speakers might come from a country where assumptions of guilt or innocence differ from our own legal system. *Id.* The concept that a person enjoys "rights" needs to be explained in Spanish as well. *Id.*

234. *Id.* at 18.

235. *Id.*

the judicial proceedings.²³⁶ In many Latin American countries, police are unconditionally feared or hated because they are corrupt or arbitrary.²³⁷ These fears may be carried over to United States law enforcement and judicial officials,²³⁸ and such fears can affect the defendant's behavior before both judicial officials and juries.²³⁹ For example, in one case, a non-English speaking defendant did not urge his attorney to object because he did not want the jury to think negatively of him.²⁴⁰ Considering the linguistic variations in the Spanish language, the lack of similarity between the legal cultures of the United States and most Spanish-speaking countries, and the fears of many Spanish speaking defendants, the Administrative Office of the United States Courts had a difficult task when it began to devise an interpreter certification procedure, which is one of the first steps in facilitating the passage of a non-English speaker through our court system.

2. *Bridging Cultural Gaps by Providing Capable Court Interpreters*

a. General characteristics preferred in a court interpreter

By enacting the Court Interpreters Act, Congress acknowledged that court interpreting is a highly specialized profession and not simply a function for which all bilingual persons are qualified.²⁴¹ First, not all native speakers who wish to interpret can realistically be ex-

236. *Id.* at 22.

237. *Id.*

238. *Id.*

239. See *Hovland*, *supra* note 10, at 485, 490 (explaining that a defendant may not object at trial because he does not want the jury to think negatively of him).

240. *Id.* (citing *State v. Her*, No. Co-91-608, 1992 Minn. App. LEXIS 25 (Minn. Ct. App. Jan. 7, 1992)).

241. DE JONGH, *supra* note 7, at 11. De Jongh quotes Jack Leeth, Chief of the Court Interpreters Unit of the Office of the Director of the Administrator's Office of United States Courts: "Most people believe that if you are bilingual, you can interpret. That is about as true as saying that if you have two hands, you can automatically be a concert pianist." *Id.*; see *Seltzer v. Foley*, 502 F. Supp. 600 (S.D.N.Y. 1980) (recognizing the fallacy that just because one is bilingual does not mean that one can interpret). The *Seltzer* court went so far as to include significant portions of the testimony of Professor Roseann Duenas Gonzalez, a member of the team of experts engaged to develop the examination. The court stated:

[Dr. Gonzalez] gave examples of experiences . . . where janitors were called into the court to interpret; . . . that, she explained, was the problem with the justice system and why it was necessary to have this certification process [L]anguage competency is not a static monolithic entity. Language competency is a developing area, a knowledge that unless it is developed can stagnate

Id. at 607.

pected to know every regional and dialectal variation.²⁴² Moreover, not all bilingual people are able to interpret.²⁴³ The ideal interpreter should be "truly bilingual," that is, "taken to be one of themselves by the members of two different linguistic communities, at roughly the same social and cultural level."²⁴⁴

Furthermore, not all bilingual people are necessarily bicultural.²⁴⁵ A bicultural individual possesses the ability to interpret experiences in the manner appropriate to *both* cultures involved, and therefore does not assume that a particular word has the same meaning in one culture as it does in another.²⁴⁶ As Spanish speakers may come from a variety of cultures, interpretation by a truly bilingual and bicultural individual is imperative to preserve the rights of non-English speakers who come into contact with our judicial system.²⁴⁷

An interpreter must do more than merely demonstrate a capacity to interpret for an individual who speaks only or primarily a language other than English. He or she should be sufficiently familiar with the terminology and procedures of the United States judicial system so as to ensure accurate interpretations.²⁴⁸ In addition to being familiar with legal terms and phrases and their foreign language equivalents, the interpreter should be cognizant of what is commonly called "legalese."²⁴⁹

Other basic skills of a court interpreter include the ability to render precise interpretations at varying speeds, and a vocabulary that spans the entire spectrum of language, from jargon, to colloquial, to technical, to the formal language of legal instruments.²⁵⁰ Also, the interpreter must be sensitive to the nuances of all aspects of

242. *Id.* at 607; see generally DE JONGH, *supra* note 7, at 67-86 (discussing the challenges faced when interpreting dialects, nonstandard Spanish such as "Spanglish," words that deceptively appear to be cognates, drug related language and geographic variations).

243. DE JONGH, *supra* note 7, at 63 ("[Interpretation] can only be performed by bilinguals 'who process the two languages in such a way that the message remains intact while the code is changed.'") (quoting JOSIANE F. HAMERS & MICHEL H.A. BLANC, *BILINGUALITY & BILINGUALISM* 245 (1990)).

244. *Id.* at 64 (citing FRANCOIS GROSJEAN, *LIFE WITH TWO LANGUAGES* 230 (1982)).

245. *Id.* at 59-60 (quoting EINAN HAUGEN, *BILINGUALISM IN THE AMERICAS: A BIBLIOGRAPHY AND RESEARCH GUIDE* (1956)).

246. *Id.* at 59.

247. *Id.* ("To interpret speech is to transpose it with its entire semantic, emotional and aesthetic baggage into a language using different modes of expression.")

248. H.R. REP. NO. 1687, *supra* note 10, at 5-6, *reprinted in* 1978 U.S.C.C.A.N. at 4656; *id.* at 87-112.

249. DE JONGH, *supra* note 7, at 115-18 (explaining that legalese includes: esoteric vocabulary, grammatical constructions differing from ordinary usages, archaisms, terms of art, certain syntactical constructions that are infrequently used in normal discourse, redundancy, passive constructions, and numerous foreign language terms).

250. DUEÑAS GONZÁLEZ, *supra* note 221, at 5.

communication, including tone, facial cues and gestures.²⁵¹ Even where an interpreter possesses all of these necessary skills, the interpreter's job is challenging. An interpreter performs the roles of both speaker and listener simultaneously.²⁵² The combination of all of these characteristics desirable of an interpreter leads one to expect that few individuals would meet the criteria for a federally certified court interpreter.

In order to select interpreters possessing as many of the above characteristics as possible, the Court Interpreters Act created an interpreter certification procedure.²⁵³ Although the court may appoint an "otherwise qualified" interpreter when no certified interpreter is "reasonably available,"²⁵⁴ the Act expresses a preference for a certified interpreter over a non-certified interpreter.²⁵⁵ By analyzing the examination which federally certified interpreters must pass, one may determine the characteristics Congress deemed important.

b. The certification examination

The federal government has focused not only on the right to an interpreter, but also on the quality of the interpretation.²⁵⁶ The Administrative Office of the United States Courts began administering a certification examination following the enactment of the Act, in order to ensure highly qualified interpreters.²⁵⁷ Since 1978, the Federal Court Interpreter Certification Examination, consisting of two portions, has been administered nine times.²⁵⁸ All candidates must first pass the written portion of the exam before proceeding to the oral

251. DE JONGH, *supra* note 7, at 58-59.

252. *Id.* at 25-33; *see also* Perea, *supra* note 229, at 24 (explaining that interpreters must additionally avoid using the passive voice, changing powerful speech into a powerless one by using polite forms, or omitting verbal pauses and hesitation).

253. The Act provides that the Director of the Administrative Office of the United States Courts shall establish a program to facilitate the use of interpreters in courts of the United States. 28 U.S.C. § 1827(a).

254. 28 U.S.C. § 1827(b)(2).

255. H.R. REP. NO. 1687, *supra* note 10, at 5, *reprinted in* 1978 U.S.C.C.A.N. at 4655 ("Preference for appointment of a certified interpreter is the mechanism provided by this legislation, through which the government can guarantee the accuracy of the translation provided. Without this preference, existing problems regarding the quality of interpreters will continue.").

256. DUEÑAS GONZÁLEZ, *supra* note 221, at 4.

257. Interpreters may also be certified as federal court interpreters in Haitian Creole and Navajo. Shulman, *supra* note 4, at 180.

258. DUEÑAS GONZÁLEZ, *supra* note 221, at 4. The examination was given twice in 1980, and once each in 1982, 1983, 1985, 1987, 1989, 1991, and 1993. *Id.* The written examination is administered annually, and the oral examination is given approximately every two years. *Id.* at 6.

part of the exam.²⁵⁹ The written test has both English and Spanish sections, each of which tests the candidate's reading comprehension, language usage, proficiency at sentence completion and knowledge of antonyms and synonyms.²⁶⁰ The English portion of the examination has an overall difficulty level of the fourteenth grade.²⁶¹ The developers of the exam emphasize that an interpreter's role is not to simplify fourteenth-grade language used in the courtroom so that a defendant who does not have a fourteenth grade education can understand.²⁶² Instead, the presence of an interpreter serves to even out the disadvantage that non-English speakers face in the courtroom by ensuring, in most situations, a word for word translation.²⁶³ Therefore, a complex term in the original language should be interpreted as a complex word in the target language.²⁶⁴

After passing the written portion, the oral portion is conducted in a simulated courtroom and tests the candidate's use of formal language, slang, and colloquialisms.²⁶⁵ A jury charge and defense opening state-

259. Astiz, *supra* note 64, at 104. The first part consists of a written examination because the examiners must determine the basic command that a person has of both languages. Seltzer v. Foley, 502 F. Supp. 600, 607 (S.D.N.Y. 1980).

260. Seltzer, 502 F. Supp. at 605; DE JONGH, *supra* note 7, at 123. Language usage refers to grammatical errors that native speakers make in their own language, not the errors that foreigners tend to make in the second language. *Id.*

261. Seltzer, 502 F. Supp. at 606. This means that a person must have competence of understanding language, an intellectual understanding of the fourteenth grade, equivalent to a sophomore in college. *Id.* This level is not considered to be a very rigorous examination of language; it is basic comprehension of language, vocabulary and readings. *Id.* at 607. The examination is designed to measure proficiency and performance according to "standards of minimum competency" set by experienced practicing court interpreters, language specialists and members of the judiciary. *Id.*

262. *Id.* The legislature's preference for word for word translation without simplifying the terminology used in the courtroom is made clear through Congress' preference of "consecutive mode" over "simultaneous" or "summary mode." United States v. Joshi, 896 F.2d 1303, 1309 (11th Cir. 1990). Simultaneous translation requires the interpreter to interpret and to speak contemporaneously with the individual whose communication is being translated. H.R. REP. NO. 1687, *supra* note 10, at 3, *reprinted in* 1978 U.S.C.C.A.N. at 4658. No pauses are required. *Id.* Consecutive mode is when the speaker whose communication is being translated must pause to allow the interpreter to convey the testimony given. *Id.* at 4659. Summary translations, allowing the interpreter to condense and distill the speech of the speaker, are to be used sparingly. *Id.*

263. See Joshi, 896 F.2d at 1309 ("[T]he general standard for the adequate translation of trial proceedings requires continuous word for word translation . . ."). The interpreter is required to transfer all of the meaning he or she hears from the source language into the target language, without editing, summarizing, adding, or omitting. DUEÑAS GONZÁLEZ, *supra* note 221, at 5.

264. Though initially this may seem harsh, upon reflection one realizes that ideally a non-English speaking defendant should have the same comprehension as an English speaking defendant. Thus, if an English speaker would be confused, the Spanish speaker should be confused.

265. Seltzer, 502 F. Supp. at 605.

ment taken from actual trial transcripts have been used in past examinations.²⁶⁶ Candidates also have been required to interpret direct testimony and direct and cross examination questions, as well as translate probation reports and power of attorney forms.²⁶⁷ During the oral examination, each candidate is reviewed by a panel consisting of an active court interpreter, a specialist in the Spanish language, and an international conference interpreter.²⁶⁸

Although the candidate need not have any particular formal education, the written portion is of college level proficiency.²⁶⁹ Successful completion of the oral portion would normally require prior training or experience in simultaneous and consecutive interpretation and sight translation.²⁷⁰ Due to the challenging nature of the test, as of the 1993 examination, only 558 persons have passed the written and oral portions of the Spanish/English examination to become Certified Federal Interpreters.²⁷¹

The small number of candidates that actually pass the examination may be the result of two factors. First, the federal government does not provide any training programs for interpreters, and interested candidates often take the examination without knowing what to expect.²⁷² A second, and perhaps more revealing, factor is that many bilingual candidates discover during the exam that their language skills do not meet the performance standards set by the examination, either in language proficiency or in interpreting ability.²⁷³ One of the district court cases cited earlier in the Background section, *Seltzer v. Foley*,²⁷⁴ dealt with this issue.

In *Seltzer*, two independent consultants who had interpreted for many years took the written examination twice and failed.²⁷⁵ Subsequently, the consultants filed suit, challenging the certification procedure.²⁷⁶ The consultants attacked the Administrator's decision to

266. *Id.*

267. *Id.*

268. *Id.*

269. DUEÑAS GONZÁLEZ, *supra* note 221, at 6.

270. *Id.*; DE JONGH, *supra* note 7, at 123.

271. DUEÑAS GONZÁLEZ, *supra* note 221, at 6. The *Federal Court Interpreter Certification Manual* does not include the total number of applicants attempting to pass the examination. However, in 1991, the success rate was reported as 3.9 percent. ROSEANN DUEÑAS GONZÁLEZ, ET AL., *FUNDAMENTALS OF COURT INTERPRETATION: THEORY, POLICY AND PRACTICE* 62 (1991). The examination has been administered at least once since the 1993 examination, on August 27, 1994. DUEÑAS GONZÁLEZ *supra* note 221, at 9.

272. DUEÑAS GONZÁLEZ ET AL., *supra* note 271, at 62.

273. *Id.*

274. 502 F. Supp. 600 (S.D.N.Y. 1980).

275. *Id.* at 601.

276. *Id.* at 602-03.

screen out candidates through the written portion of the test.²⁷⁷ The consultants also challenged the written examination itself, claiming that the examination tested matters that interpreters did not confront in court.²⁷⁸

The *Seltzer* court found that the examinations were fairly, reasonably, and comprehensively developed under expert guidance; that the tests were properly related to precision interpretation; and that the written portions tested candidates on matters normally encountered in a courtroom.²⁷⁹ Thus, although the exam was difficult, it satisfied the express and implied terms and intent of the Act.²⁸⁰

D. Conclusion of Background

Having examined the case law prior to *Gonzalez* and the problems faced by non-English speakers in judicial proceedings, the following sections explore the holding of *Gonzalez*. In *Gonzalez*, the court applied the Act, but held that it was not necessary that the court appoint the defendant an interpreter. The object of the Case Analysis below is to determine whether the majority opinion comports either with past case law interpreting the Act or the policies intended to be served by the Act.

II. SUBJECT OPINION

A. Majority Opinion

In *Gonzalez v. United States*,²⁸¹ Miguel Angel Gonzalez pled guilty to one count of conspiracy to possess cocaine with intent to distribute and two counts of using a telephone to commit a felony.²⁸² Gonzalez moved to vacate or modify his sentence, but the motion was denied.²⁸³ Gonzalez appealed, claiming that his right to a qualified interpreter under the Court Interpreters Act had been violated.²⁸⁴ He further claimed that the lack of adequate interpretation deprived him of his Fifth and Sixth Amendment rights and that his attorney's failure to request a certified interpreter constituted ineffective assistance of counsel.²⁸⁵

277. *Id.* at 602.

278. *Id.* at 603.

279. *Id.* at 608.

280. *Id.*

281. 33 F.3d 1047 (9th Cir. 1994).

282. *Id.* at 1048.

283. *Id.*

284. *Id.*

285. *Id.*

The magistrate before whom Gonzalez pled, and the district court judge who heard Gonzalez's motion requesting that his sentence be vacated, both realized that Gonzalez's primary language was Spanish and that he had "some difficulties" with English.²⁸⁶ At arraignment proceedings, these difficulties were discussed.²⁸⁷ However, no interpreter was provided.²⁸⁸ Likewise, at Gonzalez's change of plea hearing before the district court, Gonzalez was asked a series of questions,²⁸⁹ and Gonzalez's attorney gave his opinion that Gonzalez understood his plea.²⁹⁰ Again, Gonzalez was not appointed an interpreter.²⁹¹

On appeal, the Ninth Circuit focused on the latter words of the Act,²⁹² which state that an interpreter need be appointed only when the non-primary English speaker's skills are so deficient as to "inhibit" comprehension of the proceedings.²⁹³ The Ninth Circuit found that the district court's determination that Gonzalez's language difficulties did not constitute a "major" problem was a factual finding which could only be reviewed under the clear error standard of review.²⁹⁴ The appellate court pointed out that when the lower court made its determination, the court knew that Gonzalez had lived in Oregon for ten years, had worked in the auto and truck sale business, and was in the process of buying a home.²⁹⁵ The appellate court also included in its opinion the following portion of dialogue between the magistrate and Gonzalez at Gonzalez's plea hearing, by which the court determined that Gonzalez communicated in, and comprehended, English with enough proficiency such that a court-appointed interpreter was not necessary.²⁹⁶

Court: Do you understand?
Gonzalez: Yes, little bit.

286. *Id.* at 1050.

287. *Id.*

288. *Id.*

289. *Id.*

290. The attorney stated:

I spent from about 7:00 o'clock this morning and any deficiency that he has in language, his wife is here and we fully discussed this and read all of these documents; and we have been doing the same thing for the last couple of months. As his lawyer, I am satisfied that his plea is an understanding plea and in his best interest if he did what he just told Your Honor he did.

Id.

291. *Id.*

292. 28 U.S.C. § 1827 (d)(1).

293. *Gonzalez*, 33 F.3d at 1048.

294. *Id.* at 1050.

295. *Id.*

296. *Id.*

Court: What is your problem, language problem?

Gonzalez: Well, no. I don't know how to read that much. I understand. I understand.²⁹⁷

The court also included a portion of the conversation between Gonzalez, his attorney, and the judge that led the presiding judicial officer to once again determine that Gonzalez spoke English such that an interpreter was unnecessary.²⁹⁸

Court: What did you do? Did you work with other people to buy drugs and sell them?

Gonzalez: I used the telephone.

Court: In addition to using the phone, what did you do?

Gonzalez: I worked with Forcelledo.

Court: Did you sell drugs to people?

Gonzalez: Yes.

Court: Did you deliver drugs to people?

Gonzalez: Yes.

Court: Was that drug cocaine?

Gonzalez: Yes.

Court: Where did you get the drugs you sold?

Linstedt (attorney): You worked for Forcelledo?

Gonzalez: Right.

Court: Did you ever sell cocaine to somebody?

Gonzalez: Yes.

Court: Where did you get that cocaine?

Gonzalez: Get it from Forcelledo.²⁹⁹

In summarizing Gonzalez's ability to proceed without an interpreter, the appellate court pointed out that the district court recognized that there was "some language difficulty," but concluded that the difficulty was not "a major one."³⁰⁰ The lower court had instructed that the record reflect that Gonzalez was in court when other defendants entered a plea of guilty, that he was assisted by competent counsel, and that his wife also had assisted his attorney in explaining matters to him.³⁰¹

When reviewing the analysis of the trial court, the Ninth Circuit agreed that "Gonzalez's comprehension was not sufficiently inhibited as to require an interpreter."³⁰² In reaching its conclusion, the appellate court held that Gonzalez's answers were "consistently responsive, if brief and somewhat inarticulate, and that he only

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.*

301. *Id.* at 1050-51.

302. *Id.* at 1051 (footnote omitted).

occasionally consulted his attorney.”³⁰³ Furthermore, although the court claimed that it did not find Gonzalez’s failure to object at trial to be dispositive, it did rely on Gonzalez’s inaction.³⁰⁴ Thus, because Gonzalez was not sufficiently inhibited in the eyes of the appellate court, he did not meet the statute’s provisions.³⁰⁵

Following the *Mayans* approach,³⁰⁶ the Ninth Circuit then briefly examined whether Gonzalez’s Fifth and Sixth Amendment constitutional rights had been violated.³⁰⁷ The court did not recognize separate constitutional and statutory rights as clearly as it had in *Mayans*.³⁰⁸ However, the court held that because Gonzalez was not entitled to an interpreter pursuant to the statute, appointment of an interpreter was a matter within the discretion of the lower court.³⁰⁹ The court then held that because Gonzalez had not objected during trial, the trial court had not abused its discretion.³¹⁰ Thus, the court held that his Fifth and Sixth Amendment claims failed under the *Perovich* abuse of discretion standard simply because he did not object.³¹¹

Finally, the court examined Gonzalez’s claim that his attorney’s failure to request an interpreter constituted ineffective assistance of counsel.³¹² In evaluating counsel’s performance, the court held that the record reflected the attorney’s belief that with the help of Gonzalez’s wife, he had successfully conveyed to Gonzalez “the essence of the charges . . . and the nature of the plea agreement.”³¹³ The court discussed the magnitude of Gonzalez’s misunderstanding of the proceedings, stating that it related only “to the length of his sentence . . . not the nature of the charges nor the maximum possible sentence.”³¹⁴ Therefore, the court found no error by the lower court and affirmed the lower court’s decision in its entirety.³¹⁵ The court held that neither Gonzalez’s statutory nor constitutional rights to an

303. *Id.*

304. *Id.*

305. *Id.*

306. *See supra* notes 140-74 and accompanying text (explaining the *Mayans* decision).

307. *Gonzalez*, 33 F.3d at 1051.

308. *United States v. Mayans*, 17 F.3d 1174, 1180 (9th Cir. 1994).

309. *Gonzalez*, 33 F.3d at 1051.

310. *Id.*

311. *Id.* *See supra* notes 24-34 and accompanying text (explaining the development of the *Perovich* discretion standard).

312. *Gonzalez*, 33 F.3d at 1051.

313. *Id.*

314. *Id.*

315. *Id.*

interpreter had been violated, and thus, Gonzalez had received effective assistance of counsel.³¹⁶

B. Dissenting Opinion

Judge Reinhardt's dissenting opinion criticized the approach of the trial court and that of his brethren in the Ninth Circuit. Judge Reinhardt first criticized the procedure followed by the lower court. In his view, when the judicial officer became aware that Gonzalez primarily spoke Spanish, he should have conducted a "full factual inquiry into whether language difficulties in any way inhibited [Gonzalez's] comprehension of the proceedings."³¹⁷

The dissent also scoffed at the inquiry conducted by the magistrate,³¹⁸ criticizing it as "cursory, half-hearted, and casual questioning."³¹⁹ Judge Reinhardt asserted that the dialogue between the magistrate and Gonzalez should have indicated that Gonzalez's understanding of the proceedings was inhibited by his inability to speak English.³²⁰

Judge Reinhardt also criticized the approach of the district judge,³²¹ who, according to Judge Reinhardt, "attempt[ed] to compensate for Gonzalez's inability to speak and understand English by asking only short, simple questions."³²² Judge Reinhardt rejected the idea that a judge can compensate for a failure to appoint an interpreter by asking only extremely basic questions.³²³ Judge Reinhardt pointed out that even when asked inappropriately simple questions, Gonzalez could not understand.³²⁴ According to Judge Reinhardt, this clearly indicated Gonzalez's inability to comprehend the full implications of the complex plea agreement that was written in English.³²⁵ Instead of following the approach of the trial court, Judge Reinhardt concluded that a proper factual inquiry would have focused on whether Gonzalez's comprehension of the proceedings was in any way "hindered."³²⁶

316. *Id.* at 1051-52.

317. *Id.* at 1052 (Reinhardt, J., dissenting).

318. See *supra* text accompanying notes 298-99 (reprinting the inquiry).

319. *Gonzalez*, 33 F.3d at 1052 n.2.

320. *Id.*

321. See *supra* note 299 and accompanying text (reprinting the comments of the district judge).

322. *Gonzalez*, 33 F.3d at 1052 n.2.

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.* at 1053. Judge Reinhardt interpreted "inhibit," as used in the Act, to mean "hinder." Reinhardt reached this interpretation by relying on the "common" meaning of inhibit. RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 732 (1979). Reinhardt reached this interpre-

Judge Reinhardt also criticized the appellate court's majority opinion. He insisted that instead of merely examining the lower court's factual findings for clear error, the appellate court should have reviewed the lower court's legal conclusions *de novo*.³²⁷ Judge Reinhardt further argued that the district court used an improper legal standard not found in the Act, reasoning that nothing in the Act or its legislative history indicated that a defendant must have a "major" language problem to be granted an interpreter.³²⁸ He thus argued that questioning whether his impairment was "major" was improper.³²⁹ Judge Reinhardt additionally pointed out that a defendant may be capable of speaking rudimentary English and functioning at a basic level in the United States, yet still lack the ability to comprehend judicial proceedings.³³⁰

Judge Reinhardt evaluated Gonzalez's ability to speak English by applying the correct legal standard, under which a "major" problem need not be found.³³¹ In doing so, he stated that "Gonzalez's marked inability to respond to simple, direct questions provide[d] a strong indication that the language difficulties prevented him from fully comprehending the proceedings against him."³³² Judge Reinhardt, like the majority, referred to the dialogue that took place between the district judge and Gonzalez.³³³

However, unlike the majority, which found the excerpt to be dispositive of an ability to comprehend, Judge Reinhardt saw Gonzalez as being able to respond only to those questions which required a "yes" or "no" answer, while falling non-responsive when the questions needed a fuller answer, even when he was coached by his attorney.³³⁴

tation because he, unlike the majority, adhered to the principle that "[t]he starting point in interpreting a statute is its language . . ." *United States v. Lira-Arredondo*, 38 F.3d 531, 533 (10th Cir. 1994). Thus, "inhibit" and other words in the Act are given their "common, everyday meaning." *Gonzalez*, 33 F.3d at 1053. To "hinder" means "to do harm to: impair, damage," and "to make slow or difficult the course or progress of." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1070 (1976). With all words given their "common meaning," as is the norm for statutory construction, *United States v. Morgan*, 922 F.2d 1495, 1497 (10th Cir. 1991), the scope of the Act would be very far reaching.

327. *Gonzalez*, 33 F.3d at 1053. A *de novo* trial tries a matter anew, "as if it had not been heard before and as if no decision had been previously rendered." BLACK'S LAW DICTIONARY 435 (6th ed. 1990).

328. *Gonzalez*, 33 F.3d at 1053.

329. *Id.*

330. *Id.*

331. *Id.*

332. *Id.*

333. *Id.* at 1053 n.3.

334. *Id.*

In support of his conclusions, Judge Reinhardt cited excerpts of testimony:³³⁵

- District Judge: Would you tell me what your understanding of Count 1 of the indictment is; that is, the conspiracy charge? What do you think they are charging you with by alleging you participated in the conspiracy?
- Gonzalez's Lawyer: He is asking you on the conspiracy what does that mean [sic]. What are you charged with? What did you do?
- Gonzalez: With the telephone call?
- District Judge: What did you do? Did you work with other people to buy drugs and sell them?
- Gonzalez: I used the telephone.
- District Judge: The point is, if you enter a plea of guilty now, you can't withdraw it later because you don'tlike [sic] the sentence that you get.
- Gonzalez: Yes.³³⁶

Lastly, Judge Reinhardt pointed to a second error caused by the Ninth Circuit's refusal to examine whether the correct legal standard was applied.³³⁷ The lower court based its decision that an interpreter was not needed in part upon the fact that Gonzalez's wife, a co-defendant, helped to explain the proceedings to the defendant.³³⁸ Judge Reinhardt found this contrary to the Act's clear intention, which is to provide impartial, qualified interpreters.³³⁹ He would have held that the district court's reliance on Gonzalez's wife was improper as a matter of law.³⁴⁰ If the appellate court had reviewed the case *de novo*, this error would have been detected. Finally, Judge Reinhardt concluded that the application of the correct legal standards, as dictated by the Act, would call for a reversal of the lower court's ruling.³⁴¹

The next section will examine the strength of Judge Reinhardt's dissent by determining whether the majority's opinion was supported by either legal precedent or the policies behind the Act.

335. *Id.*

336. *Id.*

337. *Id.* at 1054.

338. *Id.*

339. See *infra* notes 391-94 and accompanying text (examining problems with partiality of those used to interpret).

340. *Gonzalez*, 33 F.3d at 1054.

341. *Id.*

III. ANALYSIS

The majority's decision in *Gonzalez* was not supported by either case law interpreting the Act, nor by the policies behind the Act. While case law interpreting the Act is somewhat conflicting, no other case interpreting the Act has held that a defendant must have a "major" difficulty with English to receive a court-appointed interpreter.³⁴² Furthermore, requiring a "major" difficulty is not consistent with Congress' intent to provide aid from an interpreter to parties whose comprehension of English is inhibited.³⁴³

A. Criticism of the Gonzalez Trial Court

The trial court's ruling was clearly inconsistent with precedent. First, the trial court did not appropriately apply the *Tapia* test in requiring that the defendant's comprehension must be inhibited in a "major" way. Second, the court relied on the personal characteristics of the defendant rather than evaluating his true ability to comprehend English. Third, the court inappropriately relied on Gonzalez's statement and the assistance of Gonzalez's attorney in making its decision. Finally, the court incorrectly relied on interpreting assistance provided by Gonzalez's wife.

1. Analyzing Gonzalez under the *Tapia* Approach and Subsequent Authority Developing the Approach

The court in *United States v. Tapia*³⁴⁴ applied a two-prong test which it held was required under the Act.³⁴⁵ Under the first prong, the court must determine whether the judicial officer realized that the defendant had difficulty comprehending English.³⁴⁶ Once the first prong is satisfied, the court must conduct a factual inquiry to assess whether the defendant's comprehension of the proceedings or communications with his counsel were inhibited.³⁴⁷ Proper application of the *Tapia* test to the circumstances present in *Gonzalez* would have yielded a different result. Both the magistrate and the district court judge "quickly perceive[d]" that Gonzalez had difficulty with English.³⁴⁸

342. See *supra* notes 77-220 and accompanying text (discussing cases interpreting the Act prior to *Gonzalez*).

343. 28 U.S.C. § 1827.

344. 631 F.2d 1207 (5th Cir. 1980).

345. *Id.*

346. *Id.* at 1209.

347. *Id.*

348. *Gonzalez v. United States*, 33 F.3d 1047, 1050 (9th Cir. 1994). The opinion does not explain how the magistrate judge and the district court judge "quickly perceive[d]" that Gonzalez had some difficulties with English.

Therefore, it was incumbent upon both courts to proceed to factual inquiries that would reveal whether Gonzalez comprehended the proceedings. The officials erred by failing to follow this prong of the test.

As indicated by Judge Reinhardt in his dissent, both of the inquiries were cursory,³⁴⁹ and the judicial officer attempted to avoid appointing an interpreter by asking leading questions and allowing counsel to coax answers out of the defendant.³⁵⁰ Ironically, Gonzalez's mastery of English was so poor that even the inappropriate tactics of the judges were unable to hide the fact that Gonzalez needed an interpreter. His true lack of ability to understand surfaced in the excerpts cited by the majority and became even more clear in the excerpts cited by Judge Reinhardt.³⁵¹ Despite the efforts of the judge and Gonzalez's attorney,³⁵² Gonzalez's responses were confused and failed to directly answer the questions as asked.³⁵³

Appearing to recognize that Gonzalez's answers demonstrated that his limited knowledge of the English language inhibited his comprehension, the district court changed the standard of the Act by holding that as long as Gonzalez's inhibition was not "major" an interpreter was not mandated under the Act.³⁵⁴ This contravenes the clear holding of *Tapia*,³⁵⁵ which cites the standard applicable under the Act as, "whether the failure to have an interpreter with him throughout the proceedings inhibited [the defendant's] comprehension"³⁵⁶ Nowhere in the *Tapia* opinion, which was written with the explicit intention of providing guidance to future court interpreter cases,³⁵⁷ does the court hold that a "major" difficulty in comprehension must be identified before appointing an interpreter. Thus, the *Gonzalez* deci-

349. See *supra* text accompanying notes 298-99 (providing an example of the brevity of the court's evaluation).

350. See *supra* text accompanying note 299 (providing reprint of dialogue between the trial judge, Gonzalez and his attorney).

351. *Gonzalez*, 33 F.3d at 1050, 1053 (Reinhardt, J., dissenting).

352. The district court judge reworded his questions repeatedly, indicating that Gonzalez was unresponsive. See *supra* text accompanying note 329. Gonzalez's attorney also attempted to intervene and "coach" Gonzalez. *Gonzalez*, 33 F.3d at 1053 n.3 (Reinhardt, J., dissenting).

353. See *supra* text accompanying note 299 (recounting the dialogue between Gonzales, his attorney and the district judge).

354. See generally Piatt, *supra* note 25, at 1 ("[Judges] may have chosen not to rectify [language difficulties], acting on the same fear, apprehension, and hostility sometimes exhibited by monolingual people toward a language they do not understand and toward the people who must employ that language to survive and function in this society."). See also Shulman, *supra* note 4, at 184-85 (exploring the conflicting goals for judges).

355. See *supra* notes 81-94 and accompanying text (explaining the analysis used by the *Tapia* court).

356. *United States v. Tapia*, 631 F.2d 1207, 1209-10 (5th Cir. 1980).

357. *Id.* at 1208.

sion cannot be reconciled with the procedures clearly outlined in *Tapia*.

Cases decided subsequent to *Tapia* which interpret the Act also fail to support the legal standard applied in *Gonzalez*. In *United States v. Perez*,³⁵⁸ the court cited the standard to be used under the second prong of the test as whether "a presiding judicial official finds that a defendant's ability to comprehend the proceedings or communicate with counsel is 'inhibited' by language . . . problems."³⁵⁹ Again, this court did not state that a "major" inhibition or problem was necessary. Therefore, *Perez* provides no support for the *Gonzalez* court's stated requirement that "major" difficulty understanding English is a prerequisite to appointing an interpreter.

Three other appellate court cases similarly fail to provide support for this requirement. In *United States v. Markarian*,³⁶⁰ the court stated that the "issue of whether to appoint an interpreter is left to the sound discretion of the trial court."³⁶¹ The court cited no authority for this assertion and did not analyze the issue in a manner comparable to the *Tapia* court.³⁶² Nor did the court purport to rely on a literal interpretation of the statute. Instead, the court relied on the facts that no one moved for an interpreter at trial, and that the judge below was bilingual.³⁶³

The *Gonzalez* opinion is not supported by *Markarian*. The *Markarian* court not only appeared to ignore the two-step *Tapia* approach, which *Gonzalez* embraced, but reverted to a *Perovich* abuse of judicial discretion standard without ever mentioning the guidance provided by the statute.³⁶⁴ Furthermore, the *Markarian* court did not cite the statutory standard anywhere in its opinion.

*United States v. Catalano*³⁶⁵ similarly provides no support for the *Gonzalez* court's interpretation of the Act. The *Catalano* court rested its decision on the fact that Catalano spoke at length in English.³⁶⁶ The court did not cite the affirmative duty imposed by the statute, but instead reasoned that because Catalano communicated well in English

358. 918 F.2d 488 (5th Cir. 1990). See *supra* notes 113-19 and accompanying text (discussing the reasoning of *Perez*).

359. *Perez*, 918 F.2d at 490.

360. 967 F.2d 1098 (6th Cir. 1992).

361. *Id.* at 1104.

362. The *Markarian* court appears to skip the first step followed by the *Gonzalez* court (whether the defendant receives protection from the Act) and proceeds immediately to the abuse of discretion standard under *Perovich*. *Id.* at 1103-04.

363. *Id.* at 1104.

364. *Id.*

365. No. 91-50372, 1992 U.S. App. LEXIS 20942 (9th Cir. Sept. 3, 1992).

366. *Id.* at *2.

and did not rely primarily on a foreign language, he was not entitled to an interpreter.³⁶⁷ *Catalano* does not support the *Gonzalez* opinion because the *Catalano* court found that the defendant did not have any problems with English,³⁶⁸ not that he did not have a "major" problem with English. Similar to the *Markarian* court, the *Catalano* court did not mention the proper procedure under the Act, but seemed to revert to a simple abuse of discretion standard, going so far as to cite authority that did not interpret the Act.³⁶⁹

United States v. Mayans,³⁷⁰ the last federal appellate court case interpreting the Act prior to *Gonzalez*, also fails to justify the *Gonzalez* court's mandate that a language difficulty must be "major" before an interpreter can be appointed. In fact, the *Mayans* court held that "common sense dictates that a trial court must satisfy itself through personal observation that the defendant has *no difficulty* speaking English before the interpreter is withdrawn."³⁷¹ In *Mayans*, the court held that the interpreter could not be withdrawn until it was shown that the defendant was experiencing no problems in comprehension or communication in English.³⁷² This contrasts strongly with the insinuation in *Gonzalez* that an interpreter could be withdrawn as long as the defendant did not suffer from a "major" difficulty with English. Therefore, analyzing *Gonzalez* in light of the federal appellate court cases applying the Act fails to provide any authority for the district court's holding that an individual must have a "major" difficulty with English before the non-English speaker may receive a court-appointed interpreter under the Act.

Having analyzed *Gonzalez* in light of the case law involving a denial of a court-appointed interpreter, the following section of the Note will address specific factors upon which the *Gonzalez* court relied for its decision. The focus will be on whether the *Gonzalez* court emphasized the factors discussed in part I.B.5. of the Note that were important in earlier cases interpreting the Act.³⁷³ The Note also will address whether these factors fulfill the Act's goal of improving the comprehension of non-English speakers in the courtroom.

367. *Id.*

368. *Id.*

369. *Id.* at *2-3 (citing *United States v. Salsedo*, 607 F.2d 318, 320 (9th Cir. 1979)).

370. 17 F.3d 1174 (9th Cir. 1994).

371. *Id.* at 1180 (emphasis added).

372. *Id.*

373. See *supra* notes 77-220 and accompanying text (examining the major cases interpreting the Act prior to *Gonzalez*).

2. *The Trial Court's Inappropriate Reliance on Certain Personal Characteristics of the Defendant*

Although the *Gonzalez* trial court proceeded to a factual inquiry of Gonzalez's ability to comprehend English, the court inappropriately included factors in its analysis that do not necessarily reveal an individual's true ability to comprehend a language; such factors are contrary to the inquiry envisioned by Congress when the statute was enacted. The *Gonzalez* court found significant that Gonzalez had lived in Oregon for ten years, was buying a home, and had worked in an auto and truck sale business.³⁷⁴ Although the court did not overtly state that these facts alone convinced the court that Gonzalez spoke English well enough to understand criminal proceedings, such an inference may be drawn.³⁷⁵

As discussed in the Background section above, the *Gonzalez* court is not alone in erroneously relying on biographical data in reaching its decision.³⁷⁶ However, reliance on such personal characteristics is improper. First, there is not necessarily a connection between one's English proficiency and the amount of time that he or she has lived in the United States or his or her occupation. Spanish speakers may be substantially insulated from English speaking communities, which increases the probability that they will learn English slowly.³⁷⁷ In some states, services from election ballots to street signs may be in languages other than English,³⁷⁸ which enables Spanish speakers to live in the United States for a substantial period of time without learning much English. Whether the judge supports providing such services to non-English speakers is irrelevant; the fact remains that a Spanish speaker could live and work in the United States without comprehending English. For this reason, it is essential that the presiding judi-

374. *Gonzalez v. United States*, 33 F.3d 1047, 1050 (9th Cir. 1994).

375. The inference arises from listing the facts immediately before the colloquy between the magistrate and Gonzalez, and from the emphasis that the court places on the facts, admitting that some information was not known to the district court, but that the district court "certainly knew" other data. *Id.*

376. See *supra* notes 202-06 and accompanying text (examining the improper inclusion of biographical data when making a "factual determination").

377. See *Official English*, *supra* note 3, at 1345 (citing the argument that "recent immigrants, notably Latinos and Asians, are not acquiring English as quickly as their earlier counterparts"). The author of *Official English* then explores the arguments put forth by proponents of official-English pronouncements "that if schooling and government services were available only in English, non-English speakers, who would otherwise have insufficient incentives to acquire English, will be spurred to learn the language." *Id.* at 1359. Again, while this Note avoids expressing an opinion about the "English only" debate, it seems that both sides of that debate recognize that it is not at all uncommon for immigrants living in the United States to not speak or comprehend English.

378. *Id.* at 1345 n.3.

cial officer make a factual finding that focuses not on the biographic characteristics of a defendant, but rather on whether the defendant can speak and understand English as the defendant stands before the court.³⁷⁹

The second problem with including biographic characteristics is that focusing on such characteristics subverts the spirit of the statute. The statute mandates that an interpreter be provided when one's comprehension is inhibited.³⁸⁰ Focusing on a defendant's personal history does little to inform the fact-finder of the defendant's current comprehension. Therefore, courts that primarily consider demographic data in their "factual inquiry" are merely paying lip service to the Act. The judges' reliance on improper factors most likely results from their inability to determine the linguistic abilities of a defendant.³⁸¹

Because judges themselves may not be able to determine whether a defendant can comprehend English solely by questioning the defendant, they sometimes rely on tangible factors such as the defendant's occupation or period of residence in the United States.³⁸² While this undeniably simplifies the job of the court, it may do so at the expense of the defendant's due process rights, because demographic characteristics and comprehension of English do not necessarily go hand in hand. Therefore, to be true to the statute's requirement that a judicial officer determine whether a party's comprehension of English is inhibited, the court must conduct a full factual inquiry.³⁸³ Questioning the defendant seems a logical place to begin. However, the judge should make his or her own appraisal of the defendant's speech and comprehension. The judge should not be permitted to shirk his or her responsibilities under the statute by relying on stereotypes or non-appointed Spanish speakers in the courtroom.

3. *The Trial Court's Inappropriate Reliance on Gonzalez and Gonzalez's Attorney*

In addition to refraining from reliance on the biographic characteristics of a defendant, a judicial official that follows the guidance of the Act should not rely solely on statements made by either the defendant or the defendant's attorney regarding the defendant's ability to speak

379. See *United States v. Tapia*, 631 F.2d 1207, 1209-10 (5th Cir. 1980).

380. 20 U.S.C. § 1827.

381. See Shulman, *supra* note 4, at 179, 181-82 (claiming that judges are generally not equipped to determine whether a given defendant needs an interpreter).

382. See *supra* notes 204-06 and accompanying text (examining the improper inclusion of biographical data when making a "factual determination").

383. *Gonzalez v. United States*, 33 F.3d 1047, 1052 n. 2 (9th Cir. 1994) (Reinhardt, J., dissenting).

English. Presumably, neither a defendant nor his attorney would represent that the defendant speaks English adequately unless the defendant or the attorney believes this to be true. However, the beliefs of the defendant and his attorney should not be considered when the court makes its appraisal.

Moreover, as Judge Reinhardt indicated in his dissent in *Gonzalez*,³⁸⁴ cursory questioning of the defendant is not sufficient to accurately assess the defendant's ability to speak English.³⁸⁵ When a defendant that is specifically asked whether he or she can speak English answers "yes," the judge learns only two facts: (1) that the defendant knows the word "yes,"³⁸⁶ and (2) that the defendant *believes* that he or she can speak English. Thus, instead of merely asking Gonzalez whether he understood the proceedings, the judge should have asked questions that truly tested the defendant's knowledge of English. The questions need not have been complex; having Gonzalez identify items in the courtroom or asking him to *explain* his understanding of the claims against him or various legal concepts may have been sufficient. Only in this manner will a judicial official even begin to have adequate "data" to determine how well the defendant speaks English.

The answers received from Gonzalez by the judicial officials were not much more illuminating than receiving a "yes" in the above-mentioned scenario. Although the questions posed to Gonzalez appeared to assess his ability to speak English, the vast majority of the questions were answerable with a "yes" or a "no."³⁸⁷ Some of the questions that called for an explanation from Gonzalez, which could have provided true insight as to his ability to comprehend English, were rephrased such that he needed only to affirm or deny the questioner's statement.³⁸⁸ By conducting this desultory appraisal of Gonzalez's English speaking abilities, as well as by relying too heavily on the assurances of both Gonzalez and his attorney, the court failed to undergo the

384. *Id.* at 1052-53.

385. *Id.*

386. Without further questioning, the judge may be jumping to conclusions by presuming that the defendant realizes that "yes" is a word indicating an affirmation, equivalent to "sí" in the Spanish language. Technically, from asking only one question and receiving the single word "yes," the judge knows only that the defendant can pronounce the word "yes," not that the defendant knows the meaning of the word which he has pronounced. Critics may argue that even small children will know that "yes" is an affirmation, equivalent to "sí" in Spanish; however, in relying on the stereotype that *everyone* knows that "yes" is equivalent to "sí," the judge is abdicating her responsibility under the statute. The judge *must* make her own determination.

387. *Gonzalez*, 33 F.3d at 1050.

388. *Id.* ("Court: Where did you get the drugs you sold? Linstedt: You worked for Forcelledo? Gonzalez: Right.")

factual inquiry envisioned by the drafters of the Act. Unfortunately, this was not the full extent of the court's error in assessing Gonzalez's ability to speak English.

4. *The Trial Court's Inappropriate Reliance on Assistance Provided to Gonzalez by His Wife*

As pointed out in Judge Reinhardt's dissent, the trial court found that because Gonzalez had been assisted by his wife and his attorney, any "language difficulty" he may have had could not have impeded his due process rights.³⁸⁹ This reliance on so-called "third party interpreters" is contrary to both the Act's requirement of impartial interpreters and the policies underlying the Act.

As Judge Reinhardt indicated, the House Report accompanying the Act clearly notes that "the appointment of certified interpreters is designed to insure not only an accurate translation but also an impartial one."³⁹⁰ Congress' worries regarding partiality were so great that the legislative body included a provision in the Act that allows the court to limit waiver of officially certified interpreters.³⁹¹ The *Gonzalez* trial court was in no way assured that Gonzalez's wife had either the requisite impartiality or accuracy necessary to protect Gonzalez's interests.

Indeed, the partiality of Gonzalez's wife is particularly suspect. Judge Reinhardt notes that the majority conveniently ignored the fact that Gonzalez's wife was a co-defendant in the case.³⁹² There are several dangers that may arise when a court relies on the interpretation of a co-defendant. The co-defendant may intentionally misinterpret testimony or judicial instructions in an attempt to make the individual for whom he or she is translating appear more or less guilty than the other defendants. Likewise, as is the case with any impromptu interpreting arrangement, the co-defendant probably does not possess the skills necessary for precise court interpreting.³⁹³

Thus, if the *Gonzalez* court wanted to rely on someone who could assist Gonzalez with his comprehension of the proceedings or his communication with his attorney, it should have appointed an unbiased third party rather than relying on the interpretation of someone inti-

389. *Id.* (Reinhardt, J., dissenting).

390. *Id.* (citing H.R. REP. NO. 1687, *supra* note 10, at 5, reprinted in 1978 U.S.C.C.A.N. at 4656).

391. 28 U.S.C. § 1827.

392. *Gonzalez*, 33 F.3d at 1054.

393. See *supra* notes 241-55 and accompanying text (describing the skills that a court interpreter should possess).

mately related to the defendant. Even if Gonzalez's wife interpreted in good faith, she may have subconsciously misinterpreted certain testimony in an effort to shelter her loved one.

Aside from the questions regarding Mrs. Gonzalez's impartiality, it is unclear whether the court tested Mrs. Gonzalez's accuracy as an interpreter. Because it appears that the court was uncomfortable with assessing the English speaking abilities of the defendant, and chose to fall back on factual characteristics,³⁹⁴ it is likewise highly doubtful that the court assessed the abilities of Mrs. Gonzalez as an interpreter.³⁹⁵ This is especially troublesome because the tasks to be performed by a court interpreter are uniquely challenging.³⁹⁶ The court had no idea whether Mrs. Gonzalez had previous experiences in court, whether she knew the rights of her husband, or whether she understood what a plea agreement was. Had the court formally appointed an interpreter, the interpreter would have been expected to be familiar with these legal concepts, as well as have the ability to converse in English with the judge and attorneys about abstract legal concepts and simultaneously converse with Gonzalez in colloquialisms and slang about his drug deals.³⁹⁷

These qualities all would have been possessed by a federally certified court interpreter. The Act expresses a preference for a certified interpreter over a non-certified interpreter.³⁹⁸ However, the court may appoint an "otherwise qualified" interpreter when no certified interpreter is reasonably available.³⁹⁹ Because few bilingual people have passed the rigid standards of the federal certification examination,⁴⁰⁰ it is doubtful that Mrs. Gonzalez would have qualified as an "otherwise qualified interpreter" under the Act.

394. See *supra* notes 202-06 and accompanying text (discussing the court's reliance on biographic characteristics of the defendant).

395. See Hovland, *supra* note 10, at 479 (explaining that "[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 performance").

396. See *supra* notes 243-257 and accompanying text (describing the skills required of an interpreter).

397. See Piatt, *supra* note 25, at 6 (explaining that when bilingual counsel are used as interpreters, often no inquiry as to the attorney's competence as interpreter is ever made).

398. H.R. REP. NO. 1687, *supra* note 10, at 5, reprinted in 1978 U.S.C.C.A.N at 4655 ("Preference for appointment of a certified interpreter is the mechanism, provided by this legislation, through which the government can guarantee the accuracy of the translation provided. Without this preference, existing problems regarding the quality of interpreters will continue.").

399. 28 U.S.C. § 1827(d)(1).

400. See *supra* notes 271-73 and accompanying text (citing the number of persons who have successfully passed the federal certification test and suggesting two reasons for the low rate of success).

Even though an “otherwise qualified interpreter” has not been certified, the interpreter should have skills fairly comparable to a certified interpreter. The lack of such parity of skills between certified and “otherwise qualified” interpreters would result in two different brands of justice being meted out under the same statute, depending on the interpreting abilities of the non-certified interpreter. This is exactly the result Congress was attempting to avoid by enacting the Court Interpreters Act.⁴⁰¹ Considering Congress’ desire for standardization, it is more logical that Congress envisioned that non-certified appointed interpreters would possess many, if not most, of the same abilities as certified interpreters. As the court did not know whether Mrs. Gonzalez possessed these abilities, the court had no guarantee that Mrs. Gonzalez could use the correct Spanish words when translating English terms, especially legal terms that are part of a United States system that she herself did not understand.⁴⁰²

Thus, the *Gonzalez* court’s reliance on Mrs. Gonzalez as an interpreter was an inappropriate circumvention of Congress’ intention that only *qualified* interpreters be used in the federal courts.⁴⁰³ As such, the Ninth Circuit should have reversed the lower court’s holding, and held instead that Gonzalez was entitled to a court-appointed interpreter. The appellate court’s failure to reverse resulted from applying an incorrect standard of review as is discussed in the next subsection.

B. Criticism of the Ninth Circuit’s Standard of Review

Judge Reinhardt correctly noted that the majority opinion failed to review the lower court’s legal conclusions *de novo*.⁴⁰⁴ The majority accepted, without analysis of the Act, the trial court’s assertion that the Act requires that the defendant have a “major” language difficulty before appointing an interpreter.⁴⁰⁵ After accepting this incorrect choice of legal standard by the trial court, the majority then asserted

401. *Id.* at 4-5.

402. At the very least, the court should have evaluated Ms. Gonzalez’s abilities. Because the court did not do this, we are left to guess at her abilities. Considering the small percentage of people meeting the requirements to become a certified or “otherwise qualified” interpreter, in all likelihood Mrs. Gonzalez did not meet the standards that she would have had to meet if the court had attempted to formally appoint her as interpreter.

403. H.R. REP. NO. 1687, *supra* note 10, at 4-5, reprinted in 1978 U.S.C.C.A.N. at 4655.

404. *Gonzalez v. United States*, 33 F.3d 1047, 1053 (9th Cir. 1994) (Reinhardt, J., dissenting). The majority purported to review the decision *de novo*. *Id.* However, if a true *de novo* review had been undertaken, the proper standard, under which the finding of a “major” difficulty was not necessary, would have been used.

405. *Id.* at 1050.

that it was limited to examining the factual findings of the lower court for clear error.⁴⁰⁶

The majority's approach is troublesome for several reasons. First, the lower court should have undertaken its own analysis of the statute to determine whether the correct legal standard had been selected.⁴⁰⁷ A *de novo* review is appropriate in this situation because the "starting point in interpreting a statute is its language, for if the intent of Congress is clear, that is the end of the matter."⁴⁰⁸ Notably, in the most recent opinion involving the Act at the time this Note was written, the court used *de novo* review, finding that clear statutory language will ordinarily end the analysis.⁴⁰⁹ Moreover, absent evidence to the contrary, a court should follow the common, everyday meaning of the plain language of the statute.⁴¹⁰ Had the majority undertaken an independent legal analysis of the question of law, the court would have recognized that a "major" deficiency is not necessary, as the modifier "major" is stated nowhere in the statute.⁴¹¹ Furthermore, the majority's approach is troublesome because the requirements of the clear error rule will be nearly impossible to meet where a court uses the "major" difficulty standard.⁴¹²

The clear error standard of review is problematic for other reasons as well. The clear error doctrine is rarely used to reverse errors committed at the trial court. For example, when a defendant fails to object during lower court proceedings, the appellate court will review solely for clear error.⁴¹³ Defendants being evaluated under a clear error standard on appeal are forced to satisfy a higher standard than that for other types of error.⁴¹⁴ While this is the standard of review commonly used when no objection is made at trial, an exception to

406. *Id.*

407. See *Good Samaritan Hospital v. Shalala*, 113 S. Ct. 2151, 2157 (1993) (recognizing that federal appellate courts should begin with the statute when reviewing a lower court's interpretation of federal law).

408. *Id.*; see also *In re McLinn*, 739 F.2d 1395 (9th Cir. 1984) (citing the *de novo* standard as that applied to district judge's interpretation of federal law).

409. *United States v. Morgan*, 922 F.2d 1495, 1496 (10th Cir.), *cert. denied*, 501 U.S. 1207 (1991).

410. *Perrin v. United States*, 444 U.S. 37, 42 (1979).

411. *Gonzalez v. United States*, 33 F.3d 1047, 1052 (9th Cir. 1994) (Reinhardt, J., dissenting).

412. See *Hovland*, *supra* note 10, at 482-87 (examining cases in state court that exemplify the difficulty of getting a new trial or overturning a conviction because of an incorrect interpretation when the "plain error" standard is used).

413. See *supra* notes 198-99 and accompanying text (explaining clear error standard).

414. *Hovland*, *supra* note 10, at 492-93.

this standard of review should apply to objections regarding court interpreting.⁴¹⁵

The most obvious problem in requiring an objection at the trial level is that the defendant in these proceedings has problems with English. If an interpreter has been appointed and is making errors in interpretation, the defendant does not realize that he is receiving an inaccurate interpretation because he does not know what was actually said in English.⁴¹⁶ Moreover, if an interpreter has not been provided, the defendant may in good faith, but inaccurately, believe that he understands the words of the judge or his lawyer.⁴¹⁷ For example, if the defendant erroneously, yet in good faith, believes that a plea agreement is something that a defendant signs which automatically absolves him of further liability, he may sign the agreement. Only in subsequent stages of the proceedings may the defendant learn that his belief regarding the plea agreement was incorrect. His attorney will not likely have objected if he, too, believed his client understood. Essentially, the current requirement of a contemporaneous objection can only be met in the limited situations where a defendant is fully aware that he has poor comprehension, or where the defendant has enough of a grasp of English and Spanish to realize when an appointed interpreter is making an error in interpretation.

In summary, the approach of the *Gonzalez* court was flawed in accepting that a "major" difficulty was necessary, and in allowing the lower court to rely on inappropriate factors such as the presence of a co-defendant who represented herself as able to interpret. Unfortunately, because of the relatively small number of cases interpreting the statute, the *Gonzalez* court's opinion may have a significant impact on the development of the right to a court-appointed interpreter.

IV. IMPACT OF THE GONZALEZ DECISION

Unlike other procedures required to protect the rights of criminal defendants,⁴¹⁸ most people, including most attorneys, likely have

415. See generally *id.* at 474, 481-494 (making a comprehensive and convincing argument that an exception to the clear error rule should exist when a defendant whose objection pertains to the lack or quality of an interpreter fails to object at trial; the requirement of a timely objection at trial should be waived).

416. *Id.* at 490.

417. *Id.*

418. One example is the requirement of Miranda warnings. See *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring that an arrestee be told that he or she has the right to remain silent; that any statement he or she does make may be used against him or her; that he or she has the right to an attorney; and that he or she will be appointed an attorney if he or she cannot afford one).

never heard of the Court Interpreters Act.⁴¹⁹ These people do not realize that a party whose comprehension is inhibited has a right to a court-appointed interpreter when in court as a defendant. Yet, decisions under the Act may have a profound impact on the justice received by Spanish speaking defendants within our judicial system.

The *Gonzalez* opinion is poised to be an important precedent in the development of case law interpreting the Court Interpreters Act. The sheer lack of precedent alone encourages judicial reliance on *Gonzalez*. The courts have decided relatively few cases dealing with the Act in any respect, and *Gonzalez* was only the sixth case reviewing the complete denial of a court-appointed interpreter.⁴²⁰ Additionally, as the Background section of this Note demonstrates, even fewer cases interpreting the Act reached the second prong of the test set forth in *United States v. Tapia*, which requires the appellate court to evaluate the thoroughness of the trial court's factual inquiry into the defendant's ability to comprehend English.⁴²¹ Therefore, the fact that the *Gonzalez* court reached the second prong also increases the likelihood that future cases deciding this issue will rely on its incorrect legal analysis.

At the time this Note was being prepared for publication, the Ninth Circuit decided *Huitron v. United States*,⁴²² in which *Gonzalez* provided primary authority for the denial of appointment of a certified court interpreter. In *Huitron*,⁴²³ the Ninth Circuit duplicated many of the errors made by the *Gonzalez* court.⁴²⁴ Namely, the court pointed

419. As part of the research for this article, the author conversed with nearly 100 attorneys practicing in a variety of areas in the Chicago legal community, some of whom did extensive pro bono work in criminal defense or legal work for Spanish speakers. Only one of the attorneys had even heard of the Act, and he incorrectly believed that a judge had complete discretion in the matter, contrary to the Act's clear intent that in some situations an interpreter will be mandatory.

420. The prior cases reviewing the denial of a court appointed interpreter are *United States v. Mayans*, 17 F.3d 1174 (9th Cir. 1994); *United States v. Catalano*, No. 91-50372, 1992 U.S. App. LEXIS 20942 (9th Cir. Sept. 3, 1992); *United States v. Markarian*, 967 F.2d 1098 (6th Cir. 1992); *United States v. Torres Perez*, 918 F.2d 488 (5th Cir. 1990); *United States v. Tapia*, 631 F.2d 1207 (5th Cir. 1980).

421. 631 F.2d at 1210.

422. No. 94-55805, 1995 U.S. App. LEXIS 1937 (9th Cir. Jan. 25, 1995). The Ninth Circuit opinion indicated that "an interpreter appeared to be available." *Id.* at *5. It is unclear whether "available" signified that an interpreter was actually in the courtroom, or simply that an interpreter could have been obtained easily.

423. *Huitron* had pled guilty to thirteen charges related to distribution of cocaine and was sentenced to serve a 108-month sentence. *Id.* at *1.

424. The *Huitron* court also raised issues which had seemed settled as far back as *Mayans*. That is, in *Huitron*, the Ninth Circuit again mixed the two claims available to a defendant who did not have an interpreter in a judicial proceeding, even though the *Mayans* and *Gonzalez* courts addressed the statutory and constitutional claims separately. The *Huitron* court begins by

out that Huitron had never requested the assistance of an interpreter and that Huitron had been a legal resident of the United States for twenty years and had attended schools in this country.⁴²⁵ Moreover, the court noted that the defendant claimed that he could read, write and communicate in English.⁴²⁶

However, conspicuously lacking from the Ninth Circuit's summary of the lower court's findings was the district court judge's appraisal of the defendant's abilities. Such an assessment was absent perhaps because the judge did not decide for himself that Huitron spoke English adequately. That is, it is doubtful that the judge personally questioned Huitron and analyzed Huitron's speech in order to determine how well Huitron spoke English. The questions that the judge may have asked Huitron appeared to be of the "do you understand me?" variety. As explained above, the answers to these types of questions provide little insight into a defendant's true comprehension of the English language.⁴²⁷ Most likely, the Ninth Circuit gleaned from the record the facts listed above, and from these facts concluded that the defendant could communicate in English. While this is hardly the process envisioned by Congress when enacting the Act, it unfortunately mirrors almost exactly the process followed in *Gonzalez*.

Fortunately, the *Huitron* court did not mimic the *Gonzalez* court's requirement that a "major" difficulty with English must be identified before a defendant may be appointed an interpreter.⁴²⁸ However, given the great discretion that has been granted the lower courts and the reluctance of appellate courts to reverse lower courts' denials of court-appointed interpreters, it seems imminent that courts in future cases will adhere to the *Gonzalez* court's incorrect statutory interpretation.

citing to *Gonzalez* for the proposition that "[u]se of interpreters in a particular proceeding is 'a matter for the district court's discretion.'" 1995 U.S. App. LEXIS 1937, at *4-5 (citing *Gonzalez*, 33 F.3d 1047, 1051 (9th Cir. 1994)). This is acceptable, because Huitron's claim was for a denial of due process, which is at the discretion of the court. *Id.* at *4. However, the court also cited to the Act, without clearly explaining the difference between the statutory and constitutional claims. *Id.* at *5. It is this type of citation and analysis that resulted in the confusing jurisprudence which was finally clarified in *Mayans*.

425. *Id.*

426. *Id.*

427. See *supra* notes 386-89 and accompanying text (examining the drawbacks of using questions that may be answered simply with a "yes" or "no").

428. *Huitron*, 1995 U.S. App. LEXIS 1937, at *5.

V. CONCLUSION

Reliance on the majority opinion in *Gonzalez* will result in grave consequences for non-English speaking defendants in future cases. First, all defendants that wish to receive a court-appointed interpreter will need to exhibit a "major" difficulty with the language. In determining that a defendant does not have a "major" difficulty, the judicial official will be allowed to rely on factors such as the defendant's occupation or period of residence in the United States, or on the fact that the defendant's niece or grandson attended the trial and discussed what was happening with the defendant. If the defendant learns after the trial is over that he or she held incorrect beliefs or opinions about some aspects of the United States judicial system or misinterpreted words that the judicial official kept repeating, the realization will have come too late. This will be the justice received by the defendant if future courts employ the analysis of the *Gonzalez* opinion. This was not the justice envisioned by Congress when the Act was created.

Mollie M. Pawlosky