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No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants

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NOTE

No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants

I. INTRODUCTION

"¡Hombre, ni tengo diez kilos!"[1]

A Cuban man was convicted on drug charges for uttering the words above.[2] He used the words in response to a request for a loan and, given the dialect of the speaker and the context of the statement, they can properly be translated as "[m]an, I don't even have ten cents."[3] Instead, the court interpreter mistakenly translated them as, "[m]an, I don't even have ten kilos."[4] This case demonstrates the influence the court interpreter can have on the outcome of a case. As extraordinary as this situation may appear, however, it is not an isolated incident. Rather, what is unusual about this case is that someone caught the error and that the conviction was overturned.[5] Since no safeguards exist in the judicial system designed to catch mistakes made by court interpreters, most mistakes are never discovered.[6]

Any communication using two languages, sometimes even communication using the same language, may give rise to misunderstanding and misinterpretation of the speaker's intent. No less than any other type of communication, court interpretation is susceptible to this type of misunderstanding and misinterpretation. Court interpretation can be

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1. This quote was taken from a wire tape of a defendant's telephone conversation. Alain L. Sanders, *Libertad and Justicia for All*, Time 65 (May 29, 1989). See also Glen Craney, *Language v. The Law*, 16 Barristers at 20 (Winter 1989-90); Susan Garland, *Hispanic Court Cases: The Verdict is All in the Translation*, Christian Science Monitor 23 (Dec. 7, 1981).

2. Sanders, Time at 65.

3. Id. The Spanish word "kilo" can be translated into English as either "kilogram" or "cent." Which word is the better translation depends on the dialect of the speaker and the context of the statement. First, the word "kilo" is commonly used to mean "cent" among Cuban speakers of Spanish such as the defendant. Next, the context of the situation clearly indicates that the speaker was using the word to mean "cent," not "kilogram." Rosa Olivera, telephone interview (Dec. 3, 1992). Rosa Olivera is a federally certified interpreter.

4. In fact, drug dealers generally do not use the word "kilo" when they are referring to kilograms of cocaine. Instead, they will replace the word "kilo" with "shirt," "girl," etc., so that their words, if tape recorded, cannot be used against them. The defendant's use of the word "kilo" to mean "kilogram" should have made an experienced interpreter suspicious. Daniel Sherr, telephone interview (March 1, 1992). Daniel Sherr has been a federally certified interpreter since 1985.

5. The discrepancy was discovered when a more experienced interpreter heard the original recording of the defendant's statement. Sanders, Time at 65. If the same error had occurred during an interpretation of the defendant's testimony, rather than a translation of a tape recorded conversation, it probably never would have been discovered unless another interpreter was present.

6. See Part III.C.

an imprecise process,[7] and often the result of this imprecision may be an unfair trial for the non-English speaking defendant.

When a defendant testifies in a criminal case his testimony is critically important to the jury's determination of his guilt or innocence.[8] The first noticeable difficulty in the present system of court interpretation is that non-English speaking defendants are not judged on their own words. The words attributed to the defendant are those of the interpreter. No matter how accurate the interpretation is, the words are not the defendant's, nor is the style, the syntax, or the emotion.[9] Furthermore, some words are culturally specific and, therefore, are incapable of being translated.[10] Perfect interpretations do not exist, as no interpretation will convey precisely the same meaning as the original testimony. While juries should not attribute to the defendant the exact wording of the interpretation and the emotion expressed by the interpreter, they typically do just that.[11] In addition, American juries often are biased against non-English speaking defendants; therefore, these defendants are disadvantaged from the outset of the case.[12] Given that juries often determine the defendant's guilt or innocence based on small nuances of language or slight variations in emotion, how can it be fair for the defendant to be judged on the words chosen and the emotion expressed by the interpreter?

Although on a conceptual level it may be unfair to judge the defendant on someone else's words, which admittedly will not be an exact duplication of his original statement, it would be much more unfair to deny the defendant the use of an interpreter to exercise his constitutional rights to testify and confront witnesses.[13] Therefore, a certain degree of imprecision and inaccuracy is inherent in the system of court interpretation and must be accepted in order to guarantee the defend-

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7. Susan Berk-Seligson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process* 2 (Univ. of Chicago, 1990).

8. This Note addresses problems with interpretation of the testimony of both defendants and witnesses. It will illustrate these problems by using the example of the interpretation of the defendant's testimony. All of the problems and solutions relating to defendants' testimony also can be applied to the interpretation of witnesses' testimony.

9. The skills of an interpreter in these areas are difficult to measure due to the subjective nature of evaluating what is the equivalent register or style from one language to another. The job for the interpreter is to lessen these differences between the two languages and to make the interpretation as comparable to the original statement as possible.

10. For an example of the problems that an untranslatable word can cause for court interpreters, see the movie *The Gods Must Be Crazy*, Twentieth Century Fox (1984), in which the defendant's language had no word equivalent to the word "steal."

11. Berk-Seligson, *The Bilingual Courtroom* at 194-95.

12. See Michael A. Carranza and Ellen B. Ryan, *Evaluative Reactions of Bilingual Anglo and Mexican American Adolescents Toward Speakers of English and Spanish, Linguistics: An International Review* 83 (Dec. 15, 1975); Berk-Seligson, *The Bilingual Courtroom* at 146-47.

13. See Part II.B.

ant his constitutional rights. In an ideal world language barriers between the defendant and the judge or jury would not exist. But given the large number of ethnic groups in the United States that communicate primarily in languages other than English[14] and the constant influx of non-English speaking immigrants, this problem will not disappear and must be ameliorated as much as possible in order to guarantee due process for non-English speaking defendants.

While the United States criminal justice system is based on the concept of ensuring the greatest possible fairness to defendants, the role of the court interpreter as it pertains to fairness has long been neglected. Given that the court interpreter is the critical link between the non-English speaking defendant and the jury, such a defendant cannot be tried fairly without a competent interpreter. For a number of reasons, courts, left on their own, generally have not protected sufficiently the defendant's right to a competent interpreter.

This Note analyzes the deficiencies, both practical and conceptual, of the present system of court interpretation in the state and federal court systems. Part II examines the statutory and constitutional bases for the right to a court interpreter. Part III focuses on the unfairness of the present system to non-English speaking defendants. Part IV creates a conceptual framework for examining court interpretation by drawing an analogy between hearsay and court interpretation, then applies the conceptual framework to the problem by analyzing what safeguards should be incorporated into the system based on how court interpretation might qualify as a hearsay exception. Finally, Part V proposes a number of reforms designed to lessen the unfairness to the non-English speaking defendant.

II. RIGHT TO A QUALIFIED INTERPRETER

A. *The Statutory Right*

1. The State Court System

Most state courts recognize a right to an interpreter for non-English speaking defendants in criminal cases.[15] In some states this right is protected by a provision in the state constitution.[16] In other states it is

14. Over 10% of the United States population speak a language other than English in their homes. Bill Piatt, *¿Only English?* 28 (New Mexico, 1990).

15. Berk-Seligson, *The Bilingual Courtroom* at 219-22 (cited in note 7). The right to an interpreter in civil cases varies widely from state to state and is not addressed by this Note.

16. The constitutions of New Mexico and California, for example, have provisions that guarantee the right to an interpreter for non-English speaking defendants in criminal cases. N.M. Const., Art. II, § 14; Cal. Const., Art. I, § 14.

protected by statute[17] or administrative or judicial regulation.[18] The extent to which the defendant is ensured the right to an interpreter varies widely from state to state. Certain states only require that an interpreter be appointed "when necessary,"[19] while others explicitly define when an interpreter is to be used.[20]

Most states that recognize the right to an interpreter provide little guidance in the process of selecting a qualified interpreter.[21] The task of determining who may serve as an interpreter and when an interpreter is needed is left to the discretion of the trial court judge, and the frequent result is the appointment of an incompetent interpreter or no interpreter at all.

For the defendant's right to an interpreter to be protected, the judge must recognize the need for an interpreter. Yet a judge often will have difficulty determining whether the defendant's ability to speak English warrants the appointment of an interpreter. Some defendants have the ability to converse in very basic English but may not have the proficiency necessary to understand the level of English used at a trial.[22] Some judges, however, have ruled that no interpreter is necessary if someone has overheard the defendant speaking English.[23] Judges generally are not equipped to determine whether a given defendant needs an interpreter.[24] Also, when the defendant speaks some English,

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17. See, for example, Kan. Stat. Ann. § 75-4351 (1989).

18. For example, California law states:

> [W]hen a witness is incapable of hearing or understanding the English language or is incapable of expressing himself or herself in the English language so as to be understood directly by counsel, court, and jury, an interpreter whom he or she can understand and who can understand him or her shall be sworn to interpret for him or her.

Cal. Rule Evid. 752(a).

19. See, for example, Ill. Ann. Stat. ch. 110 § 8-1401 (Smith-Hurd, 1984), which states that "[i]nterpreters may be sworn truly to interpret, when necessary."

20. For example, Michigan law states:

> If an accused person is about to be examined or tried and it appears to the judge that the person is incapable of adequately understanding the charge or presenting a defense to the charge because of lack of ability to understand or speak the English language . . . the judge shall appoint a qualified person to act as an interpreter.

Mich. Comp. Laws § 775.19a (West Supp., 1992).

21. With the exception of the few states that require interpreters to be certified, no state provides judges with criteria by which to evaluate an interpreter other than stating that he must be "qualified" or "competent."

22. A study conducted for the Director of the Administrative Office of the United States Courts has concluded that 14 years of education are necessary to understand much of what happens in a criminal trial. Therefore, defendants whose English consists of only basic conversation skills likely will not understand enough of the proceedings to meaningfully defend themselves. Piatt, *¿Only English?* at 84 (cited in note 14).

23. See, for example, *Guerrero v. Harris*, 461 F. Supp. 583 (S.D.N.Y. 1978). Note, however, that this case was decided prior to the enactment of the Federal Court Interpreters Act. See also *State v. Topete*, 221 Neb. 771, 380 N.W. 2d 635 (1986).

24. Berk-Seligson, *The Bilingual Courtroom* at 35 (cited in note 7).

judges may have little incentive to appoint an interpreter because the presence of the interpreter lengthens the trial. Furthermore, some judges are reluctant to authorize payment for interpreters who have to travel in from other states.[25]

2. The Federal Court System

The right to a court interpreter in federal criminal cases is more clearly defined than in state court cases. In 1978, Congress passed the Federal Court Interpreters Act (the Act),[26] which guarantees the right to an interpreter in any action initiated by the United States in a United States district court for parties or witnesses who have trouble understanding judicial proceedings because they primarily speak a language other than English.[27] Under the Act, the Director of the Administrative Office of the United States Courts must prescribe, determine, and certify the qualifications of persons who may serve as interpreters.[28] A certified court interpreter must be used unless one is not reasonably available.[29] When a certified interpreter is not reasonably available, an otherwise competent interpreter must be appointed.[30]

An interpreter receives certification in a particular language by passing the Federal Court Interpreters Examination for that language.[31] Until recently, certification was available only for Spanish.[32] Recently, however, certification has been added for Haitian Creole and Navajo.[33] The certification examination consists of an oral and a written portion

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25. Sherr, telephone interview (cited in note 4).

26. 28 U.S.C. § 1827 (1988).

27. Id. § 1827(d). The Act states:

> 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 competent 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 . . . 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.

Id.

The Act also applies to hearing-impaired defendants and witnesses. Although this Note does not specifically address problems related to court interpretation for the hearing impaired, it involves many of the same problems, and to that extent, this Note also is applicable to them.

28. Id.

29. Id.

30. Id.

31. Berk-Seligson, *The Bilingual Courtroom* at 36 (cited in note 7).

32. Administrative Office of the United States Courts Informational Packet at 2 (1992) ("*Informational Packet*").

33. Id.

and tests the interpreter's ability in both English[34] and the foreign language.[35] The examination is difficult even for experienced interpreters; accordingly, only a small percentage of those who take the examination each year receive certification.[36] By any reasonable measure, federally certified interpreters are competent and represent a level of expertise all court interpreters ideally should attain.

This does not mean, however, that federally certified interpreters are perfect. Perfection in the field of court interpretation is not a realistic possibility. During the oral portion of the examination, which lasts forty-five minutes, the interpreter may commit approximately forty-five to fifty errors and still pass.[37] Therefore, the interpreter can achieve only about eighty percent accuracy and still pass the oral examination.[38] Demanding only eighty percent accuracy is necessary in order to certify enough interpreters; if one-hundred percent accuracy were demanded for certification, in all likelihood no interpreters would be certified.[39] Therefore, given the imprecision that is inherent in the system, allowing interpreters to make this number of errors on the test is necessary to make the system workable, but it highlights the need for checks on the work of all court interpreters.[40]

While the Act is a vast improvement over previous legislation and federal case law, not to mention any current legislation and case law in the state system, it is not the ideal protector of the linguistically disadvantaged defendant. Many pitfalls still exist that can prevent the non-English speaking defendant from having a competent interpreter.

First, as in state courts, the judge initially must recognize that the defendant needs an interpreter. Unlike the laws in many states, the provisions of the Federal Court Interpreters Act require an interpreter not only when the defendant speaks no English at all, but also when not having an interpreter would limit the ability of the defendant to understand the proceedings.[41] Although this provision grants the right to an interpreter to those who speak some English but are not completely proficient, the problem of determining that the defendant has

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34. For many Spanish-language interpreters, the English section of the examination is the more difficult one to pass. This is because the Spanish portion tests vocabulary that is less difficult. Berk-Seligson, *The Bilingual Courtroom* at 37 (cited in note 7).

35. For a description of the logistics of the exam, see David Mintz, *Taking the Oral Spanish Interpreters' Federal Certification Exam*, Gotham Translator 5, 5 (Dec. 1991).

36. After eight administrations of the Spanish certification examination, less than 4% (438 out of 11,267) of those who had taken the test had passed it. In addition, many of those who had passed it had failed in previous attempts. *Informational Packet* at 5.

37. Berk-Seligson, *The Bilingual Courtroom* at 39-40.

38. Id.

39. See id.

40. See Parts III.C., V.C.

41. 28 U.S.C. § 1827(d).

difficulty speaking English, especially when he has been living in this country for some time, still exists. Again, disincentives for the judge to appoint an interpreter in borderline cases remain because of the difficulties of delay and expense that using an interpreter may produce. However, one incentive for appointing an interpreter when one is requested does exist. Judges sometimes appoint an interpreter as a precautionary measure so that the defendant will not be able to appeal the case on the grounds that an interpreter was denied to him.[42]

Presently, the Administrative Office certifies interpreters in only three languages.[43] In cases involving the interpretation of a language that does not have a certification procedure, the judge is required to appoint a "competent" interpreter.[44] Requiring judges to appoint competent, but not certified, interpreters offers no meaningful safeguard to ensure that the defendant will receive a qualified interpreter. Legislators and commentators alike have supported expanding certification to additional languages.[45] However, the Administrative Office has found that the cost of developing a certification procedure for infrequently used languages is prohibitive.[46] This policy, however, results in less protection of the constitutional rights of defendants who speak less common languages.

Even if the judge recognizes the need for an interpreter, in a case involving a language for which there are certified interpreters, the judge must appoint a certified interpreter only when one is reasonably available.[47] Courts have interpreted the phrase "reasonably available" in a number of ways. Some judges will use a certified interpreter only if one

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42. Sherr, telephone interview (cited in note 4).

43. Certification is available in Spanish, Haitian Creole, and Navajo. Director of the Administrative Office of the United States Courts, *Interim Regulations—Implementing The Court Interpreters Amendments Act of 1988*, Appendix 1 at 9.

44. 28 U.S.C. § 1827(d) (1988).

45. Craney, 16 Barristers at 22 (cited in note 1). Senator Orrin Hatch recently introduced a bill that would have expanded certification procedures to Italian, Chinese, Japanese, French, Korean, Portuguese, Arabic, and American Sign Language as well as developing criteria for judging interpreters in languages for which no certification procedure exists. The legislation did not pass. Id.

46. Of the 66,785 cases in the United States District Courts that required interpreters, 62,269 (over 90%) were in Spanish, Haitian Creole, or Navajo. Sixty-seven other languages were used in federal courts less than one-hundred times. The Director of the Administrative Office stated:

> [T]he Board would opt to have every interpreter of each of the over 60 languages used in the federal courts every year, no matter how infrequently, certified by a criterion-referenced test in order to establish each interpreter's competence . . . were money no problem. Unfortunately, funds of such magnitude and experts who could develop and administer such tests will never be available to the court system.

Informational Packet at 2-3 (cited in note 32).

47. 28 U.S.C. § 1827(d) (1988).

is conveniently nearby or can report to the courthouse immediately.[48] Others, however, will have certified interpreters flown in for a particular case when no certified interpreters are available locally.[49] This differing interpretation of the language of the Act results in disparate treatment for linguistically disadvantaged defendants depending on which judge is presiding over the defendant's case and how far away a certified interpreter may be.

All of these pitfalls point to one conclusion: even under the Federal Court Interpreters Act, the right of a non-English speaking defendant to a competent interpreter is not always protected adequately. The right to a competent interpreter is fully protected only when: 1) the judge recognizes the need for an interpreter; 2) the defendant speaks a language for which there is a certification test; and 3) a certified interpreter is reasonably available.

B. The Constitutional Right

The United States Supreme Court never has addressed whether a constitutional right to an interpreter in either civil or criminal cases exists.[50] Most lower courts have held, however, that a constitutional right to an interpreter does exist in criminal trials.[51] The Second Circuit Court of Appeals firmly established this view in *United States ex rel. Negron v. New York*.[52] In *Negron*, a Puerto Rican indigent defendant who did not speak English was tried for murder.[53] A court-appointed interpreter translated the defendant's testimony into English for the court, but the interpreter was unavailable to interpret the testimony of the English speaking witnesses for the benefit of the defendant.[54] The defendant, therefore, was unable to understand most of the testimony against him, and could only confer with his lawyer during recesses.[55]

The Second Circuit ruled that denying the defendant an interpreter for the testimony against him violated his Sixth Amendment right to confront adverse witnesses.[56] It further held that when a de-

48. Sherr, telephone interview (cited in note 4).

49. Id.

50. Piatt, *¿Only English?* at 80 (cited in note 14).

51. Id. at 82.

52. 434 F.2d 386 (2d Cir. 1970).

53. Id. at 387-88.

54. Id. at 388. During two recesses in the four day trial, the interpreter spent 10 to 20 minutes summarizing the testimony of the English speaking witnesses for the defendant. Id.

55. Id.

56. Id. at 389. The court went on to state:

> The right that was denied Negron [is] even more consequential than the right of confrontation. Considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial . . . unless by his conduct he waives that right.

fendant has difficulty understanding English the court must inform the defendant that he has a right to a competent interpreter.[57] Without an interpreter, defendant could not receive a fair trial because the proceedings were nothing but a "babble of voices" to him.[58]

Recognition of a constitutional right to an interpreter has done little to eliminate the problem of unfairness in the system of court interpretation. The same pitfalls exist for the constitutional right as with the statutory right. That is, the protection is meaningful only if the judge appoints an interpreter when one is needed and appoints only competent interpreters. For the reasons discussed below,[59] judges frequently fail to perform these two tasks adequately.

III. Unfairness to the Non-English Speaking Defendant Under the Present System

A. Conflicting Goals for Judges

In most cases, the trial court judge has discretion in his choice of court interpreter and in determining when one is needed. When faced with the need for a court interpreter, judges will have conflicting goals. On the one hand, judges are responsible for a timely disposition of the trial. On the other, they must select a competent court interpreter in order to protect the defendant's constitutional and statutory rights.[60]

One source of the problem is that many courts have a backlog of cases. In most jurisdictions court interpreters generally are not chosen until the trial is about to begin,[61] and a finding that a particular interpreter is incompetent may delay the trial for an extended period of time. Any delay at the beginning of the trial will back up the docket even further.

For many judges, however, the problem of delaying the trial is secondary to that of paying an interpreter. Bringing in an interpreter from another jurisdiction is costly, as is paying his expenses for the duration of the trial, especially if the trial is lengthy. Some judges do not consider these expenditures a good use of taxpayers' money.[62] Not surprisingly, then, when the competence of the interpreter is questionable, the

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Id.

57. Id. at 391.

58. Id. at 388. The court stated: "Particularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy." Id. at 390.

59. See Part III.A, B.

60. See Part II.A, B.

61. This is not true, however, in districts that have an interpreters office or some person charged with hiring and dispatching interpreters. Sherr, telephone interview (cited in 4).

62. Id.

judge may allow the trial to go forward without the benefit of a competent interpreter rather than delay the trial and incur additional expense.

B. The Judge's Inability to Determine Who Is Qualified

Perhaps the biggest problem in the present system of allowing a judge to choose the interpreter is the assumption that a judge can accurately determine the competency of a given interpreter.[63] A judge who is not fluent in the language to be interpreted[64] cannot independently evaluate the interpreter's fluency, and he must rely on the individual's representations of her ability and experience. The interpreter's assessment may be misleading because the interpreter may exaggerate her abilities in order to get the job.

As difficult as it is for a judge to determine whether an interpreter is linguistically competent, that task is easy compared to analyzing whether the interpreter has the other skills necessary to be a good interpreter. Although the interpreter can be questioned about the number of times she has been a court interpreter, this information, even if it demonstrates that she has experience, will not guarantee competency since interpreters tend to repeat the same crucial mistakes.[65] Even during an ongoing trial, when the defense objects to the interpreter's work due to mistakes in interpretation or unprofessional conduct during the trial, the judge typically has little basis for evaluating what is or is not appropriate conduct for an interpreter.

C. Lack of Checks on the Interpreter's Work

When a non-English speaking defendant testifies, the court reporter takes down the interpreter's words, not the defendant's. For all practical purposes, therefore, the defendant's testimony is not part of the case because it is not written into the record. The interpreter's words are considered to be the defendant's testimony, and the defendant is held to have said whatever the interpreter said.[66] If the interpreter makes an error and if that error affects the outcome of the trial,

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63. This problem is not always present, however, because in many districts an interpreters office handles all requests for interpreters and does all of the initial screening of interpreters. But even in districts where such an office exists, the chief interpreter is often no better ahle to judge an interpreter's skills if that interpreter interprets a language not known by the chief interpreter.

64. When the judge does speak the language to be interpreted, he can determine not only whether the interpreter is competent, but he also can act as a check on the interpreter's work.

65. Sherr, telephone interview. If an interpreter's mistakes are not corrected by another interpreter, she may remain unaware that she is making mistakes. No amount of experience will correct this.

66. Piatt, *¿Only English?* at 86-87 (cited in note 14).

the defendant cannot correct the error by showing what he actually said since his original testimony is not in the record.

In addition, jurors who speak the language of the non-English speaking defendant and might serve as a useful check on the interpreter are ordered not to listen to the defendant, but rather to pay attention to the words of the interpreter. Bilingual potential jurors may even be excluded by the prosecutor because of their language ability.[67] Ironically, jurors are told not to judge the defendant on his own words, but rather, on the words of the interpreter that may or may not be correct.[68] In addition, judges generally have not been receptive to jurors who wish to correct an interpretation.[69]

Typically, errors in interpretation are corrected only when another interpreter or other courtroom personnel fluent in that language are present. Under the current system, the work of the judge and the attorneys is subject to appellate scrutiny, but the work of the court interpreter is not. This lack of review is especially troublesome given the imprecise and difficult nature of interpretation. Foreign language interpretation is one of the most difficult tasks a human being can perform.[70] Even the best and most experienced interpreters inevitably make mistakes. These mistakes may or may not have an effect on the outcome of the trial, but given the inevitability of errors, appellate scrutiny of the interpretation is a necessary component of fairness to the non-English speaking defendant.

D. Other Courtroom Players Are Judged Independently

In cases involving noncertified interpreters, the interpreter's competence is determined by the trial court judge. In contrast, the competency of all other actors in the courtroom setting is determined independently. An attorney, for example, is deemed competent after passing the state bar and becoming certified. Therefore, attorney competence is determined objectively and independently of a particular case. The benefit of this independent evaluation is obvious; the parties to the case can be assured of competent attorneys irrespective of the needs of the case and of the presiding judge.

An even greater need for independent determination of competence exists for court interpreters than for attorneys. If no independent determination of an attorney's competence were made, the judge still would

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67. See *Hernandez v. New York*, 111 S.Ct. 1859 (1991).

68. See id. at 1876-77 (Stevens dissenting).

69. See id. (Stevens dissenting).

70. A. Samuel Adelo, *Judiciary Interpreting and Translating: A Demanding Task for Professionals* at 2 (on file with author).

be able to determine competence accurately. The judge has expertise in law and is usually himself an attorney, so he would have some foundation on which to evaluate an attorney's competence. If he erroneously ruled an attorney competent, he would be able to identify any problems and rectify them during the trial. In addition, he would have great incentive to allow only a competent attorney to try a case because appellate courts would quickly order a retrial of a case if the record demonstrated that the attorney was incompetent. In short, even without independent evaluation of an attorney's competence, judges have the expertise and incentive to safeguard the defendant's right to a competent attorney and the ability to identify and correct problems if they occur.

Judges, however, cannot objectively assess the competence of court interpreters and, therefore, cannot meaningfully protect the defendant's right to a competent court interpreter. Judges have no basis for choosing competent interpreters;[71] they are not themselves court interpreters nor do they usually have any expertise in the area. Furthermore, little incentive exists for judges to appoint competent court interpreters.[72] Also, if the judge appoints an incompetent interpreter, discovery of the interpreter's incompetence is unlikely.[73] Given the wide discretion that trial court judges have in choosing an interpreter and the fact that no record of the testimony of the non-English speaking defendant exists, the likelihood that a case will be retried because of an incompetent interpreter is remote. In addition, if the interpreter does make a mistake, the judge most likely will be unaware of it and unable to correct it. In short, the trial court judge may be unable to protect the defendant's interests. Therefore, taking the choice out of the hands of the judge and giving it to an independent body that has the ability to objectively analyze the competence of court interpreters is imperative.[74]

IV. A Conceptual Framework for Determining Whether Someone is Qualified to Be an Interpreter

Establishing that a right to an interpreter exists leaves one with the questions: who is qualified to be an interpreter and what sorts of

71. See Part III.B.
72. See Part III.A.
73. See Part III.C.
74. In districts that have an interpreters office, this problem is not as pressing because each interpreter is evaluated by a disinterested party independent of the courtroom setting. The chief interpreter does have some incentive to choose a marginally qualified interpreter when a competent interpreter is unavailable in that it is her job to find an interpreter, but any such incentive is even less than whatever incentives exist for a judge. Moreover, the chief interpreter will understand the importance of choosing a competent interpreter because she is an interpreter herself.

standards must she meet? In cases in which no certified interpreter is available or in which one is not required, some standards for choosing a competent, noncertified interpreter must exist. Certainly a judge cannot indiscriminately choose just anyone to interpret. At the very least, the interpreter must have a solid grounding in both languages. But being bilingual is not enough; it does not qualify someone to be a court interpreter any more than knowing how to take shorthand qualifies someone to be a court reporter. An interpreter must fully understand her role in the trial process and use accepted methods of interpretation in order for the defendant to receive a fair trial. A framework should be developed to determine what standards must be used in determining whether a court interpreter is competent. This framework should address the conceptual difficulties involved in court interpretation and the underlying values that the court should protect.

A. An Analogy Between Hearsay and Court Interpretation

The general rule against hearsay was developed because of the "intrinsic weakness" of such evidence.[75] In a normal courtroom situation in which one person wishes to tell the court what a third person said, such testimony will be excluded as hearsay unless the testimony fits into one of the many hearsay exceptions. When a court interpreter testifies as to what a non-English speaking defendant said, a hearsay objection will not be made, but in a very real sense, testimony made through a court interpreter is akin to hearsay.

Hearsay statements are excluded because they are not made under ideal conditions. They are made outside the courtroom, not under oath, and without the benefit of cross-examination.[76] Statements made through a court interpreter, on the other hand, are made in the courtroom, by a witness who is under oath, and who may then be cross-examined. Therefore, court interpretation appears to be quite different than hearsay.

However, when the dynamics involved in court interpretation are examined, one will conclude that statements made through a court interpreter also should be suspect, just as hearsay is suspect. While the non-English speaking witness must take an oath, this oath is taken through the court interpreter. If the link from the court interpreter to the witness is faulty, the purpose of the oath is not served.[77] In effect, the witness will not be under oath if the interpretation is faulty. Simi-

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75. Edward W. Cleary, *McCormick on Evidence* § 245 at 728 (West, 3d ed. 1984).

76. Id. at 726-28.

77. For a description of the inadequacy of an oath given by an unqualified interpreter, see Piatt, *¿Only English?* at 79 (cited in note 14).

larly, an attorney's ability to cross-examine the witness regarding his testimony is contingent on the existence of a substantial certainty that the interpreter is properly interpreting the defendant's testimony as well as the attorney's questions.

Instead of merely stating that court interpretation is hearsay that should nonetheless fall within a hearsay exception per se, courts should analyze court interpretation as hearsay and treat it as an exception only when the values underlying the hearsay rule dictate that it should be treated as such. This does not mean, as one might suspect, that a court always should treat interpretation as hearsay or a hearsay exception. Rather, by examining the conditions surrounding each particular instance in which court interpretation is to be used the court should determine whether to treat the interpretation as an exception.

The unreliability of hearsay evidence has been attributed to four testimonial infirmities: ambiguity, insincerity, faulty perception, and erroneous memory.[78] When these infirmities exist, testimony generally is excluded as hearsay.[79] In situations in which one or more of the infirmities is overcome, a hearsay exception is created.[80] Therefore, in order to analyze court interpretation as hearsay, one must determine when it overcomes these infirmities and therefore can be considered a hearsay exception.

B. Applying the Underlying Values of the Hearsay Rule to Court Interpretation

The first two infirmities, ambiguity and insincerity, relate to whether the language conveys the message accurately.[81] If the court interpreter is competent, these infirmities are not present during court interpretation any more than during other testimony. The problems associated with ambiguity and insincerity in a normal hearsay context are attributed to the fact that the declarant cannot be cross-examined in order to expose the ambiguity or insincerity. If the court interpreter is competent, the declarant can be cross-examined and the ambiguity can be clarified through the interpreter. If, however, the interpreter is incompetent, no meaningful cross-examination can occur to clear up the ambiguity. Therefore, in order to overcome the first two infirmities, a competent interpreter must be used.

The next infirmity, perception, relates to whether the witness accu-

78. Laurence H. Tribe, *Triangulating Hearsay*, 87 Harv. L. Rev. 957, 958 (1974).
79. Id.
80. Id. at 961.
81. Cleary, *McCormick on Evidence* § 245 at 726 (cited in note 75).

rately perceived what he describes.[82] Typically, witnesses who have an interest in the case at hand cannot overcome this infirmity because that interest may have swayed their perception of the event. Court interpreters, therefore, should not have any interest in the case for which they serve as interpreter. Otherwise, the court risks inaccuracy in interpretation, whether conscious or subconscious, due to the court interpreter's interest. Therefore, excluding the defendant's friends, enemies, relatives, and attorney from acting as an interpreter is necessary. Only by using disinterested parties can the court ensure that the interpreter is not allowing his personal interest to alter his interpretation. In addition, it is essential that the interpreter accurately perceive small differences in language in order to overcome this infirmity.

The final infirmity, erroneous memory, relates to whether the witness accurately remembers his perception of the event.[83] The court interpreter does not have the usual obstacle in remembering the original event; the witness's statements occur only seconds before the interpreter has to relate them to the court. In that sense, this infirmity does not pose the usual difficulty. Reproduction of the non-English speaking defendant's testimony, however, requires tremendous accuracy. Certainly not everyone could reproduce a lengthy statement made by another person, even if the statement was made only a few moments before.[84] Therefore, if the court interpreter's memory is not very accurate, this infirmity will not be overcome. The Federal Court Interpreters Examination tests the accuracy of the applicant's sample interpretation. If the applicant does not have an accurate memory, she will not pass the examination. Therefore, court interpreters can overcome the infirmity of erroneous memory by passing the Federal Court Interpreters Examination or any similar examination that tests the interpreter's memory.

In short, given the analogy between court interpretation and hearsay, the four infirmities of hearsay suggest that a court interpreter must meet the following criteria: 1) she must be competent; 2) she must be a disinterested party; and 3) she must have an accurate memory verified by some type of examination. These requirements should not be applied retrospectively by having the appellate court determine whether these conditions were met. The hearsay rule is applied so that only in situations in which the infirmities can be shown not to exist *beforehand* will an exception be made; therefore, only when the court interpreter

82. Id.

83. Id.

84. A quick round of the children's game "telephone" reveals that many people have trouble accurately restating another person's statement made moments before. The restatement takes on added complexity when the original statement must be interpreted into another language.

satisfies these conditions before the trial should she be allowed to interpret.

V. Proposals for Reform

A. *Extension of the Federal Court Interpreters Act to State Courts*

The Federal Court Interpreters Act only protects the rights of defendants in federal cases. While certain states with large non-English speaking populations have enacted laws similar to the Act setting up certification procedures,[85] most states merely require that the court appoint a competent interpreter when necessary. States with small non-English speaking populations have little incentive to spend the large amount of resources that are necessary to certify interpreters for the small number of cases that arise each year demanding interpreters. No lobbying groups exist to advocate such legislation, and most legislators in these states are unaware that this area is problematic.

Defendants in state courts, however, are as deserving of the services of competent interpreters as are defendants in federal courts. The Federal Court Interpreters Act was adopted in part as a response to the *Negron* decision establishing the constitutional right to an interpreter.[86] The Act attempted to define what type of interpreter is qualified and when an interpreter must be provided to comply with the Constitution.[87] States that do not enact similar legislation are not necessarily violating non-English speaking defendants' constitutional rights. However, the Act does depict what Congress believes those rights to entail.

Congress is acting inconsistently by protecting the constitutional rights of federal court defendants while neglecting the rights of state court defendants. The application of the Act only to federal courts can be explained by the traditional barrier between the federal and state court systems. States create laws for their own systems because each state has its own needs and traditions. The federal government generally does not impose its own laws on state courts.

This distinction, however, should not apply in this situation. An individual state will have difficulty affording the cost of a certification program for court interpreters. But if one program covered all states and the federal court systems, all courts could more easily afford the service. Designing and administering the examination is the largest ex-

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85. Four states have developed certification examinations: California, New Jersey, New Mexico, and Washington. *Informational Packet* at 5 (cited in note 32).

86. H.R. Rep. No. 95-1687, 95th Cong., 2d Sess. 3 (1978), in 1978 U.S.C.C.A.N. Legislative History of the Court Interpreters Act at 4652 (1978) (calling *Negron* "an original impetus for [the] legislation").

87. Id.

pense of a certification program. The federal government currently administers the examination; therefore, if states utilized federally certified interpreters, this would add no additional cost to the federal certification program.

In a sense, the distinction here between the federal and state court systems is artificial. The federal courts in a state will have one set of interpreters, and the state courts in the same state will have a different set of interpreters.[88] Since many of the interpreters only work part-time,[89] resources are wasted. Both courts could share the use of the most competent interpreters. In doing so, states could elevate their standard of court interpretation to the standard present in federal courts.

One problem with this reform is that it may be financially impractical for many states. With the exception of California, no state pays the interpreters for its state court system as much as the amount paid to federally certified interpreters. Many states do not perceive the evil of using uncertified interpreters as so egregious that it warrants increasing the pay scale for interpreters. Therefore, this reform will not occur without the action of the federal government. But through the use of combined resources, state and federal courts could make more efficient use of the limited number of competent interpreters.[90]

B. Some Form of Certification for Interpreters of All Languages

Even in jurisdictions that certify interpreters, many defendants will not have a certified interpreter because they do not speak a language for which a certification exam has been established. For these defendants, therefore, no protection exists from the possibility that the judge will appoint an incompetent interpreter. The rationale for not having certification in all languages is that the cost would be too great to develop and administer a test in languages for which an interpreter is rarely needed. An argument, however, can be made that many languages for which no certification procedure exists, such as Cantonese and Korean, are used frequently enough to warrant adding them to the list.[91]

On the other hand, creating and administering a test for a majority of languages is not practical. However, certification still should exist for

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88. Sherr, telephone interview (cited in note 4).

89. Id.

90. One option is to let the defendant pay for a federally certified interpreter to be brought in.

91. In 1990, 711 cases in the United States District Courts required the use of a Cantonese interpreter, and 450 cases required the use of a Korean interpreter. Administrative Office of the U.S. Courts, *Director's 1990 Annual Report to the Judicial Conference and the Congress.*

interpreters of those languages. A certification procedure could be developed that does not directly test the interpreting skills in that particular language but does determine which interpreters have the general skills necessary to be competent interpreters. For instance, the applicants could take an examination testing their knowledge of general principles of court interpretation. This sort of test would eliminate many incompetent interpreters whom judges otherwise might have allowed to interpret. In addition, since all interpreters should have a solid grounding in English, they should take the English portion of the Federal Court Interpreters Examination. This procedure would eliminate any applicants whose English skills are not sufficient to qualify them as court interpreters. Unlike some of the other reforms, this proposal will be the most practical because it will involve no additional cost to the government.

C. Checks on the Work of Interpreters

As discussed above, the work of court interpreters is highly imprecise, and mistakes occur quite frequently.[92] While mistakes cannot be eliminated, fairness to the defendant dictates that their effect on the outcome should be diminished to the greatest extent possible. Mechanisms by which mistakes in an interpreter's work can be corrected should be implemented.

Two types of checks would be useful. First, a second interpreter should be present in the courtroom to listen for mistakes in all interpretation of testimony.[93] If the second interpreter discovers errors, she should alert the judge and jury to them, and the record should be corrected. The principal problem with instituting this type of check is that finding one qualified interpreter often is difficult and, therefore, finding a second interpreter to check the first one's work will be highly burdensome. Another major problem is the added expense in paying for a second interpreter.

In addition, a second interpreter may not catch all types of errors. Mistakes made by interpreters can be classified into two types: inadvertent and professional. Inadvertent errors occur not when the interpreter has trouble with the statement to be interpreted, but rather when the interpreter inadvertently substitutes one word or phrase for another or omits a word or phrase entirely. Inadvertent errors are easily correctable with the aid of a second interpreter.

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92. See notes 9-10 and accompanying text.

93. Many jurisdictions already use two interpreters per trial. The purpose of the second interpreter in these jurisditions, however, is to keep the interpreter fresh by alternating interpreters, not to provide a check on the interpreter's work.

The second type of error, professional, is much more difficult to correct. This class of errors includes dialect problems,[94] technical words, and other difficult interpretations. For this class of errors, the errors made by one interpreter very likely would be made, and therefore not caught, by a second interpreter. But having a second interpreter present for consultation would at least increase the chances that an interpreter in the courtroom would know the proper interpretation of a particular word or phrase.

Finally, if the court interpreter's work is corrected frequently during a trial, the jury may lose confidence in her work. This loss of confidence could result in speculation by the jury as to what the defendant *really* said. Obviously this situation is undesirable, but its negative effects would be outweighed by the increased accuracy in the interpretation that would result by having a second interpreter present in the courtroom as a check on the first interpreter.

A second type of check is to tape-record all the testimony of the non-English speaking defendant and any other non-English speaking witnesses. If the defendant were convicted due to an erroneous interpretation, he could appeal his conviction by comparing the interpretation with the original tape-recorded testimony. This type of check would make possible a meaningful appellate review of the interpreter's work. But one problem with allowing appeals based on tape-recorded testimony would be that appellate courts might be overloaded with appeals based on erroneous interpretation. Since perfect interpretations do not exist, the defendant could always point to a part of the interpretation and argue that it should have been interpreted in a different manner. Therefore, the standard of error for appeals based on erroneous interpretation would have to be very high. Only when a defendant could show that the interpretation was clearly in error and only when that error affected the outcome of the case should the appellate court rule for the defendant. Such a high standard of review would deter frivolous appeals but still would ensure that when a significant error did occur the defendant has some recourse.

D. Increased Attention to Attracting Competent People to the Profession

Underlying many of the problems discussed above is the fact that not enough competent court interpreters exist to provide every non-English speaking defendant with a competent interpreter. In part, this problem is due to difficulty in attracting qualified people into the profession. First, to attract more qualified people to become court inter-

94. See, for example, notes 2-6 and accompanying text.

preters, their salaries should be competitive with the salaries of similarly qualified people in the private sector. Second, people who have substantial background in both English and a target language but are not yet competent should be extensively trained to be competent interpreters. To argue that the government should give up trying to reach the ideal of ensuring everyone a competent interpreter just because there are not enough competent interpreters for all cases requiring one is short-sighted. If the government started an aggressive campaign to increase the number of qualified court interpreters, it could make a great deal of progress in eliminating interpreter incompetence. The government could make this progress by supporting, promoting, and expanding successful court interpreter programs in the private sector.

E. An Absolute Prohibition on Interpretation by Interested Parties

In many cases involving non-English speaking defendants, a friend or relative of the defendant, or his attorney, has acted as the interpreter.[95] As stated earlier,[96] interpreters that personally know the defendant or have some interest in the case may have a serious problem in accurately perceiving the defendant's testimony. The interested interpreter's perception may result in an inaccurate interpretation. Therefore, interpretation by interested parties should be prohibited.

VI. CONCLUSION

Court interpretation is inherently imprecise. Congress enacted the Federal Court Interpreters Act to guarantee the right of all defendants to a competent interpreter. While it has improved the equality of court interpretation in the federal system, many problems still exist. Furthermore, the Act has done nothing to improve court interpretation in the state court system.

The reforms proposed by this Note are important steps toward giving the non-English speaking defendant the same fairness and due process as is afforded to English speaking defendants. But the first step in reforming the system of court interpretation is for the judicial system

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95. See generally Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. Rev. 1 (1990); Charles C. Marvel, Annotation: *Disqualification, for Bias, as Interpreter of Testimony*, 6 A.L.R. 4th 158 (1981).

96. See Part IV.B.

to recognize that the role of the court interpreter is central to any concept of fairness in criminal trials of non-English speaking defendants.

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