Criminal Law Practitioner

Volume 2 | Issue 1 Article 4

2014

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Recommended Citation

Miller, Jeffrey Archer (2014) "Interpreting the Court Interpreters Act: A Practical Guide to Protecting the Rights of Non-English Speaking Criminal Defendants," *Criminal Law Practitioner*: Vol. 2 : Iss. 1 , Article 4.
Available at: https://digitalcommons.wcl.american.edu/clp/vol2/iss1/4

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Interpreting the Court Interpreters Act: A Practical Guide to Protecting the Rights of Non-English Speaking Criminal Defendants

by Jeffrey Archer Miller, JD 2010, AU WCL

I. Introduction

This article details the myriad of minefields that attorneys face when they represent non-English speakers, a segment of the United States population that has been growing at an exponential rate. Approximately 24.5 million people in the United States speak English less than "very well,"[1] which is an increase of roughly 6.5 million people over a seven year period.[2] The need for qualified court interpreters is following a similar upward trajectory. Since fiscal year 2000, the number of federal courtroom interpreting events has almost doubled from 190,127 to 357,171.[3] Throughout the 2010 fiscal year, the number of federal court events requiring court interpretation increased 13.8 percent.[4]

Courts, have struggled to come to terms with non-English speakers' inability to comprehend legal proceedings, which poses a challenge to the delivery of justice. Unlike allegations of ineffective assistance of counsel,[5] there is no well-established standard to determine the required effectiveness of courtroom interpretation.[6] The Supreme Court of the United States has never addressed when interpreters must be provided, nor has it opined on what quality of interpretation is required. This article argues that the broad discretion afforded to trial judges—paired with the apparent willingness of appellate judges to place their imprimatur on misguided interpretations of law—has seriously compromised the legal rights of non-English speakers. Because an appeal seeking reversal based on a failure to properly accommodate a non-English speaker's communnication needs faces a steep uphill battle, attorneys representing non-English speaking clients must not only be familiar with relevant case law, but also firmly insist that those rights be respected. It is important that attorneys advocate for proper language

1 *See* Hyron B Shin & Robert A. Kominski, *United States Census Bureau, Language Use in the United States: 2007* at 3 (2010).

2 *See* Hyron B Shin & Robert A. Kominski, *United States Census Bureau, Comparison of the Estimates on Language Use and English-Speaking Ability from the ACS, the C2SS, and Census 2000* at 13 (2008) (observing that according to the Census 2000 Supplemental Survey, approximately 19 million in the United States speak less than "very well").

3 Leonidas Ralph Mecham, *Annual Report of the Director of the Administrative Office of the United States Courts* 13 (2000) (reporting 190,127 district court events using interpreters in fiscal year 2000 and 357,171 events in fiscal year 2010); *see* James C. Duff, *Annual Report of the Director of the Administrative Office of the United States Courts* 37 (2010).

4 *See Annual Report of the Director of the Administrative Office of the United States Courts* (2010). *See generally, United States Bureau of Labor Statistics Occupational Outlook Handbook* (2010-2011) (expecting employment in interpretation and translation services to increase 22 percent between 2008 and 2018—a much faster rate than average employment growth).

5 *See* Strickland v. Washington, 466 U.S. 668 (1984).

6 *See* Michele LaVigne & McCay Vernon, *An Interpreter Isn't Enough: Deafness, Language and Due Process*, 2003 Wis. L. Rev. 843, 889 (2003). This article addresses the rights of non-hearing non-English speaking criminal defendants. The rights of deaf and hard of hearing individuals who use sign language would require an analysis of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, which are beyond the scope of the present article.

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accommodations from initial proceedings, as attorneys are much more likely to succeed if they make these demands for their clients from the outset.

Part II of this article examines the circumstances under which judges are required to provide court-appointed interpreters. In a significant number of cases, appellate courts are extremely resistant to question a trial judge's decision not to provide a courtroom interpreter. As a practical matter, this means that attorneys who represent clients with limited English skills must be pro-active in advocating for their client's right to an interpreter. If a judge does not appoint an interpreter at trial, the attorney's chance of successfully arguing on appeal that an adverse decision should be reversed due to a linguistic impairment is close to nil. Part III explores issues that may arise when more than one participant in a court proceeding requires an interpreter. Here too, the case law (outside of California) strongly suggests that a trial judge's decision is unlikely to be overturned on appeal. Accordingly, an attorney must be prepared to explain to the trial judge why his client is entitled to his *own* interpreter *throughout* the trial. A post-trial appeal on these grounds is unlikely to succeed. Part IV explores issues relating to courtroom interpreting errors: how to identify them, how to challenge them in a timely fashion, and how to prevent them from happening.

II. The Non-English Speaker's Quasi-Right to a Court-Appointed Interpreter

The Supreme Court first discussed the right to a court-appointed interpreter in the 1907 decision, *Perovich v. United States*,[7] in which the defendant was found guilty of first-degree murder. In an opinion that focused mainly on unrelated matters, the Supreme Court briefly addressed the absence of an interpreter during trial. The Court's entire analysis of the issue is reproduced below:

> One [assignment of error] is that the court erred in refusing to appoint an interpreter when the defendant was testifying. This is a matter resting largely 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.[8]

These two sentences have had an enormous impact on the non-English speaker's ability to receive court-appointed interpreting assistance. The *Perovich* approach, which provides the trial judge with broad discretion to determine whether a court-appointed interpreter is necessary, has been cited in state and federal courts for over a century and continues to be cited today.[9]

Following the *Perovich* decision, lower courts gradually acknowledged that the inability of a criminal defendant to comprehend court proceedings due to a linguistic impairment may violate the Sixth Amendment. Specifically, if a defendant is unable to understand a witness's testimony, his or her right to confrontation and cross-examination may be severely curtailed.[10] For example, in 1970, the Second Circuit held for the first time in *United States ex rel. Negron v. State*[11] that the Confrontation Clause of the Sixth Amendment, which applies to the States through the Fourteenth Amendment's Due Process Clause, requires that non-English speakers be notified that they have a right to simultaneous interpretation at the Government's expense.[12] The tension between the *Perovich* holding,

7 *See* Perovich v. United States, 205 U.S. 86, 92 (1907).

8 *See id.* at 91.

9 *See* Mollie M. Pawlowky, Note, *When Justice is Lost in "Translation:" Gonzalez v. United States, an "Interpretation" of the Court Interpreters Act of 1978*, 45 DePaul L. Rev. 435, 440 (1996).

10 United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973); *see* Gonzalez v. Virgin Islands, 109 F.2d 215, 217 (3d Cir. 1940).

11 *See* United States ex rel. Negron v. New York, 434 F.2d 386 (2d Cir. 1970) (finding that a defendant who does not speak English and is denied a court interpreter is placed in a similar situation to a defendant who is not present at his own trial).

12 *See id.* at 391.

which provides wide discretion to the trial court judge to determine whether a court-appointed interpreter is required, and the *Negron* holding, which suggests that the failure to provide an interpreter in criminal proceedings may violate the Constitution, are mutually exclusive and require a more exacting level of judicial review. This inconsistency on the issue of an interpreter, however, has never been resolved.[13]

Following *Negron*, in 1978, Congress passed the Court Interpreters Act.[14] The legislative history of the Act expressed concerns that several federal convictions were reversed on due process grounds when an interpreter was not appointed.[15] Though the act has subsequently been clarified through judicial interpretation, the initial version did not require interpreter certification. This was problematic as the courts' only basis for evaluating the quality of the interpreters' skills were the interpreters' own averments.[16] The lack of quality control led to serious communication problems. For example, in the infamous case of *Virginia v. Edmonds*, in which a deaf woman had been raped, the court interpreter improperly conveyed the victim's characterization of the event as "made love" rather than "forced intercourse."[17]

The main stated purpose of the Court Interpreters Act is to provide interpreting services sufficient to permit a non-English speaking party to comprehend court proceedings and to communicate with counsel or the presiding judicial officer.[18] The Act requires that a certified court interpreter be used unless one is not "reasonably available," in which case, an "otherwise competent" interpreter may be used.[19] A review of the case law pertaining to the Act suggests that the legislation has not been as effective as its drafters had hoped.

1. Judicial Interpretation of the Court Interpreters Act

The first case to interpret the Court Interpreters Act, *United States v. Tapia*,[20] had a profound effect on the case law pertaining to non-English speakers. In *Tapia*, the Fifth Circuit determined, consistent with *Perovich*, (1) that the decision whether to provide a court-appointed interpreter rests within the broad discretion of the trial court, (2) that there is no constitutional right to a court-appointed interpreter, and (3) that the need for an interpreter is a question of fact.[21] The Fifth Circuit explained that the district court has a duty to inquire whether a defendant's ability to comprehend the proceedings and communication with his counsel would be inhibited without the assistance of an interpreter.[22] The question of whether or not a failure to provide an interpreter was an error is whether or not "such failure made the trial fundamentally unfair."[23] In *United States v. Johnson*,[24] the Seventh Circuit elaborated on the holding in *Tapia*, finding that a defendant is only entitled to a court-appointed interpreter if the district court judge determines that the defendant (1) speaks only or primarily a language other than English and (2) his inability to speak English inhibits his ability to comprehend the proceedings or communicate with counsel.[25] However, not all circuits have retained the factual inquiry requirement. In *United States v. Perez*,[26] the Fifth Circuit found that the trial judge need not engage in a factual inquiry as to whether the criminal defendant properly understands court proceedings if the defendant does not make an affirmative

13 *See* Pawlowky, *supra* note 9, at 442.
14 *See* 28 U.S.C. § 1827(d)(1)(1988).
15 *See* 1978 U.S.C.C.A.N. 4652, 4654.
16 *See id.* at 4655.
17 *See id.* at 4654.
18 *See* § 1827(d)(1).
19 *See id.*
20 United States v. Tapia, 631 F.2d 1207, 1209 (5th Cir. 1980).
21 *See id.* at 1209.
22 *See id.*
23 *See id.* at 1210.
24 United States v. Johnson, 248 F.3d 655 (7th Cir. 2001).
25 *See id.* at 661.
26 United States v. Perez, 918 F.2d 488 (5th Cir. 1990).

assertion that he does not understand.[27] A trial judge's decision to refuse to provide an interpreter over counsel's objection during trial is subject to abuse of discretion review.[28] If counsel waits until after the trial to raise the issue, the reviewing court examines the record under the plain error standard.[29] In order to overcome plain error review, the moving party must prove that the district court ruling is (1) an error, (2) which is plain, i.e. clear under the current law, and (3) which affects the defendant's substantial rights.[30]

At least four arguments in support of the current standard of review can be distilled from the case law. The first, as noted in *Nuguid*[31] and its progeny, is that the ordinary rules of evidence require counsel to make a timely objection. If no objection is made on the record, the objection is waived, and cannot be overturned on appeal unless it can survive plain error review.[32] The second argument is that the trial judge is in the best position to evaluate the language ability of the defendant. This view is expressed in one of the earliest cases to interpret the Act, *United States v. Coronel-Quintana*.[33] In *Coronel-Quintana*, the Eight Circuit held that "[b]ecause the decision to appoint an interpreter will likely hinge upon a variety of factors, including the defendant's understanding of the English language, and the complexity of the proceedings, issues, and testimony, the trial court, being in direct contact with the defendant, should be given wide discretion . . . ."[34] The third argument in favor of a heightened standard of review is that a less deferential standard would provide an unfair windfall for defendants. The most frequently cited expression of this concern is found in *Valladares v. United States*,[35] in which the court stated, "To allow a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse."[36] The fourth argument, also raised in *Valladeres*, is the need to "balance the rights to confrontation and effective assistance against the public's interest in the economical administration of criminal law . . . ."[37]

Of the more than 90 cases that have interpreted the Act since 1978, reversal is exceedingly rare.[38] Cases in which federal appellate judges have upheld district court decisions despite serious misgivings about the trial courts' conduct are far more common.

27 *See id.* at 490-91.

28 *See* United States v. Salehi, 187 F. App'x 157, 168 (3rd Cir. June 28, 2006) (finding that district courts are afforded discretion in implementing the Court Interpreters Act and no abuse of discretion had taken place); *see also* United States v. Lim, 794 F.2d 469, 471 (9th Cir. 1986) (finding the district court did not abuse its discretion); *see also* United States v. Edouard, 485 F.3d 1324, 1337 (11th Cir. 2007) (reviewing failure of trial court to provide an interpreter under abuse of discretion standard).

29 *See* United States v. Sandoval, 347 F.3d 627, 632 (7th Cir. 2003) (finding objections made during trial are reviewed under abuse of discretion and under plain error when defendant fails to object during trial); *see also* United States v. Hasan, 526 F.3d 653, 660–61 (10th Cir. 2008) (explaining that a district court's denial of a motion will be evaluated for abuse of discretion but when a party fails to raise an issue before the district court, it is reviewed under plain error); *see also* United States v. Arthurs, 73 F.3d 444, 447 (1st Cir. 1996) (reviewing under plain error); *see also* United States v. Huang, 960 F.2d 1128, 1135–36 (2d Cir. 1992) (providing summaries rather than word-for-word interpretation is not plain error); *see also* United States v. Amador, No. 05-4934, 2007 WL 162783 at *2 (4th Cir. Jan. 19, 2007) (reviewing under plain error); *see also* United States v. Paz, 981 F.2d 199, 201 (5th Cir. 1992) (reviewing under plain error); *see also* United States v. Markarian, 967 F.2d 1098, 1104 (6th Cir. 1992) (determining that the trial court did not commit plain error in failing to provide an interpreter on its own motion); *see also* United States v. Gonzales, 339 F.3d 725, 728 (8th Cir. 2003) (reviewing under plain error).

30 *See, e.g.*, *Gonzales*, 339 F.3d at 728.

31 People of Territory of Guam v. Nuguid, No. CRIM. 89-00073A, 1991 WL 336901 (D. Guam App. Div. 1991) aff'd, 959 F.2d 241 (9th Cir. 1992).

32 *See* Debra L. Hovland, *Errors in Interpretation: Why Plain Error is not Plain*, 11 Law & Ineq. 473, 489 (1993).

33 United States v. Coronel-Quintana,752 F.2d 1284 (8th Cir. 1985).

34 *See id.* at 1291.

35 Valladares v. United States, 871 F.2d 1564 (11th Cir. 1989).

36 *See id.* at 1566.

37 *See id.*

38 *See* Claudia G. Catalano, Annotation, *Construction and Application of Court Interpreters Act, 28 U.S.C.A. §§ 1827, 1828*, 40 A.L.R. Fed. 2d 115 (2009) (listing all cases citing to the Court Interpreters Act).

For instance, in *Yaohan U.S.A. Corp. v. NLRB*,[39] the Ninth Circuit observed that although the defendant's answers were "sometimes stumbling and ungrammatical" and that it did "not approve of the ALJ's handling of the witness's language difficulties," it would not disturb the lower court's decision to deny the defendant's request for an interpreter.[40]

United States v. Juarez-Duarte[41] provides another example in which a federal court of appeals reluctantly permitted a district court decision to refuse to provide an interpreter to stand. The defendant in *Juarez-Duarte* asked for an interpreter during his sentencing hearing, claiming that he did not understand fully what had happened during an earlier appearance.[42] The district court observed that the defendant had not asked for an interpreter at his detention hearing or at his prior arraignments, and that he appeared to understand English well enough when he entered his guilty plea. The district court agreed to set aside the plea, but warned, "an improper request could have an effect on his sentencing."[43] On the defendant's third arraignment, the district court made good on its threat, recommending a two-level enhancement for obstruction of justice for "providing materially false information to a judge regarding his need for an interpreter."[44] The decision increased the defendant's sentence range from 46-57 months to 78-97 months.[45] On appeal to the Fifth Circuit, the court admitted that it was "not unsympathetic to the legitimate concerns raised by Juarez-Duarte that imposing the obstruction enhancement on defendants who falsely assert the need for an interpreter might make other defendants hesitant to request an interpreter, a right protected by the Court Interpreters Act . . . ."[46] Nevertheless, the Fifth Circuit felt compelled to affirm the district court's ruling.[47]

THE DUE PROCESS CLAUSE PREVENTS TRYING CRIMINAL DEFENDANTS WHO LACK THE CAPACITY TO UNDERSTAND CRIMINAL PROCEEDINGS: THIS PROHIBITION HOLDS FOR INDIVIDUALS WHO ARE HINDERED BY LINGUISTIC BARRIERS AS WELL AS MENTAL IMPAIRMENTS.

2. Criticisms of the Case Law

The current standards of review governing the provision of court interpreting have been heavily criticized. One of the most sophisticated arguments is that they rest on an improper reading of the Court Interpreters Act itself. The Ninth Circuit in *Gonzalez v. United States*[48] upheld the district court's determination that the defendant did not need an interpreter. In *Gonzalez*, the district court noted that "there is some language difficulty but not a major one," and the majority of the Ninth circuit found that '[t]he defendant's answers were consistently responsive, if brief and somewhat inarticulate, and he only occasionally consulted his attorney."[49] In his dissent, Judge Reinhardt argued that the statutory language and legislative history did not support the district court's narrow application of the Act. Judge Reinhardt first analyzed the plain language of the statute, noting that absent evidence to the contrary, the court must

39 Yaohan U.S.A. Corp. v. NLRB, Nos. 95-70818, 95-70913, 1997 WL 453688 (9th Cir. June 30, 1997).
40 *Id.* at *2.
41 United States v. Juarez-Duarte, 513 F.3d 204 (5th Cir. 2008).
42 *See id.* at 207.
43 *See id.*
44 *See id.* at 208.
45 *See id.*
46 *See id.* at 211.
47 *See id.*
48 Gonzalez v. United States, 33 F.3d 1047, 1052–54 (9th Cir. 1994) (Reinhardt, J., dissenting).
49 *See id.* at 1050-51.

follow its common, everyday meaning.[50] The Act provides that the presiding judicial officer

> *shall* utilize the services of the most available certified interpreter . . . if the presiding judicial officer determines on such officer's own motion or on the motion of a party that such party . . . 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.[51]

Citing the Random House Dictionary of the English Language,[52] Judge Reinhardt concluded that the common meaning of "inhibit" is "hinder." Furthermore, the language "shall" clearly indicates that the Act is nondiscretionary.[53] A judicial officer "must" appoint an interpreter when a defendant's language skills are sufficiently deficient to trigger the Act. Judge Reinhardt found further support for his view in the Act's House Report, quoting Congressman Fred Richmond's statement before the subcommittee that "[i]f language-handicapped Americans are not given the constitutionally-established access to understand and participate in their own defense, then we have failed to carry out a fundamental premise of fairness and due process for all."[54] Judge Reinhardt concluded that the proper standard of review under these circumstances should not be clear error, but *de novo* review.[55]

Several scholars have subsequently picked up Judge Reinhardt's "*de novo*" flag and attempted to carry it further.[56] Most recently, Chao has advocated for a more nuanced approach, in which appellate courts examine district court factual findings under a clear error standard of review, but examine matters of statutory construction under *de novo* review. This approach is similar to the approach that the judiciary has taken to sentencing guidelines, federal statutes of limitations, the Speedy Trial Act, and the Juvenile Delinquency Act.[57] In Chao's view, the question of whether a defendant is entitled to an interpreter under the Court Interpreters Act is a mixed question of law and fact. The district court judge's interpretation of "inhibit" and how the judge applies that legal standard to the facts of the case should be reviewed *de novo*.[58]

IT IS NOT ONLY CONSTITUTIONALLY ESSENTIAL BUT ALSO EMINENTLY REASONABLE TO REQUIRE THE APPOINTMENT OF A SEPARATE INTERPRETER TO FACILITATE COMMUNICATION BETWEEN A DEFENDANT AND HIS COUNSEL "THROUGHOUT THE PROCEEDINGS" AND NOT TO PERMIT THE DEFENSE INTERPRETER TO PERFORM AN ADDITIONAL ROLE OF INTERPRETING WITNESSES' TESTIMONY FOR THE COURT.

50 *See id.* at 1053.
51 *See id.* (emphasis added).
52 Random House Dictionary of the English Language, 732 (1979).
53 *See Gonzales*, 33 F.3d at 1053.
54 1978 U.S.C.C.A.N. 4652, 4654.
55 *See Gonzalez*, 33 F.3d at 1053 (Reinhardt, J., dissenting).
56 *See e.g.*, Mollie M. Pawlowky, Note, *When Justice is Lost in "Translation:" Gonzalez v. United States, an "Interpretation" of the Court Interpreters Act of 1978*, 45 De Paul L. Rev. 435, 488 (1996); Leslie V. Dery, *Amadou Diallo and the "Foreigner" Meme: Interpreting the Application of Federal Court Interpreter Laws*, 53 Fla. L. Rev. 239, 288 (2001); Cassandra L. McKeown & Michael G. Miller, *Say What? South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. Rev. 33, 69 (2009).
57 *See* David H. Chao, *Bifurcated Review of Interpreter Determinations Under the Court Interpreters Act*, 10 Conn. Public Interest L. J. 139, 171-72 (2010).
58 *See id.*

3. Recommendations for the Practicing Attorney

Effective representation of a non-English speaking client begins with recognizing that the trial judge's power to appoint—or refuse to appoint—a courtroom interpreter is very unlikely to be overturned. To improve the likelihood of receiving a court-appointed interpreter, an attorney who represents a client in federal court who does not speak English fluently should inform the court of any linguistic deficiencies that her client may have as soon as possible. Under no circumstances should an attorney rely on the trial judge to make a *sua sponte* inquiry into her client's language skills. Nor should the attorney assume that if a client does not ask for an interpreter then he does not need one. The frequency with which defendants are denied meaningful access to the courts merely because they are unaware of their rights—and their attorneys fail to assert their rights—is grist for grim speculation. The seminal case of *Negron* provides a particularly apt description of how fallacious reliance on the client may be:

> For all that appears, Negron, who was clearly unaccustomed to asserting 'personal rights' against the authority of the judicial arm of the state, may well not have had the slightest notion that he had any 'rights' or any 'privilege' to assert them. At the hearing before Judge Bartels, Negron testified: 'I knew that I would have liked to know what was happening but I did not know that they were supposed to tell me.'[59]

Defense counsel should be prepared to argue that the failure to provide an interpreter violates her client's Sixth Amendment rights. The Sixth Amendment ensures the right to be meaningfully present at one's own trial, to assist in one's own defense, to have effective assistance of counsel, and to confront opposing witness on cross examination.[60] To be "present" means more than physical presence; it means that a defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding."[61] The Due Process Clause prevents trying criminal defendants who lack the capacity to understand criminal proceedings;[62] this prohibition holds for individuals who are hindered by linguistic barriers as well as mental impairments.[63]

The unfortunate reality is that if counsel fails to convince the trial court that an interpreter is required early on in the process, the odds of reversal on appeal are exceedingly low. Appellate courts have uniformly demonstrated a very strong dedication to upholding trial courts' decisions regarding the provision of interpreting services. Even if defense counsel loses the argument at the trial level and has no choice but to seek reversal on appeal, it is still worthwhile to raise the need for an interpreter as early as possible. At the very least, counsel will be able to point to a detailed record regarding her efforts to secure the appropriate services for her client.

III. The Controversial Question of Whether a Non-English Speaker Has a Right to His Own Court-Appointed Interpreter.

Lawyers often incorrectly assume that obtaining an interpreter for their client for courtroom proceedings is sufficient to ensure that their client receives a fair trial. The courts employ interpreters to perform several different functions, and when an interpreter is asked to perform too many functions at the same time, the attorney's ability to represent his client is invariably compromised.[64] The

59 *See* United States ex rel. Negron v. New York, 434 F.2d 386, 390 (2d Cir. 1970).

60 *See* U.S. CONST. amend. VI; *see also* United States v. Mosquera, 816 F.Supp. 168, 172 (E.D.N.Y. 1993).

61 *See Negron*, 434 F.2d 389 (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

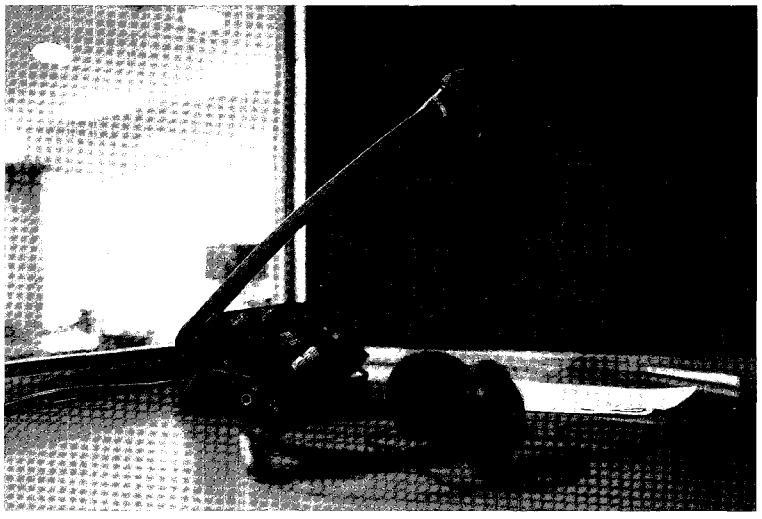
62 *See* Drope v. Missouri, 420 U.S. 162 (1975); *see also* Pate v. Robinson, 383 U.S. 375 (1966).

63 *See Negron*, 434 F.2d at 390-91.

64 The various functions include: interpreting all remarks in open court (proceedings interpreting), interpreting privileged communications in and out of court between coun-

problems that can arise are illustrated in the following hypotheticals. For the sake of simplicity, assume that all of the non-English speakers described below communicate fluently in Spanish, but do not understand English:

Example A—The Basic Case: The court appoints an interpreter because you have a non-English speaking client. Your client is the only Spanish speaker participating in the trial. Your client chooses not to testify. The interpreter sits between you and your client and performs two functions: he interprets the trial testimony for your client and facilitates communication between you and your client in and out of the courtroom.



Example B—The Case of Interpreter Borrowing: The court appoints an interpreter because you have a non-English speaking client. This time, however, your client is not the only non-English speaker to participate in the proceedings. The prosecution's star witness is also a Spanish speaker. For most of the trial, your interpreter performs the same functions as in *Example A*. He sits between you and your client; he interprets the trial testimony for your client and enables you to communicate effectively with your client during the course of the trial. But when the time comes for the prosecution's witness to testify, the judge orders the interpreter to leave the trial table, stand next to the prosecution's witness, and interpreter the witness' testimony into English for the benefit of the jury. You and your client have no means of communicating with each other while the witness is testifying. When the witness is excused, the interpreter returns to his seat between you and your client at the trial table.

Example C—The Case of Multiple Defendants: The court appoints an interpreter because there are three non-English speaking defendants in the case. Each non-English speaking defendant is represented by a different attorney. The court provides the defendants with headphones and instructs the interpreter to speak into a microphone. By listening to the interpreter's simultaneous interpretation, the defendants are able to follow the proceedings in Spanish. However, the defendants have no means of communicating with their attorneys while the proceedings are taking place.

The scenarios described above, and variations on them, have been the subject of litigation for decades. There is a line of cases that strongly condemns the practices of "borrowing" the defense's interpreter for witness testimony (as in *Example B*) or "sharing" a defense interpreter in a multi-defendant case (as in *Example C*). However, these cases may only be useful for attorneys who practice in California state court.

In *California v. Carreon*,[65] a Spanish-speaking defendant was convicted of robbery and kidnapping. On appeal, the defendant alleged that the trial and hearing courts erred in appointing only one interpreter to assist the defendant in conferring with defense counsel and to interpret a Spanish-speaking witness'

sel and the client (defense interpreting or table interpreting), and interpreting all non-English witness testimony (witness interpreting). *Mathers*, 1324 n. 33; *see also* Graham J. Steele, *Court Interpreters in Canadian Criminal Law*, 34 Crim. Law. Quarterly 218 (1991); Williamson B. C. Chang & Manuel U. Araujo, *Interpreters for the Defense: Due Process for the Non-English-Speaking Defendant*, 63 Cal. L. Rev. 801–23 (1975).

65 California v. Carreon, 151 Cal. App.3d 559, 565 (1994).

testimony[66] (in other words, *Example B*, *supra*.). The court found and agreed "that a separate interpreter should have been present throughout the proceedings to simultaneously translate all spoken English words and to facilitate communication between the defendant and

ATTORNEYS SHOULD BE FAMILIAR WITH THE PITFALLS THAT "SHARING" OR "BORROWING" INTERPRETERS FOR COURT PROCEEDINGS POSE AND SHOULD BE PREPARED TO EXPLAIN TO THE TRIAL COURT WHY AND HOW THIS PRACTICE PREJUDICE'S THEIR CLIENTS' RIGHTS.

his non-Spanish speaking attorney."[67] In support of its holding, the Court of Appeals of California observed that Article I, section 14 of the California Constitution provides that "[a] person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings."[68] The court cited with approval the Second Circuit's analysis in *Negron*, which concluded that the failure to provide "interpreter services impairs not only the defendant's due process rights, but also his right to confront adverse witnesses, to the effective assistance of counsel, and to be present at his own trial."[69] The court also quoted at length a District Court of Pennsylvania's opinion, which stated, expressly in dicta, that two interpreters may be constitutionally necessary if a Spanish-speaking witness testifies during the trial of a Spanish-speaking defendant.[70] The court then provided what may still be the most cogent argument in favor of providing a defendant with his own interpreter throughout a criminal trial:

> It is not only constitutionally essential but also eminently reasonable to require the appointment of a separate interpreter to facilitate communication between a defendant and his counsel "throughout the proceedings" and not to permit the defense interpreter to perform an additional role of interpreting witnesses' testimony for the court. The present case illustrates the point. When the Spanish-speaking victim was testifying, the interpreter was chiefly concerned with translating his testimony for the court and was not readily available to facilitate consultation between defendant and his counsel. It is true that if defense counsel and defendant wanted to consult one another, they could indicate their desire to do so and the interpreter would be made available to them, thereby interrupting the proceeding. Such an arrangement would significantly inhibit attorney-client communication. Simply put, it would require the defendant, in order to accomplish the otherwise simple task of consulting his counsel, to somehow make his intention known to the court and call the interpreter back to the counsel table. During the attorney-client conversation, attention undoubtedly would focus upon the scene at the counsel table, as occurs when counsel approach the bench for a private consultation with the court.
>
> For defense counsel's part, the risk of alienating or antagonizing the jury or bench would infuse the mere act of speaking to his client with considerations of strategy and tactics, in contrast to the English-speaking defendant whose consultation would be unobtrusive and likely to go unnoticed. Communication between counsel and defendant should not be hampered by such concerns, nor should the exercise of a constitutional right depend upon whether the defendant is assertive enough to

66 *Id.* at 555-56.
67 *Id.* at 566.
68 *Id.*
69 *Id.* at 566.
70 *Id.*, citing United States ex rel. Navarro v. Johnson, 365 F. Supp. 676, (E.D. Pa. 1973).

bring attention to himself.

Carreon raised serious doubts if it would ever be possible to "borrow" a defendant's interpreter while a non-English speaking witness testified without violating the defendant's constitutional rights.[71] In *California v. Rioz*,[72] the Court of Appeals of California effectively foreclosed the "sharing" of interpreters in a multi-defendant case as well (in other words, *Example C, supra.*). In *Rioz*, the defendant was required to share one interpreter with three other co-defendants.[73] While taking care to stress that the court was not creating a *per se* rule that an individual interpreter must be provided for each co-defendant in a multi-defendant case, the court reversed judgment against the defendant. The court held that "in any proceedings at which witnesses are called and testimony taken, the fundamental rights of a defendant to understand the proceedings being taken against him and to immediately communicate with counsel when the need arises require that each non-English-speaking defendant be afforded an individual interpreter throughout the proceedings."[74]

Finally, in *California v. Resendes*,[75] the California's Supreme Court weighed in on a procedure that has become a common and perfectly acceptable practice in federal court. In *Resendes*, two Spanish-speaking defendants shared a single interpreter. The judge devised a procedure whereby the defendant could raise his hand when he wanted to stop the proceedings, at which point the defendant would be permitted to have a private conversation with his attorney with the assistance of the court interpreter.[76] The State attempted to persuade the court that *Resendes* was distinguishable from *Carreon* because the trial court judge had created a specific procedure to address the problem of the defendant communicating with counsel.[77] The court did not agree:

> Even though the judge sanctions an interruption procedure and so informs the jury -- which apparently he did not do here -- a defendant must affirmatively interrupt proceedings each and every time he wants to invoke his *constitutional* right to communicate with counsel. Invocation of such a right should not be held hostage to a lingering fear that a jury wholly or mainly composed of monolingual English-speaking persons may view the non-English-speaking defendant as an obstructionist or at least a minor irritant.[78]

The *Carreon-Rioz-Resendes* trilogy and their companion cases[79] created robust protections for criminal defendants in state courts in California. During the early 1980s, the Court of Appeals of California repeatedly sided with non-English speaking defendants who objected to the practice of interpreter borrowing and interpreter sharing. Although the Court of Appeals cited frequently to the California's state constitution as the basis for its decision, it also drew upon federal court cases penned in the 1970s and quoted liberally from a 1975 law review article that argued that a criminal defendant should be provided with his own "defense interpreter" throughout the duration of his trial.[80]

Now, almost thirty years later, it appears safe to conclude that these cases have had prac-

71 *Id* at. 570-71. *See also* California v. Aguilar, 667 P. 2d 1198 (Cal. 1984) (reversing the conviction of a non-English speaking defendant because a second court-appointed interpreter was required); California v. Menchaca, 146 Cal. App. 3d 1019 (1983) ("In our view, nothing short of a sworn interpreter at defendant's elbow will suffice.").

72 California v. Rioz, 146 Cal. App. 3d 905 (1984).

73 *Id.* at 910.

74 *Id.* at 913.

75 California v. Resendes, 164 Cal.App.3d 812 (1985).

76 *Id.*

77 *Id.*

78 *Id.* at 612.

79 *See* California v. Aguilar, 667 P. 2d 1198 (Cal. 1984) (reversing the conviction of a non-English speaking defendant because a second court-appointed interpreter was required); *see also* California v. Menchaca, 184 Cal. Rptr. 691 (1983) ("In our view, nothing short of a sworn interpreter at defendant's elbow will suffice.").

80 Williamson B. C. Chang & Manuel U. Araujo, *Interpreters for the Defense: Due Process for the Non-English-Speaking Defendant*, 63 Cal. L. Rev. 801-23 (1975).

tically no influence on the trajectory of federal court interpreting case law. Rightly or wrongly, federal courts have construed the rights of non-English speakers to courtroom interpreters in a much narrower fashion. In *United States v. Lim*,[81] a judge sitting on the United States District for the Southern District of California "borrowed" an interpreter from the defense table to assist a witness and at times provided only one interpreter for two non-English speaking co-defendants.[82] The Ninth Circuit ruled that without a showing that the defendant's ability to understand the proceedings or communicate with counsel was impaired, the "use of interpreters in the courtroom is a matter within the discretion of the district court."[83] And that the trial judge's actions did not constitute an abuse of discretion.[84] Shortly thereafter, the Eleventh Circuit published *United States v. Bennett*.[85] The *Bennett* court encountered a fact pattern that the federal courts have faced repeatedly in the ensuing years. In *Bennett*, the trial court appointed one interpreter to interpret for three non-English speaking co-defendants.[86] Two of the defendants argued on appeal that the trial court's failure to appoint one interpreter for each defendant violated their rights under the Court Interpreters Act and the Sixth Amendment.[87] The *Bennett* Court found that the Court Interpreters Act "clearly authorizes the use of a single interpreter in multi-defendant cases".[88] The *Bennett* Court holdings have been reaffirmed repeatedly. With each successive court decision that cited with approval to *Bennett*, its holdings became more difficult to successfully challenge. Hence, when the Sixth Circuit took up the same issues in *United States v. Sanchez*,[89] the path had already been thoroughly blazed. The court noted, "Every circuit which has addressed this issue has concluded that the Act does not require every defendant in multi-defendant cases be provided with his own personal interpreter."[90]

81 United States v. Lim, 794 F.2d 469 (9th Cir. 1986).
82 *Id.*
83 *Id.* at 471 (quoting United States v. Coronel-Quintana, 752 F. 2d 1284, 1291 (9th Cir. 1985)).
84 *Id.*
85 United States v. Bennett, 848 F.2d 1134 (11th Cir. 1988).
86 *Id.* at 1140.
87 *Id.*
88 *Id.*
89 United States v. Sanchez, 928 F.2d 1450 (6th Cir. 1991).

Part IV: Courtroom Interpreting Errors

In many instances securing a court-appointed interpreter is not the final, but rather the first step in ensuring that the non-English speaker receive treatment equal to his English-speaking peers. Although there are good reasons to supply each defendant with his own interpreter, these arguments have encountered a skeptical audience outside of the California state court system. In Part IV, we touch on another substantial barrier to effective legal representation, even when court-appointed interpreters are provided: courtroom interpreter error.

The attorney who wants to provide evidence on appeal that the court interpreter's performance fell below an acceptable standard is in an exceptionally difficult position. First, unless the court has agreed to provide the defendant with his own interpreter, the defendant and his attorney have no way of knowing if the interpreter is correctly interpreting the testimony. Second, appellate courts are clearly disinclined to find that courtroom interpreter errors equate to more than harmless error. The current state of affairs is particularly disconcerting because there is reason to believe that courtroom interpreting errors are quite common.

1. Contemporaneous Objections

The evidentiary rule that objections must be contemporaneous to overcome plain error review is particularly difficult to adhere to with respect to correcting interpreting errors. Presumably, the defendant requires an interpreter because he does not speak English or speaks it poorly. Therefore, it will usually

90 *Id.* at 1455. The court relied upon *Bennett,* 848 F.2d 1134; United States v. Moya-Gomez, 860 F.2d 706, 740 (7th Cir. 1988); United States v. Lim, 794 F.2d 469 (9th Cir. 1986).

not be immediately apparent to the defendant that the interpretation is inaccurate.[91] Unless the defendant's counsel happens to be bilingual, he too will not be immediately aware that an interpreter is committing errors.[92] Even if defense counsel is bilingual, he cannot—and should not—be expected to provide his client with effective legal representation while simultaneously checking the interpreter's work for mistakes.[93] As a practical matter, given the unique disadvantages that the defendant and his lawyer face with respect to identifying interpreter errors, it may be impossible for counsel to object in a timely manner. Further complicating defense counsel's task, proceedings that are conducted with the assistance of a court interpreter are usually transcribed by court reporters into English, as if the entire proceeding were conducted in English. This makes it very difficult to verify or discount alleged errors of interpretation on appeal.[94]

2. The "Fundamentally Unfair" Hurdle

In *United States v. Joshi*,[95] the Eleventh Circuit held that "[a]lthough a continuous word for word translation of the proceedings will always pass constitutional muster, minor deviations from this standard will not necessarily contravene a defendant's constitutional rights."[96] In *United States v. Gomez*,[97] the Eleventh Circuit added that "defendants have no constitutional 'right' to flawless, word for word translations."[98] In *Valladares*, the Eleventh Circuit determined that the ultimate question is whether any inadequacy in the interpretation "made the trial fundamentally unfair."[99]

A number of subsequent court decisions suggest that it is extremely difficult for a defendant to show that an interpreter was so deficient that his trial was "fundamentally unfair." In *United States v. Huang*,[100] the Second Circuit held that an uncertified court interpreter who summarized certain portions of testimony was not fundamentally unfair, and therefore in compliance with the Act. Similarly, in *United States v. Hernandez*,[101] the Third Circuit determined that the inaccurate use of a word or phrase nine times did not rise to the level of unfairness. In *United States v. Gomez*,[102] the Eleventh Circuit concluded that the interpreter took "an unwarranted liberty with the trial testimony" by translating the word "disco" as "the Elks Lodge," which was the alleged scene of a drug deal. Although the court had no difficulty finding that the "interpreter's conduct . . . resulted in some prejudice against the appellant," it was not sufficient to render the trial fundamentally unfair.[103] Similarly, in *United States v. Mata*,[104] the Fourth Circuit upheld a district court's ruling that even if the interpreter had been ineffective, his trial was not fundamentally unfair, because the defendant did not object to the interpretation during trial, had at least a "passing" familiarity with the English language, and, in any case, there was overwhelming evidence of his guilt.[105]

V. Conclusion

Attorneys who hope to reverse the decisions of trial judges because their client was unable to fully understand and participate in the court proceedings below are treading in harsh realm. The standards of review that appellate courts employ to determine whether

91 *See Hovland, supra* note 33, at 490.
92 *See id.*
93 *See* Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. Rev. 1 (1990).
94 Susan Berk-Selignson, *The Bilingual Courtroom: Court Interpreters in the Judicial Process*, 200 (1990).
95 United States v. Joshi, 896 F.2d 1303 (11th Cir. 1990).
96 *See id.* at 1309.
97 United States v. Gomez, 908 F.2d 809 (11th Cir. 1990), *cert denied*, 498 U.S. 1035 (1991).
98 *See id.* at 811.
99 *See* United States v. Valladares, 871 F.2d 1564, 1566 (11th Cir. 1989), (citing United States v. Tapia, 631 F.2d 1207, 1210 (5th Cir. 1980)).
100 United States v. Huang, 960 F.2d 1128 (2d Cir. 1992).
101 United States v. Hernandez, 994 F. Supp. 627 (E.D. Pa. 1998), *aff'd without opinion*, 248 F.3d 1131 (3d Cir. 2000).
102 United States v. Gomez, 908 F.2d 809, 811 (11th Cir. 1990).
103 *See id.* at 811.
104 United States v. Mata, No. 98-4843, 1999 WL 427570 (4th Cir. June 25, 1999).
105 *See id.* at *2–3.

a defendant should have been provided with a courtroom interpreter—or a more qualified courtroom interpreter—are so heavily balanced in favor of upholding the trial court's decision that only the most egregious sets of facts are likely to prevail. In light of the difficulty of reversing adverse decisions due to linguistic impairment on appeal, it is of paramount importance that attorneys who represent non-English speaking clients make timely requests to increase the probability that their clients will receive court-appointed interpreters. Attorneys should be familiar with the pitfalls that "sharing" or "borrowing" interpreters for court proceedings pose and should be prepared to explain to the trial court why and how this practice prejudices their clients' rights. Attorneys should also be aware that not all court interpreters are created equally. Interpreter error is a real problem, and appeals requesting reversal because the non-English speaking client received subpar access to the court proceedings are unlikely to encounter a sympathetic audience.

Finally, this article has examined a number of cases from the California state courts, which diverge substantially from federal case law. While the California cases can be readily distinguished as decisions based on interpretations of the California State Constitution, rather than the United States Constitution, the analyses that the California state courts engaged in to justify their holdings certainly could have been adopted by the federal courts if they had chosen to do so. While perhaps of little practical value to attorneys who do not practice in California's state courts, the California cases present an intriguing window into what the Court Interpreters Act, had it been interpreted differently by the federal courts, might have become; and from the optimist's vantage point, what the Court Interpreters Act, with the nudge of some creative advocacy, might still one day accomplish.

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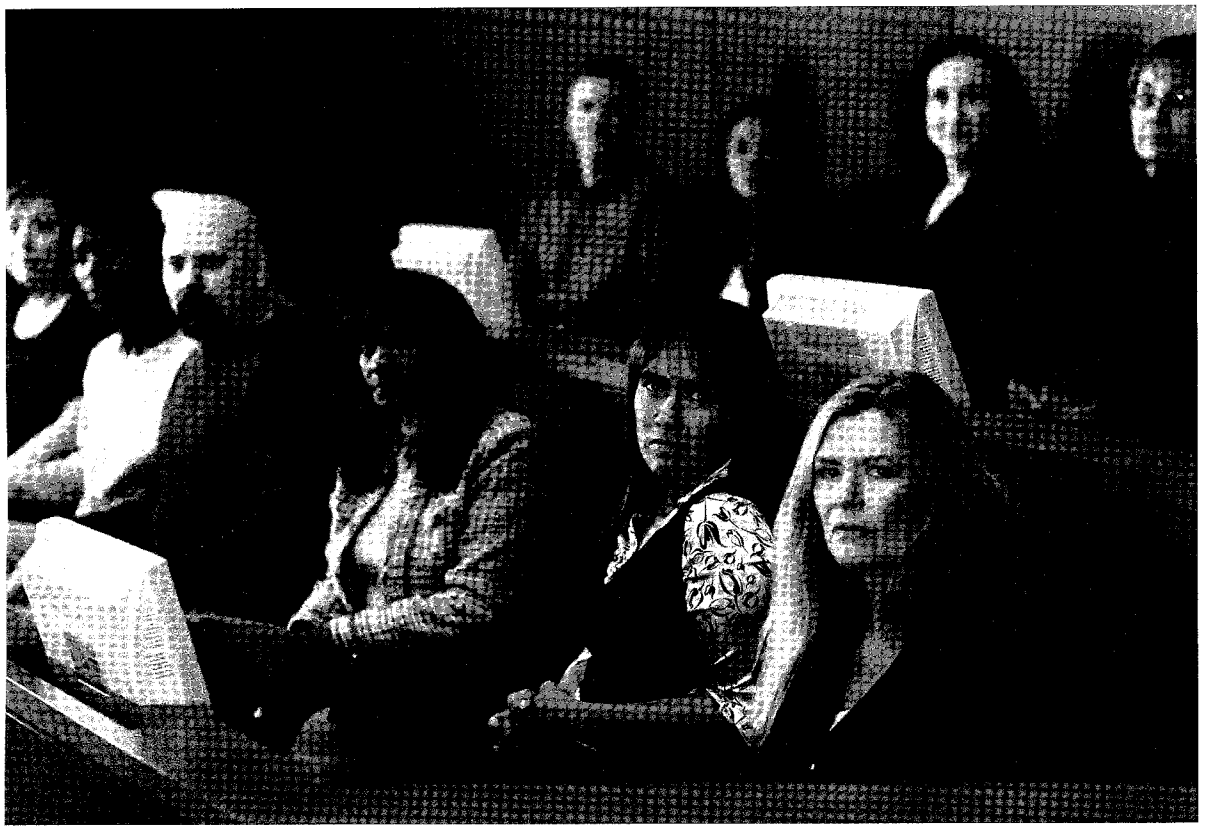

STUDIES HAVE FOUND THAT A *DEFENDANT'S RACE, ATTRACTIVENESS, AND EVEN EMPLOYMENT STATUS* CAN AFFECT JUROR JUDGMENTS