

NOTE

LOST IN TRANSLATION: THE NEED FOR A FORMAL COURT INTERPRETER PROGRAM IN ALASKA

When a non-English speaking person is charged with a crime, the language barrier that separates the defendant from his attorney, his accuser, and a jury of his peers has the potential to implicate the defendant's right to due process. The use of a qualified, impartial interpreter at trial, however, can prevent this infringement. In this Note, the author will examine the State of Alaska's current policy regarding the use of foreign language interpreters in criminal trials. The author will then suggest ways in which this policy might be amended in order to better safeguard the rights of non-English speaking defendants in the criminal justice system.

I. INTRODUCTION

The state of Alaska possesses a diverse population. According to the most recent U.S. Census, nearly 15% of Alaskans speak a language other than English in the home.¹ While this figure represents an increase in the total number of non-English speakers in the state over the last decade,² Alaska has not made significant changes to its court interpreter

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1. U.S. Census Bureau, Language Use and English Speaking Ability: 2000 5 (2003), available at <http://www.census.gov/prod/2003pubs/c2kbr-29.pdf> (last visited April 4, 2005). In 2000, 14% of Alaskans over the age of five spoke a language other than English in the home. *Id.*

2. *Id.* In 1990, only 12% of Alaskans over the age of five spoke a language other than English in the home. *Id.*

policy since 1989.³ This Note will examine the current policy and propose recommendations intended to benefit the non-English-speaking population of the state. The purpose of this Note is to discuss the inadequacies of the current interpreter policy and to advocate for reform. While the use of interpreters is an important issue throughout the Alaskan legal system, this Note will focus solely on the State's interpreter policy as it applies to the criminal justice system.

Part II of this Note will briefly summarize the various approaches to the interpreter issue taken by other jurisdictions, explain Alaska's current interpreter policy, and make a case for reform of the Alaska policy. Part III will recommend establishing a criminal defendant's right to an interpreter at trial and suggest constitutional provisions in which this right may be grounded. Part IV will discuss various policy-related issues that will arise after the right to an interpreter has been established. Part V will advocate that the Supreme Court of Alaska adopt the recommendations of the Advisory Committee on Fairness and Access as the most appropriate means of reforming the State's current court interpreter policy.

II. ALASKA'S CURRENT POLICY AND THE MOVEMENT FOR REFORM

A. Brief Overview of Federal and State Approaches

Recent census data reveals that the number of non-English-speaking persons living in the United States has steadily increased over the last twenty years.⁴ One consequence of this growing multilingualism is an increased need for language translation services, particularly in the criminal justice system. While every state has confronted this issue, states have not responded uniformly. In California, for example, the state constitution explicitly guarantees criminal defendants the right to an interpreter at trial.⁵ In other states, the right to an interpreter has been established through the courts⁶ or by statute.⁷ In addition to recognizing

3. See ALASKA R. ADMIN. 6 (2004); ALASKA R. EVID. 604 (2004); see also ALASKA SUP. CT. ORDER 959 (1989) (amending ALASKA R. EVID. 604); ALASKA SUP. CT. ORDER 816 (1987) (amending ALASKA R. ADMIN. 6(b)).

4. U.S. Census Bureau, *supra* note 1, at 1–2. In 2000, 18% of persons over the age of five in the United States reported that they spoke a language other than English in the home, versus 14% of individuals over the age of five in 1990. *Id.* In 1980, only 11% of individuals over the age of five spoke a language other than English in the home. *Id.*

5. CAL. CONST. art. I, § 14 (“A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings.”).

6. See, e.g., *State v. Lopes*, 805 So. 2d 124, 128 (La. 2001) (holding that a criminal defendant is entitled to an interpreter regardless of financial status); *State v. Natividad*, 526 P.2d 730, 733 (Ariz. 1974) (reiterating that an indigent defendant has a right to an interpreter in order to ensure a fair and impartial trial).

this right, some states have developed certification procedures to ensure that interpreters are adequately qualified to render accurate translations in court.⁸ Some states have even offered interpreter training courses in order to educate individuals in the art of courtroom interpretation.⁹

The federal government has also responded to the need for increased language translation services in the court system. The Federal Court Interpreters Act requires the use of certified language interpreters when a federal criminal defendant or witness in a federal criminal trial cannot speak or understand English.¹⁰ The Director of the Administrative Office of the United States Courts is responsible for overseeing the certification of interpreters for use in the federal court system.¹¹ Because the United States Supreme Court has not yet interpreted the Act, its implementation has varied. Several circuits, however, have held that an interpreter is required by law only when the trial court is aware of a potential language barrier, has conducted an investigation into the need for an interpreter, and has determined that an interpreter is necessary to safeguard the rights of the defendant.¹²

B. Alaska's Current Approach

In Alaska, neither the legislature nor the court system has identified a right to an interpreter during a criminal trial. Instead, parties to both civil and criminal proceedings, regardless of their financial ability, are required to supply their own interpreters.¹³ Rule 6 of the Alaska Rules of Administration provides that “[i]nterpreters and translators will be provided and their fee paid . . . in civil and criminal cases, by the party who requires translation or interpretation to understand the proceedings or who calls a witness whose testimony must be translated or interpreted.”¹⁴ No case in Alaska has considered whether an indigent defen-

7. See, e.g., WASH. REV. CODE § 2.43.010 (2004); ARK. CODE ANN. § 16-64-111 (Michie 2003).

8. See, e.g., *In re Certification for Language Interpreters in Arkansas Courts*, 338 Ark. 827 (1999) (per curiam order establishing a certification requirement for courtroom language interpreters); see also CAL. GOV'T CODE § 68561.

9. See *Court Interpreter Training Set for Panama City*, THE FLORIDA BAR NEWS ONLINE (Nov. 15, 2003), at <http://www.flabar.org/DIVCOM/JN/JNNews01.nsf/0/9261cfe6cbf7bd5585256ddc0065cf4b?OpenDocument> (last visited April 4, 2005).

10. Court Interpreters Act of 1978, 28 U.S.C. § 1827 (2004).

11. *Id.*

12. See, e.g., *Gonzalez v. United States*, 33 F.3d 1047, 1050 (9th Cir. 1994); *United States v. Perez*, 918 F.2d 488, 490 (5th Cir. 1990); see also Mollie M. Pawlosky, Note, *When Justice is Lost in the “Translation”*: *Gonzalez v. United States*, An “*Interpretation*” of the *Court Interpreters Act of 1978*, 45 DEPAUL L. REV. 435 (Winter 1996) (providing a detailed summary of litigation under the Court Interpreters Act).

13. ALASKA R. ADMIN. 6 (2004).

14. *Id.*

dant has the right to a court-appointed interpreter at trial, and nothing in the language of this Rule indicates that a trial court would be required to provide an interpreter to a non-English-speaking defendant who could not afford one.

Under Rule 604 of the Alaska Rules of Evidence, a trial judge has the discretion to disallow the use of an interpreter at trial.¹⁵ Before permitting the use of an interpreter, a trial judge is required to determine whether the proposed interpreter is qualified and impartial.¹⁶ In order to make this determination, the trial judge must “inquire into and consider the interpreter’s education, certification and experience in interpreting relevant languages; the interpreter’s understanding of and experience in the proceedings in which the interpreter is to participate; and the interpreter’s impartiality.”¹⁷ Presumably, if the trial judge were to find that the proposed interpreter were either unqualified or biased, the judge could deny the use of the interpreter at trial. It is unclear whether a trial judge may deny the use of an interpreter at trial based on a finding that the defendant (or other party requesting an interpreter) can speak and understand the English language, or for any other reason not identified in Rule 604.

The State has no training program for court interpreters and no certification procedure to ensure that untrained interpreters are adequately qualified.¹⁸

Given the ambiguity of these rules, as well as the diverse population of Alaska, one would expect a significant amount of litigation regarding the use of interpreters during criminal proceedings. In reality, however, surprisingly few cases in the state courts have dealt with this issue, and none have involved an interpretation of Administrative Rule 6 or Evidence Rule 604 or considered whether a defendant has a constitutional right to an interpreter. The following is an overview of those cases in which the absence or use of an interpreter at trial was an issue on appeal.

1. *Qualls v. City of Anchorage*. In *Qualls v. City of Anchorage*,¹⁹ the defendant had been convicted of violating two criminal ordinances for failing to restrain his dog in a secure enclosure.²⁰ Qualls argued on appeal that the trial judge erred in failing to require an interpreter for the

15. ALASKA R. EVID. 604 (2004).

16. *Id.*

17. *Id.*

18. See Phyllis Morrow, *Interpreting and Translating in Alaska’s Legal System: Further Discussion*, 17 ALASKA JUSTICE FORUM #3 2 (Fall 2000), available at http://justice.uaa.alaska.edu/forum/f104wi94/a_interp.html (last visited April 4, 2005).

19. 378 P.2d 405 (Alaska 1963).

20. *Id.* at 405.

complaining witness, whose testimony at trial was “incomprehensible.”²¹ The *Qualls* court acknowledged that the witness spoke broken English but found it “evident from the transcript . . . that she understood the questions and gave intelligent responsive answers.”²² In addition, the Alaska Supreme Court held that no error was committed because Qualls failed to request an interpreter or object to the testimony during trial.²³

Unfortunately, Qualls did not “brief [this] point to any extent,”²⁴ so the precise degree of confusion regarding the witness’s testimony is unknown. The court’s treatment of the interpreter issue, however, is consistent with that of the courts of other states.²⁵ Without using the same terminology employed by other courts, the *Qualls* court determined that the trial judge had no duty to inquire into the need for an interpreter because (1) the defendant failed to request an interpreter and (2) the witness in question had an adequate understanding of the proceedings and provided intelligent responses to the questions posed.²⁶ Interestingly, however, the court appeared more concerned with the ability of the city’s witness to understand English than with the ability of the defendant to understand the witness’s testimony. To support its finding that no error occurred, for example, the court noted that “[the witness] understood the questions.”²⁷ The court’s failure to directly address the defendant’s lack of comprehension may suggest that the court did not recognize either a statutory or a constitutional right of a defendant to understand the proceedings against him or to have an interpreter present during a criminal trial.

2. *State v. Abraham*. In *State v. Abraham*,²⁸ the defendant was convicted of manslaughter in connection with the death of his wife.²⁹ The appeal actually originated with the State, which argued that Mickey Abraham’s sentence was too lenient.³⁰ The Alaska Supreme Court agreed and formally disapproved the sentence,³¹ although it was prohibited by statute from increasing the sentence to compensate for the leniency of the trial court.³² In its opinion, the supreme court made specific

21. *Id.* at 406.

22. *Id.*

23. *Id.*

24. *Id.*

25. *See, e.g.*, *United States v. Paz*, 981 F.2d 199 (5th Cir. 1992) (interpreting the Court Interpreters Act of 1978).

26. *Qualls*, 378 P.2d at 406.

27. *Id.*

28. 566 P.2d 267 (Alaska 1977).

29. *Id.* at 268.

30. *Id.* at 267–68.

31. *Id.* at 271–72.

32. *Id.* at 268.

mention that an interpreter had been present at Abraham's trial.³³ In addressing the sentencing procedures of the lower court, the supreme court noted that the record failed to reveal whether the trial court had complied with the requirements of Criminal Rule 32(a), which requires a sentencing court to make clear to the defendant that he or she has a right of allocution during sentencing.³⁴ The court mentioned in a footnote that if Abraham, who spoke Yup'ik and had a limited understanding of English, had desired to exercise his right of allocution, "he could have done so since an interpreter was present at all stages of the sentencing proceedings."³⁵

The *Abraham* court's mention of the presence of an interpreter at the sentencing hearing is important for two reasons. First, the court acknowledged the significance of using an interpreter when a defendant, like Abraham, cannot effectively communicate in English. Second, the court indirectly implied that the absence of an interpreter itself would have constituted a violation of Rule 32(a), which Abraham could then have appealed.

3. *State v. Zeciri*. The defendant in *State v. Zeciri*³⁶ was convicted of first degree murder.³⁷ Abidin Zeciri filed an application for post-conviction relief, which included an ineffective assistance of counsel claim based on his attorney's failure to provide him with an interpreter at trial.³⁸ While the superior court granted Zeciri's application, the Alaska Court of Appeals reversed and remanded the order for further findings regarding this claim.³⁹ Specifically, the court of appeals found that the lower court failed to state the standard of proof it used to evaluate Zeciri's claim, which the court noted should have been the clear and convincing evidence standard.⁴⁰ In addition, the court found that the lower court had failed to enter specific findings with respect to the competence level of Zeciri's attorney, as well as the relevant standard of competence for counsel representing non-English speaking defendants.⁴¹

The *Zeciri* case demonstrates one of the most prominent features of the State's current interpreter policy. Because Administrative Rule 6 places the burden on the parties to provide their own interpreters,⁴² a

33. *Id.* at 268 n.5.

34. *Id.* at 268.

35. *Id.* at 268 n.5.

36. 43 P.3d 169 (Alaska Ct. App. 2002).

37. *Id.* at 170.

38. *Id.*

39. *Id.* at 171-72.

40. *Id.* at 170.

41. *Id.*

42. ALASKA R. ADMIN. 6 (2004).

non-English-speaking criminal defendant who is not afforded an interpreter at trial must challenge the absence of an interpreter through an ineffective assistance of counsel claim. As this case illustrates, a defendant may have a difficult time establishing this type of claim on appeal. First, when an ineffective assistance claim is urged on collateral appeal, the defendant must prove his or her claim by clear and convincing evidence.⁴³ This increased burden of proof may unfairly harm those defendants who were represented on direct appeal by the same attorney who assisted them at trial, therefore barring any possibility of raising an ineffective assistance claim on their initial appeal.⁴⁴

Second, in order to prevail on an ineffective assistance claim, a defendant must prove two elements: (1) that the conduct of the defendant's attorney, either in general or in one or more specific instances, did not conform to an objective standard of competence; and (2) that the lack of competency contributed to the defendant's conviction.⁴⁵ While the second prong may be satisfied simply by raising an inference of reasonable doubt based on the attorney's incompetence, establishing incompetence can prove a difficult task.⁴⁶ As the Supreme Court of Alaska has held, "all that is required of counsel is that his decisions, when viewed in the framework of trial pressures, be within the range of reasonable actions which might have been taken by an attorney skilled in the criminal law, regardless of the outcome of such decisions."⁴⁷ Because a wide range of actions are tolerated, a defendant often cannot establish that counsel's actions fell below minimum levels of professional competence. In addition, while it is difficult to imagine a situation in which an attorney who fails to obtain an interpreter for his non-English-speaking client is competent, the *Zeciri* court implicitly acknowledged that such a situation is possible when it remanded the case for further findings on this issue.⁴⁸

In addition, the failure of the State to guarantee indigent defendants a right to an interpreter may have the unintended effect of denying ineffective assistance of counsel claims to non-English-speaking defendants because lack of financial resources could be proffered by the State or the defendant's attorney as the reason for failing to hire an interpreter.

43. *Zeciri*, 43 P.3d at 170. On direct appeal, the appropriate standard of review for an ineffective assistance of counsel claim is harmless error beyond a reasonable doubt, a burden of proof ultimately resting with the prosecution. *LaVigne v. State*, 812 P.2d 217, 221 (Alaska 1991).

44. *See* Pawlosky, *supra* note 12, at 488–89 (discussing the Ninth Circuit's problematic use of the clear and convincing evidence standard).

45. *Zeciri*, 43 P.3d at 170–71.

46. *Id.* at 171.

47. *Risher v. State*, 523 P.2d 421, 424 (Alaska 1974).

48. *Zeciri*, 43 P.3d at 171.

C. The Need for Reform in Alaska

While the lack of case law addressing the use of interpreters in criminal trials suggests that interpreter services are not utilized frequently enough to necessitate reform, statistical data and anecdotal evidence indicate otherwise. First, the non-English-speaking population in Alaska is growing.⁴⁹ Data collected during the 2000 U.S. Census indicates that 14.3% of Alaskans over the age of five speak a language other than English in the home, up from 12.1% in 1990.⁵⁰ More than one-third of those who reported speaking a language other than English at home in 2000 also reported speaking English less than “very well.”⁵¹ In addition, Alaskans spoke a wide variety of languages in 2000.⁵² Of those who spoke a language other than English at home, 36.4% reported speaking a Native language and 20.1% reported speaking Spanish.⁵³ Most of the other non-English speakers reported speaking Asian or other Indo-European languages in the home, while a small number indicated that they spoke various other specified and unspecified languages.⁵⁴ These numbers indicate that a significant portion of the population would require the assistance of an interpreter if hailed into court as a criminal defendant and that bilingual interpreters are needed to translate many different languages.

In addition to this statistical data, anecdotal evidence suggests that the state court system has a need for a more formal court interpreter program.⁵⁵ In 1991, a research team consisting of a trial lawyer, a cultural anthropologist, and a linguist studied the interaction between Native Yup’iks and non-Native Americans in the legal system.⁵⁶ In general, the team found that cultural differences between the two groups inhibited their ability to communicate with one another in a legal setting, even when both participants spoke English.⁵⁷ The team noted that interroga-

49. See U.S. Census Bureau, *supra* note 1, at 5.

50. *Id.*

51. U.S. Census Bureau, Language Spoken at Home and Ability to Speak English for the Population 5 Years and Over by State: 2000, *available at* <http://www.census.gov/population/cen2000/phc-t20/tab04.pdf> (last visited April 4, 2005).

52. U.S. Census Bureau, Detailed List of Languages Spoken at Home for the Population 5 Years and Over by State: 2000, *available at* <http://www.census.gov/population/cen2000/phc-t20/tab05.pdf> (last visited Apr. 7, 2005).

53. *Id.*

54. *Id.*

55. Phyllis Morrow, *A Sociolinguistic Mismatch: Central Alaskan Yup’iks and the Legal System*, 10 Alaska Justice Forum #2 (Summer 1993), *available at* http://justice.uaa.alaska.edu/forum/f102su93/a_socio.html (last visited April 4, 2005).

56. *Id.*

57. *Id.*

tion and other question-and-answer scenarios produced the most troubling results, because Yup'iks considered requests and questions to be accompanied by an expectation of compliance.⁵⁸ The team indicated that this cultural clash could account for the “relatively high rates of confession and guilty pleas among Yup'ik clients” observed in some areas of the state.⁵⁹

In addition to these generalities, the team also found and catalogued several specific instances in which Yup'ik defendants supplied the “correct” response rather than the actual answer to a question posed.⁶⁰ The following example is representative:

Judge: Have you had time to think about what you wanted to do in this case, these cases?

Defendant: [No answer.]

Judge: Have you had time to think about all this?

Defendant: No.

Judge: You haven't? [Pause – no answer.] You want more time to think about it?

Defendant: No.

Judge: OK. Have you had enough time to think about it?

Defendant: Yes.⁶¹

The findings of this research team indicate that language interpretation services, particularly those which incorporate biculturalism, are needed on the trial level.

The Yup'ik study researched the needs of only one non-English-speaking population in Alaska. Other studies and surveys have indicated that the need for translation services extends beyond the Yup'ik population to reach both Native and non-Native groups. In 1997, a report issued by the Alaska Supreme Court Advisory Committee on Fairness and Access contained the results of a survey conducted by the Court as Employer Subcommittee.⁶² The survey asked state court system employees “to estimate the average number of times per month that customers who had difficulty communicating in English came to the court.”⁶³ While 18% of those who responded said “none,” another 18% reported that this occurred “10 times or more per month” and 3% indicated that this oc-

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. ALASKA SUPREME COURT ADVISORY COMMITTEE ON FAIRNESS AND ACCESS, REPORT OF THE ALASKA SUPREME COURT ADVISORY COMMITTEE ON FAIRNESS AND ACCESS 95 (Oct. 31, 1997) [hereinafter REPORT], available at <http://www.ajc.state.ak.us/Reports/fairness.pdf> (last visited April 4, 2005).

63. *Id.* at 92.

curred “once per month.”⁶⁴ While the report noted that “these customers sometimes or usually brought to the court someone to translate for them,”⁶⁵ the need for unbiased courtroom interpreters remains evident. The report concluded that Bethel and Dillingham are in need of Alaska Native language interpreters more than ten times per month, and that Anchorage and Juneau are often in need of Spanish interpreters.⁶⁶

Also included in the 1997 report is some anecdotal evidence from public hearings conducted by the Language and Culture Subcommittee.⁶⁷ One resident of Bethel testified that he witnessed the arraignment of two elderly Yup’ik individuals who were forced to rely on a fellow defendant for a translation of the proceeding.⁶⁸ A public defender in Anchorage indicated that the arraignments of non-English-speaking individuals were often postponed until the public defender was available, sometimes delaying an individual’s release from jail for more than a day.⁶⁹ Two Hispanic Juneau residents claimed that they “sometimes hear[d] of people who went to jail without having any idea of why they had been arrested.”⁷⁰ This evidence, while anecdotal, further suggests that reforms are necessary.

Finally, the text of the applicable rules themselves is indicative of the need for reform. Administrative Rule 6 and Evidence Rule 604 fail to address some of the most fundamental issues regarding the use of language interpreters during criminal proceedings, including issues of access, quality, and accuracy.

1. *Issues of Access.* Administrative Rule 6 provides that parties to civil and criminal proceedings must supply their own interpreters.⁷¹ Because no state court has interpreted this rule, it is unclear whether an indigent criminal defendant has the right to a court-appointed interpreter at trial. The text of Rule 6 seems to indicate that indigent defendants are not afforded this right, as the rule explicitly provides for the provision of a sign language interpreter to any party or witness “unable to effectively communicate because of a physical disability.”⁷² This provision may have been intended to establish compliance with the requirements of the

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.* at 97.

68. *Id.* at 93.

69. *Id.*

70. *Id.* at B-23.

71. ALASKA R. ADMIN. 6 (2004).

72. *Id.*

Americans with Disabilities Act⁷³ and thus does not necessarily preclude a court from finding a statutory right to a language interpreter in the language of Rule 6. However, given that the Advisory Committee on Fairness and Access has recommended that the state court system provide indigent defendants with interpreters,⁷⁴ it is unlikely that Rule 6, as currently interpreted, already confers this right.

In addition, Administrative Rule 6 and Evidence Rule 604 do not address the possibility that a defendant might be willing to supply his or her own interpreter but the trial judge may refuse to allow the interpreter to participate based on some factor other than the interpreter's qualifications or impartiality. While Rule 604 requires a trial judge to inquire into the qualifications and impartiality of a proposed interpreter, the rule is silent as to a duty or authority to inquire into other factors, including the defendant's English language ability.⁷⁵ The absence of a clear standard with regard to this issue is another indication of the need to clarify the State's current interpreter policy.

2. *Issues of Quality.* Evidence Rule 604 mandates that a trial judge "shall inquire into and consider [an] interpreter's education, certification and experience" in order to determine whether the interpreter is qualified to serve in the courtroom.⁷⁶ However, because the State lacks a certification program and very few, if any, federally certified interpreters reside in Alaska,⁷⁷ the requirement that a trial judge inquire into the "certification" of a proposed court interpreter is essentially meaningless. Thus, the proposed interpreter's education and experience, along with his or her impartiality, become essential to the determination. Judges, however, receive no training in how to assess the qualifications of an interpreter or how to supervise an interpreter who has been allowed to participate in a criminal trial.⁷⁸ Without a certification process for interpreters or a training program for legal professionals, the requirement that an interpreter be "qualified and impartial" cannot be consistently followed.

73. See generally *Nathan v. Municipality of Anchorage*, 955 P.2d 528 (Alaska Ct. App. 1998) (discussing sign language interpreter requirements under the Americans with Disabilities Act).

74. REPORT, *supra* note 62, at 18–20.

75. ALASKA R. EVID. 604 (2004).

76. *Id.*

77. See *Committees Examine Interpretation*, 13 Alaska Justice Forum #4 6 (Winter 1997), available at http://justice.uaa.alaska.edu/forum/f134wi97/c_interp.html (last visited April 4, 2005).

78. REPORT, *supra* note 62, at 102.

3. *Issues of Accuracy.* Neither Administrative Rule 6 nor Evidence Rule 604 addresses the issue of translation accuracy.⁷⁹ Because the State does not certify interpreters and the judiciary is not trained to supervise interpreters in the courtroom,⁸⁰ no mechanism exists to ensure that interpreters render accurate translations in court. In addition, interpreters permitted to participate in criminal trials are not subject to training requirements.⁸¹ Legal vocabulary is complex, and even the most skilled bilingual interpreter has problems translating certain words and concepts from one language to another.⁸² The absence of word equivalency lists and interpreter dictionaries, particularly for the Alaska Native languages, also contributes to translation accuracy problems.⁸³ The State's failure to address these issues is an additional reason to revise the current policy.

D. The Alaska Reform Movement

In the last decade, many jurists in Alaska have noted the lack of a formal policy regarding the use of interpreters in the state court system and have taken steps to correct the oversight. In 1995, the Alaska Supreme Court established the Advisory Committee on Fairness and Access, whose purpose was to "identify concerns about racial and ethnic bias in the state court system."⁸⁴ The Committee is comprised of six subcommittees, including a Language and Culture Subcommittee whose focus is on linguistic and cultural issues.⁸⁵

In 1997, the Language and Culture Subcommittee issued a list of findings and recommendations on language and culture in the state court system.⁸⁶ The subcommittee found that Alaska has a linguistically diverse population and identified several instances in which language barriers had resulted in confusion and potential injustice in the courts.⁸⁷ Based on these findings, the subcommittee recommended the following: (1) that the court system provide language interpreters to indigent defendants; (2) that all court forms be written in plain, clear English; (3) that all court forms be translated into other languages, including Alaska Native languages; (4) that the court system establish training programs for

79. See ALASKA R. ADMIN. 6 (2004); ALASKA R. EVID. 604 (2004).

80. REPORT, *supra* note 62, at 102.

81. *Id.* at 103.

82. See Phyllis Morrow, *Legal Interpreting in Alaska*, 10 ALASKA JUSTICE FORUM 4 (Winter 1994), available at http://justice.uaa.alaska.edu/forum/f104wi94/a_interp.html (last visited April 4, 2005).

83. *Id.*

84. REPORT, *supra* note 62, at i.

85. *Id.*

86. *Id.*

87. *Id.* at 94–96.

judicial personnel related to the assessment and supervision of language interpreters in the courtroom; (5) that the court system educate lawyers and other legal professionals on the use of language interpreters; (6) that the court system establish training and certification programs for courtroom interpreters; and (7) that judges inform non-citizen defendants of the possible immigration-related consequences of conviction.⁸⁸ While the Alaska court system has yet to implement any of these recommendations, the subcommittee's report has served to foster discussion about the interpretation issue throughout the Alaska legal community.

In the spring of 2000, for example, the Alaska Bar Association hosted a session on interpretation entitled "Mutual Understanding: Interpreting and Translating in Alaska's Legal System."⁸⁹ Legal professionals and linguistic experts presented information to bar association members about the use of translation services both inside and outside the courtroom.⁹⁰ Presenters from Alaska informed the audience about the use of interpreters within the state, while those from outside Alaska gave informative lectures on certification practices and training programs in other states and in Canada.⁹¹ The bar session served to remind Alaska legal professionals of the interpretation issue and signified that the reform effort was ongoing.⁹²

These preliminary reform measures confirm the inadequacy of the State's current courtroom interpreter policy. Having established that reform is needed, this Note will next focus on establishing a right to an interpreter and discussing other policy-related matters.

III. ESTABLISHING A CONSTITUTIONAL RIGHT TO AN INTERPRETER

The first step in reforming the current policy is to establish a criminal defendant's right to have an interpreter present during his or her trial. This important step will lay the groundwork for discussion on policy-related matters. The right may be established by the state legislature through the passage of a regular statute or constitutional amendment, or by the state courts through the interpretation of pre-existing constitutional provisions. This analysis will focus on establishing a right to an interpreter through the court system and suggest existing constitutional provisions in which this right may be grounded. Because Alaska courts are not bound by federal case law when interpreting the provisions of the Alaska Constitution,⁹³ this analysis will attempt to find a right to an interpreter in both the federal and state constitutions.

88. *Id.* at 100–04.

89. *See* Morrow, *supra* note 18, at 2.

90. *Id.*

91. *Id.*

92. *Id.*

93. *See, e.g.,* Shagloak v. State, 597 P.2d 142, 144 n.14 (Alaska 1979).

Because the right to an interpreter may have many different meanings, it is important to define exactly what the right entails. For the purposes of this analysis, the right to an interpreter includes: (1) for all non-English-speaking defendants, the right to supply one's own interpreter at trial and (2) for indigent non-English-speaking defendants, the right to a court-appointed interpreter at trial.

A. Federal Constitution

The Supreme Court of the United States has yet to determine whether a right to an interpreter exists within the Federal Constitution.⁹⁴ Moreover, because the Court Interpreters Act of 1978 governs most interpreter issues in the federal courts, few federal appellate cases have addressed whether the Federal Constitution contains such a right.⁹⁵ Several circuit courts have held, however, that in some cases the denial of an interpreter may constitute a violation of a criminal defendant's Fifth and Sixth Amendment rights.⁹⁶ In addition, federal constitutional jurisprudence suggests that a non-English-speaking defendant's due process rights would be implicated if she were denied an interpreter at trial.⁹⁷

1. *Fifth Amendment Right to Testify.* The right to testify on one's own behalf in a criminal proceeding is derived from two other constitutional rights: the Fifth Amendment freedom from self-incrimination and the Sixth Amendment right to call witnesses in one's favor.⁹⁸ A non-English-speaking defendant's right to testify is implicated when the use of an interpreter is denied or an inadequate interpreter is provided. In *United States v. Mayans*,⁹⁹ the Ninth Circuit Court of Appeals found a violation of this right after the defendant was denied the use of an inter-

94. See, e.g., *United States v. Johnson*, 248 F.3d 655, 663 (7th Cir. 2001).

95. See, e.g., *United States v. Sanchez*, 928 F.2d 1450, 1456 (6th Cir. 1991) ("As a constitutional matter the appointment of interpreters is within the district court's discretion."); see also *United States v. Bennett*, 848 F.2d 1134, 1141 (11th Cir. 1988).

96. See *United States v. Mayans*, 17 F.3d 1174, 1181 (9th Cir. 1994) (holding that the withdrawal of defendant's interpreter mid-trial constituted a violation of defendant's Fifth Amendment right to testify on his own behalf); *United States v. Lim*, 794 F.2d 469, 470 (9th Cir. 1986) (acknowledging that some courts have found violations of the Confrontation Clause of the Sixth Amendment where non-English-speaking defendants have had inadequate interpretation at trial); *United States ex rel Negron v. New York*, 434 F.2d 386, 389-90 (2d Cir. 1970) (noting that the right to confront witnesses can be inhibited by the absence of an interpreter).

97. See also *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir. 1989) (suggesting that denial of an interpreter can constitute a violation of defendant's due process rights).

98. See, e.g., *Rock v. Arkansas*, 483 U.S. 44, 51-52 (1987).

99. 17 F.3d 1174 (9th Cir. 1994).

preter at his trial.¹⁰⁰ Pablo Mayans, a Cuban-American whose first language was Spanish, used an interpreter to translate the proceedings throughout his trial.¹⁰¹ When he took the stand, Mayans testified through the interpreter that he had lived in the United States for two decades and spoke English.¹⁰² The trial judge then dismissed Mayan's interpreter and suggested that Mayans "try it in English" because the testimony took twice as long with the interpreter.¹⁰³ Although Mayans objected, the judge refused to allow the interpreter to return.¹⁰⁴ Mayans' counsel then withdrew Mayans as a witness.¹⁰⁵ The Court of Appeals found a Fifth Amendment violation because Mayans was forced to choose between "forfeiting his right to testify . . . [and] participat[ing] in the risky in-court experiment proposed by the trial judge."¹⁰⁶

The *Mayans* case is illustrative of a broader principle. A non-English-speaking defendant who is denied the ability to use an interpreter at trial, whether by the trial judge or by his own economic circumstances, must forfeit his constitutional right to testify on his own behalf. Thus, the Fifth Amendment right to testify is one federal constitutional provision in which a court may find a right to a language interpreter.

2. *Sixth Amendment Right to Confront Witnesses.* The Sixth Amendment to the Federal Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy . . . the right to be confronted with the witnesses against him."¹⁰⁷ At least two federal appellate courts have acknowledged that inadequate language interpretation at trial can violate a defendant's right to confront witnesses.¹⁰⁸ When a criminal defendant has no interpreter or an inadequate one, his or her confrontation rights are clearly affected. If the prosecution's witnesses testify in a language that the defendant does not understand, the defendant cannot advise his attorney regarding cross-examination. The defendant will be unable to confront the witnesses against her because she will not have understood their allegations. If a non-English-speaking defendant is denied access to an adequate interpreter at trial, a court could find that the defendant's federal right to confront the witnesses against her has been violated.

100. *Id.* at 1181.

101. *Id.* at 1177.

102. *Id.* at 1178.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1181.

107. U.S. CONST. amend. VI.

108. *United States v. Lim*, 794 F.2d 469, 470 (9th Cir. 1986); *United States ex rel. Negron v. New York*, 434 F.2d 386, 389-90 (2d Cir. 1970).

3. *Fifth and Fourteenth Amendment Rights to Due Process.* The Due Process Clauses of the Federal Constitution guarantee the right of a fair trial to criminal defendants.¹⁰⁹ Due process requires that the defendant be afforded an opportunity to present a meaningful defense at trial.¹¹⁰ The right to an interpreter could be grounded in several different aspects of the right to due process. First, the United States Supreme Court has held that a defendant has a right to be present at trial.¹¹¹ As at least one state court has held, a non-English-speaking defendant who is denied an adequate interpreter at trial has in effect been denied his or her right to attend the proceeding.¹¹² Second, a defendant may have a due process right to communicate with his or her attorney.¹¹³ If a language barrier prevents effective communication between an attorney and his or her non-English-speaking client, the attorney's ability to prepare a meaningful defense will be significantly impaired. Finally, if a defendant's right to a fair trial includes the right to understand the proceedings, then the due process rights of a non-English-speaking defendant who has been denied the use of interpreter at trial clearly have been violated.

In addition to these due process claims, which would guarantee the right of a defendant to use an interpreter at trial, indigent defendants may claim the right to a court-appointed interpreter under procedural due process. In *Ake v. Oklahoma*,¹¹⁴ the United States Supreme Court held that an indigent defendant is entitled to the "basic tools of an adequate defense."¹¹⁵ The Court articulated three factors used to identify these "basic tools" and to ensure that a defendant has a meaningful opportunity to offer a defense at trial.¹¹⁶ The three factors are (1) the private interest affected, (2) the governmental interest affected, and (3) the probable value of the procedural safeguard requested.¹¹⁷ Using this test, the *Ake* Court determined that an indigent defendant intending to plead an insanity defense was entitled to an evaluation by a court-appointed psychiatrist.¹¹⁸ In other cases, the Supreme Court has held that an indigent defendant is entitled to a free transcript of his or her trial¹¹⁹ and a court-appointed attorney for an appeal of right.¹²⁰

109. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 684–85 (1984).

110. *Ake v. Oklahoma*, 470 U.S. 68, 76 (1985).

111. *See, e.g.*, *Portuondo v. Agard*, 529 U.S. 61 (2000).

112. *State v. Rios*, 539 P.2d 900, 901 (Ariz. 1975).

113. *See* 5 A.L.R.3d 1360 (discussing the "scope and extent . . . of accused's right to communicate with his attorney").

114. 470 U.S. 68 (1985).

115. *Id.* at 77.

116. *Id.*

117. *Id.*

118. *Id.* at 83.

119. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

120. *Douglas v. California*, 372 U.S. 353, 356–58 (1963).

Similarly, an indigent defendant who cannot speak or understand English should be entitled to a court-appointed interpreter as a basic tool of his or her defense. The private interest affected is substantial, as a wrongful conviction resulting from the lack of an adequate interpreter could signify the imposition of an undeserved prison sentence or even execution. By contrast, the governmental interest is relatively insubstantial. Under *Ake*, the government cannot assert an interest in having a strategic advantage over the defendant at trial because the state's primary concern should be the fair administration of justice.¹²¹ Here, the only legitimate interest the state can assert is its interest in fiscal responsibility. When compared to the defendant's liberty interest, however, the state's interest in its economy is *de minimis*.¹²² Finally, the probable value of providing an interpreter to an indigent defendant is significant. The use of an interpreter prior to trial would improve the quality of the defense prepared by assisting in communications between the defendant and his or her attorney. In addition, the presence of an interpreter at trial would likely increase the effectiveness of the defense's cross-examination of prosecution witnesses. In the balance, it appears that an indigent non-English-speaking defendant is as entitled to a court-appointed interpreter as an indigent defendant alleging an insanity defense is entitled to a court-appointed psychiatrist. For these reasons, a court could ground the right to an interpreter within one of the various due process rights.

B. Alaska Constitution

As noted previously, Alaska courts are not limited in their interpretation of the Alaska Constitution by federal case law concerning counterpart provisions of the Federal Constitution.¹²³ In particular, state courts have held that the Due Process Clause of the Alaska Constitution¹²⁴ "confer[s] broader protection than . . . its federal counterparts."¹²⁵ Thus, an Alaska court might find a right to an interpreter in the state Due Process Clause, which, like its federal counterparts, protects the right of a criminal defendant to be present at every stage of his or her trial.¹²⁶ In addition, the three-part test for procedural due process rights under the Alaska Constitution¹²⁷ is nearly identical to the test iterated by the

121. *Id.*

122. *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985).

123. *See, e.g., Shagloak v. State*, 597 P.2d 142, 145 (Alaska 1979).

124. ALASKA CONST. art. I, § 7 (2004).

125. *See, e.g., Maeckle v. State*, 792 P.2d 686, 688 (Alaska Ct. App. 1990); *see also Roberts v. State*, 458 P.2d 340, 342 (Alaska 1969).

126. *In re Curda*, 49 P.3d 255, 257 (Alaska 2002).

127. *See, e.g., Hilbers v. Municipality of Anchorage*, 611 P.2d 31, 36 (Alaska 1980) ("[I]dentification of the specific dictates of due process generally involves consideration

United State Supreme Court in *Ake v. Oklahoma*.¹²⁸ Just as the United States Supreme Court has found a right to a court-appointed psychiatrist in the Federal Due Process Clauses,¹²⁹ a state court could establish a right to a court-appointed interpreter on state procedural due process grounds.

The Alaska Constitution also protects the right to testify on one's own behalf.¹³⁰ In *Hughes v. State*,¹³¹ the Alaska Supreme Court declared that "no defendant requesting to testify should be deprived of exercising that right and conveying his version of the facts to the court or jury."¹³² The commanding language used by the supreme court to define this right¹³³ suggests that the court would likely consider the notion of grounding a derivative right to an interpreter in the right to testify on one's own behalf.

In addition, the state constitution provides, in language nearly identical to that of the Sixth Amendment of the Federal Constitution, that "[i]n all criminal prosecutions, the accused shall have the right . . . to be confronted with the witnesses against him."¹³⁴ Thus, an Alaska court could ground the right to an interpreter in the right of confrontation guaranteed by the state constitution.

Finally, it is important to note that the use of the Alaska Constitution to establish a criminal defendant's right to an interpreter will be necessary if the United States Supreme Court ever holds that the Federal Constitution does *not* guarantee such a right. Because the state courts are not bound by federal case law interpreting the Federal Constitution,¹³⁵ an Alaska court could establish a right to an interpreter using provisions of the state constitution, regardless of the status of such a right under federal law.

IV. BALANCING POLICY CONSIDERATIONS

Having identified several constitutional provisions in which the right to an interpreter might be found, it is now appropriate to consider the policy-related matters that will arise if such a right is ever established by the courts. Although some specific recommendations will be made,

of . . . the private interest, . . . the risk of an erroneous deprivation . . . and the probable value of additional or substitute procedural safeguards, . . . and the government's interest including . . . fiscal and administrative burdens.").

128. 470 U.S. 68, 77 (1985).

129. *Id.* at 83.

130. *See, e.g., Hughes v. State*, 513 P.2d 1115, 1119 (Alaska 1973).

131. 513 P.2d 1115 (Alaska 1973).

132. *Id.* at 1119.

133. *Id.*

134. ALASKA CONST. art. I, § 11 (2004).

135. *Shagloak v. State*, 597 P.2d 142 (Alaska 1979).

in most instances this Note will merely identify factors that the State should consider in reforming its interpreter policy without suggesting a particular course of action.

A. Issues of Access

The State must first determine whether the right to a court-appointed interpreter will extend to all non-English-speaking defendants or only those defendants who could not otherwise afford to provide their own. At least one state supreme court has held that this right extends to all criminal defendants regardless of their financial status.¹³⁶ In its 1997 report, however, the Language and Culture Subcommittee recommended limiting the right to a court-appointed interpreter to indigent defendants only.¹³⁷ The subcommittee estimated that providing interpreters to those who qualify under the State's indigency guidelines would cost the court system approximately \$100,000 per year.¹³⁸ Clearly, providing court-appointed interpreters to all non-English-speaking defendants would cost the State significantly more.

The State may have justification, however, for providing court-appointed interpreters to all criminal defendants who cannot speak or understand English regardless of financial status. If the use of a court-appointed interpreter were required, the specter of bias that would usually accompany the use of a privately funded interpreter would be eliminated. The State must balance its financial concerns against this potential benefit to determine whether court-appointed interpreters should be used in all criminal trials or only those that involve an indigent defendant.

Next, the State must consider whether a trial judge should have the authority to deny the use of an interpreter based on the defendant's English language ability, and if so, what factors the trial judge may consider in making this determination. In the case of court-appointed interpreters, it would appear that the State has a clear financial interest in ensuring that its limited funds are not wasted on a defendant who is capable of speaking and understanding English. Even in cases involving privately funded interpreters, however, the State has an interest in the efficient administration of justice, which arguably is hindered when a criminal trial is needlessly lengthened by the use of an unnecessary interpreter.¹³⁹ These factors indicate that a trial judge should have the authority to deny

136. *State v. Lopes*, 805 So. 2d 124, 128 (La. 2001).

137. REPORT, *supra* note 62, at 101.

138. *Id.*

139. *See Morrow*, *supra* note 82, at 1 (noting that use of a translator lengthens the trial process); *United States v. Mayans*, 17 F.3d 1174, 1178 (9th Cir. 1994) (noting trial judge's remark that the defendant's testimony took twice as long with an interpreter).

the use of an interpreter at trial if the defendant has a sufficient understanding of the English language.

In this hypothetical reality, however, a defendant would possess a constitutional right to an interpreter. If a trial judge is permitted to deny the defendant's use of an interpreter, the factors upon which the trial judge may base that determination should be limited in order to ensure that the rights of the defendant are adequately safeguarded. For example, if a defendant requests the use of an interpreter, court-appointed or otherwise, the trial judge should make an immediate assessment of the defendant's English language ability.¹⁴⁰ If the trial judge determines that the defendant would benefit from the use of an interpreter, the interpreter should be allowed. If the judge determines that the defendant might benefit or would not benefit from the use of an interpreter, a more in-depth investigation should be required. In essence, the use of an interpreter should be disallowed only when it is clear that it would not benefit the defendant and, if permitted, would hinder the efficient administration of justice.

B. Issues of Quality

The State must also take action to ensure that courtroom interpreters are adequately qualified to provide accurate translations in court. One method of ensuring quality that has been utilized in other jurisdictions is certification.¹⁴¹ A certification process would guarantee that interpreters permitted to participate in courtroom proceedings have attained a minimum level of proficiency in the provision of translation services.¹⁴² The establishment of a certification program is necessary to secure a non-English-speaking defendant's right to an adequate interpreter at all stages of his or her criminal trial.

In considering the type of certification program it should implement, the State must decide whether to offer training courses¹⁴³ to interpreters seeking state certification. Interestingly, the Language and Culture Subcommittee recommended establishing an interpreter training program *before* implementing a certification requirement.¹⁴⁴ While the subcommittee was likely motivated by fiscal concerns,¹⁴⁵ the suggestion also serves a more practical purpose. Given the dearth of qualified in-

140. *Cf., e.g.,* Mayans, 17 F.3d at 1179–81 (recognizing that a trial court may deny the use of an interpreter based on its assessment of the defendant's English language ability).

141. *See, e.g., In re Certification for Language Interpreters in Arkansas Courts, supra* note 8; *see also* CAL. GOV'T. CODE § 68561.

142. REPORT, *supra* note 62, at 103.

143. *See Court Interpreter Training Set for Panama City, supra* note 9.

144. REPORT, *supra* note 62, at 103–04.

145. *Id.*

terpreters in the state,¹⁴⁶ few individuals would achieve certification if not first properly trained in the art of courtroom interpretation.

The final consideration of the State with regard to the implementation of a certification procedure or interpreter training program is the financial cost. In 1997, the Language and Culture Subcommittee estimated that the State “could expect to spend \$50,000 to \$70,000 in the first year to staff . . . the establishment of the training and certification program.”¹⁴⁷ The State should take these figures into account when deciding whether to implement a certification procedure, a training program, or both.

C. Issues of Accuracy

Finally, the State must determine how to ensure the accuracy of translations rendered in the courtroom. As the Language and Culture Subcommittee recommended in its 1997 report, a program designed to train judicial personnel in the assessment and supervision of courtroom interpreters would likely improve the accuracy of courtroom translations.¹⁴⁸ In addition, the development of word equivalency lists and interpreter dictionaries, especially for the Alaska Native languages, would increase consistency and assist interpreters in rendering accurate translations of convoluted legal concepts.¹⁴⁹

As with other reform measures, the State must consider the economic burden of implementation. The Language and Culture Subcommittee estimated that training programs for judges and lawyers could be administered for less than \$10,000.¹⁵⁰ While the cost of developing and producing interpreter dictionaries and word lists is unknown, it is unlikely that their cost would rise above the level of *de minimis*. Thus, it appears that the implementation of these two reform measures would be an inexpensive but effective method of improving the accuracy of translations rendered in the courtroom.

V. CONCLUSION

As the non-English-speaking population of the State of Alaska grows, the need for a more formal court interpreter program will become self-evident. Fortunately, many groups within the state are actively advocating for reform before a trend of injustice is established. In order to guarantee the right of a non-English-speaking criminal defendant to have an interpreter present at all stages of his or her trial, the Alaska court

146. See *Committees Examine Interpretation*, *supra* note 77.

147. REPORT, *supra* note 62, at 104.

148. *Id.* at 102–03.

149. MORROW, *supra* note 82, at 1.

150. REPORT, *supra* note 62, at 102–03.

system should make every effort to adopt the recommendations of the Language and Culture Subcommittee of the Advisory Committee on Fairness and Access. These recommendations directly address the inadequacies of the State's current interpreter policy, and, if implemented, would correct the access, quality, and accuracy deficiencies that characterize the current system. In addition, the Alaska court system should look to develop interpreter word lists and dictionaries to further guarantee the accuracy of courtroom translations. The implementation of these recommendations will work to prevent the occurrence of any further injustice resulting from language barriers in the courtroom.

T. Caroline Briggs-Sykes