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My Ears Hear More Than English: Granting Multilingual Jurors Accommodations and Treating Multilingualism as a Common Type of Juror Expertise

A. Lee Valentine II
Boston College Law School, alvin.valentine@bc.edu

MY EARS HEAR MORE THAN ENGLISH: GRANTING MULTILINGUAL JURORS ACCOMMODATIONS AND TREATING MULTILINGUALISM AS A COMMON TYPE OF JUROR EXPERTISE

Abstract: To find an example of court-sanctioned discrimination against Spanish-speaking prospective jurors, one need not look further than the 2011 U.S. Court of Appeals for the Fourth Circuit decision in *United States v. Cabrera-Beltran*. Three multilingual jurors were struck for cause during voir dire for not agreeing to ignore all Spanish-language evidence that would be presented at trial and adhere solely to the English-language interpretation, even if they detected errors in the interpretation. Although these jurors could have been accommodated, the court upheld the decision to strike them. In other cases, jurors with other types of expertise typically have not been asked to abandon their expertise during a trial, nor have they been subject to for-cause challenges on the basis of their skills. This Note argues that multilingual jurors should be provided appropriate accommodations for their linguistic skills, and that they, like other expert jurors, should typically not be subject to for-cause challenges because they possess particular skills.

INTRODUCTION

> *The Court: [I]f you were to believe that the translators were not accurately translating what the witness might be saying, would you be able to base your decision on what the translator has said, or would you have problems with that?*
>
> *Prospective Juror # 2: It would depend on, you know, what was said. If, you know, the difference. I couldn't give you a specific yes-or-no answer.*[1]

In 2011, in *United States v. Cabrera-Beltran*, the U.S. Court of Appeals for the Fourth Circuit held that Prospective Juror Number Two, along with

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[1] United States v. Cabrera-Beltran, 660 F.3d 742, 748 (4th Cir. 2011) (alteration in original), *cert. denied*, 132 S. Ct. 1935 (2012).

two other Spanish-speaking jurors, was properly excluded "for cause."[2] Multilingual[3] prospective jurors, according to the Fourth Circuit, could be excluded if they had any doubts about their ability to ignore original Spanish-language evidence in favor of English-language interpretations or translations.[4] In *Cabrera-Beltran*, prospective jurors were asked to accept English-language interpretations even if they believed that they heard mistakes in the interpretations.[5]

Given that the defendant in *Cabrera-Beltran* was charged with the distribution of drugs, a crime carrying significant penalties, an egregious interpretation or translation error at trial could have had serious implications.[6] Nevertheless, these jurors were asked during voir dire to discount *all* such future errors at trial before ever having heard any testimony and without knowing the nature and magnitude of any potential errors.[7] Provided that a juror understands English, for-cause strikes in this situation can only impact multilingual jurors, as monolingual English-speakers would not be able to readily identify errors in interpretation.[8]

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[2] *See id.* at 747, 750.

[3] Although a number of cases cited in this Note involved bilingual prospective jurors, I have used the term "multilingual" throughout to include jurors who speak more than two languages. *See infra* notes 4–225 and accompanying text. All future uses of the term "multilingual" assume that the juror has an understanding of English, because the law requires an understanding of English for federal jury service. *See* 28 U.S.C. § 1865(b)(2) (2012). Spanish is the most common language spoken in the United States after English, with thirteen percent of the population aged five or older speaking it at home. *Language Spoken at Home: 2013 American Community Survey 1-Year Estimates*, U.S. CENSUS BUREAU [hereinafter *Language Spoken at Home*], *available at* http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_13_1YR_S1601&prodType=table, *archived at* http://perma.cc/9ESW-W2AU.

[4] *See Cabrera-Beltran*, 660 F.3d at 747–50. This Note uses the term "translation" to mean "[t]he transference of meaning of a written document from the source language into the target language in writing." 5 U.S. ADMIN. OFFICE OF THE U.S. COURTS, GUIDE TO JUDICIARY POLICY § 140, at 4 (rev. 2014), *available at* http://www.uscourts.gov/uscourts/FederalCourts/Publications/Guide_Vol05.pdf, *archived at* http://perma.cc/M4P2-32H2. "Interpretation," in contrast, refers to "[t]he rendering of the full and accurate meaning of speech from one language into another . . . ." *Id.* § 140, at 3 (defining "simultaneous interpretation"). Some courts ignore the document-versus-speech distinction between the terms and thus use them interchangeably. *See, e.g.*, Hernandez v. New York, 500 U.S. 352, 356–57, 360–61 (1991) (plurality opinion) (conflating interpretation and translation); *Cabrera-Beltran*, 660 F.3d at 748 (same).

[5] *See Cabrera-Beltran*, 660 F.3d at 748.

[6] *See id.* at 746.

[7] *See id.* at 747–48 (inquiring whether prospective jurors would be willing to accept official Spanish-to-English interpretations even if the jurors thought the interpreters "were not accurately" interpreting witness testimony).

[8] *See Hernandez*, 500 U.S. at 379 (Stevens, J., dissenting) (noting that peremptory strikes involving the willingness to abide by a translation would "inevitably result in a disproportionate disqualification of Spanish-speaking venirepersons" as compared to monolingual English-speaking jurors). A person who does not understand English cannot serve as a juror in the federal courts. 28 U.S.C. § 1865(b)(2).

This Note argues that for-cause strikes against multilingual jurors on the basis of their language skills are unjust and should not be upheld.[9] Part I reviews the law regarding strikes of prospective jurors during voir dire, the treatment of foreign language evidence, and the permissible methods for jurors to ask questions during trial in some instances.[10] Part II draws a comparison between expert jurors who are not subject to for-cause challenges on the basis of the expertise they possess and multilingual jurors who in some instances have been subject to for-cause challenges.[11] Finally, Part III argues that courts should treat multilingual jurors similarly to other expert jurors and should not subject multilingual jurors to for-cause strikes out of fear or distrust.[12]

I. PEREMPTORY STRIKES OF PROSPECTIVE JURORS: HOW RACE-BASED STRIKES BECAME PROHIBITED, WHILE LANGUAGE-BASED STRIKES ARE SOMETIMES STILL PERMITTED

Understanding how the Fourth Circuit came to allow the for-cause exclusions of multilingual jurors requires a background on race- and language-based peremptory strikes and how jurors are normally expected to react to foreign language evidence.[13] Section A reviews the basic elements of the jury selection process and strikes against prospective jurors.[14] Section B discusses the 1986 decision in *Batson v. Kentucky*, where the U.S. Supreme Court articulated the standard for reviewing race-based peremptory strikes.[15] Section C then explains the 1991 decision in *Hernandez v. New York*, where the U.S. Supreme Court attempted to provide clarity with respect to peremptory strikes against multilingual jurors.[16] Section D focuses on how jurors should consider foreign language evidence at trial.[17] Finally, Section E discusses how jurors with concerns about evidence are sometimes able to ask questions during trial.[18]

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[9] *See infra* notes 170–225 and accompanying text.
[10] *See infra* notes 13–117 and accompanying text.
[11] *See infra* notes 118–169 and accompanying text.
[12] *See infra* notes 170–225 and accompanying text.
[13] *See infra* notes 19–117 and accompanying text.
[14] *See infra* notes 19–34 and accompanying text.
[15] *See infra* notes 35–42 and accompanying text.
[16] *See infra* notes 43–69 and accompanying text.
[17] *See infra* notes 70–87 and accompanying text.
[18] *See infra* notes 88–117 and accompanying text.

A. Jury Selection and Voir Dire

Juries for federal trials are chosen by a complex system of rules partially governed by federal laws, but largely developed by local courts.[19] The Jury Selection and Service Act of 1968 requires courts to create lists of prospective jurors, sourcing the names from lists of registered or actual voters, and to supplement the lists as needed from other sources.[20] Although federal law establishes minimum requirements for eligibility for jury duty,[21] the Jury Selection and Service Act requires each federal district court to devise its own plan for randomly selecting jury members.[22]

One key part of the federal jury selection process is the juror background interview process called voir dire.[23] A randomly selected pool of prospective jurors called the venire is interviewed to determine whether the jurors will be assigned to a given trial.[24] The preferences of individual judges determine whether the interviews are conducted primarily by the judge in charge of the case or by the attorneys.[25] Federal law provides that even if the judge chooses

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[19] *See* 28 U.S.C. § 1863 (2012) (governing the random selection of jurors). District courts must promulgate jury selection plans. *Id.* § 1863(a). *See generally* U.S. DIST. CT. E.D. CAL., JUROR MANAGEMENT PLAN (rev. 2010), *available at* http://www.caed.uscourts.gov/caednew/assets/File/493.pdf, *archived at* http://perma.cc/X32H-8RBU (providing local rules for the Eastern District of California); U.S. DIST. CT. S.D. W. VA., PLAN PRESCRIBING METHOD FOR THE COMPOSITION OF JURY WHEELS AND THE QUALIFICATION AND RANDOM SELECTION OF GRAND AND PETIT JURORS (rev. 2103), *available at* http://www.wvsd.uscourts.gov/pdfs/JuryPlanandOrderasApprovedbyJudicialCouncil.pdf, *archived at* http://perma.cc/XT9B-3J2S (providing local rules for the Southern District of West Virginia).

[20] 28 U.S.C. § 1863(b)(2); *see* U.S. DIST. CT. E.D. CAL., *supra* note 19, § 2.01 (using "county voter registration lists"); U.S. DIST. CT. S.D. W. VA., *supra* note 19, § 2.3 (using "lists of actual voters"). Massachusetts uses a list of residents of the Commonwealth as opposed to a list of voters. 28 U.S.C. § 1863(b)(2) (explicitly excepting Massachusetts from the more typical means of selecting jurors that other states must abide by); MASS. GEN. LAWS ANN. ch. 234A, § 10 (West 2000 & Supp. 2015) (specifying the details of the "numbered resident list").

[21] 28 U.S.C. § 1865. Eligibility requirements for a prospective juror include being a citizen of the United States who is 18 years old or older, and who has been a resident in the federal judicial district for at least one year. *Id.* Additionally, there are minimum English language proficiency requirements and requirements to be mentally and physically capable to serve. *See id.* Finally, convictions for certain crimes may exclude a person from being eligible to serve on a jury. *See id.*

[22] *Id.* § 1863(a).

[23] *See* 9 MOORE'S FEDERAL PRACTICE § 47.10 (3d ed. 2013) (noting that voir dire helps to ensure a defendant's constitutional "right to an impartial jury"). "Voir dire" is "[a] preliminary examination of a prospective juror by a judge or lawyer to decide whether the prospect is qualified and suitable to serve on a jury." BLACK'S LAW DICTIONARY 1805 (10th ed. 2014). In the federal courts, statutory requirements plus procedural rules set forth the basic requirements for voir dire. *See* 28 U.S.C. § 1870; FED. R. CIV. P. 47; FED. R. CRIM. P. 24.

[24] *See* KEVIN F. O'MALLEY ET AL., 1 FEDERAL JURY PRACTICE AND INSTRUCTIONS § 3:8 (6th ed. 2013); BLACK'S LAW DICTIONARY, *supra* note 23, at 1789.

[25] *See* FED. R. CIV. P. 47(a); FED. R. CRIM. P. 24(a)(1); *Hernandez*, 500 U.S. at 356 (plurality opinion) (noting that the state trial court "talked to" prospective jurors during voir dire and that the

to conduct each juror interview, they must allow the attorneys to pose questions to prospective jurors where the questions are proper.[26]

Voir dire includes both attorneys excluding some jurors biased against their clients' cases and attorneys seeking to include other jurors who are either neutral or favorably disposed toward their clients' cases.[27] In theory, one objective of voir dire is to root out and exclude any jurors with expressed or situationally implied biases for or against any party to the trial.[28] A judge may grant an unlimited number of challenges "for cause" against jurors who have expressed biases or who have an obvious interest in the outcome of the proceedings.[29] For-cause challenges cannot be used at an attorney's whim because prospective jurors are presumed to be impartial, absent proof to the contrary.[30]

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prosecutor was allowed to ask them questions); *infra* note 26 and accompanying text (citing cases where judges asked questions during voir dire).

[26] FED. R. CIV. P. 47(a) (allowing proper attorney questioning in civil cases); FED. R. CRIM. P. 24(a)(2) (allowing proper attorney questioning in criminal cases). The trial court determines which questions are "proper," subject to an abuse of discretion standard on appeal. *See* United States v. DePugh, 452 F.2d 915, 921–22 (10th Cir. 1971). A trial court has substantial discretion in deciding which questions are proper during voir dire provided that the court crafts a voir dire procedure designed to generate an "impartial jury." *See* Ratliff v. Schiber Truck Co., 150 F.3d 949, 956 (8th Cir. 1998). What is "proper" varies from case to case. *See, e.g.*, Smith v. Tenet Healthsystem SL, Inc., 436 F.3d 879, 884 (8th Cir. 2006) (upholding the district court's decision to reject questions that would have required jurors to respond at length); Darbin v. Nourse, 664 F.2d 1109, 1114–15 (9th Cir. 1981) (reversing a trial court that prevented prospective jurors from being questioned as to whether they would find the testimony of law enforcement officials more credible than other witnesses); Fietzer v. Ford Motor Co., 622 F.2d 281, 285 (7th Cir. 1980) (reversing a district court's refusal to allow the defendant in a negligence case to ask whether jurors or their families had ever received injuries in rear-end collisions).

[27] *See* GORDON BERMANT & JOHN SHAPARD, THE VOIR DIRE EXAMINATION, JUROR CHALLENGES, AND ADVERSARY ADVOCACY 1 (1978) (discussing how defense attorneys in a 1975 murder trial "'bought' the verdict" acquitting their client of murder, thanks in part to spending money on "an extensive, systematic jury selection exercise"); JAMES J. GOBERT ET AL., JURY SELECTION: THE LAW, ART AND SCIENCE OF SELECTING A JURY § 10:1 (2013) (describing voir dire as a process of removing potential jurors who the parties' attorneys perceive to be undesirable).

[28] O'MALLEY ET AL., *supra* note 24, § 4:8 (noting that some voir dire challenges target prospective jurors with "some actual or implied bias or prejudice").

[29] *See* 28 U.S.C. §§ 1866(c), 1870 (2012); O'MALLEY ET AL., *supra* note 24, § 4:8; *see also* FED. R. CIV. P. 47(c) (allowing a trial court to "excuse a juror for good cause" at any point "[d]uring trial or deliberation" in a civil case).

[30] *See* Moran v. Clarke, 443 F.3d 646, 650 (8th Cir. 2006) ("The courts presume that a prospective juror is impartial, and a party seeking to strike a venire member for cause must show that the prospective juror is unable to lay aside his or her impressions or opinions and render a verdict based on the evidence presented in court."); *see also* 9 MOORE'S FEDERAL PRACTICE, *supra* note 23, § 47.20[1] ("In the absence of facts pointing to presumptive bias, a prospective juror is presumed to be impartial.").

Attorneys, however, are not solely interested in excluding jurors with expressed or situationally implied biases; they are also interested in excluding jurors that the attorneys suspect may be unfavorably disposed toward their clients.[31] To this end, federal law allots each attorney a limited number of peremptory challenges.[32] No hidden bias needs to be proven to use these peremptory challenges.[33] Any juror who is successfully challenged for cause, or who is the target of a peremptory challenge, is excused from service on that trial, while prospective jurors who survive the process may be impanelled on the case.[34]

B. Race-Based Juror Challenges During Voir Dire

Challenges during voir dire cannot be intentionally targeted against protected classes of citizens because of their membership in particular racial or national origin groups.[35] In *Batson*, the U.S. Supreme Court held that race-based peremptory challenges violated the Fourteenth Amendment's Equal Protection Clause.[36] The Court further held that peremptory challenges may not be used under the assumption that all prospective jurors of a given race

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[31] *See* 9 MOORE'S FEDERAL PRACTICE, *supra* note 23, § 47.30 (discussing the use of peremptory challenges to remove jurors with "unacknowledged or unconscious bias"). *Compare* Bailey v. Bd. of Cnty. Comm'rs of Alachua Cnty., 956 F.2d 1112, 1128 (11th Cir. 1992) (discussing a juror who should have been struck for cause because they knew the plaintiff and a number of witnesses in the case), *and* 9 MOORE'S FEDERAL PRACTICE, *supra* note 23, § 47.20[1] (discussing strikes due to express or implied bias), *with* BERMANT & SHAPARD, *supra* note 27, at 1 (discussing the uses of various types of strikes to shape a winning jury).

[32] 28 U.S.C. § 1870 (noting that each side has three peremptory challenges in federal civil litigation); FED. R. CRIM. P. 24(b) (noting that each side has anywhere from three to twenty peremptory challenges in federal criminal cases, depending on the severity of the defendant's offense).

[33] *Hernandez*, 500 U.S. at 374 (O'Connor, J., concurring) (quoting Lewis v. United States, 146 U.S. 370, 378 (1892)) (explaining that peremptory challenges may be exercised in an "arbitrary and capricious" manner); Batson v. Kentucky, 476 U.S. 79, 89 (1986) (quoting United States v. Robinson, 421 F. Supp. 467, 473 (D. Conn. 1976), *mandamus granted sub nom.* United States v. Newman, 549 F.2d 240 (2d Cir. 1977)) (noting that although prosecutors cannot make race-based challenges to prospective jurors, they are typically "entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to [their] view[s] concerning the outcome' of the case to be tried").

[34] *See* 9 MOORE'S FEDERAL PRACTICE, *supra* note 23, §§ 47.20[1], 47.30; GORDON BERMANT, JURY SELECTION PROCEDURES IN U.S. DISTRICT COURTS 14–21 (1982). "Impanel" means "[t]o swear in (a jury) to try an issue or case." BLACK'S LAW DICTIONARY, *supra* note 23, at 638, 869.

[35] 28 U.S.C. § 1862 (2012) (prohibiting jurors from being excluded from jury service based on "race, color, religion, sex, national origin, or economic status."); *Batson*, 476 U.S. at 88 ("[T]he Constitution prohibits all forms of purposeful racial discrimination in selection of jurors.").

[36] *See Batson*, 476 U.S. at 88, 100. The Fourteenth Amendment's Equal Protection Clause provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1.

will be biased and unable to serve.[37] Prior case law had focused on prohibiting discrimination in the selection of the venire, but *Batson* expanded protections to petit jury selection as well.[38]

In reaching its decision, the Court established a three-part test to prove a violation of the Equal Protection Clause in peremptory challenges involving race.[39] First, the defendant has to establish a prima facie case that the prosecutor used race-based challenges.[40] Second, the prosecutor bears the burden of proffering a race-neutral reason for using peremptory challenges against the jurors.[41] Finally, the court must decide whether the defendant has proven intentional discrimination in the use of the peremptory challenge process.[42]

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[37] *See Batson*, 476 U.S. at 89 ("[T]he Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.").

[38] *Id.* at 95–96 (discussing how case law had developed since *Swain v. Alabama*, 380 U.S. 202 (1965), *overruled by Batson*, 476 U.S. 79, and ultimately concluding that a prima facie case of discrimination may also be established by evidence of the discriminatory use of peremptory challenges). A "petit jury" is "[a] jury ([usually] consisting of 6 or 12 persons) summoned and empaneled in the trial of a specific case." BLACK'S LAW DICTIONARY, *supra* note 23, at 987.

[39] *Hernandez*, 500 U.S. at 358 (plurality opinion) (citing *Batson*, 476 U.S. at 96–98).

[40] *Id.* (citing *Batson*, 476 U.S. at 96–97). One way a prima facie case might be established is by proving "a 'pattern' of strikes against" jurors of a given racial group. *See Batson*, 476 U.S. at 97. Such a pattern may be demonstrated by showing that the "percentage of strikes against minority prospective jurors surpasses the proportion of minority jurors on the venire." Ikedi O. Onyemaobim, Comment, Batson *Challenges at Work: Jury Selection in the Realm of Employment Law*, A.B.A. (Jan. 13, 2015), http://apps.americanbar.org/litigation/committees/employment/articles/winter2015-0115-batson-challengers-work-jury-selection-realm-employment-law.html, *archived at* http://perma.cc/W5CD-FMGD (citing Miller-El v. Dretke, 545 U.S. 231, 241 (2005)). In *Hernandez*, the trial court did not reach a conclusion as to whether the plaintiff had established a prima facie case of discrimination, and the U.S. Supreme Court thought the issue was moot because the "prosecutor ha[d] offered a race-neutral explanation for the peremptory challenges and the trial court ha[d] ruled on the ultimate question of intentional discrimination." *See Hernandez*, 500 U.S. at 359.

[41] *Hernandez*, 500 U.S. at 358–59 (citing *Batson*, 476 U.S. at 97–98). In *Hernandez*, a majority of the court agreed that striking prospective jurors who expressed "difficulty in accepting the [interpreter's] rendition of Spanish-language testimony" was a race-neutral reason for striking jurors. *See id.* at 361. Nevertheless, a prosecutor's allegedly race-neutral reason may be rejected as pretextual where their peremptory challenges were not made evenhandedly to jurors of different races who were similarly motivated to bias the outcome of the case. *See* Snyder v. Louisiana, 552 U.S. 472, 482–85 (2008).

[42] *Hernandez*, 500 U.S. at 359 (citing *Batson*, 476 U.S. at 98). According to a 1996 study, only 62.23% of all complainants alleging a *Batson* violation established a prima facie case. Kenneth J. Melilli, Batson *in Practice: What We Have Learned About* Batson *and Peremptory Challenges*, 71 NOTRE DAME L. REV. 447, 460 (1996). Only 17.59% of those challenges where a prima facie *Batson* violation existed were successful. *Id.*

C. Peremptory Challenges of Multilingual Jurors

Five years after *Batson*, the U.S. Supreme Court addressed the issue of peremptory challenges of multilingual jurors.[43] In *Hernandez*, the Supreme Court held that multilingual prospective jurors could be lawfully excused via peremptory challenges if the prospective jurors appeared hesitant to adopt the Spanish-to-English evidentiary interpretations of a court interpreter.[44] Because Spanish language evidence was to be considered in the case, the prosecutor asked the bilingual prospective jurors whether they would be willing to rely solely on English language interpretations provided through a court interpreter, rather than considering their own interpretations of original Spanish language evidence.[45] Each of the Spanish-speaking jurors hesitated in answering the prosecutor's question, and as a result, the prosecutor issued peremptory challenges to the jurors.[46] The *Hernandez* Court applied the three-part test from *Batson* in considering the peremptory challenges of these prospective jurors.[47] The Court held that potential hesitancy by the prospective jurors to rely solely on a court interpreter's interpretation of Spanish-language evidence was a race-neutral explanation for the challenge.[48]

The Court split over the Equal Protection analysis because of the impact this type of challenge would have on prospective bilingual jurors, with six justices agreeing on the judgment but with no more than four signing on to any one opinion.[49] Justice Anthony Kennedy announced the judgment of the Court and delivered a plurality opinion in which Chief Justice William Rehnquist and Justices Byron White and David Souter joined.[50] In spite of agreeing that the peremptory challenges in *Hernandez* had been race-neutral, Justice Kennedy's plurality was concerned that such challenges could eventually cause a high percentage of bilingual jurors to be excluded from jury ser-

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[43] *See Hernandez*, 500 U.S. at 355–57, 372.

[44] *See id.*

[45] *Id.* at 356–57.

[46] *Id.* at 356–58; *see also* Eric N. Einhorn, Note, Batson v. Kentucky *and* J.E.B. v. Alabama *ex rel.* T.B.*: Is the Peremptory Challenge Still Preeminent?*, 36 B.C. L. REV. 161, 179 (1994) (discussing the prosecutor's peremptory challenges of these prospective jurors).

[47] *See Hernandez*, 500 U.S. at 358–59.

[48] *See id.* at 372.

[49] *See id.* at 355–79. Four opinions were filed in *Hernandez*. *See id.* Justice Anthony Kennedy announced the opinion of the court, and delivered a plurality opinion in which Chief Justice William Rehnquist and Justices Byron White and David Souter joined. *Id.* at 354–72. Justice Sandra Day O'Connor filed an opinion concurring in the judgment, which Justice Antonin Scalia joined. *Id.* at 372–75 (O'Connor, J., concurring). Justice John Paul Stevens filed a dissent joined by Justice Thurgood Marshall. *Id.* at 375–79 (Stevens, J., dissenting). Justice Harry A. Blackmun filed his own short dissent, which agreed with part of Justice Stevens' dissent. *Id.* at 375 (Blackmun, J., dissenting).

[50] *See id.* at 355 (plurality opinion).

vice.[51] Thus, the plurality considered the potential disparate impact of this type of challenge and whether it might be evidence of racially motivated strikes.[52] The plurality observed that past precedent provided that an "invidious discriminatory purpose" may be inferred from the totality of the facts including the disproportionate, negative racial impact of a government policy.[53]

The plurality concluded that unless the prosecutor had made peremptory challenges to cause a disparate negative impact against multilingual prospective jurors, it would not violate *Batson's* requirement that the challenges be racially neutral.[54] To that end, the plurality considered whether the prosecutor's excuse for his peremptory strikes—the hesitation of the jurors answering his questions about their willingness to adhere strictly to the English-language interpretations—could have been pretextual.[55] To arrive at their ultimate answer, the plurality applied a "no clear error" standard in deciding to support the trial court's determination that there was no discriminatory intent shown in the peremptory strikes.[56] Justice Sandra Day O'Connor, joined by Justice Antonin Scalia, concurred in the Court's judgment, but stated that the plurality should have observed the Supreme Court's Equal Protection jurisprudence and considered only intentional discrimination without considering the peremptory challenges' negative racial impact.[57]

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[51] *See id.* at 362–63, 372; *infra* note 60 and accompanying text (discussing the views of the *Hernandez* dissenters along with those of commentators that multilingual jurors will be disproportionately excluded from service by language-based challenges). Justice Kennedy's plurality was particularly concerned by the "harsh paradox" that one must be English-proficient to serve on a federal jury, but at the same time one can face a peremptory challenge based on knowledge of English plus a second language. *Hernandez*, 500 U.S. at 371; *see* Juan F. Perea, Hernandez v. New York*: Courts, Prosecutors, and the Fear of Spanish*, 21 HOFSTRA L. REV. 1, 51–54 (1992) (commenting on Justice Kennedy's "harsh paradox"); *see also* 28 U.S.C. § 1865(b)(2)–(3) (requiring English proficiency for jury service).

[52] *See Hernandez*, 500 U.S. at 362–63 (plurality opinion).

[53] *See id.* at 363 (citing Washington v. Davis, 426 U.S. 229, 242 (1976)).

[54] *See id.* at 362. The plurality for the Court explained:

> But even if we knew that a high percentage of bilingual jurors would hesitate in answering questions [about ignoring the Spanish-language evidence] and, as a consequence, would be excluded under the prosecutor's criterion [that the jurors could be excluded because they hesitated in answering his questions], that fact alone would not cause the criterion to fail the race-neutrality test. . . . Unless the government actor adopted a criterion with the intent of causing the impact asserted, that impact itself does not violate the principle of race neutrality.

Id.

[55] *See id.* at 363–69.

[56] *See id.* at 369, 372.

[57] *See id.* at 372–75 (O'Connor, J., concurring).

The dissenters were somewhat divided about the Equal Protection analysis.[58] Justice John Paul Stevens, joined by Justice Thurgood Marshall and supported, in part, by Justice Harry A. Blackmun, would have rejected the prosecutor's supposedly race-neutral reason for challenging the jurors as just a "proxy" for intentional discrimination.[59] Justice Stevens worried that Spanish-speaking prospective jurors would be at risk of being disproportionately excused as a result of peremptory challenges under the holding of *Hernandez*.[60] In a part of Justice Stevens' dissent, only joined by Justice Marshall, Justice Stevens focused heavily on past Equal Protection precedents, which provided that racially motivated treatment may be inferred from sufficient disparate racial impact taken together with the rest of the facts of the case.[61]

Seven justices—the plurality and the three dissenters—agreed that there were limits on striking bilingual jurors.[62] The plurality suggested a potential accommodation for bilingual jurors in future cases: the defendant could propose that bilingual jurors be impanelled and allowed to inform the trial court of potential errors they observed that were committed by the court interpreter.[63] The plurality concluded that if the prosecutor opposed that accommodation, then this refusal could be evidence of a racially-biased motivation for the peremptory challenge.[64] The dissenters agreed with the use of the *Hernandez*

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[58] *See id.* at 375 (Blackmun, J., dissenting) (agreeing only with Part II of Justice Stevens' dissent, which rejected the prosecutor's explanation for his peremptory strikes against Spanish-speaking prospective jurors).

[59] *Id.* at 379 (Stevens, J., dissenting).

[60] *See id.* Justice Stevens' concern may be well-founded, because multilingual jurors may be unable to simply "tune out" the foreign language testimony that they hear. *See* Anthony Fassano, Note, *The Rashomon Effect, Jury Instructions, and Peremptory Challenges: Rethinking* Hernandez v. New York, 41 RUTGERS L.J. 783, 796–97 (2010). Furthermore, without any knowledge about the testimony of the witness, the competency of the interpreter, and the nature of the potential error, a multilingual juror may be unable to answer questions in the abstract about whether he or she will abide exclusively by a court interpreter's English-language interpretation where the juror believes it to be materially different than the original foreign language testimony. *See* Perea, *supra* note 51, at 29–34.

[61] *See Hernandez*, 500 U.S. at 376–78 (Stevens, J., dissenting) (citing Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265–66 (1977); *Washington*, 426 U.S. at 242) ("An avowed justification that has a significant disproportionate impact will rarely qualify as a legitimate, race-neutral reason sufficient to rebut the prima facie case because disparate impact is itself evidence of the discriminatory purpose.").

[62] *See Hernandez*, 500 U.S. at 364 (plurality opinion); *id.* at 379 (Stevens, J., dissenting).

[63] *Id.* at 364 (plurality opinion). This Note refers to this accommodation as "the *Hernandez* accommodation." *See infra* notes 64–225 and accompanying text.

[64] *Hernandez*, 500 U.S. at 364 (plurality opinion). In addition to proposing the *Hernandez* accommodation, Justice Kennedy's plurality also opined that if bilingual jurors were challenged only because they spoke Spanish, this could be merely a "pretext for racial discrimination." *See id.* at 371–72.

accommodation.[65] In short, although the judgment of the Court in *Hernandez* was that there were no clearly unconstitutional uses of peremptory challenges in that particular case, seven members of the Court supported a method to accommodate multilingual prospective jurors in future cases.[66]

Although the plurality and the dissenters in *Hernandez* could not agree on whether the peremptory challenges had been valid, the seven justices found some common ground on the issue of future for-cause challenges based on language.[67] The plurality implied that a multilingual juror's hesitation to accept a court interpreter's Spanish-to-English interpretation could be the basis for a "valid for-cause challenge."[68] The dissenting justices in *Hernandez* rejected mere hesitation during voir dire as a valid basis for a language-based peremptory challenge, but they nevertheless concluded that a multilingual juror's unwillingness to accept an interpreter's Spanish-to-English interpretation of testimony could be grounds for a for-cause challenge rather than just a peremptory challenge.[69]

D. How Jurors Interact with Foreign Language Evidence

In federal court, English is the language of the trial record for appellate review.[70] In cases where a witness testifies in a foreign language at trial, only the English language interpretation is usually transcribed by the court reporter.[71] As a result, unless an error in interpretation of oral testimony is raised at trial, it may be difficult or impossible to raise a claim on appeal that there was an error in interpretation, because typically only the resulting English interpretation is preserved.[72]

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[65] *See id.* at 379 (Stevens, J., dissenting).

[66] *See Hernandez*, 500 U.S. at 372 (plurality opinion) (expressing the judgment of the Court that there were no clear *Batson* violations during voir dire); *id.* at 364 (proposing the *Hernandez* accommodation); *id.* at 379 (Stevens, J., dissenting) (same).

[67] *See id.* at 362–63 (plurality opinion); *id.* at 379 (Stevens, J., dissenting).

[68] *See id.* at 362–63 (plurality opinion); *see also Cabrera-Beltran*, 660 F.3d at 749 (discussing *Hernandez*).

[69] *See Hernandez*, 500 U.S. at 378–79 (Stevens, J., dissenting).

[70] *See* United States v. Boria, 371 F. Supp. 1068, 1069 (D.P.R. 1973), *aff'd*, 518 F.2d 368 (1st Cir. 1975); Perea, *supra* note 51, at 34–37.

[71] *See* Perea, *supra* note 51, at 34–37. The nearly exclusive use of English in the federal trial record is even true in Puerto Rico, where the majority of the population speaks Spanish as its primary language. *See* Andrea Freeman, *Linguistic Colonialism: Law, Independence, and Language Rights in Puerto Rico*, 20 TEMP. POL. & CIV. RTS. L. REV. 179, 185–86 (2010).

[72] Perea, *supra* note 51, at 37 ("[Non-English] testimony is usually not preserved in any way. The failure to preserve testimony in non-English languages makes impossible meaningful appellate review of the accuracy of interpretations."); *see also* Freeman, *supra* note 71, at 185–86 (noting that in the federal courts in Puerto Rico, jurists are likely to make their decisions based on witness testimony made in Spanish, but the court reporter creates the official record—which will

Although court interpreters are generally qualified professionals, some can and do make mistakes in interpretations.[73] Sometimes the errors can be subtle differences such as how formal or polite the interpreter makes the original witness seem, which may in turn bias jurors for or against the witness.[74] At other times, errors in interpretation can be more egregious, such as when an interpreter misunderstands a witness or takes liberties with an interpretation.[75] For example, in one case where the witness said they were, "going to 'chat with' the victim," the interpreter said the witness testified they were "going to 'kill' the victim."[76]

In addition to English-language translations or interpretations, a jury can also consider original foreign language testimony as evidence during trial.[77] One form of foreign language evidence that juries may consider is a recorded conversation.[78] Some jurisdictions have ruled that foreign language recordings, rather than English transcriptions, are the "real evidence" at trial.[79] The evidentiary value of transcriptions of those foreign language record-

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presumably be used on appeal—based on English-language interpretations of Spanish-language primary evidence).

[73] *See* Marina Hsieh, *"Language-Qualifying" Juries to Exclude Bilingual Speakers*, 66 BROOK. L. REV. 1181, 1189 (2001) (providing a table of some noteworthy instances where the original foreign-language testimony and the English-language interpretation varied substantially); Sarah B. Clasby, Note, *Understanding Testimony: Official Translation and Bilingual Jurors in* Hernandez v. New York, 23 U. MIAMI INTER-AM. L. REV. 515, 531–32 (1992) (noting that interpreters can change the features of testimony such as the level of formality and verb tense, but in the process, they may also "slant what a speaker is trying to say" because of their personal biases).

[74] *See* Perea, *supra* note 51, at 24–25; Clasby, *supra* note 73, at 531–32.

[75] *See* Clasby, *supra* note 73, at 532. A few examples of particularly egregious errors in interpretation include:

> 1) The witness said, "as for the Vietnamese, I never associate with them," but the interpreter merely said, "no."
> 2) The question, "Do you remember the day [defendant] sexually assaulted you?" was translated as, "Do you remember the day [defendant] made love to you?"
> 3) The witness said, "I don't even have 'ten cents,'" but the interpreter said, "I don't even have 'ten kilos.'"

Hsieh, *supra* note 73, at 1189 (alteration in original).

[76] Hsieh, *supra* note 73, at 1189.

[77] *See* United States v. Montor-Torres, 449 F. App'x 820, 822–23 (11th Cir. 2011) (noting that the defendant was offered the opportunity to play foreign language tapes as evidence); United States v. Cruz, 765 F.2d 1020, 1024 (11th Cir. 1985) (allowing jurors to hear a foreign language recording to consider factors such as the changes in the "voice modulation" of speakers over the course of the recording).

[78] *See Montor-Torres*, 449 F. App'x at 823; *Cruz*, 765 F.2d at 1023–24.

[79] *See Cruz*, 765 F.2d at 1023 ("What was said at the time it was recorded is what the real evidence is, the transcripts are not. They are merely to help you identify [the speakers]. But in this situation where we have a foreign language tape they also inevitably provide you content of the conversation as well." (citation omitted)); *accord Montor-Torres*, 449 F. App'x at 822 (quoting *Cruz*, 765 F.2d at 1023) ("[English-language t]ranscripts may be used as substantive evidence to

ings is disputed, with some jurisdictions ruling that they have independent evidentiary value, while other jurisdictions give transcriptions no independent evidentiary value.[80]

Even when they do not understand the language of a recording, monolingual English speakers may be able to gain something from analyzing foreign language evidence directly.[81] For example, when considering spoken testimony in a foreign language, monolingual English-speaking jurors are able to listen to a speaker's vocal pitch, volume, or speed to draw conclusions about the speaker.[82] A witness may also be able to identify the voice of a particular speaker from listening to a recording, allowing jurors to consider the credibility of that "witness's voice identification."[83]

There is no legal requirement that jurors be able to understand the language used in a foreign language recording admitted into evidence.[84] Nevertheless, where English-speaking jurors are to consider recorded evidence in a foreign language, English-language transcripts of the conversations will likely be required.[85] Where the parties to the trial can agree upon an interpreta-

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aid the jury in determining the real issue presented, the content and meaning of the [Spanish-language] tape recording."); *cf.* United States v. Aisenberg, 120 F. Supp. 2d 1345, 1347 (M.D. Fla. 2000) (opining that "the evidence is the recordings and *not* the transcripts" in the context of an English-language transcript of an English-language recording).

[80] *Compare Montor-Torres*, 449 F. App'x at 822 (holding that transcripts may be considered as "substantive evidence"), *with* United States v. Nunez, 532 F.3d 645, 651 (7th Cir. 2008) (holding that transcripts typically have no "independent weight").

[81] *See Cruz*, 765 F.2d at 1024.

[82] *See id.* (noting that the court "played the tape recording for the jury and had an interpreter signal the jury when it was appropriate to turn the pages of the transcript," and explaining that this process "enabled the jury to detect changes in voice modulation and note any hesitancies or other characteristics which might give meaning to the tape recording"). *But see* Clifford S. Fishman, *Recordings, Transcripts, and Translations as Evidence*, 81 WASH. L. REV. 473, 517 & n.177 (2006) (arguing that jurors should be thwarted in their "attempts to rely on inflections and emphases in the foreign language that they do not understand").

[83] *See Montor-Torres*, 449 F. App'x at 823 (citing United States v. Cuesta, 597 F.2d 903, 915 (5th Cir. 1979)); *see also* FED. R. EVID. 901(b)(5) (stating that a witness may offer opinion evidence about the identity of a speaker in a recording).

[84] United States v. Llinas, 603 F.2d 506, 509 (5th Cir. 1979) (observing that if jurors were required to understand all foreign language evidence presented at trial without the aid of an interpreter, "persons would be free to engage in conspiracies in this country without fear that the government could show direct evidence of the conspiracy, as long as the conspirators addressed each other in a foreign language").

[85] *See Nunez*, 532 F.3d at 651 (citing United States v. Camargo, 908 F.2d 179, 183 (7th Cir.1990)) ("Transcripts of recorded conversations are a virtual necessity when the conversations take place in Spanish and are admitted into evidence before an English-speaking jury."); *Cruz*, 765 F.2d at 1023 ("[W]here we have a foreign language tape [transcripts] also inevitably provide [jurors] content of the conversation as well."); Fishman, *supra* note 82, at 517 (opining that translated transcriptions of foreign language recordings should be handed out to jurors because they will be unable to understand the original recordings).

tion of a recording, a single official English-language transcript may be created.[86] Otherwise, each party may need to submit its own English-language transcript for the jurors to consider.[87]

E. Jurors Asking Questions During Trial

Understandably, when a multilingual prospective juror can understand evidence in a foreign language that other jurors will need an interpreter to understand, potential problems may arise.[88] There are a number of ways courts have accommodated this knowledge rather than simply striking multilingual prospective jurors outright.[89] Subsection 1 explains a standard jury instruction that instructs jurors to pay attention only to the English-language interpretations and translations developed on the record, but also discusses jurisdictions that allow multilingual jurors to direct their concerns about an interpretation or translation to the court.[90] Subsection 2 discusses the possible genesis of the *Hernandez* accommodation and how it could work in practice.[91] Finally, Subsection 3 explores a recent method that allows all jurors to anonymously propose questions to witnesses.[92]

1. Pattern Jury Instructions Governing Foreign Language Evidence

Although foreign language testimony, writings, and recordings have evidentiary value, multilingual jurors who understand that evidence without the aid of a translator or interpreter are often forced to "ignore" the foreign language primary evidence.[93] The jury instructions for several federal circuits

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[86] *Llinas*, 603 F.2d at 509–10.

[87] *Id.*

[88] *See* United States v. Perez, 658 F.2d 654, 662–63 (9th Cir. 1981) (discussing a court's response to a conflict between an interpreter and a multilingual juror); *infra* notes 101–109 and accompanying text (discussing that same conflict).

[89] *See infra* notes 93–117 and accompanying text.

[90] *See infra* notes 93–100 and accompanying text.

[91] *See infra* notes 101–109 and accompanying text.

[92] *See infra* notes 110–117 and accompanying text.

[93] *Compare Perez*, 658 F.2d at 662–63 (observing that Spanish speakers can understand testimony given in Spanish and should be allowed to point out discrepancies in interpretations), *with* PATTERN CRIMINAL FEDERAL JURY INSTRUCTIONS FOR THE SEVENTH CIRCUIT § 3.18 (1998) (disallowing multilingual jurors from considering foreign language evidence directly). Other circuits have jury instructions similar to those in the U.S. Court of Appeals for the Seventh Circuit. *See* MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE EIGHTH CIRCUIT § 2.06B (2013 rev. ed.); MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT § 1.12 (2010 ed.); ELEVENTH CIRCUIT CIVIL PATTERN JURY INSTRUCTIONS § 1.3 (2013). It is unrealistic to believe that a multilingual juror could simply ignore original foreign language evidence that they can understand. *See* Perea, *supra* note 51, at 29 n.132 (explaining that if courts expect multilingual jurors to "ignore entirely the [foreign]-language testi-

require that multilingual jurors disregard information they garnered from foreign language evidence by virtue of their ability to speak a language other than English.[94] Thus, there is tension between multilingual jurors' duty to fairly consider the primary evidence before them and their duty to ignore what they understand the foreign language to mean.[95]

In *Hernandez*, both the plurality and the dissent recognized this tension and proposed the *Hernandez* accommodation, which provides that multilingual jurors should be impanelled and allowed to direct questions to the court when they detect discrepancies in a translation or interpretation.[96] This accommodation is not generally reflected in the jury instructions in a number of the federal circuits.[97]

At least two states with large language minority[98] populations, Florida and California, have integrated an accommodation like the one proposed in

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mony and hear and understand only the English-language interpretation, then substantial linguistic evidence suggests that compliance with [such a] request would be impossible"); Farida Ali, Note, *Multilingual Prospective Jurors: Assessing California Standards Twenty Years After* Hernandez v. New York, 8 NW. J.L. & SOC. POL'Y 236, 270 (2013) (describing the mandate to ignore foreign language evidence as a mere "procedural goal" rather than a "reflection of reality").

[94] *See supra* note 93 and accompanying text (detailing jury instructions for federal circuit courts). The following model criminal jury instructions for the Ninth Circuit are an example of the types of jury instructions in a number of federal jurisdictions:

> [A language] [Languages] other than English will be used for some evidence during this trial. [When a witness testifies in another language, the witness will do so through an official court interpreter.] [When recorded evidence is presented in another language, there will be an official court translation of the recording.]
>
> The evidence you are to consider and on which you must base your decision is only the English-language [interpretation] [translation] provided through the official court [interpreters] [translators]. Although some of you may know the non-English language used, you must disregard any meaning of the non-English words that differs from the official [interpretation] [translation].
>
> [You must not make any assumptions about a witness or a party based solely upon the use of an interpreter to assist that witness or party.]

MANUAL OF MODEL CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT COURTS OF THE NINTH CIRCUIT, *supra* note 93, § 1.12 (alterations in original).

[95] *See* Perea, *supra* note 51, at 29 n.132 (claiming that it is "impossible" for multilingual jurors to ignore what they hear in a foreign language that they can understand); Ali, *supra* note 93, at 270 (noting that it is not a "reflection of reality" to ask multilingual jurors to ignore what they hear in a language they can understand); *supra* note 93 and accompanying text (discussing how it is unrealistic to expect multilingual jurors to ignore testimony in their native language and that such a request may not be possible for them to comply with).

[96] *See Hernandez*, 500 U.S. at 364 (plurality opinion); *id.* at 379 (Stevens, J., dissenting); *supra* notes 63–65 and accompanying text (discussing the *Hernandez* accommodation).

[97] *See supra* notes 93–94 and accompanying text (citing examples of model jury instructions).

[98] *See* 52 U.S.C.A. § 10503(e) (West 2014) (defining "language minorities"). This Note uses the term "language minorities" to refer to persons who speak a language other than English where

Hernandez directly into their state pattern jury instructions concerning foreign language evidence.[99] In those states, multilingual jurors must still defer to the English-language interpretations or translations provided by the court, but the jurors can direct concerns to the judge if they detect a discrepancy between the original, foreign-language evidence and the English-language version presented by a court interpreter or translator.[100]

2. *United States v. Perez*, the Inspiration for the *Hernandez* Accommodation

The case that likely inspired the *Hernandez* accommodation is *United States v. Perez*, a 1981 decision from the U.S. Court of Appeals for the Ninth Circuit, which held that a trial judge did not engage in an abuse of discretion when he dismissed a multilingual juror from the trial after the juror argued

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that language is associated with their ethnicity or national origin. *See id.* Although the term "language minorities" is used in voting rights law, its usage in that context may be narrower than in this Note. *See id.* For example, federal elections law grants certain language-specific accommodations to "language minorities," but defines the term to include "persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage." *Id.* Unlike this Note, under United States voting rights law, the definition of "language minorities" includes only those persons from language groups that "have been effectively excluded from participation in the electoral process" and may require access to bilingual election materials for full participation in elections. *See* § 10503(a)–(e).

[99] *See* JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS, *Duty to Abide by Translation Provided in Court* § 108 (2013); FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, *Jury to Be Guided by Official English Translation/Interpretation: Preliminary Instructions* § 2.8–.12 (2013). The text of an exemplary Florida jury instruction follows:

> [Language used] may be used during this trial.
>
> The evidence you are to consider is only that provided through the official court [interpreters] [translators]. Although some of you may know [language used], it is important that all jurors consider the same evidence. Therefore, you must accept the English [interpretation] [translation]. You must disregard any different meaning.
>
> If, however, during the testimony there is a question as to the accuracy of the English interpretation, you should bring this matter to my attention immediately by raising your hand. You should not ask your question or make any comment about the interpretation in the presence of the other jurors, or otherwise share your question or concern with any of them. I will take steps to see if your question can be answered and any discrepancy resolved. If, however, after such efforts a discrepancy remains, I emphasize that you must rely only upon the official English interpretation as provided by the court interpreter and disregard any other contrary interpretation.

FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, *supra* § 2.8.

[100] *See* JUDICIAL COUNCIL OF CALIFORNIA CIVIL JURY INSTRUCTIONS, *supra* note 99, § 108 ("If you believe the court interpreter [interpreted] testimony incorrectly, let me know immediately by writing a note . . . ."); FLORIDA STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES, *supra* note 99, §§ 2.8–.12 ("If . . . during the testimony there is a question as to the accuracy of the English interpretation, you should bring this matter to my attention immediately by raising your hand.").

with an interpreter.[101] Initially the juror, hearing what she thought was an error in interpretation, spoke out in the courtroom without prompting from the judge.[102] Part of the exchange between the interpreter and the juror went unheard by the judge at the time, but at the end of the exchange the juror either called the interpreter "an idiot" (as the court reporter recorded) or said the dispute was over "an idiom" (as the juror later told the judge in chambers).[103] Only later would the judge become aware of the latter part of the exchange and dismiss the juror out of fear that the juror may have become too biased against one of the parties or the court proceedings to continue serving.[104]

The trial judge in *Perez* dismissed the juror because of the juror's demeanor both during and after the outburst, not because the juror had a concern over the interpretation.[105] In fact, the judge responded immediately to the juror's initial concerns by developing an impromptu system whereby questions would be directed to the judge by the juror after the witness had completed testifying, after which the judge would instruct the prosecutor to relay questions to the witness for clarification.[106]

According to records available to the Ninth Circuit on review, this process went smoothly.[107] In developing this method, the trial judge openly acknowledged that Spanish-speaking jurors would actively listen to and understand the Spanish-language evidence presented in the case and may have concerns about some of the interpretation.[108] The trial judge developed this

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[101] *See Hernandez*, 500 U.S. at 360 n.3, 364 (plurality opinion) (proposing the *Hernandez* accommodation despite characterizing the juror's interruption in *Perez* as "illustrat[ing] the sort of problems that may arise where a juror fails to accept the official translation of foreign-language testimony"); *id.* at 379 (Stevens, J., dissenting) (citing approvingly the trial judge's instruction in *Perez* that jurors with questions about interpretations should direct them to the court's attention only after the witness is done testifying); *Perez*, 658 F.2d at 662–63 (discussing the dismissal of a juror who disagreed with the interpretation). For a critique of Justice Kennedy's appraisal that multilingual jurors can be a source of "problems" and a defense of the important role of multilingual jurors, see Perea, *supra* note 51, at 37–40.

[102] *Perez*, 658 F.2d at 662.

[103] *Id.* at 662–63.

[104] *Id.* at 663.

[105] *See id.* at 662–63.

[106] *Id.*

[107] *See id.* at 663 (noting that after the court understood the multilingual juror's concerns, the prosecutor asked the witness for clarification, and the "examination proceeded thereafter without incident").

[108] *See id.* at 662–63. The trial judge in *Perez* addressed Mrs. Kim, the multilingual juror in question, along with the other jurors as follows:

> Just a moment. The Court recognizes that some of the jurors may be able to understand Spanish, and your own ears will tell you what you hear. This witness is testifying through an interpreter, but if those of you who can in fact understand Spanish hear certain words differently that [sic] you understand the interpreter to relate them, then you may, when the witness is finished with his testimony, you may place your

procedure to answer the multilingual juror's concerns while maintaining order in the courtroom and preventing jurors from interacting in an uncontrolled fashion with the interpreter or the witness.[109]

3. Allowing All Jurors to Ask Questions During Trial

Although the *Hernandez* accommodation focuses on allowing multilingual jurors to ask questions during trial, attempts have been made in some federal courts to allow *all* jurors to ask questions during trial.[110] One technique for managing juror questions was implemented in a recent case in the U.S. District Court for the Eastern District of Texas.[111] The trial judge's technique required jurors to each pass in a question form, with or without questions on it, to preserve juror anonymity.[112] The judge and attorneys involved in the case reviewed the questions while the jurors took a short break.[113] The judge selected, with advice from the attorneys, which questions he would ask.[114] The attorneys then had the opportunity to use those questions as lead-

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> question, you may raise the question that you have with the Court. If the Court feels that it is a question that can be properly answered, then the Court will take care of attempting to get it answered. But we are obviously going to break down if individual jurors want to ask questions of the interpreter or of the witness directly. The reason for that is, some of those questions may be what the law declares to be incompetent. That would result in prejudicial error either to the defendant or to the government.
>
> Now, let's start over again. Mrs. Kim, tell me what question you have about your understanding of an answer, and we'll place the question again to the witness.

Id.

[109] *See supra* note 108 and accompanying text (discussing the judge's admonition that the trial could "break down" if the juror directly interacts with a witness or interpreter).

[110] *See Hernandez*, 500 U.S. at 364 (plurality opinion) (discussing the *Hernandez* accommodation); *id.* at 379 (Stevens, J., dissenting) (same); Stephen D. Susman & Thomas M. Melsheimer, *Trial by Agreement: How Trial Lawyers Hold the Key to Improving Jury Trials in Civil Cases*, 32 REV. LITIG. 431, 452–55 (2013) (discussing the juror questions approach employed in *CEATS, Inc. v. Cont'l Airlines*, No. 6:10cv120 (E.D. Tex. Mar. 27, 2012)); Alison K. Bennett, *Eastern District of Texas Experiments with Jurors' Questions During Trial*, BATTLE BLAWG (Mar. 22, 2012), http://thebattleblawg.com/2012/03/22/eastern-district-of-texas-experiments-with-jurors-questions-during-trial/, *archived at* http://perma.cc/LFA8-PWQU (discussing the *CEATS* case where all jurors were invited to ask questions); *supra* notes 63–65 and accompanying text (discussing the *Hernandez* accommodation); *infra* notes at 111–117 and accompanying text (discussing the Eastern District of Texas approach in further detail). *See generally* Laurie Forbes Neff, Comment, *The Propriety of Jury Questioning: A Remedy for Perceived Harmless Error*, 28 PEPP. L. REV. 437 (2001) (providing a survey of the history of federal and state court practices regarding jurors asking questions at trial).

[111] *See* Bennett, *supra* note 110 (discussing *CEATS*). This Note refers to this technique as the "Eastern District of Texas approach." *See infra* notes 112–225 and accompanying text.

[112] Bennett, *supra* note 110.

[113] *Id.*

[114] *Id.*

ins for additional questions, which they elected to do around one-third of the time.[115] The total process added about fifteen minutes per witness to the length of the trial.[116] All eleven of the attorneys involved in the trial were polled about their satisfaction with the system before the verdict was handed down, and each attorney strongly supported the system.[117]

II. FOR-CAUSE CHALLENGES TO JURORS WITH SPECIALIZED EXPERTISE: WHY FOREIGN PHONEMES ARE FEARED MORE THAN PHYSICS

As is inevitably the case with jury pools, some prospective jurors may arrive with a specialized skill set or knowledge germane to weighing or interpreting some of the evidence that will be presented at trial.[118] This Part analyzes whether jurors with different types of expertise can be struck for cause during voir dire.[119] Section A examines a Fourth Circuit opinion which ruled that multilingual jurors can be struck for having doubts about whether they will bring their linguistic expertise into play in considering original foreign language evidence.[120] Section B then compares this treatment with jurors who have expertise in other contexts and their immunity to for-cause strikes on the basis of that expertise.[121]

A. For-Cause Strikes Against Jurors with Expertise in Foreign Languages

In 2011, in *United States v. Cabrera-Beltran*, the U.S. Court of Appeals for the Fourth Circuit held that multilingual prospective jurors who showed any unwillingness to adopt the foreign language interpretations of a court interpreter could be excused by means of a for-cause challenge during voir dire.[122] During voir dire, the district court struck three prospective jurors on

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[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *See, e.g.*, United States v. Cabrera-Beltran, 660 F.3d 742, 748, 750 (4th Cir. 2011) (considering a case where several prospective jurors understood Spanish and were challenged for cause during voir dire in a trial where Spanish-language evidence was to be presented), *cert. denied*, 132 S. Ct. 1935 (2012); Hard v. Burlington N. R.R. Co., 870 F.2d 1454, 1462 (9th Cir. 1989) (examining a case where a juror possessed the skills necessary to interpret an X-ray that had been admitted into evidence); State v. Mann, 39 P.3d 124, 132, 135 (N.M. 2002) (examining a case where a juror with expertise in physics used evidence presented at trial by an expert witness to calculate the probability that an alleged accident was actually a murder).
[119] *See infra* notes 122–169 and accompanying text.
[120] *See infra* notes 122–140 and accompanying text.
[121] *See infra* notes 141–169 and accompanying text.
[122] *See* 660 F.3d at 748, 750.

its own motion.[123] The dismissed jurors all had some ability to understand Spanish and, when presented with a hypothetical question about language use during voir dire, all had expressed some hesitancy at accepting a Spanish-to-English interpretation by a court interpreter if they thought it was in error.[124] The district court made this decision to strike them even though it was not certain that any interpreters or translators would be used during trial.[125] The court feared that even if interpreters or translators were used, a multilingual juror could be a "shadow translator in the jury box."[126] The defendant objected, noting that the strikes would remove all Latino prospective jurors from the venire only because they had the ability to speak Spanish.[127] The defendant lost on the objections and appealed, in part, on the basis of these strikes.[128]

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[123] *See id.* at 748.

[124] *Id.* at 747–48. The trial judge had asked which prospective jurors were "fluent in the Spanish language." *Id.* at 747. The relevant portion of the voir dire interviews with the resulting three multilingual prospective jurors who were dismissed for cause is reproduced below:

> THE COURT: If you were chosen to be a juror in this case and you disagreed with the interpretation or translation by the interpreters, could you base your decision on what the translator—all of these translators are court certified. Would you have any problem in basing your decision on what the translators have done?
> PROSPECTIVE JUROR # 1: Well, Your Honor, I'm certain if I disagreed with the translator, it would have to be a matter that I would bring up either to the Court or to fellow jurors. I've also testified in civil court in a foreign country in a foreign language, Portuguese in this case, and I know the differences between translation and what was actually said in the court, so it's a matter of some sensitivity to me.
> . . .
> THE COURT: [I]f you were to believe that the translators were not accurately translating what the witness might be saying, would you be able to base your decision on what the translator has said, or would you have problems with that?
> PROSPECTIVE JUROR # 2: It would depend on, you know, what was said. If, you know, the difference. I couldn't give you a specific yes-or-no answer.
> . . .
> THE COURT: All right. You've heard my question to the other two potential jurors. Would you have difficulty if you felt that there was a translation that you didn't agree with?
> PROSPECTIVE JUROR # 3: Yes.

Id. at 748 (alterations in original).

[125] *Id.* at 747–48.

[126] *Id.* at 748.

[127] *See* Brief of Appellant at 11–12, *Cabrera-Beltran*, 660 F.3d 742 (No. 10-4084), 2010 WL 2210944, at *11–12.

[128] *See Cabrera-Beltran*, 660 F.3d at 748. The defendant filed a petition for a writ of certiorari to the U.S. Supreme Court. Petition for Writ of Certiorari, *Cabrera-Beltran*, 132 S. Ct. 1935 (2012) (No. 11-1099). The writ was denied without an opinion. *Cabrera-Beltran*, 132 S. Ct. at 1935 (2012) (denying certiorari).

To determine whether the district court's for-cause strikes were constitutional, the Fourth Circuit looked to the plurality opinion and the dissents in the 1991 U.S. Supreme Court decision *Hernandez v. New York*.[129] Having determined that seven of the nine justices in *Hernandez* would have supported a for-cause challenge to a juror unwilling to accept the interpretation of a court interpreter, the Fourth Circuit held that the trial court's for-cause strikes of the prospective jurors did not violate the Equal Protection Clause of the Fourteenth Amendment.[130]

The defendant in *Cabrera-Beltran* also argued that striking the three prospective jurors violated his Sixth Amendment right to trial by an impartial jury.[131] The Fourth Circuit rejected this argument, holding that jurors are not entitled to substitute their own interpretations of foreign language evidence instead of relying on a court interpreter's interpretation.[132] The court reasoned that allowing multilingual jurors to rely on their own interpretations of foreign language evidence would result in the multilingual jurors considering different evidence than the evidence that monolingual English speakers could consider.[133]

In reaching this holding, the Fourth Circuit recognized that the district court *could* have employed the *Hernandez* accommodation, but ruled that it

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[129] *See Cabrera-Beltran*, 660 F.3d at 748–49. *See generally* Hernandez v. New York, 500 U.S. 352, 362–63 (1991) (plurality opinion) (noting that a juror who could not accept the official English interpretation of foreign language evidence could be dismissed for cause); *id.* at 379 (Stevens, J., dissenting) (same).

[130] *See Cabrera-Beltran*, 660 F.3d at 749. *But see Hernandez*, 500 U.S. at 364 (plurality opinion) (suggesting the *Hernandez* accommodation—which lets jurors raise their concerns about interpretation or translation errors to the court rather than striking the jurors for cause during voir dire—and opining that the decision of the prosecutor to strike a multilingual juror rather than abide by a requested accommodation could be evidence of intentional discrimination); *id.* at 379 (Stevens, J., dissenting) (supporting the *Hernandez* accommodation); *Cabrera-Beltran*, 660 F.3d at 750 n.6 (recognizing that the U.S. Supreme Court had proposed the *Hernandez* accommodation and further recognizing that the multilingual prospective jurors in *Cabrera-Beltran* could have been offered the *Hernandez* accommodation, even though the Fourth Circuit refused to require such an accommodation).

[131] *See Cabrera-Beltran*, 660 F.3d at 749. The Sixth Amendment of the U.S. Constitution provides in relevant part that, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, *by an impartial jury* of the State and district wherein the crime shall have been committed . . . ." U.S. CONST. amend. VI (emphasis added). The Fourth Circuit in *Cabrera-Beltran* opined that a juror is only impartial if they can "render a verdict based on the evidence *presented in court* . . . ." *See* 660 F.3d at 740 (quoting Patton v. Yount, 467 U.S. 1025, 1037 n.12 (1984)). The court then effectively concluded that foreign language evidence is not "evidence *presented in court*" and ruled that the multilingual jurors could be struck for cause because they were unwilling to ignore such evidence. *See id.* at 749–50.

[132] *See Cabrera-Beltran*, 660 F.3d at 749.

[133] *See id.*

did not abuse its discretion in failing to do so.[134] The Fourth Circuit's analysis on this point was limited, merely noting that *Hernandez* was not in conflict with the court's holding in *Cabrera-Beltran*.[135]

Notably, the three prospective jurors who were dismissed each expressed different levels of hesitancy toward the judge's questions.[136] Prospective Juror Number One merely requested a variant of the *Hernandez* accommodation by saying that they would want to inform someone, the court or the other jurors, about any noted discrepancy.[137] Prospective Juror Number Two seemed uncertain how to respond, claimed that it might depend on the situation, and implied that the nature or type of differences in the interpretation could affect that juror's willingness to abide by a separate interpretation.[138] Prospective Juror Number Three agreed that they would "have difficulty" abiding by an interpretation that differed from their own understanding of the original Spanish-language evidence.[139] The Fourth Circuit, however, did not distinguish between these types of juror responses when determining eligibility to be struck for cause by the district court on its own motion.[140]

B. For-Cause Strikes Are Generally Not Allowed Against Jurors with Non-Language-Based Expertise

Multilingual jurors are not the only jurors who can have some type of specialized skill related to understanding and weighing evidence.[141] Jurors may have a skill set that allows them to form opinions about complex evi-

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[134] *See id.* at 750 & n.6.

[135] *See id.* It is unclear whether the Fourth Circuit came to this conclusion because it viewed the *Hernandez* accommodation as non-binding dicta, or whether it prioritized the view from *Hernandez* that an unwillingness to abide by an official court interpretation was grounds for a for-cause challenge, or both. *See id.*

[136] *See id.* at 748; *supra* note 124 and accompanying text (providing the relevant portion of the responses of the multilingual prospective jurors during voir dire).

[137] *See Cabrera-Beltran*, 660 F.3d at 748. The Fourth Circuit seems to have recognized the juror's comments as a request for a Hernandez accommodation, or at the very least realized that such an accommodation was possible. *See id.* at 750 & n.6 (acknowledging that some previous cases had suggested that multilingual jurors could be allowed to address the court with their concerns about potentially flawed interpretations).

[138] *See id.* at 748.

[139] *See id.*

[140] *See id.* at 748–50 & n.6 (refusing to require the *Hernandez* accommodation for any of the prospective jurors while acknowledging that the trial court could have granted such an accommodation).

[141] *See* Paul F. Kirgis, *The Problem of the Expert Juror*, 75 TEMP. L. REV. 493, 524–25 (2002) (providing examples of jurors with specialized skill sets that were applicable to analyzing trial evidence). *See generally* Michael B. Mushlin, *Bound and Gagged: The Peculiar Predicament of Professional Jurors*, 25 YALE L. & POL'Y REV. 239 (2007) (discussing how the United States legal system interacts with jurors with specialized abilities to examine material evidence).

dence or to assess the credibility of expert testimony in a way that other jurors simply cannot.[142] These jurors with specialized knowledge germane to interpreting certain evidence in a case are sometimes called "professional jurors," because they often possess this knowledge by virtue of their area of employment.[143] This Note, however, refers to jurors with such specialized knowledge as "expert jurors."[144] Although expert jurors may be subject to a peremptory challenge like other jurors, they are not generally subject to challenges for cause on account of their expertise, so long as they can remain impartial.[145]

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[142] Mushlin, *supra* note 141, at 240–41 & n.9 (discussing the phenomenon generally of jurors with professional-level expertise); *see Hard*, 870 F.2d at 1462 (examining a case where a juror possessed the skills necessary to interpret an X-ray that had been admitted into evidence); *Mann*, 39 P.3d at 132, 135 (examining a case where a juror with expertise in physics used evidence presented at trial by an expert witness to calculate the probability that an alleged accident was actually a murder).

[143] *See* Mushlin, *supra* note 141, at 241 & n.9.

[144] *See* Marquez v. City of Albuquerque, 399 F.3d 1216, 1224 (10th Cir. 2005) (describing a juror as an "'expert' juror" with special knowledge regarding dog training even though it was primarily the juror's family members, rather than the juror herself, who were engaged in dog training). One commentator has argued that the term "expert juror" should be used to refer to jurors who may possess the same types of knowledge as expert witnesses would at trial. *See* Kirgis, *supra* note 141, at 496, 526–28; *see also* Mushlin, *supra* note 141, at 241 n.9 (commenting on the use of the term "expert juror"). Another commentator has argued that the term "professional juror" is broader, because it encompasses jurors who would not be categorized as expert witnesses if testifying, but who nevertheless have skill by virtue of their chosen professions. *See* Mushlin, *supra* note 141, at 241 n.9. This Note adopts the term "expert jurors" more broadly than either of these usages, to mean jurors who have heightened skills material to the interpretation of the trial evidence in a given case, whether or not the skills arise from the jurors' professions or whether they are sufficiently skilled so as to be categorized as an expert witness. *See Marquez*, 399 F.3d at 1224. This usage refers to such jurors regardless of how common their skill set is. *See infra* notes 160, 188–193 and accompanying text (arguing that multilingualism is a common skill, and even were it otherwise, the majority rule allows jurors to exercise their skills at considering evidence openly in the jury room).

[145] *See, e.g.*, Blank v. Hubbuch, 633 N.E.2d 439, 442 (Mass. App. Ct. 1994) (upholding a trial court's decision not to strike a doctor for cause from serving as a juror in a medical malpractice case); *Mann*, 39 P.3d at 132, 135 (opining that substantial educational or professional experience alone are not grounds to assume that a prospective juror should be struck for bias); People v. Arnold, 753 N.E.2d 846, 851, 854 (N.Y. 2001) (holding that "specialized knowledge" or background alone are not grounds for "automatic exemptions from [jury] service" unless the knowledge is shared with other jurors); *see also* Kirgis, *supra* note 141, at 524–26 & n.217; Mushlin, *supra* note 141, at 257 & nn.90–91. Two commentators have, however, proposed expanding for-cause challenges to exclude jurors with expertise related to some material evidence in a case. *See* Kirgis, *supra* note 141, at 535 ("[J]udges can and should also play a role [during voir dire] by granting challenges for cause in cases where a juror's expertise clearly encroaches upon material issues in the case."); Mushlin, *supra* note 141, at 272–77 (proposing that courts should allow for-cause challenges to jurors with professional-level expertise in a subject that is important in the case). Expert jurors would still be subject to for-cause challenges if they were otherwise ineligible for jury duty or had some express or implied bias toward the case. *See* O'MALLEY ET AL., *supra* note 24, § 4:8 (noting that for-cause challenges occur where a juror is legally ineligible for service or where the juror shows signs of some "actual or implied bias"); Kirgis, *supra* note 141, at 525–26

The case law surrounding expert jurors typically focuses on appellate challenges to the presence of an expert on the jury when information comes to light that the expert juror used his expertise to interpret evidence during jury deliberations.[146] Jurisdictions generally do not regulate whether expert jurors can use their knowledge for their own internal deliberations because what a particular juror is thinking during deliberations is rarely known.[147] Instead, the case law focuses on whether an expert juror can share his or her interpretations of the evidence with the rest of the jurors during deliberations.[148] The question that arises out of this sharing during deliberations is whether an expert juror will inject extraneous prejudicial information into the case.[149]

Typically, courts allow experts to sit on juries, but jurisdictions are split as to whether expert jurors may share their specialized knowledge during deliberations.[150] For example, in 2002, in *State v. Mann*, the New Mexico Supreme Court held than an expert on the jury was allowed to share his analysis of data presented at trial with other jurors during deliberations.[151] *Mann* was

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(noting that jurors can be challenged for cause for "fail[ure] to meet the statutory qualifications for service" or for "actual bias").

[146] *See infra* notes 150–163 and accompanying text (explaining the majority and minority rules on expert jurors); *see also Hard*, 870 F.2d at 1462 (examining a case where a juror possessed the skills necessary to interpret an X-ray that had been admitted into evidence); *Mann*, 39 P.3d at 132, 135 (examining a case where a juror with knowledge about physics used evidence presented at trial by an expert witness to calculate the probability that an alleged accident was actually a murder).

[147] *See* FED. R. EVID. 606(b); *see also* Kirgis, *supra* note 141, at 493 & n.5 (noting an exception to the general rule for deliberations infected with "extraneous prejudicial information"); *infra* notes 159–163 and accompanying text (noting that, even in a minority rule jurisdiction, expert jurors may consider the trial evidence using their full skill set during jury deliberations although they cannot share their expert knowledge with other jurors). In federal court, there are tight limits on the types of information related to the inner workings of jury deliberations that can be introduced to overturn a jury verdict. *See* FED. R. EVID. 606(b). One exception to this is that a juror may testify about what transpired during jury deliberations when the jury verdict was based on "extraneous prejudicial information [that] was improperly brought to the jury's attention." *See id.* Evidence is said to be "extraneous" or "extrinsic" when it was never "legitimately [brought] before the court." BLACK'S LAW DICTIONARY, *supra* note 23, at 675, 705. Outside of certain statutory exceptions, such as for extraneous prejudicial information, jurors are not allowed to testify about their own or another jurors' "mental processes" that occurred during jury deliberations and voting. *See* FED. R. EVID. 606(b). For additional commentary on these principles as applied to multilingual jurors, see Perea, *supra* note 51, at 40–43.

[148] *See* Mushlin, *supra* note 141, at 258–65.

[149] *See Mann*, 39 P.3d at 129–32, 136 (holding that juror expertise shared during jury deliberations is not extraneous prejudicial information); *see also supra* note 147 and accompanying text (discussing the definition of "extraneous prejudicial information").

[150] Mushlin, *supra* note 141, at 258. *Compare Mann*, 39 P.3d at 132, 136 (holding that the sharing of juror expertise during deliberations is not juror misconduct), *with* People v. Maragh, 729 N.E.2d 701, 704–06 (N.Y. 2000) (holding that the sharing of juror expertise during deliberations is juror misconduct).

[151] *See Mann*, 39 P.3d at 127, 136.

a criminal case that involved a boy who died after being impaled with a screwdriver.[152] An expert witness presented evidence about the likelihood of a child accidentally dying by falling and impaling himself on a screwdriver, and suggested that there was a possibility that the boy may not have been murdered.[153] One juror was an engineer and performed a probability calculation based on the expert witness' data to determine the likelihood that the death was an accident.[154] The juror concluded that the odds of such a death occurring accidentally as detailed by the expert witness were astronomically low.[155] After sharing his calculations in jury deliberations, the jury convicted the defendant.[156] The case was appealed on the grounds that the jury had considered extraneous prejudicial information, but the court held that the juror had merely interpreted evidence that had actually been presented at trial.[157] *Mann* represents the majority rule on expert jurors, which is also followed by at least two federal circuits.[158]

In contrast, in 2000, in *People v. Maragh*, the Court of Appeals of New York came to a different conclusion, holding that expert jurors could not communicate information related to their expertise during jury deliberations about any "material issue in the case."[159] Accordingly, in New York, it is now juror misconduct for an expert juror—someone with specialized knowledge beyond the "common ken" of jurors—to share that expertise with other jurors during deliberations if the information is material to the case.[160] Sharing such

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[152] *See id.* at 125, 127.

[153] *See id.* at 126–27.

[154] *See id.* at 127.

[155] *See id.* at 128 ("I simply multiplied the numbers, one over 10 times one over two times 1 over 100 three times, and the number you get is basically five times ten to minus 8 or in what most of us think about, one in a 20 million chance.").

[156] *See id.* at 127.

[157] *See id.* at 129, 134, 136; *supra* note 147 and accompanying text (discussing the definition of "extraneous prejudicial information").

[158] *See* Kendrick v. Pippin, 252 P.3d 1052, 1065 (Colo. 2011) (noting that *Mann* represents the majority rule on expert jurors as of 2011), *abrogated on other grounds by* Bedor v. Johnson, 292 P.3d 924 (Colo. 2013); *see also* United States v. Benally, 546 F.3d 1230, 1237 (10th Cir. 2008) (noting that jurors may not introduce "specific extra-record facts relating to the defendant," but they may introduce matters related to "the jurors' personal experience"); *Marquez*, 399 F.3d at 1223 (holding that a juror's discussion of her knowledge of police dog training during deliberations was not "extraneous prejudicial information"); *Hard*, 870 F.2d at 1462 (holding that a juror's knowledge of how to interpret an X-ray entered into evidence was not extraneous prejudicial information).

[159] *See Maragh*, 729 N.E.2d at 704–05. *Maragh* was a homicide case where two nurse-jurors shared information with other jurors about the possible medical effects of the victim's blood loss that might have resulted in death, which potentially affected the verdict. *See id.* at 702–06.

[160] *See id.* at 704–05 (suggesting that juror expertise is the ability to "conduct[] personal specialized assessments not within the common ken of juror experience and knowledge"). Although *Maragh* did not provide a more explicit interpretation of the "common ken" standard, New York

information may provide grounds for reversal upon appeal.[161] Even in New York, however, jurors cannot be struck for cause during voir dire solely because they possess expertise that could be used to personally consider evidence.[162] *Maragh* represents the minority rule on expert jurors.[163]

A major concern over an expert juror sharing his or her expertise during deliberations is that the expert juror will be instantly promoted to the status of an alpha juror,[164] thereby controlling the outcome of the deliberations.[165] The rule articulated in *Maragh*, allowing expert jurors to be impanelled but disallowing them from sharing material information garnered from their areas of their expertise, is intended to keep them from becoming alpha jurors.[166] This

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modified its criminal jury instructions to take the *Maragh* standard into account, providing possible insight into the standard. *See* N.Y. STATE UNIFIED COURT SYS., *Juror Expertise*, in CRIMINAL JURY INSTRUCTIONS 2D (2003) [hereinafter *Juror Expertise*], *available at* http://www.nycourts.gov/judges/cji/1-General/CJI2d.Juror_Expertise.pdf, *archived at* http://perma.cc/GHT7-TA5T. In New York, during criminal jury deliberations, a juror may only share the type of "knowledge and experience that an average person would acquire in life" and not "special expertise," which is "something more than ordinary knowledge or experience in a certain area." *Id.* Maragh represents the minority rule. *Kendrick*, 252 P.3d at 1064. This Note argues that multilingualism is so common relative to other forms of juror expertise that it is unclear that it is even beyond the "common ken" of the average juror. *See infra* notes 188–193 and accompanying text. This Note defines the term "expert juror" more broadly as someone who has heightened skills material to the interpretation of the trial evidence in a given case, regardless of the relative commonality of those skills. *See supra* notes 143–144 and accompanying text.

[161] *See Maragh*, 729 N.E.2d at 702, 706.

[162] *See id.* at 704–05.

[163] *Kendrick*, 252 P.3d at 1064 (noting that *Maragh* is the minority opinion as of 2011). The Supreme Court of Nevada has supported the minority position as well. *See* State v. Thacker, 596 P.2d 508, 509 (Nev. 1979) (affirming an order granting a new trial when a cattleman juror introduced facts about cattle into deliberations that were not in evidence at trial).

[164] *See* THE NEW OXFORD AMERICAN DICTIONARY 45 (Elizabeth J. Jewell & Frank Abate eds., 2001) (defining alpha as "(of animals in a group) the socially dominant individual"). An "alpha juror" is one who leads the rest of the jurors and is someone who all other jurors look up to or become subservient to by virtue of the expert juror's subject matter authority. *See id.*; *see also* Muslin, *supra* note 141, at 270 (noting how jurors with expertise in particular professions may come to control jury deliberations by virtue of an "air of authority" granted by their subject matter expertise). One commentator has observed that a juror is most likely to become an alpha juror due to one or all of the following factors: having a strong personality, coming from a respected profession, and having a higher level of educational attainment. *See* Hsieh, *supra* note 73, at 1197.

[165] *See Maragh*, 729 N.E.2d at 704 (suggesting that other jurors will tend to defer to an expert juror); Mushlin, *supra* note 141, at 270 (sharing one jury consultant's view that an expert juror's "expertise itself would lend the professional juror an air of authority that could prove decisive in deliberations"). *See generally* Ted A. Donner & Melissa M. Piwowar, *Avoiding a Jury of One: Challenging Expert Jurors by Focusing Voir Dire on Their Ability to Deliberate and Follow the Law*, *in* 2 BLUE'S GUIDE TO JURY SELECTION, App. G-6 (Lisa Blue & Robert B. Hirschhorn eds., 2004) (arguing that lawyers should try to identify expert jurors during voir dire and question them about "any preconceptions" that derive from their area of expertise to avoid having one juror dominate the jury as a subject matter authority).

[166] *See Maragh*, 729 N.E.2d at 704–06.

approach could be problematic because it might prevent expert jurors from fully engaging in deliberations.[167] Alternately, it could allow expert jurors to share their opinions, but force them to hide the rationale behind those opinions.[168] This could potentially still lead other jurors to credit them as experts with "inside knowledge," but disallow the experts' rationales from being thoughtfully considered and debated by all jurors.[169]

III. METHODS FOR ACCOMMODATING AND IMPANELLING MULTILINGUAL JURORS: CHANGING A LEGAL SYSTEM THAT FEARS OR DISTRUSTS MULTILINGUAL JURORS

In a diverse, modern American courtroom, using for-cause strikes to exclude multilingual jurors from service in trials of their peers is both unacceptable and unnecessary.[170] This Part argues that courts should accommodate the particular expertise of multilingual jurors and proposes methods for doing so.[171] Section A asserts that fear of multilingual jurors may motivate some courts to refuse those jurors accommodations, and that multilingual jurors, like other expert jurors, should not be excused for cause during voir dire.[172] Section B reviews the *Hernandez* accommodation standard outlined in the 1991 U.S. Supreme Court decision *Hernandez v. New York*, and suggests that the Fourth Circuit unjustly refused to require a requested *Hernandez* accommodation for prospective jurors.[173] Finally, Section C argues that when appropriately combined, the rules for expert jurors and the *Hernandez* accommodation are the appropriate ways to impanel multilingual jurors and guarantee fairer trials involving foreign language evidence.[174]

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[167] Mushlin, *supra* note 141, at 271. One commentator describes the effects of the *Maragh* rule as being "bound and gagged" because expert jurors are still bound to serve on juries, but they are "gagged" because they cannot fully share their observations "openly or effectively" about material evidence the way that non-expert jurors could. *See id.* This commentator notes that being "gagged" is directly at odds with a juror's responsibility to deliberate about the evidence, concluding that "the *Maragh* instruction may be impossible to follow." *Id.* at 278.

[168] *Id.* at 279–80.

[169] *Id.* at 279–81.

[170] *See infra* notes 175–225 and accompanying text.

[171] *See infra* notes 175–225 and accompanying text.

[172] *See infra* notes 175–202 and accompanying text.

[173] *See infra* notes 203–209 and accompanying text.

[174] *See infra* notes 210–225 and accompanying text.

A. Fear of Multilingual Jurors is a Possible Reason for Courts' Reluctance to Adopt the Hernandez *Accommodation*

When a multilingual juror is asked hypothetical questions during voir dire about possible foreign language evidence, there are five possible outcomes if the *Hernandez* accommodation is the default rule of the jurisdiction.[175] First, the concern about foreign language evidence might be completely unwarranted if no interpreters or translators are used at trial.[176] Second, if an interpretation or translation is accurate, there may be no differences or only immaterial differences between the way that the multilingual juror perceives the foreign language evidence and the way the interpreter or translator rendered it into English.[177] In this instance, no good reason exists to strike multilingual jurors for cause because no party would be prejudiced by letting multilingual jurors hear the same evidence in two different languages.[178] Third, the interpreter or translator may make an egregious mistake or subtly bias the evidence by making a witness or evidentiary source seem more or less favorable in English than the evidence was in the foreign language.[179] In this case, if a multilingual juror can catch and fix the error through the intervention of the court, justice is best served.[180] Fourth, the multilingual juror may perceive an error in interpretation or translation where none existed.[181] If the juror brings this to the court's attention, the witness or the original source material used in the translation may be re-examined to make sure that all jurors have an equal understanding of the evidence.[182] The fifth possibility is similar to the fourth, except in this instance, a rogue multilingual juror refuses to follow court instructions and then shares his or her

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[175] *See infra* notes 176–183 and accompanying text (outlining possible outcomes when multilingual jurors encounter foreign language evidence).

[176] *See* Brief of Appellant, *supra* note 127, at 11–12 (claiming that because no interpreters were needed in *United States v. Cabrera-Beltran*, the voir dire questioning about language use was "baseless and unnecessary"). *But see* Brief of the United States at 13 n.4, United States v. Cabrera-Beltran, 660 F.3d 742 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1935 (2012) (No. 10-4084), 2010 WL 2422266, at *13 n.4 (asserting that interpretation and stipulated translations were used at trial).

[177] *See* Perea, *supra* note 51, at 21–22.

[178] *See id.*

[179] *See supra* notes 73–76 and accompanying text (giving examples of such mistakes and biases).

[180] *See* Perea, *supra* note 51, at 28 (noting that everyone should concern themselves over whether the interpretations in the courtroom are "accurate and faithful to the meaning of a witness's testimony").

[181] *See id.* at 22; *supra* notes 101–104 and accompanying text (discussing a multilingual juror in *Perez* who incorrectly challenged a court interpreter).

[182] *See infra* notes 200, 216–217 and accompanying text (suggesting that courts openly air the multilingual juror's concerns as part of the adversarial process).

alternate perspective in the jury room during deliberations as a "shadow" translator or interpreter and introduces information that prejudices one of the parties.[183]

Some courts assume that multilingual jurors who are unable to guarantee that they will unquestioningly abide by a court interpreter's interpretation are rogue jurors in the fifth scenario.[184] The blame is put on prospective jurors even when the *Hernandez* accommodation is requested and denied or ignored.[185] Indeed, the government sometimes assumes that the ability of jurors to speak other languages should alone be evidence of their "potential biases."[186] Such antagonistic policies toward language minorities may be caused by fear and lack of understanding that some monolingual English-speakers have toward multilinguals.[187]

If the ability to communicate in a foreign language is treated like other forms of juror expertise, then multilingual jurors should not be struck for cause.[188] Even under the minority rule definition, if juror expertise represents some mastery of knowledge outside of the "common ken" of jurors, then expertise in another language is certainly common enough today.[189] Consider

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[183] *See Cabrera-Beltran*, 660 F.3d at 748 (discussing the trial judge's concern that a multilingual juror could be a "shadow translator in the jury box").

[184] *See id.*

[185] *See id.* at 748, 750 & n.6 (writing that after the court failed to grant the requested *Hernandez* accommodation, one multilingual juror was struck for his "inability to accept English translations" and two others were struck for this "inability" along with other factors).

[186] *See* Brief of the United States, *supra* note 176, at 13 ("During jury selection, the district court questioned prospective jurors regarding, *among other potential biases*, their ability to speak and understand Spanish." (emphasis added)). The U.S. Supreme Court's 1986 decision in *Batson v. Kentucky* prohibited peremptory strikes justified by the notion that all members of a race are biased in a particular way. *See* 476 U.S. 79, 89 (1986). In defining the ability to speak Spanish as a type of "potential bias[]," the government seems to be engaging in the very type of stereotyping which *Batson* sought to guard against. *See id.*

[187] *See* Perea, *supra* note 51, at 37 (discussing *Hernandez* and claiming that parts of the decision represent "a fear and misunderstanding" of multilingual jurors and worries that their presence will result in a "loss of control" by monolingual English-speakers in the courtroom); *see also* Hernandez v. New York, 500 U.S. 352, 356–58 (1991) (plurality opinion) ("Language elicits a response from others, ranging from admiration and respect, to distance and alienation, to ridicule and scorn."); Hsieh, *supra* note 73, at 1196 n.46 (discussing the fear that some monolingual English-speakers have toward speakers of non-English languages, particularly in the courtroom).

[188] *See* State v. Mann, 39 P.3d 124, 132 (N.M. 2002) (noting that juror expertise alone is not a sufficient basis for a for-cause challenge).

[189] *See* People v. Maragh, 729 N.E.2d 701, 704 (N.Y. 2000) (discussing the minority rule "common ken" standard for expert jurors); *supra* note 160 and accompanying text (elaborating on New York's interpretation of the minority rule "common ken" standard). Aside from special exclusions from service such as having a lack of proficiency in English, as of 2012 there were approximately 220 million people in the United States who were potentially eligible for jury duty because they were eighteen or older and were U.S. citizens. *Language Spoken at Home*, *supra* note 3; *see also* 28 U.S.C. § 1865(b) (2012) (listing qualifications for eligibility for jury duty).

that a doctor-juror can use their medical expertise on a medical malpractice case, yet multilingual jurors—who are likely more common—can be denied the ability to sit on some juries unless they ignore foreign-language evidence.[190] Because approximately one-in-seven people potentially eligible for jury duty speaks a language other than English at home, and more than one-third of Americans are conversationally multilingual, if multilingualism is a form of expertise, it is so common that multilingual jurors should not be struck for cause.[191] This is particularly likely to be true in ethnically concentrated court districts where a language minority criminal defendant may have multiple prospective jurors in the venire who are drawn from the same language community.[192] Spanish, in particular, is a commonly spoken language in the United States, and Spanish-speakers are involved in many cases involving foreign language evidence.[193]

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[190] *See Cabrera-Beltran*, 660 F.3d at 750 & n.6 (upholding a decision to strike multilingual prospective jurors who could not or would not adhere solely to English-language interpretations); Blank v. Hubbuch, 633 N.E.2d 439, 442 (Mass. App. Ct. 1994) (upholding a trial court's decision not to strike a doctor for cause from serving as a juror in a medical malpractice case). About 14.5% of the jury-eligible population speaks a language other than English, while about 0.4% of the jury-eligible population is composed of professionally active physicians. *See Language Spoken at Home*, *supra* note 3 (citing the percentage of U.S. citizens aged eighteen or older who speak a language other than English at home); *Total Professionally Active Physicians*, KAISER FAM. FOUND. (last visited Apr. 13, 2015), http://kff.org/other/state-indicator/total-active-physicians/, *archived at* http://perma.cc/VJ5D-98DM (stating that there are 897,420 actively practicing physicians in the United States). The figure of 14.5% of adults who are multilingual considers only those that use a foreign language well enough to speak it at home. *Language Spoken at Home*, *supra* note 3. More than one third of all Americans reported that they spoke a foreign language well enough to hold a conversation in it. Jeffrey M. Jones, *Most in U.S. Say It's Essential That Immigrants Learn English*, GALLUP, Aug. 9, 2013, http://www.gallup.com/poll/163895/say-essential-immigrants-learn-english.aspx, *archived at* http://perma.cc/K2UX-LN9R. The percentage of bilingual jurors cited in this Note may be somewhat overstated because the data cited do not separately list out the number of United States citizens who are monolingual in a language other than English. *See Language Spoken at Home*, *supra* note 3. The number of practicing physicians eligible for jury duty is probably also somewhat overstated because the data does not state the number of doctors who are not United States citizens or who are otherwise ineligible for jury duty. *See Total Professionally Active Physicians*, *supra*.

[191] *See Maragh*, 729 N.E.2d at 705 (calling any expectation that jurors should abandon their abilities at the courtroom door "unrealistic"); *supra* notes 160, 190 and accompanying text (noting that multilingualism among jurors appears to be a relatively common skill, and even were it otherwise, the majority rule on expert jurors applies regardless of the relative commonality of jurors' skills). Note that the 14.5% of adult Americans who speak a non-English language at home is approximately equal to one seventh of the adult population of U.S. citizens. *See supra* note 190 and accompanying text (discussing the percentage of the jury-eligible population that speaks a language other than English).

[192] *See Hernandez*, 500 U.S. at 356–58 (plurality opinion) (noting that the complainants, the defendant, and the prosecution witnesses were all Latino or had Latino surnames, and that the multilingual venirepersons who were excused all spoke Spanish).

[193] *See Language Spoken at Home*, *supra* note 3 (noting that 8.3% of United States citizens aged eighteen or older speak Spanish or Spanish creole at home, compared to 6.2% who spoke all

Regardless of how common multilingualism is, the majority rule is that an expert juror should still be allowed to share their interpretations of evidence presented at trial, even if other jurors cannot understand the evidence with the same level of comprehension.[194] For example, even if not all jurors understand how to interpret an X-ray presented as evidence at a trial, an expert juror who can read an X-ray may employ that skill in jury deliberations.[195] Such use of expertise that not all jurors share does not amount to juror misconduct.[196] Because original foreign language evidence is the "real evidence" at the trial, once that evidence is part of a record, multilingual jurors should be allowed to consider that evidence directly just like other expert jurors.[197]

The question dividing the majority rule from the minority rule on expert jurors is merely whether the expert juror can share their interpretations during deliberations.[198] Some courts fear that expert jurors will introduce extraneous prejudicial information into jury deliberations, information that has not been tested in the adversarial process.[199] The *Hernandez* accommodation, however, will tend to avoid these issues altogether because a juror could address questions directly to the court and thereby subject their assessments of the evidence to the adversarial process.[200] The law does not require expert jurors

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other non-English languages at home); Jones, *supra* note 190 (noting that 60% of multilingual Americans speak Spanish as a second language); *see also Hernandez*, 500 U.S. at 363–64 ("It would be common knowledge in the locality that a significant percentage of the Latino population speaks fluent Spanish, and that many consider it their preferred language, the one chosen for personal communication, the one selected for speaking with the most precision and power, the one used to define the self.").

[194] *See Mann*, 39 P.3d at 133–36 (espousing the majority view that expert jurors may share their expertise with other jurors during deliberations).

[195] *See* Hard v. Burlington N. R.R. Co., 870 F.2d 1454, 1462 (9th Cir. 1989).

[196] *See id.* (ruling that a juror's ability to interpret an X-ray in evidence was not juror misconduct); *Mann*, 39 P.3d at 132–36 (holding that a juror's ability to calculate the probability that a death was not accidental using expert evidence presented at trial was not juror misconduct).

[197] *Cf.* United States v. Cruz, 765 F.2d 1020, 1023 (11th Cir. 1985) (citing favorably the district court's jury instruction that the "real evidence" to be considered is the foreign language recording and not the English-language transcripts of that recording). In a later case in the Eleventh Circuit which also involved transcripts and foreign language recorded evidence, the court noted that although transcripts could be considered "as substantive evidence to aid the jury[,] . . . the real issue presented" was the information contained in a Spanish-language recording. United States v. Montor-Torres, 449 F. App'x 820, 822 (11th Cir. 2011) (quoting *Cruz*, 765 F.2d at 1023).

[198] *See supra* notes 150–163 and accompanying text (discussing the majority and minority rules concerning expert jurors).

[199] *See Maragh*, 729 N.E.2d at 704–05 (expressing fears that an expert juror might use their specialized knowledge to form an opinion about the case and "communicate[] that expert opinion to the rest of the jury panel with the force of private, untested truth as though it were evidence" (citations omitted)).

[200] *See* Nicole L. Mott, *The Current Debate on Juror Questions: To Ask or Not to Ask, That Is the Question*, 78 CHI.-KENT L. REV. 1099, 1119 (2003) (observing that jurors asking questions

to abandon their experience and skills at the door of the courtroom, even if they have "greater understanding than the average person" of material evidence.[201] Similar to any other type of expert juror, multilingual jurors should not be subjected to for-cause challenges during voir dire because of their particular skill set and should be allowed to fully participate in the American jury system.[202]

B. The District Court's Decision in Cabrera-Beltran *Not to Provide the* Hernandez *Accommodation to Multilingual Jurors Was Unjust*

As articulated by the U.S. Supreme Court, the *Hernandez* accommodation allows multilingual prospective jurors to be impanelled with the ability to inform the trial court of possible errors in translation or interpretation that they observe during the course of a trial.[203] When the *Hernandez* accommodation is requested by a juror and yet still rejected by the trial court, the plurality cautioned that the court's motivations should be carefully weighed to ensure that the decision was racially neutral.[204] This accommodation is per-

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during trial did not conflict with the adversarial process and actually improved jurors' understanding of the evidence); *see also supra* notes 111–117 and accompanying text (discussing how lawyers and judges can get involved in the process of jurors asking questions); *infra* notes 210–217 and accompanying text (same).

[201] *See Mann*, 39 P.3d at 133–36; *accord Hard*, 870 F.2d at 1462. The minority rule agrees that expert jurors should not be asked to ignore their own skills, but merely requires that they not share that information openly during deliberations. *See Maragh*, 729 N.E.2d at 704–05.

[202] *See Mann*, 39 P.3d at 135 (holding that expert jurors are not subject to for-cause challenges on the basis of their skills, but are subject to peremptory challenges). For information about multilingual jurors facing peremptory strikes, see generally *Hernandez*, 500 U.S. 352.

[203] *See Hernandez*, 500 U.S. at 364 (plurality opinion); *id.* at 379 (Stevens, J., dissenting).

[204] *See Hernandez*, 500 U.S. at 364 (plurality opinion). At least four of the Justices in *Hernandez*—and perhaps as many as seven—agreed that if the prosecutor opposed the *Hernandez* accommodation, the refusal could be evidence of a racially-biased motivation for the prosecutor's peremptory challenge of multilingual jurors. *Hernandez*, 500 U.S. at 364 (plurality opinion); *id.* at 379 (Stevens, J., dissenting). Although only Justice Anthony Kennedy's plurality opinion explicitly suggested this interpretation of a prosecutor's opposition to the *Hernandez* accommodation, the three dissenters actually found that even the peremptory strikes used in that case were not facially neutral. *See id.* at 364 (plurality opinion); *id.* at 378–79 (Stevens, J., dissenting). Because both the plurality opinion and Justice John Paul Stevens' dissent proposed the same accommodation, and because Justice Stevens' dissent had a lower threshold for holding that the peremptory strikes were not race neutral, there is no reason to believe that the dissenters would have interpreted a prosecutor's opposition to the *Hernandez* accommodation any differently. *See id.* at 364 (plurality opinion); *id.* at 378–79 (Stevens, J., dissenting). A trial court should not reject a requested *Hernandez* accommodation lightly; Justice Kennedy's plurality opinion cautioned that any excuse given for a strike that would not be accepted as race neutral when proffered by an attorney would also not be race neutral when proffered by a court. *See id.* at 362 (plurality opinion). Justice Kennedy's observation here was referring to reasons offered in support of peremptory strike, but it is also applicable in the context of a court's refusal to accept a requested *Hernandez* accommodation. *See id.*

haps the only protection currently afforded post-*Hernandez* to multilingual jurors who are unwilling or unable to adhere exclusively to English-language interpretations and translations, and is therefore an important factor to consider when reviewing for-cause challenges.[205]

In the 2011 case *United States v. Cabrera-Beltran*, however, the U.S. Court of Appeals for the Fourth Circuit Court upheld for-cause strikes against multilingual prospective jurors despite recognizing that the district court could have offered the jurors the *Hernandez* accommodation.[206] By failing to provide multilingual jurors the *Hernandez* accommodation, the district court prevented prospective multilingual jurors from being impanelled.[207] On appeal, the Fourth Circuit should have heeded the guidance of the plurality in *Hernandez* and viewed the court's refusal to provide the *Hernandez* accommodation as potential evidence of the trial court's lack of race-neutral motivation.[208] In the future, courts should reject the Fourth Circuit's approach of upholding for-cause strikes against multilingual jurors; courts should instead offer those jurors the *Hernandez* accommodation.[209]

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[205] *See id.* at 362–64 (plurality opinion) (proposing the *Hernandez* accommodation but noting that otherwise failing to adhere to an English-language interpretation would be grounds for a "valid for-cause challenge"); *id.* at 379 (Stevens, J., dissenting) (agreeing with the plurality on this point); *see also Cabrera-Beltran*, 660 F.3d at 749, 750 & n.6 (upholding for-cause challenges of multilingual prospective jurors in a case where the *Hernandez* accommodation was not granted). Nevertheless, the systematic use of strikes against all prospective jurors sharing a common language may sometimes be evidence that discriminatory motives are at work. *See Hernandez*, 500 U.S. at 371–72 (plurality opinion); *id.* at 379 (Stevens, J., dissenting) (rejecting the prosecutor's proffered reason in *Hernandez* for striking Spanish-speakers during voir dire).

[206] *See* 660 F.3d at 750 & n.6.

[207] *See supra* notes 124, 136–140 and accompanying text (discussing the dismissal of the jurors in *Cabrera-Beltran*). Providing the *Hernandez* accommodation would have likely ameliorated the concerns at least of Prospective Juror Number One who expressed a desire to report observed errors. *See supra* notes 124, 136–140 and accompanying text. If the accommodation was offered to one multilingual juror, it almost certainly could have been offered to all three of them. *See supra* notes 124, 136–140 and accompanying text.

[208] *See Hernandez*, 500 U.S. at 362, 364 (plurality opinion); *supra* note 204 and accompanying text (arguing that the dissenters may have implicitly supported the plurality's position on this point even though they did not explicitly address the issue).

[209] *See Hernandez*, 500 U.S. at 362, 364; *supra* note 204 and accompanying text (arguing that striking multilingual jurors instead of providing them requested accommodations may not be a racially-neutral action).

C. Combining Juror Questions and Limited Jury Instructions to Allow for More Open Deliberations by Multilingual Jurors

Once a trial court decides to grant a prospective multilingual juror the *Hernandez* accommodation, it can be implemented in a number of ways.[210] Regardless of the method chosen, a trial court should always require that questions from a multilingual juror be directed at the judge, rather than the interpreter or translator, to avoid arguments that may interrupt the proceedings.[211]

Although one could either allow multilingual jurors to ask questions in open court or allow all jurors to submit questions for witnesses on special forms, the latter approach has a number of advantages.[212] First, it has the advantage of screening out legally invalid questions, such as those about inadmissible evidence, before the other jurors hear the questions.[213] Second, it prevents one juror from potentially dominating the questioning process.[214] This approach may also have the added benefit of helping to ensure that multilingual jurors do not become alpha jurors.[215] Once the concerns of multilin-

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[210] *See supra* notes 101–109 and accompanying text (allowing only multilingual jurors to pose questions to the court); *supra* notes 110–117 and accompanying text (giving all jurors the opportunity to ask questions via submitted, anonymous forms).

[211] *See* United States v. Perez, 658 F.2d 654, 662–63 (9th Cir. 1981) (detailing a conflict that broke out in open court between a multilingual juror and an interpreter and the judge's resulting instruction to direct further concerns to the court rather than the interpreter); *supra* notes 101–105, 108 and accompanying text (discussing *Perez*).

[212] *See Perez*, 658 F.2d at 662–63 (allowing a multilingual juror to ask questions openly to the court, which then relayed the questions to the witness via the prosecutor "without incident"); Bennett, *supra* note 110 (noting that the Eastern District of Texas approach allowed all jurors to submit questions via anonymous juror question forms and that it had "no downside"); *infra* notes 213–214 and accompanying text. *See generally* Alison K. Bennett, *Allowing Jurors to Ask Questions During Trial: Pros and Cons*, BATTLE BLAWG (Apr. 11, 2012), http://thebattleblawg.com/2012/04/11/juror-questions-pros-and-cons/, *archived at* http://perma.cc/NV88-34RY (observing potential advantages and disadvantages of letting jurors ask questions).

[213] *See Perez*, 658 F.2d at 662–63 (observing that the judge should decide which of the juror's questions to present to the witness or the interpreter to avoid asking questions which are not allowed by law and could end up tainting the verdict in the case).

[214] *See* Diane Diamond, *Let All Jurors Ask Questions!*, HUFFINGTON POST (Apr. 3, 2013, 8:43 AM), http://www.huffingtonpost.com/diane-dimond/let-all-jurors-ask-questi_b_3003224.html, *archived at* http://perma.cc/9VPZ-2BA4 (observing that a concern about jurors asking questions directly is that one of them could "dominate the questioning and alienate others who might then disengage from the testimony"); Bennett, *supra* note 212 (noting that one potential disadvantage of letting jurors ask questions directly is that one juror may be overly talkative and drag out the length of the trial).

[215] *See* Charles Montaldo, *Jurors Asking Questions During Trial*, ABOUT.COM (last visited Apr. 13, 2015), http://crime.about.com/od/Crime_101/a/jurors-questions.htm, *archived at* http://perma.cc/Q7WT-VZ3D (suggesting that when jurors get to ask questions, all jurors become better informed about the subject, thereby avoiding the tendency of less-informed jurors to fall in lockstep behind expert jurors). Moreover, when the judge decides which questions get presented to attorneys, it may

gual jurors about a translation or interpretation have been aired before the court, the observed differences can be dealt with more openly as part of the adversarial process.[216] The knowledge of the multilingual juror will then be something all of the jurors may equally consider.[217]

In cases involving a single, official interpretation or translation, allowing juror questions alone may not be enough; the judge may have to provide special jury instructions about the official record of the proceedings.[218] In such a case, after resolving potential errors spotted by the multilingual jurors, the jury could be instructed by the court to abide by the resulting official record of the evidence rather than rely on the multilingual jurors' own translations or interpretations.[219] This is the system used in the state courts of California and Florida, and it could be just as effective in federal district courts.[220] Even these state rules should be relaxed to follow the majority rule on expert jurors when multiple competing translations or interpretations are at issue, thereby freeing multilingual jurors to discuss that evidence during jury deliberations.[221]

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reduce or prevent a single juror from dominating the questioning and potentially boring or excluding other jurors from the process. *See* Diamond, *supra* note 214. One leading scholar on Latinos and the American legal system theorizes that multilingual jurors may lack sufficient social clout to become alpha jurors precisely because of a trust deficit that language minorities face when interacting with monolingual English-speakers. *See* Perea, *supra* note 51, at 46. Unlike a person whose expertise is associated with a professional degree, being an ethnic minority may come with a lower social status, not a greater one. *See* Mushlin, *supra* note 141, at 270, 272–73 (observing that jurors who are experts by virtue of their professions may have "undue influence" on jury deliberations); Perea, *supra* note 51, at 45–46; *see also* Hsieh, *supra* note 73, at 1197 (concluding that multilingual jurors are unlikely to become alpha jurors solely because of their language skills).

[216] *See* Bennett, *supra* note 110 (noting that attorneys had the opportunity to provide advice to the judge on which questions to pick and could "ask follow-up questions, which they did about one-third of the time").

[217] *See* Montaldo, *supra* note 215 ("When jurors' questions are answered, it helps create an environment of equality[,] and each juror can participate and contribute to the deliberations rather than being dictated to by those who appear to have all the answers."). This should counteract the fear of the Fourth Circuit in *Cabrera-Beltran* that if multilingual jurors were the only jurors who understood and considered foreign language testimony directly, they would be considering different evidence than other monolingual, English-speaking jurors. *See Cabrera-Beltran*, 660 F.3d at 750.

[218] *See Hernandez*, 500 U.S. at 379 (Stevens, J., dissenting) (suggesting that multilingual jurors may be impanelled and given jury instructions about the official nature of the English interpretation while at the same time receiving the *Hernandez* accommodation).

[219] *See supra* notes 99–100 and accompanying text (discussing California and Florida pattern jury instructions, which allow jurors to ask questions about translations and interpretations, but instruct that the resulting English translation or interpretation controls).

[220] *See supra* notes 99–100 and accompanying text (discussing state systems which offer their own equivalents of the *Hernandez* accommodation).

[221] *See Hard*, 870 F.2d at 1462 (holding that an expert juror was permitted to share his knowledge during deliberations); *Mann*, 39 P.3d at 132–36 (same). If the parties cannot agree on what should be included in a single English-language transcript of a foreign-language recording,

When there is an issue with a prepared translation in the case and a multilingual juror disagrees with that translation, this may present a more complex problem.[222] Although an interpreter can quickly pose a new question to a live witness, a translator may not have ready access to a willing witness who is able to answer questions about the contents of the document that was translated.[223] In determining whether a translator should maintain or revise their translation in light of a juror's observations, the translator should, at a minimum, refer to a district approved foreign language reference dictionary to resolve potential discrepancies.[224] Although any system of accommodating multilingual jurors may require attention to details such as these, such minor concerns are no reason to avoid application of the *Hernandez* accommodation.[225]

CONCLUSION

Unlike other expert jurors, multilingual jurors are often expected to ignore the full range of their skills when considering material evidence presented at trial. In many courts, multilingual jurors may be struck for cause because they might be unable to adhere unquestioningly to a potentially errone-

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in some jurisdictions, each party may submit competing transcripts and attack the validity of the opposing party's transcript. *Compare Cruz*, 765 F.2d at 1023 (allowing for competing transcripts), *and* United States v. Llinas, 603 F.2d 506, 509–10 (5th Cir. 1979) (same), *with* United States v. Upia-Frias, 422 F. App'x 78, 82 (3d Cir. 2011) (ruling that competing English-language transcripts of Spanish-language recordings should be excluded due to a lack of a fair alternate rule that could resolve the conflict). Multilingual jurors should be free to discuss which of the competing translations or interpretations they prefer and why with other jurors; that evidence is already on record at the trial and therefore the discussion would not be introducing extraneous prejudicial information into the deliberations. *See Hard*, 870 F.2d at 1462; *Mann*, 39 P.3d at 132–36. In the case of a foreign language recording, the recording is still the "real evidence" at trial, not the English transcripts of the recording. *See Cruz*, 765 F.2d at 1023; *accord Montor-Torres*, 449 F. App'x at 822 ("[T]ranscripts may be used as substantive evidence to aid the jury in determining the real issue presented, the content and the meaning of the tape recording." (alteration in original) (quoting *Cruz*, 765 F.2d at 1023)).

[222] Interview with R. Michael Cassidy, Professor, Boston College Law School, in Newton, Mass. (Nov. 25, 2013). Recall that a "translation" refers to the English-language version of a foreign-language text, whereas an "interpretation" is the English-language version of foreign-language speech. *See supra* note 4 and accompanying text.

[223] Interview with R. Michael Cassidy, *supra* note 222.

[224] *See* ESSENTIAL DICTIONARIES FOR COURT INTERPRETERS, N.J. COURTS (2008), *available at* https://www.judiciary.state.nj.us/interpreters/dict.pdf, *archived at* https://perma.cc/CWX8-KK3P (containing a list of English and foreign language dictionaries that should be used in the state of New Jersey).

[225] *See Hernandez*, 500 U.S. at 364 (plurality opinion) (proposing the *Hernandez* accommodation); *id.* at 379 (Stevens, J., dissenting) (same); *Perez*, 658 F.2d at 663 (describing how a judge developed an accommodation like that proposed in *Hernandez* which worked "without incident" to resolve a contentious situation in the courtroom).

ous English-language interpretation or translation. Instead of being struck because they might detect such errors, multilingual jurors should be offered the opportunity to ask questions when they perceive these errors, allowing their concerns to be aired openly as part of the adversarial process. Only then should they be asked to abide by the resulting clarified interpretation or translation. Additionally, when both parties offer competing interpretations or translations of foreign language evidence, multilingual jurors should not be forced to sit by "gagged" during jury deliberations; they should be allowed to openly weigh in on the credibility of each party's proffered version of the evidence. Multilingual jurors should be allowed to use their skills to consider all of the evidence, just like any other expert juror in the majority of jurisdictions. Fear of foreign languages should not be used as a silent excuse to prejudice justice in our courts.

A. LEE VALENTINE II