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# Non-English-Speaking Persons in the Criminal Justice System Current State of the Law

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# NON-ENGLISH-SPEAKING PERSONS IN THE CRIMINAL JUSTICE SYSTEM: CURRENT STATE OF THE LAW

America is a nation of immigrants, many of whom have come to this country with little or no mastery of the English language. Courts have been faced with the problems of non-English-speaking criminal defendants throughout our history. Only recently has the law in this area shown a significant pattern of development.[1] The primary controversy in this area has focused upon the defendant's right to an interpreter. The precedents thus far have been constructed piecemeal, particularly during periods of significant immigration. Only the latest cases have exhibited the sophisticated analysis that is needed to evaluate the numerous aspects of communication necessary to fair and just criminal proceedings. The traditional approach to a defendant's request for an interpreter relies upon the unguided discretion of the trial judge, who is constrained only by his duty to ensure that such defendants receive fair trials. The purpose of this Note is to examine critically the established responses to language difficulties in criminal trials. Particular emphasis will be placed upon the developing trend toward the judicial recognition of a right to an interpreter as a method of protecting essential constitutional guarantees and upon the establishment of affirmative duties in the trial court to secure this right.

## I

## THE RIGHT TO AN INTERPRETER

Non-English-speaking defendants are obviously handicapped in understanding a criminal prosecution if they are not given the assistance of an interpreter. Yet the Supreme Court recognizes no constitutional right to a court-appointed interpreter. The Court has handled only one case that directly presented the issue, *Perovich v. United States*.[2] There the Court held that the decision to

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[1] The dates of the decisions analyzed in this Note vary considerably. Discussions of nearly ancient precedents remain essential, however, in view of their continued vitality in many jurisdictions. *Cf.* United States *ex rel.* Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970), where the court noted that case law discussing the rights of non-English-speaking persons in the criminal justice system is quite "sparse."

[2] 205 U.S. 86 (1907).

appoint an interpreter to aid a defendant attempting to testify in his own behalf rests entirely upon the discretion of the trial judge.[3] No constitutional arguments were presented or considered, and the Court's analysis of the issue was completed in one short paragraph.[4] Despite this superficial treatment of the question, the *Perovich* decision has been followed by most courts, and has exhibited an impressive ability to survive the modern expansion of the constitutional rights of defendants in our criminal justice system.[5]

A. *The Protection of Sixth Amendment Rights*

Although no court has held that there is a direct constitutional right to an interpreter, several courts have held that an interpreter must be appointed to ensure the integrity of certain constitutional rights. Usually these decisions have been based upon the sixth amendment,[6] particularly upon the right of a defendant to be confronted with the witnesses against him. The right of confrontation is "one of the fundamental guarantees of life and liberty,"[7] and has been applied to state prosecutions through the fourteenth amendment.[8]

The right of confrontation ensures that the defendant may be physically present at his own trial. The Supreme Court has held that neither the defendant nor his counsel may be permitted to waive this right.[9] But when language difficulties inhibit the defendant's ability to understand the proceedings, his physical presence

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[3] *See also* Felts v. Murphy, 201 U.S. 123 (1906), where the Court found proper jurisdiction to convict a deaf defendant of murder, holding that there was no denial of due process by failure to repeat testimony to the defendant through an ear trumpet.

[4] No counsel appeared to represent the defendant on appeal, but the Court believed that it could render a fair decision on the basis of its own review of the case and the brief submitted by the district attorney.

[5] *See, e.g.*, United States v. Barrios, 457 F.2d 680 (9th Cir. 1972); People v. Mammilato, 168 Cal. 207, 142 P. 58 (1914); State v. Aguelera, 326 Mo. 1205, 33 S.W.2d 901 (1930); State v. Rusos, 127 Wash. 65, 219 P. 843 (1923).

[6] In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

[7] Kirby v. United States, 174 U.S. 47, 55 (1899).

[8] Pointer v. Texas, 380 U.S. 400 (1965).

[9] In Lewis v. United States, 146 U.S. 370, 372 (1892), the Court reversed a conviction for murder when the defendant's counsel was forced by the trial court to make juror challenges with the prisoner absent. The Court stated:

> A leading principle that pervades the entire law of criminal procedure is that, after indictment [is] found, nothing shall be done in the absence of the prisoner. . . . [I]t is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during trial.

*Id.* at 372.

in the courtroom may actually impinge upon the right of confrontation by presenting the facade of a just hearing in place of actual fairness.

One of the first decisions to reverse a conviction for failure to appoint an interpreter involved a deaf-mute.[10] The court held that the right of confrontation must include the defendant's right to understand the accusations and evidence presented against him, and must include the means to defend against those charges.[11] When presented with a confrontation that was limited to the mere physical presence of the accused at trial, the court bluntly characterized the confrontation as "meaningless . . . vain and useless."[12] Trials conducted under such a misconception of the sixth amendment, said the court, would be "useless" exercises, "bordering on the farcical."[13]

Similarly, in *State v. Vasquez,*[14] the Supreme Court of Utah recognized that the right of confrontation cannot be limited to the defendant's ability "to see the witness testifying against him and to hear what the witness says."[15] Such sensory impressions, severed from an actual comprehension of "what is going on in the proceeding,"[16] were held insufficient to sustain a constitutionally proper conviction of the accused. Thus, the trial court's refusal to provide an interpreter for Vasquez, who spoke and understood only Spanish, constituted reversible error.

Recently, several courts have used even stronger language in concurring with *Vasquez.* The United States Court of Appeals for the First Circuit, in *United States v. Carrion,*[17] concluded that "the right to confront witnesses would be meaningless if the accused could not understand their testimony . . . ."[18] Interpreters must be provided as a right to non-English-speaking defendants because "no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment."[19] The

[10] Terry v. State, 21 Ala. App. 100, 105 So. 386 (1925).

[11] Cases dealing with a defendant's mental competence to stand trial appear to forbid the trial of an accused whose severe intellectual shortcomings prevent him from understanding a criminal proceeding even though no language difficulties are present. *See, e.g.,* Pate v. Robinson, 383 U.S. 375 (1966); Dusky v. United States, 362 U.S. 402 (1960). *See also* notes 94-98 and accompanying text *infra.*

[12] Terry v. State, 21 Ala. App. 100, 102, 105 So. 386, 387 (1925).

[13] *Id.*

[14] 101 Utah 444, 121 P.2d 903 (1942).

[15] *Id.* at 449, 121 P.2d at 905.

[16] *Id.*

[17] 488 F.2d 12 (1st Cir. 1973), *cert. denied,* 416 U.S. 970 (1974).

[18] *Id.* at 14.

[19] *Id.*

Supreme Court of Arizona, in *State v. Natividad,*[20] characterized an uninterpreted trial of a non-English-speaking defendant as "fundamentally unfair."[21]

Slowly, courts are acknowledging the persuasiveness of these confrontation arguments.[22] Most of these decisions have buttressed their conclusions by recognizing that the right to confront witnesses includes the right of cross-examination,[23] a right which the Supreme Court has called "one of the safeguards essential to a fair trial."[24] The first case to stress the importance of the defendant's understanding of cross-examination, *Garcia v. State,*[25] relied upon the confrontation provision of the Texas Constitution. In *Garcia,* the court reversed the defendant's conviction because he alleged that he could not understand the testimony which was crucial to the prosecution's case.[26]

In *United States ex rel. Negron v. New York,*[27] the United States Court of Appeals for the Second Circuit emphasized that the defendant's right to cross-examine the prosecution's witnesses would be violated if he did not understand the precise nature of their testimony. Thus the summaries of testimony by a translator, offered to the defendant periodically during the trial, could not support a conviction. The court believed that the effectiveness of a

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[20] 111 Ariz. 191, 526 P.2d 730 (1974).

[21] *Id.* at 194, 526 P.2d at 733.

> It would be as though a defendant were forced to observe the proceedings from a soundproof booth or seated out of hearing at the rear of the courtroom, being able to observe but not comprehend the criminal processes whereby the state had put his freedom in jeopardy. Such a trial comes close to being an invective against an insensible object, possibly infringing upon the accused's basic "right to be present in the courtroom at every stage of his trial."

*Id.* at 194, 526 P.2d at 733 (citations omitted).

[22] *See, e.g.,* United States *ex rel.* Negron v. New York, 434 F.2d 386 (2d Cir. 1970); Gonzalez v. Virgin Islands, 109 F.2d 215 (3d Cir. 1940); United States *ex rel.* Navarro v. Johnson, 365 F. Supp. 676 (E.D. Pa. 1973); Parra v. Page, 430 P.2d 834 (Okl. Crim. 1967).

[23] *See* Pointer v. Texas, 380 U.S. 400 (1965).

[24] Alford v. United States, 282 U.S. 687, 692 (1931).

[25] 151 Tex. Crim. 593, 210 S.W.2d 574 (1948). The court stated:

> The constitutional right of confrontation means something more than merely bringing the accused and the witness face to face; it embodies and carries with it the valuable right of cross-examination of the witness.
>
> Unless appellant was in some manner, either through his counsel or an interpreter, afforded knowledge of the testimony of the witness, the right of cross-examination could not be exercised by him.
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> . . . [I]n denying the appellant an interpreter, the trial court abused its discretion and appellant was thereby denied a right granted by the Constitution.

*Id.* at 601-02, 210 S.W.2d at 580.

[26] *Id.* at 601-02, 210 S.W.2d at 580.

[27] 434 F.2d 386 (2d Cir. 1970).

defense counsel's cross-examination is inevitably blunted when the defendant is unable to respond to specific testimony and promptly consult with his attorney. Periodic summaries were found to be less than the constitutional equivalent of immediate interpretation by a translator.

*Negron* thus reveals another communication link which must be maintained if effective cross-examination is to take place—that between the defendant and his attorney. Without an interpreter to help transfer the thoughts of a non-English-speaking defendant to an English-speaking attorney, the defendant's understanding of the testimony offered against him is of no avail.[28] Several courts have examined the need for effective attorney-client communication in terms of the adequacy of counsel's representation of the accused[29] and the defendant's right to participate in the preparation of his own defense.[30] The Supreme Court, in regard to an

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[28] *See, e.g.,* United States v. Carrion, 488 F.2d 12 (1st Cir. 1973), *cert. denied,* 416 U.S. 970 (1974) (right to confront witnesses meaningless if accused unable to understand their testimony); United States *ex rel.* Navarro v. Johnson, 365 F. Supp. 676 (E.D. Pa. 1973) (two interpreters needed at some trials: one to interpret witness's testimony for court, one to interpret defendant's remarks to his attorney); State v. Natividad, 111 Ariz. 191, 526 P.2d 730 (1974) (defendant's inability to understand spontaneously testimony limits his attorney's effectiveness on cross-examination).

[29] *See* United States *ex rel.* Navarro v. Johnson, 365 F. Supp. 676 (E.D. Pa. 1973); State v. Natividad, 111 Ariz. 191, 526 P.2d 730 (1974). Arguments centering on the inadequacy of counsel may be quite difficult to sustain. *Cf.* United States v. Garguilo, 324 F.2d 795, 796 (2d Cir. 1963) (declining to vacate conviction upon claim of incompetent representation without showing of "total failure to present the cause of the accused in any fundamental respect," *quoting,* Brubaker v. Dickson, 310 F.2d 30, 39 (9th Cir. 1962), *cert. denied,* 372 U.S. 978 (1963)); United States v. Wight, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied,* 338 U.S. 950 (1950) (holding that relief upon claim of inadequacy of counsel available only upon showing that representation had been so markedly inadequate "as to make the trial a farce and a mockery of justice").

[30] United States *ex rel.* Negron v. New York, 434 F.2d 386 (2d Cir. 1970); United States *ex rel.* Navarro v. Johnson, 365 F. Supp. 676 (E.D. Pa. 1973); State v. Natividad, 111 Ariz. 191, 526 P.2d 730 (1974). In *Navarro,* the court developed an interesting approach to the problem of ensuring that the accused can participate fully in developing his defense:

> [W]e feel it is important to note one aspect of the matter not heretofore given much attention: the case may well arise where the defendant's constitutional rights may require the presence of *two* interpreters. Such a situation might have arisen in the present case during the period when the court interpreter was translating the testimony of the Spanish-speaking witness for the benefit of the court, at which time Navarro was unable to communicate with his lawyer. Such situations are likely to occur in long trials where credibility is the central issue, where cross-examination of witnesses speaking in the foreign tongue is therefore critical, but where interruption of the testimony (as in the present case) is impractical. Unless a second interpreter is somehow furnished, the defendant's incapacity to respond to specific testimony will "inevitably hamper the capacity of his counsel to conduct effective cross-examination."

365 F. Supp. at 682-83 n.3, *quoting* United States *ex rel.* Negron v. New York, 434 F.2d 386 (2d Cir. 1970).

alleged mental incapacity to stand trial, has gone so far as to hold that the inability of the defendant "to consult with his lawyer with a reasonable degree of rational understanding," unconstitutionally vitiates the significance of the defendant's right to be present.[31]

Attorney-client communication is critical at other junctures of the criminal process as well.[32] Without a complete and meaningful interview with his client, a defense attorney can rarely conduct an adequate pretrial investigation of the facts surrounding the case.[33]

Some courts that apparently accept the importance of the defendant's understanding of the proceeding and his ability to communicate with his counsel in the cross-examination context, have legitimized questionable refusals to supply interpreters on the ground that the defense counsel understood the proceedings and presumably would manage to communicate with his client.[34] The recent case of *Salas v. State*[35] reflects the presumption that counsel will interpret testimony for his client. The court found no denial of due process when an interpreter was denied. This holding was based primarily upon the defendant's waiver of his right to an interpreter.[36] Yet the court justified its ruling by stating that an interpreter was not necessary because "there was no testimony as to

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[31] Dusky v. United States, 362 U.S. 402 (1959).

[32] *See, e.g.*, People v. Vitale, 3 Ill. 2d 99, 119 N.E.2d 784 (1954) (ability of defendant's attorney to translate for him properly assured that defendant understood meaning of his change of plea); People v. Medina, 24 App. Div. 2d 516, 261 N.Y.S.2d 831 (2d Dep't 1965) (defendant's alleged language difficulty did not prevent his understanding of statutory sentencing procedure).

[33] *See* Rivera v. United States, 370 F. Supp. 439 (S.D.N.Y. 1973). The court held that problems of communication between the defendant and his counsel, which allegedly prevented counsel from completing an adequate pretrial investigation, did not constitute an ample reason for reversal. The court supported the trial court's refusal to appoint an interpreter here by stating that "it does not appear that such witnesses referred to by petitioner had any material information that could be of value to the defense." *Id.* at 441.

[34] *See, e.g.*, The King v. Ah Har, 7 Haw. 319 (1888), wherein the court, relying on the confrontation clause in Hawaii's territorial constitution, stated:

> We agree with the contention of the counsel for the defendants, that the constitutional right of an accused person "to meet the witnesses who are produced against him face to face" is not complied with unless he is in some way made to understand their evidence, in order to enable him to avail himself of his further expressed constitutional right of cross-examining these witnesses, and also to meet their evidence with his own proofs . . . .
>
> . . . But if the accused has counsel who understands the evidence, whether directly from the witnesses or through an interpreter, the constitutional requirement is complied with, though the accused himself may not understand it. It is to be presumed that counsel will communicate with client.

*Id.* at 322. *See also* Escobar v. State, 30 Ariz. 159, 245 P. 356 (1926).

[35] 385 S.W.2d 859 (Tex. Crim. App. 1965).

[36] *Id.* at 861. *See* text accompanying notes 56-62 *infra*.

whether counsel representing the appellant could or could not make this interpretation [of a witness's testimony] for him."[37]

Even when an attorney attempts to interpret the proceedings for the defendant, the process presents unavoidable difficulties. An attorney must concentrate upon his role as the defendant's legal representative if he is to provide his client with an adequate defense. Even the most expert and conscientious defense counsel cannot adequately analyze the testimony of witnesses, protect the evidentiary rights of his client, and prepare to challenge the prosecution's case if, at the same time, he must translate the proceedings. Certainly the precision of interpretation mandated by *Negron* will be lacking when the court substitutes the defense counsel for an interpreter.

Some courts have held that a difficulty in communication between the accused and his attorney represents only one of the many factors that must be considered in judging the adequacy of counsel. In *Cervantes v. Cox,*[38] a Mexican national brought a habeas corpus proceeding claiming inadequate representation based on incomplete communication with his lawyers. The court denied the petitioner relief because he had exhibited sufficient knowledge of English to be aware of the consequences of his guilty plea. The court went on, however, to acknowledge that in certain circumstances the inability to communicate with an attorney would deny the defendant constitutional rights.[39]

B. *Due Process*

Courts have also found that the due process clause of the fourteenth amendment requires the appointment of an interpreter for the non-English-speaking accused. Over time the due process clause has been the vehicle for multiple, and occasionally complex,

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[37] 385 S.W.2d at 861.

[38] 350 F.2d 855 (10th Cir. 1965).

[39] The court in *Cervantes* noted:

> Although we have no doubt that under extreme circumstances the inability of an accused to communicate with his counsel may deny to him the right to effective representation and actually result in the entry of a plea without understanding we do not find the case at bar to be of such nature. There is no constitutional right, as such, requiring the assistance of a court-appointed interpreter to supplement the right to counsel. Nor is there a duty to an accused to furnish counsel who can communicate freely with the accused in his native tongue. The existence of a language barrier between counsel and client is merely one circumstance probing the questions of whether the accused has been adequately represented by counsel and has voluntarily and knowingly entered his plea.

*Id.* at 855.

judicial doctrines. In the setting of a criminal proceeding, the denial of due process has been defined as

> the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial.[40]

*Ex parte Cannis*[41] was an early case that relied upon the due process clause to overturn a conviction on the basis that an interpreter had been improperly denied. The Oklahoma Criminal Court of Appeals, in reviewing a rape prosecution marked by numerous constitutional violations, maintained that the "fair and impartial"[42] trial guaranteed by the due process clauses in the fourteenth amendment to the United States Constitution and in article II, section 7 of the Oklahoma Constitution included the right to an interpreter when needed to enable the defendant to understand the proceedings.

The Second Circuit in *Negron,* reiterating the reasoning of the court in *Cannis,* stated that

> the right that was denied Negron seems to us even more consequential than the right of confrontation. Considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial, unless by his conduct he waives that right. And it is equally imperative that every criminal defendant—if the right to be present is to have meaning—possess "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." Otherwise, "[t]he adjudication loses its character as a reasoned interaction . . . and becomes an invective against an insensible object."[43]

Thus, several courts have determined that the problems of confrontation, cross-examination, and adequacy of counsel involved in the refusal to provide an interpreter to a non-English-speaking defendant combine to deprive that person of his general right to a

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[40] Lisenba v. California, 314 U.S. 219, 236 (1941). *See* Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974); Ham v. South Carolina, 409 U.S. 524, 526-27 (1973).

[41] 173 P.2d 586 (Okl. Crim. 1946).

[42] *Id.* at 594.

[43] United States *ex rel.* Negron v. New York, 434 F.2d 386, 389 (2d Cir. 1970) (citations omitted). The court in *Negron* did not specifically refer to nor cite *Cannis.*

fair trial guaranteed by the due process clause, as well as his specific rights under the sixth amendment.[44]

C. *Knowing and Intelligent Waivers*

Some courts have favored the appointment of an interpreter to ensure that the waiver by a non-English-speaking defendant of his constitutional rights is made knowingly and intelligently. In *Parra v. Page*,[45] the accused was a 23-year-old, uneducated Mexican-American migrant worker who understood only Spanish. The court reversed the conviction based on a plea of guilty and held that an interpreter should have been provided to inform the defendant of his rights.

In *Landeros v. State*,[46] the court approved the defendant's application to withdraw his guilty plea and substitute a plea of not guilty. The court concluded that the non-English-speaking defendant did not understand the explanation of his constitutional rights, recited to him in English. Therefore, any waiver he made could not have been knowing and intelligent. Yet, the trial judge in this case refused to appoint an interpreter to aid the accused.

*In re Muraviov*[47] involved an alleged waiver by the defendant of his right to counsel at trial. No interpreter was present either at the arraignment or at the trial. The court held, therefore, that the petitioner's inability to speak or understand English established

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[44] United States *ex rel.* Navarro v. Johnson, 365 F. Supp. 676 (E.D. Pa. 1973). In State v. Natividad, 111 Ariz. 191, 526 P.2d 730 (1974) and State v. Faafiti, 54 Haw. 637, 513 P.2d 697 (1973), the respective courts supported the general right of a non-English-speaking defendant to assistance of an interpreter. In *Natividad*, the court remanded in order to determine the nature and severity of any language difficulty. In *Faafiti*, the court rejected the defendant's contention that his lack of complete familiarity with English required the appointment of an interpreter.

It is important to note that these cases that rely on the due process clause as the source of a right to an interpreter perceive the trial as a proceeding to pronounce and test factual assertions. In this context the accused may play a useful part in his defense because he, if anyone, should know what actually happened. Defendants have been denied interpreters at hearings where only questions of law are at issue. In United States v. Paroutian, 299 F.2d 486 (2d Cir. 1962), the court rejected a claim that due process was denied when no interpreter was provided the defendant at a hearing to determine the court's jurisdiction. Such holdings indicate that the preparation of legal arguments is usually the job of the defendant's lawyer, and as long as the lawyer can understand the proceedings, fairness is assured. This argument is quite persuasive since any other position would result in increased costs without a corresponding increment of fundamental fairness.

[45] 430 P.2d 834 (Okl. Crim. 1967).

[46] 480 P.2d 273 (Okl. Crim. 1971).

[47] 192 Cal. App. 2d 604, 13 Cal. Rptr. 466 (1961).

that "he did not with intelligent understanding waive his right to counsel."[48]

D. *Constitutional and Statutory Provisions*

Only one state, New Mexico, provides in its state constitution for the right of the accused to have an interpreter.[49] A majority of states have statutory provisions dealing with problems of non-English-speaking persons in a criminal proceeding.[50] Most states either provide for the use of interpreters when a witness is incapable of hearing or understanding the English language or is incapable of expressing himself in the English language in a manner that the court, jury, or counsel can understand directly.[51] The problem with this formulation is that it clearly illustrates the tendency of the courts to appoint interpreters for the benefit of the court rather than for the welfare of the defendant. The New Jersey statute specifically provides for the appointment of an interpreter whenever such will expedite or improve the transaction of judicial business. In addition, it limits the use of interpreters to certain enumerated languages.[52]

The use of interpreters in the federal courts is governed by Rule 28(b) of the Federal Rules of Criminal Procedure, which provides:

> The court may appoint an interpreter of its own selection and may fix the reasonable compensation of such interpreter. Such compensation shall be paid out of funds provided by law or by the government, as the court may direct.

The Notes of the Advisory Committee on the Criminal Rules specifically acknowledged that an interpreter may be needed to interpret the testimony of non-English-speaking witnesses or to assist non-English-speaking defendants in understanding the proceedings or in communicating with assigned counsel.[53]

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[48] *Id.* at 605-06, 13 Cal. Rptr. at 467.

[49] N.M. CONST. art. II, § 14, which provides in pertinent part:

> In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and hy counsel; to demand the nature and cause of the accusation; to be confronted with the witnesses against him; to have the charge and testimony interpreted to him in a language that he understands. . . .

[50] For a brief discussion of different state statutory provisions, see Note, *The Right to an Interpreter*, 25 RUTGERS L. REV. 145, 147-48 (1970).

[51] *See, e.g.*, CAL. EVID. CODE § 752(a) (West 1966); ILL. REV. STAT. ch. 38, § 165-11 (Smith-Hurd 1973).

[52] N.J. STAT. ANN. § 2A:11-28 (Supp. 1975). The enumerated languages are Italian, German, Polish, Russian, Spanish, Yiddish, Hungarian, Slavic, and Greek.

[53] *See* FED. R. CRIM. P. 28(b), Advisory Committee Note. Senator John Tunney has introduced the Bilingual Courts Act (S. 565, 94th Cong., 1st Sess. (1975)), which was passed

It should be noted that these statutory provisions do not effectively add to any federal or state constitutional right. Courts are directed to appoint interpreters only when they deem it necessary.[54] The result is that appointment of an interpreter is still left to the discretion of the trial court. However, a judge may be more inclined to exercise that discretion pursuant to a clear statutory authorization as opposed to case-law precedent.

## II

## TRADITIONAL ROADBLOCKS TO THE APPOINTMENT OF AN INTERPRETER

### A. *Waiver by Silence*

Cases recognizing the right to an interpreter often arise in situations where the absence of an interpreter at trial does not constitute a violation of defendant's rights. Many such appellate decisions rely on precedent allowing an intelligent relinquishment or abandonment of a known right.[55] Despite the possibility that a defendant (even with counsel) has no knowledge of his right to an interpreter, courts have gone quite far to infer a waiver of an interpreter from the defendant's silence.

The first significant discussion of the "waiver by silence" doctrine came in *State v. Rusos*.[56] Exhibiting a concern for judicial efficiency the court placed the burden on the defendant and his counsel to notify the court of language difficulties.[57]

In a more recent case, *People v. Ramos*,[58] the court argued that

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by the Senate (121 CONG. REC. S12445-46 (daily ed. July 14, 1975)) and sent to the House (121 CONG. REC. H6821 (daily ed. July 15, 1975)). The bill provides for more effective bilingual proceedings in the federal district courts. The legislation provides that whenever the trial judge determines, on his own motion or that of a party to the proceeding, that an interpreter is needed, one should be provided for an accused or a witness. The act mandates the use of certified interpreters and permits electronic recordings of the proceedings for verification of the translated testimony.

[54] *See, e.g.*, People v. Soldat, 32 Ill. 2d 478, 207 N.E.2d 449 (1965); State v. Aguelera, 326 Mo. 1205, 33 S.W.2d 901 (1930).

[55] *See, e.g.*, Johnson v. Zerbst, 304 U.S. 458 (1938).

[56] 127 Wash. 65, 219 P. 843 (1923).

[57] The court in *Rusos* explained:

> Appellant and his counsel knew, if anyone did, of his lack of fluency in the English tongue, how comprehensible and intelligible his language was, and what, if any, difficulties a stranger might have in grasping his meaning. Hence it was their duty to call the attention of the court to the necessity for an interpreter, if there was such necessity. Not having done so is an admission that they believed no interpreter necessary. . . .

*Id.* at 66, 219 P. at 844.

[58] 26 N.Y.2d 272, 258 N.E.2d 197, 309 N.Y.S.2d 906 (1970).

the "waiver by silence" position was necessary to avoid useless litigation and to protect the interests of the prosecution in convicting the guilty with the least expenditure of time and effort. If courts could not legitimately infer a waiver of the right to an interpreter from the failure of the defense to request such services,

> it would be possible for a defendant to remain silent throughout the trial, and take a chance of a favorable verdict—failing in which, he could secure a new trial upon the ground that he did not understand the language in which the testimony was given. The absurdity of such a proposition is self-evident.[59]

*Ramos* is only one of a number of cases exhibiting the vitality of the "waiver by silence" doctrine,[60] despite the recent Supreme Court cases holding that the waiver of a constitutional right should not be presumed upon a silent record.[61] For example, in *Henry v. Mississippi*,[62] the Supreme Court stated that the doctrine which precludes the review of an error unless an objection was raised at trial does not apply when the issues involved concern deprivation of a fundamental constitutional right. It is also important to note that the arguments offered in *Rusos* and *Ramos* assume that the defendant either actually speaks English or at least is aware of his right to an interpreter. The latter assumption presumes adequate representation by a lawyer who is aware of that right. Inadequate representation, or communication difficulties between the accused and his attorney, however, could leave the non-English-speaking defendant without any knowledge of his right to an interpreter. Again, the severe burden of proof concerning the sixth amendment claim of inadequacy of counsel[63] probably would block a reversal of a conviction at a trial in which the defendant was inadequately represented.

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[59] *Id.* at 275, 258 N.E.2d at 198-99, 309 N.Y.S.2d at 908.

[60] *See, e.g.*, People v. Estany, 210 Cal. App. 2d 609, 26 Cal. Rptr. 757 (1962); People v. Medina, 24 App. Div. 2d 516, 261 N.Y.S.2d 831 (2d Dep't 1965); *see also* Duroff v. Commonwealth, 192 Ky. 31, 232 S.W. 47 (1921); Zunago v. State, 63 Tex. Crim. 58, 138 S.W. 713 (1911).

[61] *See, e.g.*, Brady v. United States, 397 U.S. 747 (1969); Boykin v. Alabama, 395 U.S. 238 (1969) (involving the alleged waiver of the right to a jury trial); Miranda v. Arizona, 384 U.S. 436 (1966) (involving waiver of the right to counsel at pretrial custodial examinations of the defendant and waiver of the fifth amendment privilege against self-incrimination); Carnley v. Cochran, 369 U.S. 506 (1962) (involving a waiver of the right to an appointed counsel).

[62] 379 U.S. 443 (1965).

[63] *See* note 29 and accompanying text *supra*.

B. *Standard for the Appointment of an Interpreter*

The trial court judge makes the decision whether to appoint an interpreter. Formal standards regarding when a translator should be appointed are not necessarily used. Instead, it has most often been held that such a determination is within the discretion of the judge.[64] Other courts have refined this formulation by stating that the judge has discretion only when it is clear that a person can in some way communicate in English. Otherwise it is mandatory that the judge appoint a translator.[65]

The test for abuse of discretion is generally whether the failure to appoint a translator has hampered the defendant in any manner in presenting his case fairly to the jury.[66] This same test is applied where the court has failed to appoint an interpreter to assist a non-English-speaking witness.[67] Many courts have been quite strict in applying the test. In *People v. Ramos,*[68] for example, the court stated that the trial judge should investigate the possible need for an interpreter "[o]nly when it becomes acutely obvious that the defendant is exhibiting an inability to understand the trial proceedings or to communicate with his counsel due to a language barrier . . . ."[69]

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[64] For cases in which requests for interpreters were denied under this formulation, see Perovich v. United States, 205 U.S. 86 (1907); United States v. Sosa, 379 F.2d 525 (7th Cir.), *cert. denied,* 389 U.S. 845 (1967); Suarez v. United States, 309 F.2d 709 (5th Cir. 1962). For a case in which an interpreter was appointed, see Kelly v. State, 278 So. 2d 400 (Miss. 1973), where the court relied upon MISS. CODE ANN. § 1529 (1956), which authorized use of an interpreter when "necessary."

[65] People v. Annett, 251 Cal. App. 2d 858, 59 Cal. Rptr. 888, *cert. denied,* 390 U.S. 1029 (1967).

[66] United States v. Sosa, 379 F.2d 525 (7th Cir.), *cert. denied,* 389 U.S. 845 (1967); Viliborghi v. State, 45 Ariz. 275, 43 P.2d 210 (1935); State v. Vasquez, 101 Utah 444, 121 P.2d 903 (1942).

[67] *See, e.g.,* Duroff v. Commonwealth, 192 Ky. 31, 232 S.W. 47 (1921).

> The trial court is vested with a broad discretion in the matter of calling an interpreter, to be exercised according to the facts of each case. If the witnesses are unable to understand and speak the English language the court should either on motion or on its own knowledge call a competent qualified person to translate and interpret the questions propounded and the answers given thereto, but where the witnesses are able to understand and speak the English language, even imperfectly, but so as to make themselves understood and to convey their thoughts and ideas, no interpreter should be called or allowed.

*Id.* at 34, 232 S.W. at 49.

[68] 26 N.Y.2d 272, 258 N.E.2d 197, 309 N.Y.S.2d 906 (1970).

[69] *Id.* at 275, 258 N.E.2d at 199, 309 N.Y.S.2d at 909. One interesting argument in favor of a standard that would minimize the appointments of interpreters was noted in United States v. Frank, 494 F.2d 145, 157 (2d Cir.), *cert. denied,* 419 U.S. 828 (1974), where the court expressed reservations about the use of an interpreter on cross-examination when one had hardly been used on direct.The court feared that in cases in which the need

Some courts apparently fail to realize the seriousness of the protestations of non-English-speaking defendants. In *State v. Faafiti*,[70] the accused, a native Samoan, was denied an interpreter when he testified before the jury. The court stated that although the defendant did not speak grammatically correct English, he had sufficient command of the language to understand the questions and convey his thoughts to the jury.[71] The court emphasized that a defendant's lack of complete familiarity with the English language does not automatically entitle him to have an interpreter. The court, in fact, made a total mockery of the defendant's claim by quipping that few native English speakers are "completely familiar with the English language. . . . [a] fact . . . substantiated in decisions of this court and other supreme courts which show obvious grammatical errors."[72] The substantial difficulties of the defendant were thus lightly discarded.

In *Diaz v. State*[73] the court's approach to the plight of non-English-speaking defendants was equally callous. The defendant, a Latin American, unsuccessfully appealed his conviction for attempted rape on the ground that the court failed to appoint an interpreter to assist him with his testimony.[74] In deciding that there

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for an interpreter was questionable, the defense could request that the prosecutor slacken the pace of cross-examination and rephrase questions so that the defendant would not be confused.

[70] 54 Haw. 637, 513 P.2d 697 (1973).

[71] The court in *Faafiti* stated:

> We do not agree with the defendant that whenever a defendant "is not completely familiar with English," upon his request as a matter of right he is entitled to an interpreter. In the first place, how many of us even though educated in the United States are *completely* familiar with the English language?

*Id.* at 639, 513 P.2d at 699 (emphasis in original).

[72] *Id.* at 639 n.1, 513 P.2d at 699 n.1.

[73] 491 S.W.2d 166 (Tex. Crim. App. 1973).

[74] The trial record showed the following exchanges:

> DEFENSE COUNSEL:
> If the Court please, let me rephrase that. Thomas,—Your Honor, there is going to be some difficulty of communication here, there always has been. This man does not really fully understand English.
>
> THE COURT:
> I will permit you to go beyond the normal English speaking standard, but make your leading be the minimum.

And later,

> Q [by defense counsel]:
> Well, the question I'm asking you and you—you answered partly right and partly—I don't think you—either you misunderstood me or something. What you are saying is, that you have in the past drank enough that you had no knowledge of what was going on around you and no recollection of what had happened to you or where you had been, is this true?
>
> A:
> I wish I can have a interpreter, but I don't have a interpreter. See, sometimes I say

was "ample evidence that appellant understood and communicated in the English language reasonably well,"[75] the appellate court cited several factors throughout the opinion: appellant answered, "not guilty sir," upon the reading of the indictment; "there was no showing that his counsel could not and did not communicate in Spanish with appellant [and] . . . a defense witness stated that [Diaz] did not speak *fluent* English."[76] In addition, the court noted that "[t]here was no request for an interpreter"[77] although the defendant specifically told his lawyer in open court that he wanted an interpreter. The court then not only ignored Diaz's language difficulties but also ignored his request for assistance in testifying.

A further problem in appellate review of a trial court record is the weight that is sometimes accorded simple or monosyllabic answers to questions from the defense counsel, the district attorney, or the judge. There is a danger that a decision to affirm a conviction will be based on "yes" or "no" answers given by the defendant when he does not fully understand the consequences of his statements.[78] It is readily apparent that an appellant may easily respond to a question in such a manner yet not speak English.[79] Given the perfunctory questions often asked at the time of arraignment or guilty plea, a defendant may still need an interpreter so he can comprehend the significance of a particular question or action.

## III

## MOVEMENT TOWARD HEIGHTENED JUDICIAL RESPONSIBILITY IN PROTECTING THE RIGHT TO AN INTERPRETER

Several courts have forthrightly rejected the casual and indifferent attitude traditionally taken with regard to language difficulties in criminal trials. For example, in *State v. Natividad*[80] the court

something I'm not supposed to say and sometimes I say something wrong. I just say what I know the way—

THE COURT:

You just listen very carefully to the man's questions. I think you can get along all right, to either of the lawyers, they'll put their questions to you pretty clearly, I think.

*Id.* at 167.

[75] *Id.* at 168.

[76] *Id.* at 167-68.

[77] *Id.* at 168.

[78] For an example of reliance on "yes" and "no" responses, see People v. Annett, 251 Cal. App. 858, 59 Cal. Rptr. 888, *cert. denied*, 390 U.S. 1029 (1967).

[79] *In re* Muraviov, 192 Cal. App. 2d 604, 13 Cal. Rptr. 466 (1961).

[80] 111 Ariz. 191, 526 P.2d 730 (1974).

denied that a failure to make a request for an interpreter at trial constituted a proper waiver.[81] The court in *State v. Vasquez*[82] also cautioned against casual refusal of an interpreter for a non-English-speaking defendant and analyzed the hidden inequities that may result from such a refusal.[83]

The United States Court of Appeals for the Second Circuit, in *United States ex rel. Negron v. New York*,[84] similarly noted that a defendant's failure to request an interpreter cannot be taken as a passive waiver. Not only may the defendant be unaccustomed to asserting his personal rights, but he may never realize or understand that he has such rights until it is too late. The court noticeably departed from past holdings, stating that a court, given notice of a defendant's severe language difficulty, is obligated to "make unmistakably clear to [the accused] that he has a right to have a competent translator assist him, at state expense if need be, throughout his trial."[85]

This notification requirement certainly decreases the danger

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[81] The court in *Natividad* stated:

> A defendant who passively observes in a state of complete incomprehension the complex wheels of justice grind on before him can hardly be said to have satisfied the classic definition of a waiver as "the voluntary and intentional relinquishment of a known right." City of Tucson v. Koerber, 82 Ariz. 347, 313 P.2d 411 (1957); Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1937). This would be especially true with a Mexican national during his initial contact with our judicial system.

*Id.* at —, 526 P.2d at 733. *See also In re* Muraviov, 192 Cal. App. 2d 604, 13 Cal. Rptr. 466 (1961).

[82] 101 Utah 444, 121 P.2d 903 (1942).

[83] The court in *Vasquez* observed:

> Degrees of understanding may present themselves between that of complete comprehension of the language to that of minor matters. The question, not properly heard or understood, may bring forth an answer that might turn the scales from innocence to guilt or from guilt to innocence. Then, too, the answer given might be made in words not entirely familiar or understood by the defendant. . . .
>
> While English has comparatively few inflections, either a prefix or a suffix mistakenly applied or interpreted may change the meaning of a whole sentence.

*Id.* at 450, 121 P.2d at 905-06.

[84] 434 F.2d 386 (2d Cir. 1970).

[85] *Id.* at 391. Even after the Second Circuit's decision in *Negron*, New York State courts do not have to follow this procedure. People v. Ramos, 31 App. Div. 2d 815, 297 N.Y.S.2d 886 (2d Dep't 1969), *aff'd*, 26 N.Y.2d 272, 258 N.E.2d 197, 309 N.Y.S.2d 906 (1970). The highest state courts and the lower federal courts are separate jurisdictions standing on equal footing, both governed by the same reviewing authority of the United States Supreme Court. Therefore a federal court decision is not controlling in a state court. United States *ex rel.* Meyer v. Weil, 458 F.2d 1068 (7th Cir.), *cert. denied*, 409 U.S. 1060 (1972); Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972); United States *ex rel.* Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970), *cert. denied*, 402 U.S. 983 (1971); People v. Stansberry, 47 Ill. 2d 541, 268 N.E.2d 431, *cert. denied*, 404 U.S. 873 (1971); State v. Coleman, 46 N.J. 16, 214 A.2d 393 (1965), *cert. denied*, 383 U.S. 950 (1966).

that a non-English-speaking defendant may go through his trial without comprehending the testimony offered therein. The United States Court of Appeals for the First Circuit, in *United States v. Carrion,*[86] placed an even greater burden on the trial court to assure that the defendant is cognizant of his rights. The First Circuit considered it to be the duty of the trial court to make an investigation to determine whether an interpreter is necessary, with a requirement that the court make clear to a defendant with a possible language difficulty his right to have a court-appointed interpreter.[87]

Texas and Utah courts have also held that once the trial court learns that a defendant has difficulty speaking English, it is necessary for the court, in the exercise of its discretion, to inquire and ascertain whether the accused needs an interpreter to safeguard his rights.[88] For example, in *State v. Karumai*[89] the court stated that "it is the duty of the Court to take whatever steps are necessary to prevent injustice and, if necessary, the Court should, on its own motion, appoint an interpreter for the defendant at the State's expense."[90]

In considering whether a hearing should be conducted concerning the need for an interpreter, at least one court, the Second Circuit in *Negron,* has analogized the situation to that of persons of questionable mental competency. In such an instance, where the evidence raises a "bona fide doubt" as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a sanity hearing.[91] Further, the Supreme Court in *Dusky v. United States,*[92] in defining legal mental incompetency, set a fairly high standard.[93]

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[86] 488 F.2d 12 (1st Cir.), *cert. denied,* 416 U.S. 907 (1973).

[87] The court in *Carrion* elaborated:

> [The trial court] should make unmistakably clear to a defendant who may have a language difficulty that he has a right to a court-appointed interpreter if the court determines that one is needed, and, whenever put on notice that there may be some significant language difficulty, the court should make such a determination of need.

*Id.* at 15.

[88] Garcia v. State, 151 Tex. Crim. 593, 210 S.W.2d 574 (1948); State v. Vasquez, 101 Utah 444, 121 P.2d 903 (1942).

[89] 101 Utah 592, 126 P.2d 1047 (1942).

[90] *Id.* at 599, 126 P.2d at 1050.

[91] Pate v. Robinson, 383 U.S. 375 (1966).

[92] 362 U.S. 402 (1960).

[93] [I]t is not enough for the district judge to find that "the defendant [is] oriented to time and place and [has] some recollection of events," but that the "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him."

*Id.* at 402.

The non-English-speaking defendant, unable to consult with his English-speaking lawyer, is in the same position as the mental incompetent. In addition, without the aid of interpretation the accused may well not have the requisite factual understanding of the proceedings against him and be unable to aid in his own defense. This clearly raises a "bona fide doubt" as to the defendant's competence to stand trial. Because it would be a violation of due process to convict a person who is legally incompetent,[94] a hearing should be conducted to determine the accused's ability to communicate and participate in his own trial[95] without an interpreter. If it were possible for incompetents to waive the hearing, it would be a rather hollow right.

Several appellate courts have remanded cases to the trial court for a hearing to determine whether the defendant's alleged language difficulty gave him the right to an interpreter at trial.[96] The United States Court of Appeals for the Fifth Circuit, in *Atilus v. United States*,[97] ordered a hearing on the severity of the defendant's language problem upon his claim that it was impossible for him to understand the proceedings at trial despite the fact that an official interpreter did participate to a degree in the trial. The Fifth Circuit has also held that once a witness has requested an interpreter, the trial court in making its determination is obligated to make a preliminary inquiry as to the necessity of appointing a translator.[98]

A hearing, such as those required by *Carrion* and *Atilus*, was actually held by a trial court on its own initiative in *Kelly v. State*.[99] The judge interrupted the proceedings to make the determination, in chambers, that an interpreter was needed after he had heard the defendant answer less than a dozen questions on the witness stand.

Lastly, many courts are concerned with the special problems of non-English-speaking persons who are called upon to be witnesses

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[94] *See* Jackson v. Indiana, 406 U.S. 715 (1972); Bishop v. United States, 223 F.2d 582 (D.C. Cir. 1955), *rev'd on other grounds*, 350 U.S. 961 (1956) (*per curiam*).

[95] Pate v. Robinson, 383 U.S. 375 (1966).

[96] *See, e.g.*, State v. Natividad, 111 Ariz. 191, —, 526 P.2d 730, 733-34 (1974):

> The decision of the trial court will be adhered to in the absence of a clear abuse of discretion. There is no evidence in the record before us to indicate the lower court made a finding on this issue.
>
> Accordingly we remand the case in order that a hearing may be held to establish the nature and severity of any language difficulty and to determine whether the defendant in the instant case was entitled to be informed of his right to an interpreter under the criteria discussed above.

[97] 378 F.2d 52 (5th Cir. 1967).

[98] Pietrzak v. United States, 188 F.2d 418 (5th Cir.), *cert. denied*, 342 U.S. 824 (1951).

[99] 278 So. 2d 400 (Miss. 1973).

at criminal trials.[100] Some courts allow counsel to ask leading questions of witnesses who are using an interpreter to facilitate the proceeding. Indeed, in *Diaz v. State*,[101] the trial judge allowed defense counsel to ask leading questions of the accused himself in order to minimize at least partially the language problems.

## IV

## THE SELECTION, COMPETENCE, AND DUTY OF AN INTERPRETER

Once the decision has been made to provide an interpreter, either for a witness or for the accused, it has been uniformly held that the trial court is given wide discretion as to whom to appoint.[102] Although interpreters with an interest in the proceeding should be avoided,[103] judges have not hesitated to use partisan translators. Convictions have been affirmed despite the use of an interpreter who was the deputy sheriff who helped investigate and arrest the accused,[104] the injured complainant,[105] a witness,[106] an employee in the county attorney's office,[107] the defendant in a prior civil suit brought by the accused,[108] or a co-defendant being tried with the accused.[109] The courts have also permitted the interpreter to be the wife of the witness[110] and even the mother of the raped girl who needed to testify.[111] One court went so far as to state that there was no requirement that an interpreter should be unbiased toward the defendant.[112] Despite these decisions, the

[100] *See, e.g.*, People v. Brown, 273 Ill. 169, 112 N.E. 462 (1916). In helping such a witness, counsel here was instructed not to directly indicate or suggest the answers he desired. *See also* text accompanying note 53 *supra*.

[101] 491 S.W.2d 166 (Tex. Crim. App. 1973).

[102] United States v. Addonizio, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972); Chee v. United States, 449 F.2d 747 (9th Cir. 1971); Gil v. State, 266 So. 2d 43 (Fla. App. 1972), *cert. denied*, 271 So. 2d 139 (Fla. 1973).

[103] Mislik v. State, 184 Ind. 72, 110 N.E. 551 (1915); Bustillos v. State, 464 S.W.2d 118 (Tex. Crim. App. 1971).

[104] State v. Firmatura, 121 La. 676, 46 So. 691 (1908) (murder).

[105] Sellers v. State, 61 Tex. Crim. 140, 134 S.W. 348 (1911) (assault).

[106] Green v. State, 260 A.2d 706 (Del. 1969) (robbery).

[107] Bustillos v. State, 464 S.W.2d 118 (Tex. Crim. App. 1971) (assault with intent to murder).

[108] State v. Boulet, 5 Wash. 2d 654, 106 P.2d 311 (1940) (grand larceny).

[109] People v. Rivera, 13 Ill. App. 3d 264, 300 N.E.2d 869 (1973) (unlawful possession of narcotics).

[110] United States v. Addonizio, 451 F.2d 49 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972) (affirming conspiracy to interfere with interstate commerce).

[111] Almon v. State, 21 Ala. App. 466, 109 So. 371 (1926) (although rape conviction was reversed due to insufficiency of evidence).

[112] Brown v. State, 59 S.W. 1118 (Tex. Crim. App. 1900) (theft conviction affirmed).

court in *Lujan v. United States*[113] expressed the generally accepted view:

> While in the nature of things, a disinterested interpreter is essential to an impartial interpretation of a witness' testimony, at the same time the trial court is necessarily accorded a wide discretion in determining the fitness of the person called, and the exercise of that discretion will not be disturbed on review in the absence of some evidence from which prejudice can be inferred.[114]

In *Lujan,* the defendant, an American Indian, unsuccessfully objected to the use of an interpreter who was a blood relative of some of the government's witnesses. The problem was remedied by the use of a "counter-interpreter" who sat at the defense table and corrected the first interpreter if necessary. In addition, the second interpreter was used for Indian defense witnesses.

Only in very rare instances have judgments been reversed due to partisan interpretation. In one instance, the appointment of the husband of a deaf mute victim in a prosecution for burglary and attempted rape was held to be fundamentally unfair and violative of due process. In that case, *Prince v. Beto,*[115] the husband had attempted to extort one hundred dollars from the accused by promising that he would stop the prosecution. In reversing the conviction, the court did point out that the husband was an "intensely interested party" and that there would be "few situations [with] greater potential for bias."[116]

The question whether the interpreter is competent is also a discretionary decision to be made by the trial court.[117] It is quite unusual, however, for an appellate court to reverse a conviction on

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[113] 209 F.2d 190 (10th Cir. 1953).

[114] *Id.* at 192.

[115] 426 F.2d 875 (5th Cir. 1970).

[116] *Id.* at 877. *See also* People v. Allen, 22 Ill. App. 3d 800, 317 N.E.2d 633 (1974), where a conviction for aggravated battery was reversed due to the use of an interpreter who was a close personal friend of the complaining witness, a witness at the trial for the prosecution, and also had personal knowledge of the facts of the case. The United States Supreme Court has decided one case in which a biased interpreter was a factor. In Marino v. Ragen, 332 U.S. 561 (1947), a judgment was vacated upon a petition of habeas corpus. The accused, an 18-year-old who had been in the United States for two years and did not understand English, pleaded guilty after two interpreters, one of whom was his arresting officer, had supposedly told him of the consequences of the plea. Before pleading guilty, the defendant never received the assistance of counsel. The Court, in holding that there was a denial of due process, based its decision on the absence of an attorney.

[117] Hardin v. United States, 324 F.2d 553 (5th Cir. 1963); People v. Mendes, 35 Cal. 2d 537, 219 P.2d 1 (1950).

this basis.[118] One problem in reviewing the competence of the interpreter is that there is no trial transcript to reflect the interaction between the witness or accused and the interpreter. The record consists only of the translated remarks of the witness.[119] The only way to review thoroughly the interpreter's performance is to review the English record with the witness and another interpreter to see if the witness believes that the translation is accurate. This approach is obviously quite impractical. As an alternative, the accused could have the option of requesting the compilation of a bilingual record. The cost of employing the needed extra personnel, however, would be prohibitive, and it would probably be very difficult to get a court stenographer for each of the different languages used. To take advantage of this service, or alternatively to utilize a tape recording of the proceeding, the defendant also would have to find an independent person who could analyze the translation.[120] A final consideration militating against such a step would be the infrequency with which the extra transcript would actually be used to review the work of the interpreter. In any event, proving the requisite prejudice to secure a reversal would be very difficult.[121] Without a showing of major errors, courts would probably hold slight confusions or misunderstandings to be harmless error and affirm the lower court judgment.

Further, some courts have noted that if an objection to an interpreter is not made at trial, the accused has waived his right to object in a later proceeding.[122] Again, the logic of this position is not convincing. Unless there is a bilingual person assisting the defense at the time of trial, there is no competent person to judge the performance of the interpreter. Without the attendance of such a person, it would be necessary for an independent party to review the proceeding after the trial is completed. If

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[118] In Kelly v. State, 96 Fla. 348, 118 So. 1 (1928), a death sentence was reversed when it turned out that the two interpreters did not speak the same language as the defendant.

[119] Properly transcribed, interpreted testimony is treated with the same weight and in the same way as ordinary English testimony. People v. Lopez, 21 Cal. App. 188, 131 P. 104 (1913).

[120] *Cf.* note 53 *supra.*

[121] *See, e.g.,* Lujan v. United States, 209 F.2d 190 (10th Cir. 1953).

[122] *See* United States v. Diaz Berrios, 441 F.2d 1125 (2d Cir. 1971); Gonzalez v. Virgin Islands, 109 F.2d 215 (3d Cir. 1940); Gil v. State, 266 So. 2d 43 (Fla. App. 1972), *cert. denied,* 271 So. 2d 139 (Fla. 1973) (squarely holding that failure to object at trial precludes raising issue for first time at subsequent proceedings).

at that time, however, it can be shown that the translation was prejudicially inadequate, it makes little sense to dismiss an appeal due to lack of timely objection during trial.

The method an interpreter should use in translating testimony for the court and the accused has been largely ignored in discussions of the role and effect of an interpreter in a criminal proceeding. A distinction should be noted between the use of an interpreter for a witness in testifying and for the accused in listening. Although some courts require the translator to give a verbatim translation of what the witness states,[123] other courts have allowed responses in the third person.[124] Whichever method is used, it is then up to the jury to assess the credibility of the witness by watching the interaction between the interpreter and the person testifying.[125]

The real controversy over the responsibility of a translator concerns the service provided for the accused at the defense table. An interpreter could provide simultaneous translation of the witness's testimony or he could be used as the defendant desires without the perfection of instant translation. The best-reasoned analysis appears in the lower court decision in *Negron:*

> In order to afford Negron his right to confrontation, it was necessary under the circumstances that he be provided with a simultaneous translation of what was being said for the purpose of communicating with his attorney to enable the latter to effectively cross-examine those English-speaking witnesses to test their credibility, their memory and their accuracy of observation in the light of Negron's version of the facts.[126]

Simultaneous translation better protects the accused in fully exercising his constitutional rights and in receiving the best defense possible by being able to follow the court proceeding and communicate at all times with counsel.

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[123] *See* People v. Jackson, 53 Cal. 2d 89, 346 P.2d 389, *cert. denied,* 362 U.S. 977 (1959); People v. Wong Ah Bang, 65 Cal. 305, 4 p. 19 (1884); Rajnowski v. Detroit, B.C. & A.R. Co., 74 Mich. 15, 41 N.W. 849 (1889); Prokop v. State, 148 Neb. 582, 28 N.W.2d 200 (1947).

[124] For example, the translator might translate the remarks of the witness saying "he said he went to the bank," instead of "I went to the bank." *See* People v. Jackson, 53 Cal. 2d 89, 346 P.2d 389 (1959), *cert. denied,* 362 U.S. 977 (1960), where such responses were allowed as nonprejudicial, but the court said the duty of an interpreter was to repeat answers verbatim. However, Prokop v. State, 148 Neb. 582, 28 N.W.2d 200 (1947), which affirmed the trial court's requirement of a verbatim translation, specifically cautioned against such a method. *Id.* at 584, 28 N.W.2d at 202.

[125] Hensley v. State, 228 Ga. 501, 186 S.E.2d 729 (1972).

[126] United States *ex rel.* Negron v. New York, 310 F. Supp. 1304, 1307 (E.D.N.Y.), *aff'd,* 434 F.2d 386 (2d Cir. 1970).

## CONCLUSION

Recent cases have come a long way toward establishing a right to an interpreter for non-English-speaking defendants. This right is based on confrontation, cross-examination, and due process grounds. Affirmative duties have been imposed by some appellate courts concerning the discretion of trial judges to protect this newly-won right. Slowly, advances are also being made in the competence of the interpreters who are assigned to aid defendants. All these events are long overdue in a nation marked by significant cultural diversity. Hopefully, our courts and legislatures will become even more cognizant of the severe handicap inherent in the inability to communicate and will ensure that when an issue so important as one's personal freedom is at stake language barriers will be reduced.

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