FINDING JUSTICE IN TRANSLATION: AMERICAN JURISPRUDENCE AFFECTING DUE PROCESS FOR PEOPLE WITH LIMITED ENGLISH PROFICIENCY TOGETHER WITH PRACTICAL SUGGESTIONS

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"The right to an interpreter rests most fundamentally, however, on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment." – *United States v. Carrion*[5]

"A defendant's inability to spontaneously understand . . . . [It] would be as though a defendant were forced to observe the proceedings from a soundproof booth . . . , 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 . . . ." – *State v. Natividad*[6]

"Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." – U.S. Const. amend. XIV, §1.

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[5] United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973).

[6] State v. Natividad, 526 P.2d 730, 733 (Ariz. 1974).

INTRODUCTION

On September 20, 2007, the police of Plainfield, New Jersey arrested German Marquez for refusing to submit to a breathalyzer test, not because he actually refused, but because he simply did not understand what the police wanted.[7] The police first encountered Mr. Marquez when they responded to an accident in which he had been involved.[8] After approaching Mr. Marquez's vehicle, the officer asked for his license in English, but Mr. Marquez did not understand, so the officer asked for it in Spanish.[9] Smelling alcohol on Mr. Marquez during this exchange, the officer ordered him to exit the car and began instructing him, in English, to perform various field sobriety tests.[10] Meanwhile, Mr. Marquez just stood there, leaning against a tree for support, understanding none of the instructions.[11] Eventually, based on the smell of alcohol, some slurred speech, and some swaying, the officer decided to arrest Mr. Marquez for drunk driving and took him to the police department to bolster the evidence with a breathalyzer test.[12]

Under New Jersey law, any person who drives on state roads impliedly consents to a breathalyzer test whenever an officer has reasonable grounds to believe the person has been driving under the influence of alcohol.[13] However, the law cautions that a person cannot be physically forced to submit to the test.[14] Instead, it penalizes someone who refuses with a fine and revocation of the driver's license.[15] Before citing someone for refusing to submit to the test, however, the officer "shall . . . inform the person arrested [for drunk driving] of the consequences of refusing to submit to such test . . .[by means of] [a] standard statement . . . [which] shall be read by the police officer to the person under arrest."[16]

Luckily, the officer who arrested Mr. Marquez dutifully read this statement, which concluded as follows:

> "I repeat, you are required by law to submit to [ ] taking of samples of your breath for the purpose of making chemical tests to determine the content of alcohol in your blood. Now, will you submit the samples of your breath?"[17]

Once the officer had finished reading, Mr. Marquez just shook his head and pointed to his eye.[18] The officers thought the response was ambiguous, so

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[7] *See* State v. Marquez, 202 N.J. 485 (N.J. 2010).
[8] *Id.* at 491.
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] N.J. Stat. Ann. § 39:4-50.2(a) (West 2007).
[14] N.J. Stat. Ann. § 39:4-50.2(e) (West 2007).
[15] N.J. Stat. Ann. § 39:4-50.4(a) (West 1981).
[16] N.J. Stat. Ann. § 39:4-50.2(e) (West 2007).
[17] *Marquez*, 202 N.J. at 492.
[18] *Id.* Mr. Marquez pointed to his eye because he had been taking prescription medications for an eye injury that could have influenced his driving. *See id.* at 493.

they read the next two paragraphs of the form statement, which reiterated the request for consent.[19] This time, however, the officers thought it would be a good idea to point to the machine and demonstrate how to use it by pantomiming, all while reading the statement.[20] Baffled, Mr. Marquez responded, "¡*No Entiendo*!"[21] After making a note in the police file reading, "I speak Spanish, 'No Entiendo,'" the officers issued a summons to Mr. Marquez for refusing to submit to the breathalyzer test.[22]

Two crucial facts from this story have been intentionally left unclear thus far because they relate to the central theme of this article—the officers read the statement in English and Mr. Marquez did not speak English. Mr. Marquez was charged for intentional refusal when he simply didn't understand. His "refusal" was neither knowing nor voluntary. In this example it may be that Mr. Marquez was charged with a crime simply because he could not speak English.

Unfortunately, Mr. Marquez may not be the only person who feels that justice can be frustrated by language barriers. The demographic makeup and language ecology of the United States have changed dramatically in recent history, leaving many judges and lawyers wondering how to properly apply laws to and interpret the rights of people unfamiliar with the American legal system or with the English language. Approximately 47 million U.S. residents speak a language other than English at home[23] with 68 percent of the foreign-born population residing in California, Florida, Illinois, New Jersey, New York, and Texas.[24] States that previously did not have large immigrant populations have experienced a dramatic increase in non-native English speakers. For example, between 1990 and 2000, the increase in the immigrant population in twenty-two states equaled the six largest immigrant population states mentioned above. Arizona, Arkansas, Colorado, Georgia, Kentucky, Nebraska, Nevada, North Carolina, Tennessee, and Utah underwent more than a 125% increase in their non-native English speaking population.[25]

In 2000, more than one-quarter of the non-U.S. born population was from Mexico, and over half from Latin America generally (primarily Cuba, the Dominican Republic, and El Salvador). Spanish is spoken by 60% of those who do not speak English at home. According to a National Center for Education Statistics Report, 25% of those enrolled in ESL classes self-re-

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[19] *Id.* at 493.

[20] *Id.*

[21] *Id.* ("No entiendo" is Spanish for "I don't understand").

[22] *Id.*

[23] U.S. Census Bureau, Census Atlas, Chapter 8, Language, copy on file at http://www.census.gov/population/www/cen2000/censusatlas/pdf/8_Language.pdf (last accessed November 2, 2010).

[24] RANDOLPH CAPPS, MICHAEL E. FIX & JEFFREY PASSEL, THE DISPERSAL OF IMMIGRANTS IN THE 1990s, Information Brief No. 2 in Series on Immigrant Families and Workers: Facts and Perspectives (Urban Institute: Washington, D.C. November 26, 2002), *available at* http://www.urban.org/publications/410589.html.

[25] *See id.*

ported that they read English "not at all" or "not well."[26] These data suggest that millions of adults living in the U.S. may be unable to participate meaningfully in court proceedings without the use of an interpreter.

Unfortunately, prison populations are reflective of this growth. The Bureau of Justice estimates that 64% of state prison inmates in 2001 are racial or ethnic minorities with 21% comprising Hispanics, Asians, and Native Americans.[27] This trend also highlights the absolute and imperative judicial need to appreciate, respect, and understand the important role the court interpreter plays in the criminal justice system.

These general statistics provide a picture of the large populations of Low English Proficiency (LEP) persons living in the United States, many of whom are involved in the American criminal justice system as defendants, victims, witnesses, and jurors. In 2009, a working group consisting of a Utah state court judge (the Honorable Lynn W. Davis), a law student (Maxwell Alan Miller), a sociolinguist with experience in forensic linguistics and minority language issues (Dr. William G. Eggington), and a linguistics major preparing to enter law school (Adam Prestidge) focused their experience and research time on addressing legal and linguistic issues related to these demographic and linguistic changes in U.S. society. This paper is an attempt to combine considerable expertise with a focus on court-based interpreting issues in order to ensure that linguistic minorities are as protected by the Fifth, Sixth, and Fourteenth Amendments of the U.S. Constitution as every other U.S. resident.

Foundational Linguistic Issues Relevant to the U.S. Legal System

Because of the high potential for lost life, liberty, and property in criminal cases, we discuss a number of the most important legal and linguistic issues arising from recent jurisprudence involving foreign-language interpreters that have arisen from our survey of over ninety cases from 2004 to 2010. We hope not only to communicate the current law regarding foreign-language interpreter issues in the courts, but also to provide a sufficient basis of knowledge so that attorneys may advocate wisely for non-English speaking clients, and so that judges may ensure that due process for non-English speaking defendants is not lost without interpretation. We will commence with an overview of relevant linguistic research that will inform the ensuing discussion.

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[26] National Center for Education Statistics, Adult Participation in English-as-a-Second-Language (ESL) Classes, May 1998, copy on file at http://nces.ed.gov/pubs98/98036.pdf (last accessed Nov. 2, 2010).

[27] James J. Stephan, U.S. Dept. of Justice, Bureau of Justice Statistics, Census of Jails, 1999, August 2001, *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cj99.pdf (last accessed Nov. 30, 2010).

Defendant Issues

Linguistics is the scientific study of language. With respect to language minority issues and the legal system, a number of areas of linguistic inquiry are extremely relevant. These areas include sociolinguistics and second language acquisition theory with a focus on language minorities, survival-based comprehension strategies used by second language learners, and culturally influenced communication strategies that can create difficulties when language minorities interact with the U.S. legal system. Space does not permit an exhaustive study of these issues, however, we hope to provide the most relevant and rudimentary linguistic findings.

Sociolinguistics and Language Minorities

Sociolinguistics is the sub-discipline of linguistics that often focuses on the relationships between language behavior (language proficiency, language acquisition, and language use) and behavior toward language (attitudes toward language, language speakers, and the language ecology). Sociolinguistic studies often commence by reviewing the broad language environment or ecology within a speech community. The United States, for example, does not have a formal language policy mandating English use. There are, however, numerous informal policies that require English as the "language of wider communication," the language of education, the language of government including education and legal systems, and the language of business. Within the English language itself, there are numerous informal policies and practices that require proficiency in Standard or General American English, especially in written English, for anyone wishing to be seen as a well-educated functioning adult. Society has established various reward structures, usually through its educational systems, to ensure that those who are not proficient in Standard English undergo considerable "nativist" pressures that lead to the acquisition of Standard English.

Within Standard English, there is a wide range of context dependent variability. An extreme and somewhat frivolous example is provided by the transformation inflicted upon the sentence, "I looked at the ball." This utterance is entirely appropriate for most spoken situations, but very inappropriate for written English in many academic, scientific and legal contexts where a semantic equivalent such as, "Personal observations were conducted vis-à-vis a designated spherical object" is more suited. This latter "high-code" sentence is Latin-heavy, contains complex syntax (passive voice), and lexical nominalizations (i.e., verbs changed to nouns, e.g., "looked" to "observations"). Acquisition of this high-code register requires a minimum of five years of sustained exposure and interaction with the code – a process that usually begins in secondary school and is completed by college graduation. Jim Cummins shows that many English Language Learners (hereafter referred to as ELLs), can acquire "I looked at the ball" type proficiency through natural language acquisition – a process he labels

as the acquisition of Basic Interpersonal Communicative Strategies (BICS).[28] However, the complex high-code of English, which Cummins labels as "Cognitive Academic Language Proficiency" (CALP) as used in academic, legal, and bureaucratic contexts takes much longer to acquire and usually requires considerable formal education – a process that can take more than five years of intensive study and immersion within "the code." Generally speaking, it is almost impossible for an adult ELL with limited formal education and low literacy levels to acquire the high-code without undergoing a long and sustained educational process. Usually, adult immigrants do not have the resources in terms of time and money to commit to high-code English acquisition. Instead, as J. Schumann shows, their English proficiency plateaus or fossilizes at a basic survival level. They are able to express their basic needs in a heavily-accented reduced English, reduced in terms of vocabulary range and syntactic complexity.[29] This level of English proficiency allows them to cope within a narrow range of low-level linguistic tasks and contexts found within basic employment and commercial domains. Once outside these contexts, these individuals simply cannot function in English. Without interpreter assistance, many ELLs will resort to basic low-level communicative strategies relying on gestures and telegraphic speech consisting of a string of known vocabulary and formulaic phrases. They often employ fake comprehension strategies by providing feedback that gives the impression that they are understanding while, in reality, they are playing a guessing game hoping that more linguistic and contextual input will help their comprehension. Fake comprehension strategies may work in socially benign situations, but they are a dangerous strategy when employed in legal contexts. They can easily give the impression that a defendant understands the proceedings and thus does not need an interpreter.

Finally, from a linguistic perspective, a prevailing theme running through the following review of cases involves the determination of the need for language assistance, usually in the form of an interpreter. It appears that this decision is made by law enforcement officers, lawyers, and judges based upon subjective experience and criteria as they interact with non-native English speaking clients, suspects, witnesses, and defendants. We live in a global village that some have labeled "the age of proximity" where we all interact physically or digitally with a myriad of languages and cultures to a degree that would have seemed impossible only 50 years ago. English has become the global language or "language of wider communication." Approximately 90% of the world's current and new information is stored and retrieved in and through English. The English-centered communicative needs of this age of proximity have required the development of quick and objective English language proficiency testing procedures that could easily

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[28] Jim Cummins, *BICS and CALP: Origins and Rationale for the Distinction*, *in* SOCIOLINGUISTS: THE ESSENTIAL READINGS 322 (Christina Bratt Paulston & G. Richard Tucker eds., Blackwell 2003).

[29] *See* J. SCHUMANN, THE PIDGINIZATION PROCESS: A MODEL FOR SECOND LANGUAGE ACQUISITION (Newberry House Publishers 1977).

be adapted to meet the needs of the U.S. legal system. For example, initial proficiency testing of defendants could efficiently determine the need for, and type of, English language assistance a defendant may require to understand proceedings. Adoption and implementation of minimal proficiency standards that make a recommendation for the need of an interpreter could significantly reduce subsequent appeals processes and increase the reliability of court findings.

Interpreter Issues

The above-mentioned significant increase in non-English immigration to the U.S. has resulted in a similar increase in the demand for qualified interpreters within the legal system. However, as Virginia Benmaman indicates, "it takes more than bilingualism to make a *legal* interpreter. The *legal* interpreter must also be able to manipulate dialect and geographic variation in his/her working languages, possess wide general knowledge, understand both the *legal* process and the related terminology, and also understand the various discourse styles used in the courtroom."[30] Studying legal interpreting strategies and training requirements has been a major focus within the forensic linguistic research community, revealing the incredibly complex and often conflicting issues and challenges surrounding accurate interpreting. For example, as John Gibbons and Ester Leung indicate, interpreters often are required to switch roles or "frames," speaking for all the salient voices in the courtroom.[31] Many lawyers and judges require interpreters to only act as "a transmission belt or telephone" in the courtroom.[32] Practically speaking, however, this non-participatory role is an impossibility. Interpreters, consciously and subconsciously, can be overt or covert participants in courtroom proceedings. As Gibbons and Leung state, "This explains why in our data interpreters sometimes comply, sometimes resist, and sometimes redefine their roles in the proceedings, either knowingly or unconsciously taking on the role of principal."[33] Given the need for and complexity of qualified courtroom interpreters, one would expect a well-established, significant quality interpreter training program in the U.S. Sadly, this is not the case. As Benmaman indicates, "academic institutions have been slow to develop suitable programs" in legal interpreting, especially at the advanced graduate level.[34]

In summary, a huge portion of the U.S. population cannot function within the legal system without some form of quality language assistance

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[30] Virginia Benmaman, *Bilingual Legal Interpreter Education*, 6(1) FORENSIC LINGUISTICS 109, 109 (1999) (emphasis added).

[31] Ester S. M. Leung & John Gibbons, *Who is responsible? Particpant roles in legal interpreting cases*, 27(3) MULTILINGUA JOURNAL OF CROSS-CULTURAL AND INTERLANGUAGE COMMUNICATION 177 (2008).

[32] *Id.* at 179 (quoting United States v. Anguloa, 598 F.2d 1182, 1186 (9th Cir. 1979)).

[33] *Id.* at 180.

[34] Benmaman, *supra* note 30, at 111.

usually provided through interpreter services. The absence of such assistance can easily lead to miscarriages of justice that can only be addressed through appellate courts. The following discussion will investigate standards of review related to some of the above-mentioned language issues with respect to judicial review proceedings.

Discussion

I. Standards of Review and Objections

The application of the proper standard of review by an appellate court in matters of language-related barriers is crucial in overturning a trial court's ruling or setting aside a conviction and ordering a new trial. Because an appeal must be based on error of the trial court, which standard of review the appellate court applies depends on whether the attorney objected to the error at the time of its occurrence. A succinct analysis of the alternative standards of review is found in *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*:

> Provided that the defense makes a timely and specific objection during the proceedings which is noted on the record, then courts employ an abuse of discretion standard. Proof must be presented that an interpreter-related problem has occurred which is prejudicial to the defendant's case, such as a procedural error related to the presence of the interpreter or to the interpreter's actual performance. Alternately, if an error is not objected to at trial, then appeal may be sought under the plain error standard. This requires a showing that the error was egregious, that it affected substantial rights, represented a miscarriage of justice, or resulted in an unfair trial.[35]

Demonstrating a miscarriage of justice is enormously difficult, and often appellate courts simply decline to review the trial court's error if no objection has been made. Of the cases we reviewed, in at least seven the appellate court affirmed the ruling of the trial court because the defendant failed to make a timely objection. In *People v. Rivera,* the defendant appealed his entry of plea, claiming he pled guilty unknowingly because no interpreter was present to assist him.[36] The court rejected his argument, noting that "the issue is not preserved for our review, as defendant did not formally ask for an interpreter and, when County Court indicated that it would adjourn the proceedings to obtain an interpreter if defendant desired

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[35] Hon. Lynn W. Davis et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, 7 Harv. Latino L. Rev. 1, 13 (2004) (quotations and citations omitted).

[36] 788 N.Y.S.2d 802, 803 (N.Y. App. Div. 4th 2005).

one, defendant said that he would proceed in English. . . ."[37] It is likely that the defendant could function in basic interpersonal English, while faking comprehension in the all-important high-code, thus giving the impression that he was coping linguistically. Later in the opinion, the *Rivera* court explained why it would not have accepted the defendant's claims anyway. "The [county] court did inquire regarding the ability of defendant to speak English, and properly accepted his assurance that he could proceed in English."[38] Even with such an assurance he may still have been faking comprehension.

However, not all courts give an explanation. The court in *Munguia-Vargas v. State* only stated that the "appellant did not object to the translator providing the occasional English word to the complainant. Accordingly, no error is preserved for appellate review. We overrule appellant's fourth point of error."[39] Yet the appellant's claim that the interpreter acted inappropriately by supplying English words to an LEP victim testifying in English may be legitimate. Unfortunately, the court could not address the appellant's complaint because the appellant's attorney never objected.

Making a timely objection is also important in identifying errors in interpretation on the record. In *Ramirez v. United States*, both the prosecution and defense were bilingual and objected to specific errors made by the interpreter during a witness's testimony.[40] Thus the appellate court was able to review each error to evaluate the appellant's claim that the trial court should have voir dired the interpreter sua sponte. While the harmless nature of the errors formed some basis for the court's decision, the failure to object likewise played a significant role. The appellate court concluded that, "[w]hile the trial court could very well have ventured sua sponte into yet another examination of the interpreter's qualification, nonetheless in the circumstances here, *absent any request by counsel*, we are quite unable to say that the trial court abused its discretion by not taking any further action."[41]

Fortunately, the interpretation errors in *Ramirez* were harmless. But even a harmful error may not alter a court's decision in the absence of an objection. The *Ramirez* court explained that "the defendant must make the court aware of any difficulties with the translator, since 'to allow a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse.'"[42]

The *Ramirez* court is not alone in its sentiments; it relied on an Eleventh Circuit Court of Appeals case, *Valladares v. United States*.[43] Similarly, courts in Indiana and New York have expressed concern with crying 'misun-

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[37] *Id.* at 803.
[38] *Id.* at 804.
[39] No. 05-07-00143-CR, 2008 Tex. App. LEXIS 1251, at *12 (Tex. App. 5th Feb. 21, 2008).
[40] 877 A.2d 1040, 1041 (D.C. 2005).
[41] *Id.* at 1045 (emphasis added).
[42] *Id.* at 1044 (quoting Redman v. U.S., 616 A.2d 336, 338 (D.C. 1992)).
[43] 871 F.2d 1564 (11th Cir. 1989).

derstanding' on appeal.[44] A study of *Valladares* reveals that at least forty-five other cases nationwide have cited *Valladares* on this particular point.[45]

Nor are the *Ramirez* court's concerns entirely invalid. To hear a defendant's claim on appeal that he does not speak English, when he really is fluent, wastes the court's time and offends notions of fairness and justice. Unfortunately, defendants like this seemingly do exist.[46] In *Correas v. State* the defendant had access to an interpreter in trial and in many other proceedings, "communicated extensively with the trial judge in English," communicated with his counsel through an interpreter and in English "without any detriment," and then claimed on appeal that he should have had Spanish-speaking counsel.[47] In *State v. Castro* the defendant claimed that his rights to due process were violated because the court didn't appoint an interpreter.[48] Yet the record revealed that an interpreter was present in many proceedings and after a suppression hearing the trial court conducted an inquiry into the need for an interpreter, concluding, without objection from counsel, "the defendant's English is far superior than a lot of folk. . ."[49] The appellate court concluded: "We find numerous examples in the record of Castro's ability to capably speak, write, and understand the English language. He has written numerous *pro se* filings in the trial court and on appeal. Those filings display a mastery of the English language that is at least equal to that of the average native-born *pro se* defendant."[50] *Correas* and *Castro* thus validate the Ramirez court's concern given that the facts demonstrate that the defendants in *Correas* and *Castro* seemed to pretend on appeal that they didn't understand the trial court proceedings.

But *Correas* and *Castro* are easier cases. In *Rodriguez v. Trombly* the court denied a habeas corpus petition, which was based on the court's failure to appoint an interpreter, because the petitioner failed to raise the issue in court, had completed high school, and had been living in the U.S. for seventeen years.[51] Unfortunately, the details are sparse, but theoretically the court's grounds for finding that the petitioner understood the court proceedings in his case could be contested by feigned comprehension, plateau effect, and poor high schools. A more difficult case, like *Rodriguez*, demonstrates that the *Ramirez* court's concerns seem to ignore the enormous difficulty of determining how much a man truly understands of the court proceedings.

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[44] *See* Nur v. State, 869 N.E.2d 472, 477 (Ind. Ct. App. 2007); People v. Ramos, 258 N.E.2d 197, 199 (N.Y. 1970).

[45] Cases were identified using the "Shepherdize" tool on LexisNexis.

[46] *See, e.g.*, United States v. Blair, 8:08-cr-450-T-33EAJ, 2010 U.S. Dist. LEXIS 55789 (M.D. Fla. May 14, 2010) (although defendant had an interpreter through trial he appealed his conviction because court admonished him that he didn't really need one); State v. Poblete, 993 A.2d 1104 (Me. 2010).

[47] No. 05-08-00100-CR – 102-CR, 2009 Tex. App. LEXIS 4006, at *10-16 (Tex. App. 5th May 29, 2009).

[48] 09-887, p. 24 (La. App. 5 Cir. 5/25/10); 40 So. 3d 1036, 1048.

[49] *Id.*

[50] *Id.* at 1049.

[51] No. 2:06-CV-11795, 2010 U.S. Dist. LEXIS 1444, at *41-43 (E.D. Mich. January 8, 2010).

While the criminal system has become comfortable evaluating mens rea or hatred towards a particular group, determining understanding is a different matter because understanding doesn't necessarily manifest itself in overt actions. For example, a man with an intent to kill might stalk his victim and make plans for the victim's capture. But if the linguistic studies are to be believed, then the manifestations of understanding can be faked; an LEP person might respond to a court's colloquy appropriately for some questions, but that does not necessarily prove understanding, depending on the difficulty and nature of the questions. Still, courts evaluate a particular defendant's understanding because they are reticent to endorse a defendant's claim of misunderstanding on appeal when no request for an interpreter was made at the trial level. Thus, the failure to object to an interpretation problem can be detrimental, regardless of the veracity of a defendant's claim of misunderstanding or misinterpretation.

Appellants have attempted to evade the consequences of failing to object in two ways. First, a defendant might claim that "he had no reason to object . . . at trial because he and his trial counsel were unaware of [the problems]. . . ."[52] In *People v. Adamu Taye Chan* the defendant claimed he was denied a fair trial because the interpreter violated California Court Rules and the National Association of Judiciary Interpreters and Translators (NAJIT) Code of Ethics in two ways: first, by conversing outside of court with the prosecutor and the complainant's associate, and second, by interpreting in open-court portions of a recording of a telephone conversation between the defendant and the victim.[53] The defendant may have had a valid claim because NAJIT advises against "simultaneous interpreting of a recording in the courtroom . . . by an interpreter,"[54] and NAJIT and the California Court Rules dictate that interpreters should avoid even the "appearance of bias."[55] Still the court "found no grounds for reversal"[56] because there was "no evidence in the record [that] substantiates th[e] [defendant's] claim of ignorance."[57] Therefore, "the arguments were forfeited because they were not raised during trial."[58]

One might wonder what kind of evidence would substantiate ignorance. How would a lawyer prove to the court he had no knowledge of rules of interpreter ethics or out of court communications? More generally, how could an English-speaking lawyer object to a Spanish interpretation? How would a Spanish speaking defendant know if the interpreter is interpreting the English correctly? Without such knowledge, the lawyer could likely miss a key objection and the defendant's ability to participate in his defense

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[52] People v. Adamu Taye Chan, A122550, 2010 Cal. App. Unpub. LEXIS 2322, at *48 (Cal. Ct. App. Mar. 30, 2010).
[53] *Id.* at *43-45.
[54] *Id.* at *44-45.
[55] *Id.*
[56] *Id.* at *47.
[57] *Id.* at *48.
[58] *Id.* at *47.

is seriously diminished. *Adamu* thus underscores the difficulty of convincing an appellate court of a trial court's error when no objection was made at the trial court level.

Second, appellants have even cited the failure to object as the error upon which appeal is made. In *State v. Ingram,* the appellant claimed his lawyer was ineffective because he failed to object on hearsay grounds to testimony by a police officer of statements made by the defendant.[59] The appellant in *Jama v. State* also claimed ineffective assistance of counsel for failure to request an interpreter for a witness.[60] Noting that the witness's testimony was not pivotal, the court concluded that "even if it was error for defense counsel to fail to request an interpreter for [the witness], this error was not prejudicial."[61]

While the particular fact scenarios in *Ingram* and *Jama* were not detrimental to the defendant, one could easily imagine the conviction of a defendant resting on pivotal testimony that should have been interpreted. Unfortunately, witnesses unable to speak the English language fluently may be unable to express themselves fully or accurately. For example, in *State v. Reid,* a witness testifying through an interpreter repeatedly called a gun a "gold-type color."[62] Believing there was a problem with the interpretation because the interpreter was Puerto Rican and the witness Mexican, the prosecution asked the witness, "what is silver in Mexico?"[63] The witness responded, "I call silver a gold color."[64] Misidentifying a gun could have serious consequences. Would an appellate court be able to look back and determine that the words 'gold color,' though 'reasonably understandable,' really meant silver? However, with the aid of the interpreter the prosecution in *Reid* proved the witness could identify the murder weapon. Thus, interpreters minimize the great potential for misunderstanding when a witness testifies in a non-native language.

Consider also the case of *Elizondo v. State.*[65] Elizondo had shot Garcia while Garcia allegedly approached him threateningly with a tire iron. When a bilingual Texas Ranger asked why Elizondo did not just try to scare Garcia, Elizondo responded, "lo quebré."[66] The Ranger and the prosecutor interpreted the videotaped statement as "I meant to kill," but on cross-examination of the officer, the defense counsel interpreted the statement as "I broke him."[67]

In *Elizondo*, the interpretation of the defendant's statement could refute premeditation and thus could mean the difference between acquittal or conviction on a first-degree murder charge. In a similar case, *State v. Carmona-*

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[59] No. 06AP-984 2007-Ohio-7136, 2007 Ohio App. LEXIS 6278, ¶ P43 (Dec. 31, 2007).
[60] 756 N.W.2d 107, 111 (Minn. Ct. App. 2008).
[61] *Id.* at 116.
[62] 213 S.W.3d 792, 837 (Tenn. 2006).
[63] *Id.*
[64] *Id.*
[65] No. 13-01-619-CR, 2005 Tex. App. LEXIS 3680 (Tex. App. 13th May 12, 2005).
[66] *Id.* at *13.
[67] *Id.*

Olvara, the defense sought to introduce expert testimony concerning the proper interpretation of a statement the defendant made to a police officer during interrogation, which the officer interpreted as, "I don't know, I just did it."[68] When the prosecution asked the defendant at trial if he remembered saying that to the officer, the defendant testified, "I told him I do not know anything."[69] Without an interpreter it is likely that no one else would identify the potential error in the officer's testimony or to communicate the defendant's denial of guilt effectively to the jury. If no objection had been made to the interpreter's absence, the defendant in *Carmona-Olvara* would be locked away without ever receiving the opportunity to contest the testimony given against him. Fortunately, defense counsel objected to the trial court's refusal to admit expert testimony concerning the true interpretation of Carmona-Olvara's statement, and the guilty verdict was reversed on appeal.[70] Thus, *Reid*, *Elizondo*, and *Carmona-Olvara* demonstrate the importance of objecting to the absence of a certified and qualified interpreter.

This brief review of these relevant cases points to the need for the legal system to increase its sophistication in identifying the linguistic needs for defendants and witnesses, as well as improving the quality and quantity of courtroom interpreters. The use of interpreters ensures, to the extent possible, that witnesses unable to speak English can relate their knowledge of criminal activities accurately and defendants unable to understand English can participate meaningfully in their own defense.

II. Right to an Interpreter

The court in *State v. Ibrahim* acknowledged in 2004 that "The United States Supreme Court has not yet recognized a constitutional right to a court-appointed interpreter. The United States Supreme Court, instead, has recognized that the right to an interpreter is a matter largely resting in the discretion of the trial court."[71] We have found no case since then changing that position. Still, defense attorneys have continued to challenge trial court rulings, essentially arguing that their clients had a right to an interpreter, either constitutionally or statutorily, which was violated by an interpreter's absence, error, misconduct, or lack of qualifications.

Constitutional arguments in this area are often grounded in the Sixth and Fourteenth Amendments. If a defendant is unable to understand the proceedings because of difficulty with the English language, then the defendant is unable to "to be confronted with the witnesses against him," or "assist in his own defense."[72] To an LEP person, witness testimony in English is incoherent babble. Such procedures, which are required to convict, would not

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[68] 842 N.E.2d 313, 316 (Ill. App. Ct. 2005).
[69] *Id.*
[70] *Id.* at 319.
[71] 862 A.2d 787, 797 (R.I. 2004).
[72] U.S. CONST. amend. VI.

constitute due process because the procedures, while faithfully executed, would have no meaning to an LEP defendant. It would be as if the prosecution were attempting to convict a comatose patient. Indeed, cases involving LEP issues have been compared to cases involving mental incapacity.[73] Thus, as the argument goes, failure to appoint an interpreter who is necessary to help the defendant understand the proceedings violates constitutional rights.

Where constitutional arguments are unavailable, defendants have relied on a statutory right to an interpreter. Congress enacted the Court Interpreters Act in 1978, which mandates appointment of interpreters in federal district courts for those who "[speak] only or primarily a language other than the English language."[74] Additionally, the Supreme Court has found that Title VI of the Civil Rights Act of 1964 requires state courts who receive federal financial assistance to appoint interpreters.[75] The Brennan Center for Justice at New York University School of Law (BCJ) surveyed forty-two states and found that twenty-four states and the District of Columbia have some form of written mandatory interpreter requirement in all civil cases.[76] Of those eight not surveyed, three had statutes in place governing the use of foreign-language interpreters,[77] while other states merely provided interpretation in some form. For example, South Dakota requires interpreters for witnesses[78] and Wyoming recognizes a right to a "translator" for a victim.[79]

However, even states with no written interpreter requirements may still provide interpreters. Evidence of that comes from other statutes referencing foreign-language interpreters. Connecticut, for example, established a Commission on Racial and Ethnic Disparity in the Criminal Justice System whose duties include evaluating the adequacy of the number of accessible court interpreters.[80] Colorado's code requires that all indigents be given counsel and "supporting services" at state expense, which could be construed to include foreign-language interpreters.[81]

It is difficult to determine how frequently courts throughout the nation appoint interpreters. A BCJ survey indicated that 46% of the thirty-five states examined failed to require interpreter services in all civil cases. However, more states likely appoint interpreters in criminal cases, considering

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[73] *See* Murillo v. State, 163 P.3d 238 (Idaho Ct. App. 2007) (using the sufficient present ability test for an LEP person as if he had argued mental inability).

[74] Court Interpreters Act, 28 U.S.C.S. § 1827(d)(1)(A) (2010).

[75] Lau v. Nichols, 414 U.S. 563, 568–69 (1974). *See also* Civil Rights Act, 42 U.S.C. § 2000d (1964).

[76] Laura Abel, *Language Access in the Courts 11*, Appendix D (unpublished Brennan Center for Justice Report, New York U. School of Law Brennan Center for Justice, 2009) (copy on file with Brennan Center for Justice); DC, GA, ID, IN, IA, KS, KY, LA, ME, MD, MA, MN, MO, MS, NE, NJ, NM, NY, OR, PA, SC, TX, UT, WA, WI.

[77] ALA. CODE § 15-1-3 (LexisNexis 2010); N.D. SUP. CT. ADMIN. RULE § 50 (LexisNexis 2009); OHIO REV. CODE ANN. § 2301.12 (LexisNexis 2010).

[78] S.D. CODIFIED LAWS § 19-3-7 (LexisNexis 2010).

[79] WYO. STAT. ANN. § 1-40-204 (LexisNexis 2010).

[80] CONN. GEN. STAT. § 51-10c (LexisNexis 2008).

[81] COLO. REV. STAT. § 18-1-403 (LexisNexis 2009).

forty states are members of the Consortium for State Court Interpreter Certification. Regardless of the potential failure of the courts to dutifully appoint interpreters when needed, legal recourse is available for LEP persons who feel they were prejudiced by interpretation problems. Not surprisingly, recent litigation has challenged courts to decide the extent of the right to an interpreter.[82]

a. *Absence or Failure to Appoint*

Perhaps the most revealing case in which a defendant asserted his right to an interpreter is *United States v. Edouard*.[83] In that case, the defendant contended that the trial court violated the Court Interpreters Act and his constitutional rights by "failing to conduct an inquiry into whether he needed an interpreter and failing to appoint an interpreter for him during his trial."[84]

Pursuant to the Court Interpreters Act, the court should appoint an interpreter "if the presiding judicial officer determines on such officer's own motion or on the motion of a party. . . [the defendant] speaks only or primarily a language other than the English language . . . so as to inhibit such party's comprehension of the proceedings. . . ."[85] Emphasizing the statute's "inhibition of comprehension" qualification, the court reasoned that "a defendant is only statutorily entitled to the appointment of an interpreter if the district court determines that the defendant: (1) speaks only or primarily a language other than the English language; *and* (2) this fact inhibits their comprehension. . . ."[86] Thus, the *Edouard* court, consistent with the other cases we reviewed, placed a defendant's statutory right to an interpreter soundly within the discretion of the trial court, as the trial court is in the best position to decide if understanding is "inhibited."

Seemingly, the only limitation to a trial court's broad powers is the duty to "inquire as to the need for an interpreter" upon "any indication to the presiding judicial officer that a criminal defendant speaks *only or primarily* a language other than the English language."[87] Beyond a mandatory inquiry upon notice, no guidance or limitations are placed on the trial court to decide when or if a defendant actually needs an interpreter. In other words, the trial court judge must decide how well a defendant understands English and if an interpreter is needed without any guiding criteria.

To accomplish this task, a trial court may review prior interactions it has had with the defendant, just as the Eleventh Circuit reviewed the record in *Edouard*. After reviewing the record, the *Edouard* court concluded that "[it] is not apparent . . . that Edouard had such 'difficulty with English' so

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[82] For a good survey of available remedies and a discussion on interpreter qualifications, see City of Columbus v. Lopez-Antonio, 153 Ohio Misc. 2d 4, 2009-Ohio-4892, 914 N.E.2d 464.

[83] 485 F.3d 1324 (11th Cir. 2007).

[84] *Id.* at 1336.

[85] Court Interpreters Act, 28 U.S.C.S. § 1827(d)(1) (LexisNexis 2009).

[86] *Edouard*, 485 F.3d at 1337.

[87] *Id.*

as to trigger the district court's duty to inquire into whether Edouard's language difficulties would inhibit his comprehension of the proceedings or communications with his counsel and the district judge."[88] To justify its conclusion, the court noted that Edouard participated in pretrial hearings without requesting an interpreter, was able to testify in English without apparent difficulty after some questions were rephrased, spoke to friends in English, and never used the available interpreters when offered.[89]

What is most interesting about the Eleventh Circuit's justification is that Edouard explicitly requested an interpreter to help him with those questions that were rephrased. In one instance, after the prosecution posed a confusing question, Edouard responded, "Could the interpreter translate for me, please? Because I really want to understand everything very well."[90] The prosecutor rephrased and again Edouard requested an interpreter. "I don't really understand well. I don't want to say something and not understand exactly what it is."[91] At this point, even the prosecutor indicated that an interpreter may be needed. He stated, "Your Honor, this kind of raises whole new concerns about an interpreter for me at this point."[92] However, the court refused to allow interpretation, saying "Well, I think it's your question. I mean, it's incomprehensible."[93]

Admittedly, the prosecution's question was confusing, and the defendant adequately answered subsequent simpler questions. Still, the Eleventh Circuit's decision appears to be placing more weight on the observations of judges and evidence admitted into the record than on the defendant's requests for an interpreter. This seems to create an artificial dichotomy. By denying an interpreter on the basis of *some* understanding of English, the court seems to create a black-and-white characterization of an LEP person's need for an interpreter when language abilities fall along a gray spectrum, ranging from basic interpersonal communicative strategies (BICS) to high-code cognitive academic language proficiency (CALP). Such a dichotomy implies that, when there is some understanding (BICS), no interpreter is needed. Some proceedings may in fact be easier for a defendant to understand than others. Perhaps during the course of the same proceeding a defendant can understand some parts but cannot understand others, which would require an interpreter for some statements, but not for others. Basing the decision to appoint an interpreter in one proceeding on *some* demonstrated understanding in another proceeding would effectively deny interpreters for many people who need one. Importantly, the *Edouard* case leaves us asking: "How little English must a defendant understand or speak before a court is required to provide an interpreter?"

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[88] *Id.* at 1339.
[89] *Id.*
[90] *Id.* at 1338.
[91] *Id.*
[92] *Id.*
[93] *Id.*

The answer to that question naturally varies from court to court, and trial court decisions will be reversed only if an appellate court finds an abuse of discretion. However, courts in Idaho and Indiana have offered some insight into when a trial court ought to appoint an interpreter. Because Idaho recognized that failure to appoint an interpreter violated constitutional rights to assistance of counsel and assistance in one's own defense, the court in *Murillo v. State* stated, "the due process right to a fair trial also prohibits trying or convicting a defendant while he or she lacks the mental capacity to understand the proceedings."[94] An LEP person is legally similar to a mentally incompetent person because they both have limited understanding of court proceedings. Thus, "[t]he test . . . is whether the defendant has sufficient present ability to consult with his or her lawyer with a reasonable degree of rational understanding and whether the defendant has a rational, as well as factual, understanding of the proceedings against him or her."[95]

However, the linguistic problem with "reasonable degree of rational understanding" is that it is a standard by which to evaluate mental competence, not linguistic comprehension. The means for determining rational understanding are focused on the mentally incompetent, not linguistically disadvantaged. Though the two may share legal similarities because of limited understanding, they are entirely different—a linguistically disadvantaged person may display perfectly sufficient competence while lacking language comprehension. Assessments of general intelligence or the ability to think without interference do not address the same questions as linguistic proficiency tests.

A linguistically disadvantaged person may possess a rational as well as factual understanding of the proceedings against him and still be incapable of aiding in his or her own defense because of language issues. The defendant may be reasonably competent in his or her own language, and may even display sufficient L2 proficiency in some registers, while still lacking the proficiency to comprehend courtroom proceedings. This standard fails when a court decides, based on competency inquiries, that the defendant is capable of a "reasonable degree of rational understanding" and neglects to account for insufficient language comprehension.

Alternatively, in Indiana, the test for whether a defendant needs an interpreter appears more difficult to meet than a reasonable degree of rational understanding. In *Nur v. State* the court relied on the Court Interpreters Act jurisprudence and held that "we cannot say that the court had notice that Nur had a significant language difficulty."[96] Elsewhere in its opinion, it emphasized that Nur had not demonstrated *significant* language difficulty.[97] Because Nur's statement to the court that he had "a little trouble with the [English] language," was insufficient, or not *significant* enough, to over-

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[94] 163 P.3d 238, 241 (Idaho Ct. App. 2007) (citing State v. Hernandez, 820 P.2d 380, 383 (Idaho Ct. App. 1991)).

[95] *Id.* at 241.

[96] 869 N.E.2d 472, 481 (Ind. Ct. App. 2007).

[97] *Id.* at 480.

come "participat[ion] in numerous question-and-answer sessions with the court in English," the court refused to reverse the trial court.[98]

Indeed, the question remains as to what language difficulties *are* significant enough to mandate appointment of a qualified interpreter. In *People v. Warcha* the court agreed with the trial court's decision to proceed with a trial after learning during jury selection that the defendant's native language was Quiche, a Guatemalan dialect, although the interpreter spoke Spanish.[99] The trial court based its decision largely on the Spanish interpreter's assurance that they "'could make themselves understood' to the defendant, [and] could also understand what the defendant had to say" even though "the defendant's ability to express himself in that language was 'limited,' [and] he could understand Spanish, provided the interpreters spoke slowly."[100]

From a linguistic standpoint, the accommodation for linguistic disadvantage in *Warcha* seems quite crude. While we acknowledge that it is within the trial court's authority to make these language decisions, from a linguist's perspective they are questionable at best. It is reasonable to assume that a man who speaks Quiche, a Guatemalan dialect, not a Spanish dialect, will face extreme difficulty in comprehending legal proceedings, conducted in high code English, which are then interpreted into Spanish. The court's Spanish interpreters themselves acknowledged that the defendant's ability to express himself in Spanish was "limited," yet stipulated that they could be understood if they spoke slowly.

In spite of these limitations, it was decided that no other interpreter would be needed. The defendant in this case had no comprehension of English, and limited comprehension of Spanish, yet it was determined that he could "meaningfully participate in his own defense."[101]

The linguistic evidence to support such a conclusion is unconvincing. The court interpreters stated that they could be understood if they spoke slowly, even though the defendant lacked the ability to express himself in Spanish. Furthermore, the trial court cited "evidence in the record that [the defendant] had been speaking Spanish with coworkers for the previous two years, and that, while in school in his native Guatemala, he had been taught both in Spanish and in Quiche."[102]

None of this supports the decision that the Quiche speaker would be able to meaningfully comprehend his trial. Speaking with coworkers in Spanish does not indicate any actual high level fluency in Spanish. Such conversations would most likely be conducted in a very simple register regarding specific labor topics. Furthermore, if bilingual education in the United States is any example, it is safe to assume that just because the defendant was taught in Spanish and in Quiche, it does not mean that he had acquired mastery of Spanish at any level.

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[98] *Id.* at 480–81.
[99] 792 N.Y.S.2d 627, 629 (N.Y. App. Div. 2005).
[100] *Id.* at 629.
[101] *Id.* at 628.
[102] *Id.* at 629.

Perhaps recognizing the defendant's severe linguistic disadvantage, the trial court "recognized that it would be useful for the defendant to have a Quiche interpreter available, and ordered a recess to afford court personnel and the defendant a reasonable opportunity to locate one."[103] However, after "diligent effort"[104] no Quiche interpreter was found and the trial proceeded with a Spanish interpreter. The mere fact that an effort was "diligent" does not mean that it was sufficient: linguistic accommodation does not come from diligent, unsuccessful efforts.

In this instance, the trial court and the affirming appellate court showed a limited understanding of linguistic disadvantage, failing to account for register differences, courtroom comprehension, and second and third language abilities. Considering this lack of understanding, we question the appellate court's declaration that the trial court "is in the best position to make the fact-intensive inquiries necessary to determine whether there exists a language barrier such that the failure to appoint an interpreter will deprive the defendant of his or her constitutional rights."[105] Unfortunately, this case is not exceptional.

In *People v. Watkins,* the court affirmed the defendant's conviction even though "translation of a victim's testimony was slow and difficult because the interpreter and the victim spoke different dialects, and . . . the interpreter sometimes had to make multiple attempts to translate a question."[106] The court reasoned that "problems with translation did not prevent the defendant from conducting an effective cross-examination, or cause any other prejudice."[107]

Further exploration into different standards for determining when a trial court must appoint an interpreter shows more deference to trial courts. Under Utah law, "once a trial court determines that a defendant 'has a limited ability to understand and communicate in English, a certified interpreter *shall* be appointed.'"[108] But *State v. Jadama* limits this right in interesting ways. The court held that this right does not apply "to *any* defendant who speaks English as a second language and who does not completely understand legal terms and proceedings."[109] This is because the intent of the statute was only "to secure the rights of persons who are unable to understand or communicate *adequately* in the English language . . . ."[110] Since "lack of understanding as to legal terminology and the way in which a case proceeds is certainly not unique to non-English speakers and is not the reasoning behind providing interpreters . . . [they should be] provided only to redress problems directly arising from a language barrier, not to compensate for a

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[103] *Id.* at 628.
[104] *Id.*
[105] *Id.* at 629.
[106] 786 N.Y.S.2d 133, 134 (N.Y. App. Div. 2004).
[107] *Id.*
[108] State v. Jadama, 2010 UT App 107, ¶ 16, 232 P.3d 545, 551 (quoting Utah R. Jud. Admin. 3-306(6)(A) (2009)).
[109] *Id.* at ¶ 17, 232 P.3d at 552.
[110] *Id.* (quoting Utah R. Jud. Admin. 3-306)(emphasis in original).

defendant's lack of legal savvy."[111] Thus, under the *Jadama* standard, it is not necessary that an LEP person completely understand legal terminology or courtroom proceedings. This standard is very ironic considering that in many courtroom proceedings a defendant may be asked to knowingly and voluntarily waive legal rights he or she presumably doesn't completely understand nor need to understand. The assumption of the justice system is that an English speaker does understand enough to make decisions knowingly and voluntary; otherwise he would be legally incompetent. Here, however, the court seems to think that either little understanding of proceedings and law is necessary to make a defendant's actions knowing and voluntary, or that even English speaking defendants don't understand enough, but are pushed through the system anyway. If the *Jadama* court thinks the latter, that might explain why it was not more protective against LEP defendants being pushed through the justice system without sufficient understanding of proceedings and law.

Indeed the *Jadama* court, like all the others, is highly deferential to the trial court's decision not to appoint an interpreter by making a distinction between *determining* that a defendant has limited ability and *accommodating* a defendant who may or may not have limited ability.[112] In *Jadama*, the trial court made several inquiries into the defendant's English proficiency. During the first hearing on the matter, defense counsel expressed her opinion that despite the various indications that the defendant could speak English, "due to his broken English, [the defendant] needed an interpreter."[113] The defendant himself said, "he would be more comfortable with an interpreter."[114] After "the trial court engaged Jadama in a limited amount of basic English dialogue," it concluded, "I'm not sure how much or how little [the defendant understands[,] [so this] might be the subject of a future proceeding."[115] When the defendant *again* expressed his preference for an interpreter, the trial court responded, "I think it would be a *terrible idea not to appoint an interpreter* . . . given the fact that he's facing a first degree felony."[116] In subsequent hearings the trial court reversed its position. At a pre-trial conference, for example, defense counsel expressed misgivings about continuing without an interpreter, because "[the defendant] was not familiar with the terminology [counsel] used."[117] The trial court expressed its opinion in the dialogue that follows:

> THE COURT: I have had Mr. Jadama in front of me a number of times and he seems to understand perfectly well. I'm able to carry on a conversation with him without any difficulty. I appreciate there is terminology and other things that are used, but would

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[111] *Id.*
[112] *Id.* at ¶ 16, 232 P.3d at 551-52.
[113] *Id.* at ¶ 3, 232, P.3d at 547.
[114] *Id.*
[115] *Id.*
[116] *Id.* (emphasis added).
[117] *Id.* at ¶ 6, 232 P.3d at 548.

> charge [counsel] with taking [the] time in explaining it. I'm mean, it's not lost on me. The man has a high school diploma, correct?
> [THE DEFENDANT]: Yes.
> THE COURT: He has been in the United States since he was 9 years old or so?
> [THE DEFENDANT]: Eleven years since I was in the United States.
> THE COURT: Listen to him now . . . . It is frustrating to have gone through this process and had the delays that [the prosecutor] refers to, in part due to this question of an interpreter when—while he may not understand at the level of someone who has obtained a [law degree], he's certainly, I find, to be completely conversational in English.
> DEFENSE COUNSEL: I don't think what I said is contradictory to what you said. However, I would also note if we are going to have this discussion that the interpreter, and request for an interpreter in part was on [the defendant's] request because there was some difficulty in understanding what was going on. Clearly, when you have a one on one conversation with him, it is not so difficult when there is two or more voices or a dialogue that is more than a one on one, it does get more difficult.
> THE COURT: I see no *need* for an interpreter.[118]

On appeal, the defendant claimed that the "trial court erred by changing its prior observation that he required an interpreter."[119] The appellate court found that the trial court never made a "determination" that the defendant needed an interpreter.[120] Instead of "determination," the *Jadama* court called the trial court's initial position, in the first inquiry, an "accommodation."[121] Since "accommodation is not equivalent to a determination by the trial court under the applicable rule that a defendant *needs* an interpreter,"[122] the statutory right doesn't apply. Moreover, the trial court's later *determination* at the pre-trial conference that the defendant didn't need an interpreter was not in error because the defendant spoke in English several times in court, had been in the "United States for many years, had taken English classes before and after immigrating, had graduated from high school in the United States, had used English in his employment [at a fast food restaurant], had been able to participate in a psychiatric evaluation in English, and had written letters to the prosecutor and the trial court in English."[123]

It is interesting that the *Jadama* court would list these indicators of the defendant's English proficiency as a justification for the trial court's *determi-*

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[118] *Id.* at ¶ 6, 232 P.3d at 548-49.
[119] *Id.* at ¶ 15, 232 P.3d at 551.
[120] *Id.* at ¶ 16, 232 P.3d at 551.
[121] *Id.*
[122] *Id.* at ¶ 16, 232 P.3d at 552.
[123] *Id.* at ¶ 18, 232 P.3d at 553.

nation to deny an interpreter because the trial court was aware of many of these indicators when it *accommodated* the defendant after the first hearing on the matter.[124] The trial court didn't seem to think any of it was relevant at the first hearing or the last hearing. Indeed, the trial court's later determination to deny an interpreter seemed to rest on the court's own encounters with the defendant. Yet the appellate court points to the defendant's exposure to English, seemingly to legitimize the trial court's reversal.

The *Jadama* court's distinction between accommodation and determination also effectively legitimizes the trial court's change in position. Effectively, *Jadama* creates a loophole for trial courts to rescind prior decisions in regards to interpreters without running afoul of court interpreter statutes. Presumably, under *Jadama* a trial court may never need to make an actual determination. After all, it would be much easier to accommodate and revoke than to decide how much a defendant understands: the time and effort alone of preparing for an evidentiary hearing would dissuade determinations. But, without a determination, on what grounds would a defendant appeal? Even if a defendant managed to appeal, the appellate court, rather than scrutinizing a trial court's decisions, would need only call the first decision an "accommodation."

Jadama, Watkins and *Warcha* are typical of the cases we reviewed in one very important way. The decision to appoint an interpreter rests firmly within the trial court's discretion and will not be overturned absent prejudice. The trial court only has a duty to appoint an interpreter if it has been put on notice that the defendant needs one. The question of when a defendant needs an interpreter appears to be when "significant language difficulties" are apparent. Problems due to different dialects are seemingly not considered "significant" enough to mandate appointment of an interpreter. Likewise, specific requests, in light of evidence that the person has some English proficiency, do not always mandate appointment.

Still, the most important question is, "How severe do interpretation problems have to be before a trial court's refusal to appoint a qualified interpreter is considered an abuse of discretion?" The appellate courts found error in the trial court's decision, but did not always reverse, in six of the cases reviewed. Three of the cases related to a person's right to an interpreter. In *State v. Selalla*, the appellate court found that the dismissal of an interpreter who would have interpreted proceedings simultaneously for the defendant was in error, even though the defendant brought a second interpreter intending to use her to communicate with counsel.[125] The court explained that "the trial court did not conduct a fluency hearing to determine the extent of Selalla's English comprehension, nor did it enter findings either written or oral in support of its determination that the second interpreter was unnecessary."[126] The only basis for the trial court's decision seems to be that

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[124] *Id.* at ¶ 3, 232 P.3d at 547.
[125] 2008 SD 3, ¶ 31, 744 N.W.2d 802, 812.
[126] *Id.*

there is "no point in paying for two interpreters."[127] The court conducted no formal inquiry into Selalla's understanding.[128]

The *Selalla* court provides an important limitation on the trial court's powers to deny appointment of interpreters, even if it is only that "the record must reflect some basis upon which the trial court exercised this discretion."[129] *Selalla* also hints at challenging the presumption of English fluency found in all the other cases, since the *Selalla* court noted the trial court's failure to conduct an inquiry into proficiency was in error and the trial court initially appointed an interpreter upon Selalla's request even though "he had conversed with various individuals in English on the day prior to his arrest."[130] Seemingly, the trial court's error was in not making sure Selalla *did not* need interpretation. The defendant's request appeared sufficient to rebut existing evidence that Selalla could speak English well enough. Viewed in this way, *Selalla* could oppose *Edouard*. Admittedly, *Selalla* does not necessarily contradict *Edouard* since the trial court in *Selalla* did not make an inquiry. But, because the difference between the two cases is how much the defendant communicated with the court in English, *Selalla* plainly contradicts *Edouard* when viewing English proficiency in black-and-white terms for purposes of appointing interpreters. According to *Edouard*, the defendant demonstrated *some* English proficiency, therefore, no significant impediment to understanding existed and no interpreter was needed. But according to *Selalla*, a defendant who exhibits some English proficiency and requests an interpreter may still have a significant impediment to understanding court proceedings. Thus, dismissing an interpreter without further inquiry may be in error.

Edouard and *Selalla* also appear to be in tension over proficiency presumptions. Perhaps fearing that bilingual people will take advantage of the justice system, courts like that in *Edouard* presume English proficiency until placed on notice that significant language difficulties inhibit understanding. If equal protection and equal access to the courts are such noble goals, why not generously appoint interpreters? Why attempt to peer inside another's head to determine precisely how much English he or she understands when the presence of an interpreter can be used as needed to clarify communication between the defendant and the court? If there is any question, simply err on the side of care.

b. *Waivable Right*

Thus far, the burden has been placed on the defendant to affirmatively request an interpreter since the court has no obligation to inquire into interpreter needs until notified. Or, at least, no court will find a defendant's rights have been violated when he never requested an interpreter. In *State v.*

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[127] *Id.*
[128] *Id.* at ¶ 32, 744 N.W.2d at 812.
[129] *Id.* at ¶ 26, 744 N.W.2d at 810.
[130] *Id.* at ¶ 14, 744 N.W.2d at 806.

Ibrahim, the Rhode Island Supreme Court was "unable to conclude from the record that the defendant's deficiency in English was so significant that the trial [court] should have realized that an interpreter was necessary."[131] The trial record indicated that he did "have a basic, functional understanding of English," and "sometimes expresses too much."[132] Despite the sufficiency of the record for its decision, the court importantly highlighted Ibrahim's failure to request an interpreter in its opinion. "Not once during or before the trial had he requested an interpreter. In the absence of such a request, defendant's contention that he was denied any statutory or constitutional right clearly lacks merit."[133]

The *Ibrahim* court's reasoning is understandable. After all, if someone needs an interpreter, why wouldn't he or she request one? However, there may be a number of explanations for why a defendant wouldn't request an interpreter, including an unrealistic belief that one can understand, feigned understanding or ignorance of such a right. Whatever the explanation supporting the *Ibrahim* court's reasoning, the important point is that the law appears to presume that rights to an interpreter are waived absent an affirmative request or demonstration of clear prejudice. But, not all rights are deemed waived by silence. The right to counsel, for instance, must be affirmatively waived. Indeed, "presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."[134]

There is some case law supporting the argument that the right to an interpreter must be affirmatively waived. A Texas court held that the right to an interpreter must be affirmatively waived when the trial judge is first aware of language difficulties.[135] In *Garcia v. State* the defendant moved for a new trial, claiming that a waiver of appeal, pursuant to a sentencing agreement, was involuntary because he lacked sufficient understanding of the English language.[136] At the evidentiary hearing the court interpreter testified that "she was sworn in as the interpreter for this case, [but] she was not called upon to interpret the English-speaking testimony for Garcia."[137] Nor did she see anyone else interpreting for him. Even the judge at oral argument admitted that he "noticed that the testimony was not being translated."[138] Unfortunately, the defendant's lawyer had "never advised Garcia that he had a right to an interpreter."[139]

That the defendant did not understand the trial seemed clear from reading the court's opinion. During his own testimony, the prosecution asked if

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[131] 862 A.2d 787, 798 (R.I. 2004).
[132] *Id.*
[133] *Id.*
[134] Miranda v. Arizona, 384 U.S. 436, 475 (1966).
[135] Garcia v. State, 149 S.W.3d 135 (Tex. Crim. App. 2004).
[136] *Id.* at 138.
[137] *Id.*
[138] *Id.* at 139.
[139] *Id.*

Garcia understood the questions asked of the victim. Garcia replied, "No, because I don't understand a lot of English."[140] Indeed, the court observed that "Garcia did not realize that he had been found guilty until they left the courtroom. [His attorney's assistant] told him he had been found guilty in the stairway outside the courtroom, and he was surprised and shocked."[141] Nonetheless, the trial judge denied Garcia's motion for a new trial, saying "Garcia had not knowingly and intelligently waived his right to appeal."[142] The court noted that even though the "lack of translation violated, among other things, [the defendant's] *Sixth Amendment* right to confront the witnesses against him . . . *confrontation clause* violations must be raised at trial."[143]

The Court of Criminal Appeals disagreed. First, the *Garcia* court recognized that the defendant had a constitutional right to an interpreter. "We have previously acknowledged that providing an interpreter to an accused who does not understand English is required by the *Confrontation Clause*."[144] The court explained that "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."[145] The court went on further to note that if the defendant is not "afforded knowledge of the testimony of the witness, the right of cross-examination could not be exercised by him."[146] It stated the following:

> Being present at a trial without understanding the language of the witnesses '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.'. . . [N]o defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.[147]

Having established that a constitutional right to an interpreter does exist, the court turned its attention to the question at issue. Had "Garcia waived error in his failure to object at trial to the lack of a translation?"[148] The court recognized that though the "right to an interpreter can be waived, it is not deemed waived if the trial court is aware 'that an accused does not speak and understand the English language.'"[149] The court reasoned that the

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[140] *Id.* at 138.
[141] *Garcia*, 149 S.W.3d at 139.
[142] *Id.* at 140.
[143] *Id.* at 139.
[144] *Id.* at 141 (emphasis added).
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.* at 143.
[149] *Id.*

right to an interpreter "must be implemented by the system unless expressly waived" because "[i]t would be illogical to require a non-English-speaking defendant to assert his right to an interpreter in a language he does not understand when he may very well be unaware that he has the right in the first place."[150] Thus, when the judge is aware of a language difficulty, "the judge has an independent duty to implement this right in the absence of a knowing and voluntary waiver by the defendant."[151]

It is important to note that the holding in *Garcia* does not necessarily conflict with *Ibrahim* because *Garcia* merely qualified the necessity of an affirmative waiver by requiring the judge to first know about language difficulties. There was no indication of language difficulties in *Ibrahim,* thus the waiveable right never 'vested.' Still, the *reasoning* in *Garcia* is at odds with the presumption that an interpreter's services are waived absent an affirmative request. Requiring that a non-English speaking person ask for an interpreter is comparable to requiring a layperson to ask for an attorney—neither really understands the justice system and may be "unaware that he has the right in the first place."[152] The *Garcia* court's reasoning is even somewhat at odds with its own holding, as a judge's awareness of linguistic difficulty has little to do with whether or not a defendant is trapped in a Kafkaesque isolation booth in the middle of an open courtroom. In this light, making the right to a court interpreter only affirmatively waiveable could be the best way to prevent such a grim outcome for LEP defendants who lack the benefit of an informed and vigilant attorney.

c. *Right to an Interpreter in Interrogations*

Thus far we have discussed an LEP person's right to an interpreter in court proceedings, including the preliminary hearing, plea hearing, trial, and sentencing. How do those rights extend to settings outside the courtroom, such as the right to have an interpreter during a police interrogation? In *State v. Sanchez-Diaz*, the defendant appealed the trial court's decision to admit inaccurately interpreted statements Sanchez-Diaz made to the police via an interpreter.[153] The defendant argued that admission of the statements denied him a fair trial because four separate errors occurred in the interpretation process: "First, the interpreter was not certified; second, she did not take an oath before translating; third, the statements were not transcribed into Spanish for appellant to sign; and fourth, the statements included 47 identified errors."[154] The court concluded that the collective errors in the process merited exclusion of the evidence gleaned from the process.[155]

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[150] *Id.* at 144.
[151] *Id.*
[152] *Id.*
[153] 683 N.W.2d 824, 827 (Minn. 2004).
[154] *Id.* at 835.
[155] *Id.* at 835-37.

However, the Minnesota Supreme Court disagreed with the defendant's reasoning. While "an accused who does not speak English has the right to have a 'qualified interpreter' present at an interrogation," that "right is not a constitutional one and violation of the statute does not require the application of the exclusionary rule."[156] Turning to Minnesota's Interpreter statute, the court found that it "does not require that an interpreter translating during an interrogation be certified," nor must the interpreter take an oath.[157] The state may either record or transcribe statements, and ultimately chose to record the statements in this case.[158] Lastly, the court concluded that though "there were a few more serious errors. . . [they] did not change the basic character of appellant's confession or compel him to confess."[159]

The limitations the *Sanchez-Diaz* court placed on the rights of LEP persons during interrogations have serious implications. By denying the constitutional nature of the right the court infers that obtaining a confession in the absence of a certified interpreter is fundamentally different from obtaining a confession in the absence of a certified lawyer or obtaining the smoking gun without a warrant. LEP persons would be left with only a statutory recourse to suppress any statements made to police, and those living in states without interpretation statutes would be left with no recourse. Under *Sanchez-Diaz,* a qualified police officer could lawfully interpret for the defendant without taking an oath to remain neutral and interpret fairly.

In *Baltazar-Monterossa v. State* this came close to a reality.[160] In Nevada, the court recognized that under NRS 50.054 the "Legislature has provided persons with a disability the right to assistance by a qualified interpreter when being interrogated, but it has not done so for non-English-speakers."[161] Baltazar-Monterrosa argued that "police interviews of non-English-speakers should be conducted by independent interpreters under [the same statute]."[162] The lack of a clear statutory right to an interpreter prompted the defendant to appeal on constitutional grounds as well. He claimed that the admission of statements made to police violated the due process clause because the police themselves, who could not help but be biased, interpreted for the defendant.[163]

The court rejected both arguments, holding that "police interviews need not be conducted by an independent interpreter and no presumption of police bias should apply absent a showing in the record."[164] As to the defendant's statutory claims, the court "interpret[ed] the absence of such provisions for the interrogation of non-English-speakers as the Legislature's specific intention to 'eschew[] the enactment of similar legislation' [as to persons of disa-

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[156] *Id.* at 835; *see also* Minn. Stat. § 611.32, subd. 2 (2002).
[157] *Sanchez-Diaz,* 683 N.W.2d at 835.
[158] *Id.* at 835-836.
[159] *Id.*
[160] 137 P.3d 1137 (Nev. 2006).
[161] *Id.* at 1141.
[162] *Id.*
[163] *Id.*
[164] *Id.*

bility]."[165] Thus, because the defendant "fail[ed] to point to any actual police bias in the record, [the court] conclude[d] that his argument lack[ed] merit."[166]

However, the demonstration of actual bias may be beside the point. In *Baltazar-Monterossa*, the defendant's constitutional argument could be interpreted to be based on the police officer's conflict of interest, not actual bias or presumed bias. Even the most honorable and fair officers remain conflicted when interrogating a suspect. An officer interpreting for the accused during an interrogation is like the prosecutor interpreting for the accused during trial; they are adversaries.

Many states have statutory protections against this procedure at trial. In Oregon, however, the code of ethics that applies to interpreters at trial is not applicable in interrogation settings.[167] Interestingly, in Oregon, a certified court interpreter must "be impartial and unbiased and shall refrain from conduct that may give an appearance of bias or conflict of interest."[168] Still, the Oregon Court of Appeals held that the Interpreters Code of Professional Conduct only applied to "interpreters providing services 'in the courts or in adjudicatory proceedings before agencies,'" where a certified court interpreter translated for the defendant during police interrogations as an independent interpreter and later testified on behalf of the state to rebut the defendant's testimony concerning the interrogation.[169] Unfortunately, the defendant in *Alcazar* challenged the effectiveness of his counsel and counsel's failure to object to the interpreter's testimony; the effect of a conflict of interest in interrogation settings on due process rights was never addressed. Nevertheless, *Alcazar* limits even statutory rights to an interpreter during interrogations. Even when a certified court interpreter translates during an interrogation, she is not bound by statutory codes of ethics. This holding leaves LEP persons with little right to a qualified and un-conflicted interpreter.

At first glance, demonstrating this kind of bias seems like an impossibly high hurdle. However, one defendant was able to meet that burden in a case already mentioned. In *Carmona-Olvara*,[170] the court held that the suppression of expert linguistic testimony was in error where the defense sought to introduce evidence that the defendant's statement to a police officer was actually a denial of guilt rather than an admission.[171] The defendant had been apprehended by an officer who claimed to have seen the defendant light a car on fire. On the witness stand, the officer admitted that he interrogated the defendant in Spanish himself. According to the officer's interpretation, when the officer asked the defendant why he did it, the defendant

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[165] *Id.* at 1142 (alteration in original) (quoting Commonwealth v. Carrillo, 465 a.2d 1256, 1263 (Pa. Super. Ct. 1983)).

[166] *Id.*

[167] Alcazar v. Hill, 98 P.3d 1121, 1126 (Or. Ct. App. 2004).

[168] *Id.* at 1125 (citation omitted).

[169] *Id.* at 1126 (quoting OR. REV. STAT. § 45.288 (2008)).

[170] 842 N.E.2d at 319.

[171] *Id.*

responded, "I don't know, I just did it."[172] When asked about this statement at trial, the defendant answered, "I told him I do not know anything."[173] The defendant sought to introduce expert testimony concerning the true meaning of the defendant's statement to the officer.

On appeal, the court identified "this case [as one that] involves a real possibility of 'bias or partiality' affecting the interpreter's translation of defendant's words,"[174] as "'there is an inherent possibility of bias, . . .whenever an arresting police officer is called upon to serve as the defendant's interpreter.'"[175] Thus, because "[c]onfessions carry extreme persuasive weight," and "[t]he evidence against defendant largely depended on the credibility of Officer Perez's testimony," the court held that it could not "say that the evidence so overwhelmingly favored the prosecution that the exclusion of the alternate translation of defendant's words had no prejudicial effect. Accordingly, [they] reverse[d] the judgment of the trial court."[176]

Carmona-Olvara seems to restrain *Sanchez-Diaz* and *Baltazar-Monterrosa*, but a few distinctions in *Carmona-Olvara* limit its holding. First, the court only held that suppressing alternate interpretations was impermissible. It did not say the officer's interpretation ought to be excluded because of bias. Such a holding allows defendants, at best, to enter into a linguistic battle over the true meaning of contested statements. Second, the court's holding incorporated a balancing test between the confession and the remaining evidence against the defendant. In other words, suppression of an alternate interpretation to a confession is still within the power of the trial court as long as the remaining evidence "overwhelmingly favor[s]" conviction.[177] With these qualifications attached, *Carmona-Olvara*'s presumption of bias when the arresting officer is the interpreter may only be academic; under certain conditions an arresting police officer can still act as interpreter.

Likewise, according to *U.S. v. Sanchez-Godinez*,[178] the *Mirandizing* officer can also interpret for the accused. Despite the reservations of the court, it ultimately held that the admission of testimony from the interpreting officer or any other officer present was acceptable because the defendant failed to show any inaccuracies in the interpretation, spoke English well enough to ensure the accuracy of the interpretations, and the remaining evidence against the defendant was overwhelming.[179]

Admittedly, the defendant challenged the admission of statements made to the officers on hearsay grounds. Still, the reasoning used in *Sanchez-Godinez* to admit a statement made by an interpreter, because the interpreter is an agent of the defendant, is substantially similar to the reasoning in the

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[172] *Id.* at 316.
[173] *Id.*
[174] *Id.* at 318 (citation omitted).
[175] *Id.* (citation omitted).
[176] *Id.* (citation omitted).
[177] *Id.*
[178] 444 F.3d 957 (8th Cir. 2006); United States v. Sanchez-Godinez, 444 F.3d 957 (8th Cir. 2006).
[179] *Id.* at 961.

cases we've discussed addressing the correctness of an officer interpreting for the defendant. Both cases presume no bias exists and look instead at the overall prejudicial effect of admitting the officer's interpretation. In *Sanchez-Godinez* even the demonstration of the ATF agent's clear conflict of interest became irrelevant because the defendant would have been convicted anyway. It thus appears that the right to an unbiased interpreter during interrogations varies according to the ultimate prejudicial effect.

In *Diaz v. State* an investigator for Child Protective Services (CPS) provided interpretation for an accused pedophile's admission of guilt.[180] But, on the basis of accusations made by the defendant's daughter, CPS had removed the girl from the defendant's home prior to the defendant's statement.[181] On appeal of his conviction, the defendant argued that his admission wasn't voluntary and violated due process because his interpreter, a CPS investigator, was biased and "failed to correctly translate the statement . . . [because] she had a motive for seeing that [the] statement was as incriminating as possible."[182] The court applied a four-part test to determine whether the interpreter was biased. "Those four factors include: (1) which party supplied the interpreter; (2) whether the interpreter had any motive to mislead or to distort; (3) the interpreter's qualifications and language skill; and (4) whether actions taken subsequent to the conversation were consistent with the statements as translated."[183]

At first, this test appears to be quite different from the analysis in *Sanchez-Godinez*, *Carmona-Olvara*, and *Baltazaar-Monterossa*. The *Diaz* court applies it in a way that ignores conflicts of interest. Under the test, an interpreter could be supplied by one particular party and could have a motive to mislead, to convict someone who is "obviously" a pedophile, for example. But such an interpreter isn't necessarily biased unless the "actions subsequently taken" are inconsistent with the translated statements. In other words, this test allows a court to focus solely on actual bias. To demonstrate, note that *Sanchez-Godinez*, *Carmona-Olvara*, and *Baltazaar-Monterossa* would all have come out the same if this test had been applied.

However, the first prong could describe a potential conflict of interest, depending on how it is interpreted, and depending on the facts of the case. The *Diaz* court removed any concerns over conflicts of interest from the test when it found that "neither party supplied the interpreter . . . [because] [she] simply happened to be at the police station [at the time]."[184] This interpretation of "supply" focuses more on the physical act rather than on issues of agency. Technically, the police department didn't "supply" the CPS investigator in the sense that she wasn't hired by the police or part of the police force. Yet she worked for the very state agency that removed the

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[180] No. 08-07-00323-CR, 2010 Tex App. LEXIS 194, *9-10 (Tex. App. 8th January 13, 2010).

[181] *Id.* at *2.

[182] *Id.* at *18-19 (citations omitted).

[183] *Id.* at *20 (citations omitted).

[184] *Id.* at *20-21.

defendant's child over the same allegations that lead to the statement she interpreted. While the case is unclear on this point, she may have even been the very agent to handle the defendant's daughter's case. The *Diaz* court ignores these connections and so ignores the conflict of interest. Focusing instead on actual bias, the *Diaz* court rejected the defendant's claim of bias, "find[ing] nothing in the record to suggest that [the CPS investigator] was motivated to translate the statement incorrectly or did translate the statement incorrectly."[185] Thus Diaz also ignores the conflict of interest and instead seems to focus on the presence of actual bias and the ultimate prejudicial effect.

Such a test is dangerous, especially because it ignores procedure. The prejudicial effect test ignores an officer's conflict of interest so long as there exists sufficient evidence to support a conviction. But conviction often rests on statements taken by police officers. If attorneys must avoid conflicts of interest, why not police officers? Proper procedure must be respected. The court in *United States v. Bailon-Santana* recognized that although the attorney's "representation that he is fluent in Spanish was no doubt entirely candid, his statement nonetheless lacks one crucial component: confirmation by someone familiar with the requisite standard that the lawyer's fluency is commensurate with the level required for translating . . . ."[186] Such confirmation is fundamentally procedural. Thus, in the absence of a certified court interpreter, "*Federal Rule of Evidence 604* provides a means for the court to qualify an individual as an interpreter, employing the methodology used for qualifying expert witnesses."[187] Either way, "the record must reflect a determination, based on something more than the individual's say-so, that he has the requisite translating ability."[188] Though the defendant in *Bailon-Santana* was later convicted in a bench trial, the court still reversed the lower court, not because the attorney wasn't capable of translating or the defendant did not understand, but because "the district court seems to have [simply] accepted the lawyer's self-certification at face value."[189] Self-certification is *procedurally* impermissible. Interpretation by accusers should also be *procedurally* impermissible. We question the propriety of the use of a conflicted party, whose job it is to obtain an admission of guilt from a free individual, to represent to others the words, thoughts and defenses of that same free individual. At least one court requires the presence of an interpreter for interrogations of LEP persons. Still, where such statutes vary or are unavailable, the cases we have presented may be more applicable.

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[185] *Id.* at 22.
[186] 429 F.3d 1258, 1261 (9th Cir. 2005).
[187] *Id.*
[188] *Id.*
[189] *Id.*

III. Voluntary Statements

Without an interpreter, LEP persons are vulnerable to making uninformed decisions. Plea bargains, for example, require a defendant to waive his or her right to confrontation. An LEP person may not understand what that right means. Thus, defendants have argued that because they don't understand English, or because of misconduct, they did not voluntarily waive their rights. Nowhere have waivers been appealed more often than in relation to *Miranda* rights. Similar reasoning applies in appealing waivers of the right to a preliminary hearing and a jury trial.

a. *Failure to Understand*

Not surprisingly, where a defendant claims his waiver wasn't voluntary due to language difficulties, courts look to evidence that the defendant understands English. For example, in *State v. Pham*, the court held that statements made to the police in the absence of an interpreter were voluntary despite the defendant's argument that his statements could not be admitted into evidence because no interpreter was appointed pursuant to Kansas Statute 75-4351(e).[190] The defendant seemed to argue for a presumption of misunderstanding in the absence of an interpreter, since there is no claim that he actually misunderstood. The court rejected this argument and explained that "[t]he statute does not state a rule of evidence. Whether or not an interpreter is appointed and is present at the taking of the statement, the trial court must still determine whether an in-custody statement was freely, voluntarily, and knowingly given, with knowledge of the *Miranda* rights."[191]

The court then pointed to evidence indicating that Pham's statements were made freely. First, "the defendant read the *Miranda* warning [in plain English] and indicated that he understood the warning."[192] Second, his "responses were fairly quick and were appropriate to the questions asked."[193] Third, "the defendant knew of his rights. . . [considering he] said that he did not have any money and needed a lawyer."[194] Furthermore, the officer "asked Pham if he wanted an interpreter, but Pham stated he did not need one."[195] Upon reviewing several more pieces of evidence, the court concluded, "that Pham's statements were made freely, voluntarily, knowingly, and understandingly with full knowledge of his *Miranda* rights."[196]

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[190] 136 P.3d 919, 932 (Kan. 2006).
[191] *Id.* at 931 (citation omitted).
[192] *Id.*
[193] *Id.*
[194] *Id.* at 932.
[195] *Id.*
[196] *Id.* at 932–33.

Similar reasoning and results to *Pham* were found in courts from Maryland, Ohio, and Washington.[197] Courts look to see if there was evidence the defendant understood his rights. Further, they require that "a defendant who challenges his guilty plea on the basis that it was not knowingly, intelligently, and voluntarily made must show a prejudicial effect."[198]

Proving a prejudicial effect to reverse the admission of a statement or guilty plea on the grounds that it was involuntary is hauntingly similar to proving prejudicial effect to reverse the admission of a statement to a police officer acting as an interpreter. So, how important is procedure in challenging the voluntariness of statements? In such cases, should a court refuse to exclude the statements because the defendant would be convicted anyway?

In *State v. Farrah,*[199] the court partly answers that question. In *Farrah* the court held that statements made to the police were not voluntary because the defendant did not understand his rights.[200] "Still, the admission of a defendant's statements to police at trial in violation of *Miranda* does not require a new trial if the state can show beyond a reasonable doubt that the error was harmless."[201] Ultimately, the court did order a new trial because the contested statement was an admission of guilt crucial to the state's case. From the *Farrah* court's explanations it seems the convicted-anyway standard does apply to the admissibility of statements made in violation of *Miranda* rights. The prosecution in *Farrah* simply did not meet its burden of proving the convictions inevitability beyond a reasonable doubt. However, nothing in *Farrah* prohibits the admission of statements made by a defendant with little or no understanding of his rights, so long as they are *later* deemed harmless by an appellate court.

The other argument defendant's have made in the Miranda context is that the warning was inadequate because it was interpreted improperly, and so did not fully inform the defendant of his rights.[202] While Miranda warnings must be given in a language the defendant understands,[203] a poor interpretation of Miranda rights won't support the suppression of the defendant's statements unless the interpretation is ambiguous[204] or substantively altered the meaning.[205] Primarily, this is because "no talismanic incantation was

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[197] *See* Kang v. Maryland, 899 A.2d 843 (Md. 2006); Ohio v. Mota, No. L-04-1354, 2006-Ohio-3800, 2006 Ohio App. LEXIS 3779 (July 21, 2006); Washington v. Teshome, 94 P.3d 1004 (Wash. Ct. App. 2004).

[198] Ohio v. Razo, 157 Ohio App. 3d 578, 2004-Ohio-3405, 812 N.E.2d 1005 at ¶ 7 (citation omitted).

[199] 735 N.W.2d 336 (Minn. 2007); State v. Farrah, 735 N.W.2d 336 (Minn. 2007).

[200] *Id.* at 343.

[201] *Id.*

[202] *See also* Montoya v. State, Nos. 02-08-287-CR, 02-08-288-CR, 02-08-289-CR, 2010 Tex. App. LEXIS 3033 (Tex. App. 2nd Apr. 22, 2010).

[203] *See* United States v. Botello-Rosales, CR 08-385-RE, 2009 U.S. Dist. LEXIS 104290, *12 (D. Ore. Nov. 6, 2009) (quoting United States v. Connell, 869 F.2d 1349, 1351 (9th Cir. 1989)).

[204] *Id.* at *14.

[205] Lopez v. Grams, 08-cv-408-slc, 2009 U.S. Dist. LEXIS 117281, *37 (W. D. Wis. Nov. 13, 2009).

required to satisfy [the] strictures [of *Miranda*]."[206] Thus, in *Botello-Rosales* the court found that "[d]espite his omission of the word 'court' from the phrase 'in a court of law,' . . . [the detective] adequately advised defendant that any statements could be used against him."[207] In *Lopez* "although [the officer's] Spanish was far from perfect . . . [it still] reasonably convey[ed] the substantive meaning of the rights."[208] But, in *State v. Ortiz* a Miranda warning was insufficient to inform a defendant of his rights where the interpreter said the defendant had a "right to an attorney before *asking* any questions."[209] The court held, over a vigorous dissent, that this interpretation didn't "convey[ ] to [the defendant] that he has the right to an attorney before being *asked to answer* any questions."[210] To the *Ortiz* court the difference between asking questions during an interrogation and answering questions during an interrogation was significant enough to make the defendant's statements involuntary.

Fortunately, this type of analysis is rather easy to avoid by use of written Miranda statements in a suspect's language that have already been prepared by qualified translators. Only then can any court be sure a defendant is truly voluntarily waiving his or her constitutional rights. A defendant whose life, liberty, or property is in jeopardy deserves greater than a "good-enough" understanding of the rights he or she must knowingly, freely, and voluntarily waive. A court can do no less than ensure the defendant completely understands those rights to ensure due process.

IV. Progress Ahead – Practical Suggestions for Language Access to the Courts

We offer several practical suggestions to prevent the inadvertent abuse of LEP persons in the justice system.

- The Court should appoint a certified/qualified court interpreter at the earliest stage of the proceedings and, thereafter, include the interpreter at all stages of the proceeding.
- The Court and counsel should discuss, at pretrial, any unusual expectations, needs, or burdens that may be placed on the interpreter at trial and how many people (including the accused, witnesses, and victims) in attendance at trial may need interpreters.
- The Court should arrange for multiple interpreters for lengthy hearings and for all jury trials.
- The Court should disallow attorneys to act as interpreters, except in simple situations such as a continuance of a hearing for another date.

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[206] *Id.* at *36 (quoting California v. Prysock, 453 U.S. 355, 359 (1981)).
[207] *Botello-Rosales*, 2009 U.S. Dist. LEXIS 104290 at *14.
[208] *Lopez*, U.S. Dist. LEXIS 117281 at *36-37.
[209] 766 N.W.2d 244, 253 (Iowa 2009).
[210] *Id.*

- The Court should always, at the outset of any proceeding, identify the interpreter by name, her level of competency/qualification, and the subject language.
- When the Court must hear several cases in a single day, the Court may inquire, through an interpreter, who among those present may need the assistance of an interpreter. Such an inquiry can help prevent the interpreter from waiting for hours between cases. Many courts schedule interpreter-needs-cases consecutively as an accommodation to the interpreter.
- The Court should administer the interpreter oath on the record. This helps the accused understand and appreciate the role of the interpreter.
- The Court should also briefly explain to the accused on the record the role of the interpreter: she or he is not legal counsel and cannot give legal advice or editorialize.
- The Court should respect the fact that court interpreters, like court reporters, can interpret only one person at a time. When a witness, counsel, and the judge engage in simultaneous speaking, it severely impacts both accuracy and completeness. At the outset, the Court should caution everyone regarding simultaneity, and then act as gatekeeper.
- Where interpreters are utilized, everyone who addresses the Court should also be cautioned about the rate of speed of their speech. Interpreters can faithfully and professionally interpret at a high rate of speed only in short segments, but that pace is unsustainable for an extended period of time. Again, the judge should act as gatekeeper, monitor, and cautioner.
- The Court must be sensitive to interpreter fatigue and call more recesses in cases where interpreters are used and respond to interpreter requests for a break.
- When jury trials or evidentiary hearings are continued or canceled, the Court should immediately advise the assigned interpreter.
- Judges and counsel should ensure that any written documents that will be utilized at trial, such as police reports, are accessible to the interpreter in a timely manner. This should be mandatory if the document needs to be formally translated.
- At jury trial, the Court should preliminarily instruct the jury regarding the important and professional role of the court interpreter.
- For the benefit of the record and the court interpreter, and to monitor witness response during trial, the Court should instruct all witnesses to speak clearly and loudly.
- Judges should carefully review the "Code of Professional Responsibility for Court Interpreters" and make sure that the judiciary does not invite, order, or solicit a breach of any canon. Failure to do so may result in reversible error. The following examples can cause a breach of the interpreter's professional responsibilities:

  - Orders to interpreters not to speak while the judge is speaking. This interferes with the required simultaneous translation, and reduces accuracy and completeness;
  - Orders or requests such as "don't interpret this";
  - Orders such as, "Go out in the hallway, read him his rights, make sure he understands them, answer his questions, and return to enter a plea"; and
  - Orders such as, "Don't interpret objections, responses, or rulings because they are purely legal in nature."
- Courts must recognize that interpreters can be appointed, in an abundance of caution, on an "as needed" basis where a party is quite fluent in English but may need the periodic assistance of an interpreter.
- Courts must respect the fact that interpreters have a professional duty to interrupt proceedings when:
  - The rate of speed of speech creates problems;
  - The speaker mumbles or is inaudible;
  - Multiple people speak simultaneously;
  - The interpreter must pause to consult a dictionary or colleague regarding a word or phrase;
  - The interpreter must correct the record; and
  - The interpreter seeks a break.
- Attorneys representing bilingual clients should determine and advise the Court as early as possible if an interpreter will be needed.
- Where an attorney requests an interpreter for his or her client, the attorney should describe on the record any limitations in his or her client's language abilities. Furthermore, attorneys should inform the Court if an interpreter was necessary in order to confer with the client.
- Attorneys should be aware of the presence or absence of the court interpreter. If a client needs an interpreter, but none is present, the attorney should object. Furthermore, the attorney should note for the record any time a court interpreter isn't assisting his or her client.
- Attorneys should periodically inquire into his or her client's understanding of the court proceedings and request a recess to explain the proceeding if necessary.
- Counsel should object to the admission of a statement into evidence made to police officers or other uncertified court interpreters by a client. If a judge admits a statement made by a defendant to a non-certified court interpreter, counsel should introduce evidence, where possible, of a differing interpretation.
- Counsel should never waive the right to a certified court interpreter unless the interpreter is unnecessary.
- Counsel should object if the Court dismisses an interpreter, unless the interpreter is unnecessary.

- Courts should provide, where needed, uniformly approved translated documents such as an Affidavit of Indigency, and Statement in Advance of Plea.

These practical, easily implemented, suggestions can be supplemented from other sources. For example, in 2001, the American Bar Association, through its Judicial Immigration Education Project, published *A Judge's Benchbook on Immigration Law and Related Matters*.[211] That excellent publication, in a section titled "Summary: Court Interpreters: Appointment, Qualification, and Effective Utilization," contains checklists, suggested questions and other helpful materials for judges' use on the bench.[212] Judges must become aware, through judicial education, of their affirmative duties to act as gatekeepers in ensuring due process for non-English speaking litigants. The right to a court interpreter, founded on defendants' rights under the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution, cannot simply be ignored or become subservient to judicial efficiency.

In addition, many of these suggestions and those contained in *A Judge's Benchbook*, can, and should, be equally applicable in civil proceedings. Our research has focused exclusively on criminal case law and civil case law is almost non-existent.

Due process considerations in the civil arena have been recognized in some states, but with a very narrow implementation or interpretation. We note the U.S. Justice Department's current, strident emphasis on the use of court interpreters in civil cases in state courts. The Department's ultimatum requires that states must now develop standards and guidelines, together with an implementation plan, in order to provide interpreters to LEP litigants and witnesses in civil proceedings.[213]

Further guidance concerning court interpretation comes from the National Center for State Courts.[214] The National Center has developed a Consortium for State Court Interpreter Certification (Consortium), to which 40 states now belong.[215] Its goal is to "inspire and enable its members to promote equal access to justice in courts and tribunals by eliminating language

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[211] KATHLEEN M. SULLIVAN, A JUDGE'S BENCHBOOK ON IMMIGRATION LAW AND RELATED MATTERS (2001).

[212] *Id.* at S14-1.

[213] For a thorough analysis of the legal obligation of State Courts in civil proceedings, see LAURA ABEL, BRENNAN CENTER FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW, LANGUAGE ACCESS IN STATE COURTS (2009), *available at* http://brennan.3dn.net/684c3cdaaa2bfc8ebc_6pm6iywsd.pdf.

[214] *Consortium for Language Access in the Courts*, NAT'L CTR. FOR STATE CTS., http://www.ncsconline.org/D_Research/CourtInterp/CiCourtConsort.html (last updated June 19, 2009).

[215] *Court Interpreting Consortium Member States*, NAT'L CTR. FOR STATE CTS., http://www.ncsconline.org/D_Research/CourtInterp/Res_CtInte_ConsortMemberStatesPubNove07.pdf (last modified June 11, 2009). List includes Alaska, Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Iowa, Illinois, Indiana, Kentucky, Maryland, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin.

barriers for persons with limited English proficiency."[216] The Consortium offers examinations for interpreter certification and keeps a database of tests from prior years. They also offer written examinations to determine English proficiency. States can obtain guidance on developing interpreter certification programs by speaking to staff members at the National Center for State Courts (NCSC), by speaking to other states in the Consortium through an email list serve, or by attending conferences sponsored by the NCSC wherein judges and courtroom staff can obtain training. The Consortium website also provides links to many other resources, such as various states' codes of ethics, judges handbooks, and interpreter training manuals.

In addition, many states have programs designed to promote interpreter services. These programs often keep lists of certified interpreters and dispense educational materials. For example, the Supreme Court of Ohio produced a video, *The Role of Interpreters in the Legal System*, which describes the function of interpreters and gives examples of mistakes made by interpreters and courts.

Conclusion

Our analysis of over ninety cases decided in the last six years has revealed statutory and constitutional protections for LEP persons entering the court system. However, many difficult obstacles still remain to be overcome. Some states still do not recognize the right to a certified interpreter during police interrogations. Many courts require defendants to affirmatively request an interpreter for court proceedings and presume their right to an interpreter has been waived if no request is made. Also, many require a showing of *significant* language difficulty before an interpreter's absence is viewed as prejudicial or worry about the cost and delay associated with an increased use of court interpreters.

Certainly, following the suggestions in this article can reduce delays. Any additional costs incurred by an increased use of court interpreters will be justified by the achievement of equal access to the courts. Fortunately, individual judges and groups like the Consortium are sensitive to the potentially overwhelming and frightening nature of the justice system to persons lacking English proficiency.

We urge trial court judges, defense counsel, and prosecutors to carefully scrutinize controlling case law, that they seriously consider the implementation of the listed pragmatic suggestions, and that trial courts liberally appoint court interpreters to ensure due process for LEP persons. Defendants, out of judicial ignorance, expediency, because of cost saving measures, or for any other reason, must never "face a Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment."[217]

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[216] *Consortium for Language Access in the Courts Mission Statement*, Nat'l Ctr. for State Cts., http://www.ncsconline.org/D_Research/CourtInterp/MissionStatementFinal.pdf (last visited Jan. 17, 2011).

[217] *Carrion*, 488 F.2d at 14.