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The Right to Confrontation Compromised: Monolingual Jurists Subjectively Assessing the English-Language Abilities of Spanish-Dominant Accused

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THE RIGHT TO CONFRONTATION COMPROMISED: MONOLINGUAL JURISTS SUBJECTIVELY ASSESSING THE ENGLISH-LANGUAGE ABILITIES OF SPANISH-DOMINANT ACCUSED

LUPE S. SALINAS* & JANELLE MARTINEZ**

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I. INTRODUCTION

It was not until 1942, in *State v. Vasquez*, that an American state court formally addressed the need for an interpreter to assist an accused in confronting the witnesses against him.¹ It took another twenty-eight years before a federal court decided *United States ex rel. Negron v. New York*.² In *Negron*, the Second Circuit held that an accused deemed dominant in a language other than English enjoys a Sixth Amendment right to confront

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1. 121 P.2d 903, 907 (Utah 1942).

2. See generally 434 F.2d 386 (2d Cir. 1970).

the witnesses that testify against him in English.³

When I began to practice law in 1972, two years after *Negron*, if a defendant possessed limited English-speaking ability and his or her lawyer's abilities were limited to only English, the judge in a criminal court would not accommodate the defendant and would proceed with a trial in the traditional manner.⁴ If the lawyer spoke Spanish, however, and the defendant needed an interpreter, the court expected the lawyer to serve as both counsel and interpreter. An accused who was totally or substantially unable to communicate in or understand English was at a disadvantage because he could neither understand the trial proceedings nor understand what the witnesses were saying, creating a serious confrontation issue.⁵

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.⁶

These rights are compromised if the dominant language spoken by the accused is one other than English. An accused whose dominant language is Spanish will have a tough time being "informed of the nature" of the accusation and being "confronted" by the witnesses against him. Furthermore, he will have difficulty making use of the assistance of counsel if the accused is not able to inform his lawyer that what the witness said is false and that witnesses exist who could testify in rebuttal.

While the language spoken could be Chinese, Vietnamese, or Spanish, the numbers in the United States primarily involve the Spanish-speaking Latino population. As of the 2000 Census, slightly over twenty eight million American residents speak Spanish in the home.⁷ Of the nearly forty seven million Americans who speak a foreign language, about sixty percent speak Spanish.⁸ Among the recognized languages of the world, Spanish is

3. *Id.* at 389.

4. When the first person "I" is used throughout this article, this will refer to author Salinas. When the discussion centers on the personal linguistic or other experiences of author Martinez, we will note this in the text.

5. See U.S. CONST. amend. VI; *Pointer v. Texas*, 380 U.S. 400, 406 (1965) (holding that the Sixth Amendment right to confront adverse witnesses is applicable to the states through the Fourteenth Amendment).

6. U.S. CONST. amend. VI.

7. See THE WORLD ALMANAC AND BOOK OF FACTS 2005, at 629 (Erik C. Gopel, ed., 2005) [hereinafter 2005 WORLD ALMANAC]. This figure does not address the number of non-Latinos who speak Spanish fluently, as can be seen by watching Spanish-language news channels and seeing the large number of non-Latinos easily answering questions from Latino reporters.

8. *Id.*

spoken as a first language by 322 million people.⁹

It is unlikely that Latinos will relinquish their Spanish language. To force an adjustment of a person's medium of communication strikes at among the most fundamental of one's civil rights. Several factors contribute to the linguistic persistence of the Spanish-speaking population. First, a large segment lives along the border with Mexico and Central America,¹⁰ in Florida near Cuba, in Puerto Rico or in New York City and Chicago, where almost three million Latinos reside.¹¹ Proximity to the source nations provides a constant linguistic reinforcement. Second, Latinos live in concentrated numbers in urban areas such as Los Angeles, Chicago, Houston, New York, San Antonio, and Dallas.¹² In addition, other large cities like Miami and El Paso have Latino percentages that exceed sixty five percent of the population.¹³ Such demographics also contribute to reinforcing the use of the Spanish language. In addition, most of these urban settings have Spanish language radio and television stations that permit Latinos to function socially and politically in Spanish without forcing them to learn English. For example, in 2006 the Houston, Texas Spanish-speaking community had at least six FM radio stations and seven television stations.¹⁴

We encourage the legal academy, in collaboration with language experts, to conduct empirical research on this delicate issue. As a starting point, we refer scholars to the language of the Federal Interpreter Act that provides protection for an accused who "*speaks only or primarily a language other than the English language* so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer."¹⁵ A case in point for this plea involves a criminal proceeding in Texas where the accused petitioned the judge for an interpreter.¹⁶ The

9. See *id.* at 729, citing ETHNOLOGUE: LANGUAGES OF THE WORLD (Raymond G. Gordon ed., 2004). Mandarin Chinese is the most commonly spoken language, with 873 million speakers, and English is third, with 309 million.

10. See 2005 WORLD ALMANAC, *supra* note 7, at 9. The six states with the highest percentage of Latinos in 2002—New Mexico, California, Texas, Arizona, Nevada and Colorado—are located in the American Southwest and West. These states include sixty per cent of all Latinos in the United States. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. These television stations include Univision, Telemundo, Galavision, and TV Azteca. *Not all advertisers can afford Univision*, HOUS. CHRON., May 14, 2006, at D8. Univision Communications, the largest United States Spanish-language television and radio broadcaster, has sixty-eight radio stations. *Spanish Radio Getting a Boost*, HOUS. CHRON., Sept. 17, 2004, at D3.

15. 28 U.S.C. § 1827(d)(1)(A) (2006) (emphasis added).

16. *Flores v. State*, 509 S.W.2d 580 (Tex. Crim. App. 1974).

accused twice answered his attorney's questions regarding his English ability by simply nodding.¹⁷ The defendant's English, according to his attorney, was "very slow" and "halting," as he was much more fluent in Spanish.¹⁸

The trial judge refused to provide an interpreter because "of the [d]efendant's *obvious fluency* in the English language, both understanding and speaking."¹⁹ The appellate court concluded that "the mere fact that an accused may be more fluent in speaking Spanish does not, in and of itself, make it incumbent upon a trial court to appoint an interpreter for an accused who speaks and understands the English language."²⁰ The *Flores* decision, which involved an all-too-frequent episode, motivates our quest to confront the risks involved when the judge is not prepared to tackle questions regarding the cognitive abilities of the linguistically challenged accused in criminal cases.

II. STATUTORY DEVELOPMENTS

Congress and several state legislatures have specially addressed the need for an interpreter to enhance the protection of a defendant's Sixth Amendment right of confrontation. For example, the Federal Interpreter Act directs the Director of the Administrative Office of the United States Courts to certify the qualifications of persons who may serve as interpreters for persons who speak only, or primarily, a language other than the English language.²¹ Where no certified interpreter is reasonably available, a qualified but uncertified interpreter can be used.²² The Act further directs the judge to use the most available, certified interpreter, or an otherwise competent interpreter, if he or she "determines on such officer's own motion or on the motion of a party that such party (including a defendant in a criminal case)" so predominantly speaks a non-English language that this fact could "inhibit a party's comprehension of the proceedings or communication with counsel or the presiding judicial officer."²³

The Texas statutory provision for interpreters in criminal cases differs substantially from the federal version.²⁴ Texas provides that

[w]hen a motion for appointment of an interpreter is filed by any party or

17. *Id.* at 581.

18. *Id.*

19. *Id.* (emphasis added).

20. *Id.*

21. See 28 U.S.C. §§ 1827(a) - (b)(1) (2006).

22. See § 1827(b)(2).

23. § 1827(d)(1).

24. See TEX. CODE CRIM. PROC. ANN. art. 38.30 (Vernon 2005).

on motion of the court, in any criminal proceeding, [and] it is determined that a person charged or a witness does not understand and speak the English language, an interpreter must be sworn to interpret for the person charged or the witness.²⁵

The statute provides that any person may be subpoenaed, attached, or recognized in any criminal action or proceeding, to appear before the proper judge or court to act as an interpreter therein, under the same rules and penalties as are provided for compelled witnesses.²⁶ If the only available interpreter does not possess sufficient interpreting skills or the interpreter does not understand the vernacular, the defendant or witness may seek leave from the court to nominate yet another person to act as an intermediary between the defendant or witness and the court-appointed interpreter.²⁷

The issue of interpreters for the non-English speaking population has also been addressed across the entire United States.²⁸ I visited the state courts of the Commonwealth of Puerto Rico, where all proceedings are conducted in Spanish. In the United States district courts, all proceedings are conducted in English. In both, an interpreter is a regular participant since a witness, despite the fact that she may be bilingual, might feel more comfortable expressing herself in Spanish, as I once witnessed in an employment discrimination case. At least in Puerto Rico, the flexibility as to the interpreter issue arises from the fact that all jurists are culturally sensitive to language issues.

III. ANALYSIS

While the legislative branches at the federal and state levels have made some efforts to provide predictability and professionalism with regard to linguistic interpreters, the judicial branch has not been as protective. Excellent results have emanated from some federal appellate and state supreme courts. However, other appellate courts have not been as vigilant as perhaps the Founding Fathers envisioned when they provided the accused with their Sixth Amendment protections. A review of these judicial precedents follows.

25. *Id.*

26. *See* TEX. EVID. R. 604.

27. *See* art. 38.30(a).

28. *See, e.g.,* United States *ex rel.* Negron v. New York, 434 F.2d 386, 389-90 (2d Cir. 1970); State v. Natividad, 526 P.2d 730, 733 (Ariz. 1974); State v. Selalla, 744 N.W.2d 802, 806 (S.D. 2008); Garcia v. State, 210 S.W.2d 574, 579 (Tex. Crim. App. 1948); State v. Vasquez, 121 P.2d 903, 905-06 (Utah 1942).

A. State Law Development

State v. Vasquez involved a murder allegation and a claim of self-defense.²⁹ Not long after the first witness began testifying, the defendant's counsel requested an interpreter because Vasquez was unable to understand the English-speaking witness.³⁰ The trial court did not object to the accused retaining someone to interpret for him; however, the request was denied because the right to an interpreter "was a right the defendant . . . [was not] entitled to in an English speaking court."³¹ Vasquez was called to the witness stand and took his oath in Spanish.³² At this point, the trial court was obviously aware of the language barrier, but the judge tried "to get along without an interpreter."³³ When the defendant requested to testify in Spanish, along with an interpreter to aid the English-speaking courtroom participants, the prosecution quickly objected and demanded a showing of necessity.³⁴ After the court failed to rule on or make an inquiry into the request, the accused was withdrawn from the witness stand.³⁵

The Utah Supreme Court reversed Vasquez's conviction, holding that cumulative errors denied the accused a fair trial.³⁶ One of the concurring judges nonetheless objected to the use of an interpreter, claiming that regardless of the defendant's language barrier, defendant's counsel understood English and properly cross-examined witnesses.³⁷ He also xenophobically rationalized that "the jury is . . . entitled to have the benefit of . . . [the defendant's] testimony directly if it can be conveyed . . . in English" because interpreted testimony allows an accused "to fashion a story with a facility impossible if . . . [his testimony were expressed] in the simple English terms with which . . . [he was] familiar."³⁸ The concurring justice neglected to recall that the Sixth Amendment protects the rights of the accused, not the attorney or the jury. This same justice added:

[T]he intelligent judge and juror does [sic] not have much difficulty in determining . . . whether the . . . attempt to convey the witness's impressions in English are fruitful[,] or whether he is pretending or

29. 121 P.2d 903, 904-05 (Utah 1942).

30. *See id.* at 905.

31. *Id.* at 906.

32. *Id.*

33. *Id.*

34. *Id.* at 907.

35. *See id.* at 908 (Wolfe, J., concurring).

36. *See id.* at 907 (majority opinion).

37. *See id.* at 908 (Wolfe, J., concurring).

38. *Id.*

honestly having difficulty. This in itself is a valuable index to demeanor. The court certainly was entitled to ascertain through its own observation the ability or inability of the witness to carry on in English.³⁹

Six years after *Vasquez*, in *Garcia v. State*, the Texas Court of Criminal Appeals held that the failure to provide an interpreter to someone who could not understand the language of the forum was a violation of his constitutional rights.⁴⁰ The court observed:

[W]e know that in this State, especially along the Rio Grande border, our citizenship is comprised of Latin Americans who speak and understand only the Spanish language. . . . [They] are entitled to be confronted by the witnesses under the same conditions as applied to all others. Equal justice so requires. The constitutional right of confrontation means something more than merely bringing the accused and the witness face to face; it embodies . . . the valuable right of cross-examination of the witness.⁴¹

Later, the same court, in *Baltierra v. State*, recognized the practical dilemmas that bilingual trial attorneys face.⁴² The court noted that the trial judge “commendably appointed counsel fluent in the Spanish language and thereby afforded appellant a basic aspect of effective assistance of counsel, ability to communicate.”⁴³ The court went on to say, however, that “effectuating that important constitutional requirement should not be taken as implementing the constitutional right of confrontation.”⁴⁴ The same court in 1948, in *Garcia*,⁴⁵ had suggested that a lawyer speaking the same language can interpret testimony for an accused, but *Baltierra* expressed concerns that this “added task, with its obvious distracting implications, should not be imposed on counsel.”⁴⁶

Prior to my days as a trial judge, I had the honor of being a litigator, beginning with my early days as a Mexican American Legal Defense & Educational Fund (MALDEF) civil rights attorney, a state prosecutor, and then a federal prosecutor. I can assure you that anyone who declares that a trial attorney can serve effectively as an interpreter and cross-examiner on behalf of his or her client does not have any practical experience on which

39. *Id.*

40. 210 S.W.2d 574, 580 (Tex. Crim. App. 1948).

41. *Id.*

42. See 586 S.W.2d 553, 556-57 (Tex. Crim. App. 1979) (en banc) (explaining that physical presence and competency of the defendant cannot satisfy the requirements for a fair trial when the defendant does not understand the language of the trial).

43. *Id.* at 559 n.11.

44. *Id.*

45. *Garcia*, 210 S.W.2d at 580.

46. *Baltierra*, 586 S.W.2d at 559 n.11.

to base such comments. As a judge, I have seen monolingual attorneys with English speaking clients sit and listen as objectionable testimony is being offered, and these lawyers had nothing to disrupt their duty to attentively listen to the testimony. Imagine the distraction imposed on a bilingual attorney with a non-English speaking client, who is required to absorb, analyze, and advise his client, all at once, as to what is being said.

I have seen even Board Certified Specialists in criminal law stumble about the exact or more correct objection to make. This is not to degrade the attorney; instead I hope to capture the difficulty of sitting in a trial, listening to the testimony, rising quickly to make an objection for fear of waiving error by inaction, taking notes, making a comment in the margin as to what to include on cross, and then proceeding in an organized fashion with cross-examination. It is fundamentally unfair, a denial of due process of law and of the right to effective assistance of counsel, to expect an attorney in a criminal trial to assume the added responsibilities of translation.

Imagine having to communicate to the client that the witness just said that he, the client, has been the witness's drug supplier for three years, and the client angrily and vehemently begins to deny all this to his lawyer. Who will the lawyer listen to: his client or the continuing testimony of the witness on the stand? The trial does not stop. The wheels of justice roll onward! What if the lawyer immediately stands and asks to approach the bench to ask for a recess, so that he can discuss the new revelation with his client? Will the jury deem the testimony more damaging against the accused since he called for a recess? Regardless, a lawyer should not be required to perform so many tasks. A monolingual attorney cannot do it; a bilingual attorney should not be expected to be twice as capable at trial merely because he or she speaks English and Spanish.

The Texas Court of Criminal Appeals has recognized the need for constant courtroom interpretation to ensure the constitutional right to confrontation. In *Ex parte Nanes*, the State stipulated during the trial that the accused did not understand English.⁴⁷ It was also shown that an interpreter, present during some phases of the trial, was absent during others, and was only instructed to interpret during the defendant's testimony and when the defendant was "asked to change his plea."⁴⁸ The court ordered a retrial based on the undisputed fact that Nanes did not understand English and deemed it significant that the interpreter, though available, served only when asked to do so.⁴⁹

47. 558 S.W.2d 893, 894 (Tex. Crim. App. 1977).

48. *Id.*

49. *Id.*

Garcia v. State, pertaining to a different defendant than the 1948 *Garcia* case discussed previously, involved a jury trial with mostly English-speaking witnesses.⁵⁰ The proceedings were not translated for the benefit of the Spanish-speaking defendant.⁵¹ *Garcia*, accused of sexual assault, pleaded not guilty, made bail, and hired an attorney who spoke no Spanish.⁵² Therefore, *Garcia* and his attorney were forced to communicate solely through his attorney's bilingual legal assistant.⁵³ She sat next to or near *Garcia* during trial, but due to her fear of disrupting the proceedings, she never informed *Garcia* about the substance of the witnesses' testimony.⁵⁴

The judge noticed that no one was talking to *Garcia*. He commented that "[S]ometime during the trial, I noticed that the testimony was not being translated. . . . [I]t would have been sometime in the latter part or middle or two-third—I don't remember when—of the guilt-innocence stage."⁵⁵ The court noted that for persons similarly situated to *Negron* and *Garcia*—who are present, but do not understand the language of the witnesses—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."⁵⁶

Garcia tackled several issues that have surfaced over the years regarding the provision of interpreters. First, the court determined whether *Garcia* had no interpreter or simply an ineffective interpreter. "The fact that Montoya was bilingual and sat next to *Garcia* did not automatically elevate her to the status of courtroom interpreter, regardless of the judge's statements to the jury."⁵⁷ The court reasoned that because Montoya was not sworn in to interpret, was not told to interpret, and did not interpret, there was effectively no interpreter.⁵⁸

Second, *Garcia* decided whether the accused waived his right to

50. See 149 S.W.3d 135, 136 (Tex. Crim. App. 2004).

51. *Id.*

52. See *id.* at 136-37.

53. *Id.*

54. See *id.* at 138-39 (noting that according to the legal assistant, nobody instructed her to translate the witnesses' testimony for *Garcia*).

55. *Id.* at 139; see also *United States ex rel. Negron v. New York*, 434 F.2d 386, 388 (2d Cir. 1970).

56. *Garcia*, 149 S.W.3d at 141 (citing *State v. Natividad*, 526 P.2d 730, 733 (1974)); see also *Tejeda-Mata v. INS*, 626 F.2d 721, 728 (9th Cir. 1980) (Ferguson, J., dissenting) ("Presence can have no meaning absent comprehension.").

57. *Garcia*, 149 S.W.3d at 142-43 (noting that as the trial began, the judge stated to the jury that Montoya, the legal assistant, frequently translated in courts and was "hired by the Court").

58. *Id.* at 143.

confrontation by failing to object to the lack of translation. “It 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.”⁵⁹ Thus, if a trial judge is aware that the defendant has an English language barrier, then the judge has a duty to ensure that a defendant has an interpreter, absent a knowing and intelligent waiver.⁶⁰

A party or the judge can question whether the defendant’s grasp of the English language is inadequate for trial purposes. Ultimately, the trial judge makes the final decision. However, procedures must be followed in order to provide the judge with the evidence necessary to establish that a person is not linguistically functional in English for Sixth Amendment purposes. A serious question arises as to how a monolingual person can truly know how much English comprehension is enough. In other words, can a monolingual judge be accurately aware of any and all language barriers? Without an evidentiary basis, a finder of fact would engage in speculation.

Even bilingual persons find it difficult to determine how fluent another person may be in another language. Yet, bilingual defendants have to place their trust in a monolingual judge to decide whether to appoint an interpreter. This is particularly critical since the judge’s decision is given almost total deference because it would amount to a “fruitless and frustrating exercise for the appellate court to have to infer language difficulty from every faltering, repetitious bit of testimony in the record.”⁶¹

For example, although author Martinez is Latina, she is not fluent in Spanish, but she still considers herself bilingual.⁶² If, for some reason, she were arrested in Mexico, she would have the same problem that many Latinos face in American courtrooms. She understands basic conversational Spanish, and she can speak Spanish if she absolutely has to, which a monolingual, Spanish-speaking judge in Mexico could easily discern. However, courtroom settings do not commonly utilize basic language, spoken clearly and slowly. Instead, most native Spanish speakers state their words rapidly, making it difficult to comprehend.⁶³

59. *Id.* at 144.

60. *Id.* at 145.

61. *State v. Selalla*, 744 N.W.2d 802, 822 (S.D. 2008).

62. Author Martinez’s grandparents came to America from Mexico and raised their children in the only language they knew, *español*. As a result of the hardships her parents faced in an English-speaking world, they concluded that it was best for author Martinez to avoid Spanish in order to enhance her English abilities.

63. For example, the television news persons Maria Celeste Arraras and Maria Antonieta Collins of Telemundo and Univision, speak so fast that even I, a fluent Spanish-speaker, have difficulty comprehending them.

That reality, combined with courtroom language and terms that are somewhat obscure and difficult to define, leads to a situation where a person is physically present, but yet cannot understand the testimony. If a witness spoke too fast, author Martinez would miss something, but she would be unable to stop the proceeding to ask for a break because she would be too busy trying to keep up with testimony. Simply because author Martinez was able to answer some simple introductory questions before trial, how would a monolingual judge in Mexico conclude that she had the cognitive ability to comprehend the testimony, to be both mentally present at her trial and then to confront the witnesses? The same concerns apply in American courts.

Many American Latinos can speak and understand English in varying but limited degrees and yet may not be familiar with sophisticated terms or be able to comprehend quick speakers. They would be denied their constitutional right to confrontation if an interpreter were not utilized. There is a level of linguistic sophistication required at trial which is extremely subtle and can be easily missed by a monolingual individual unfamiliar with that language. A judge's lack of foreign language experience, especially Spanish, puts individuals in a precarious position, one in which the accused must hope that the monolingual judge understands the nuances involved where the accused has the ability to speak and understand English, but still needs an interpreter to "be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence."⁶⁴

B. Developments in Federal Courts

United States ex rel. Negron v. New York is the first federal court case that provides a detailed explanation of how constitutional rights are implicated when the defendant is non-English-speaking.⁶⁵ A native of Puerto Rico, Negron had been in the United States for only a few months when a verbal dispute led to the fatal stabbing of an acquaintance.⁶⁶ The prosecution did not dispute that Negron neither spoke nor understood any English.⁶⁷ His court-appointed lawyer did not speak any Spanish.⁶⁸ Negron and his lawyer could not communicate without an interpreter.⁶⁹

64. U.S. CONST. amend. VI.

65. *See generally* 434 F.2d 386 (2d Cir. 1970).

66. *Id.* at 387.

67. *Id.* at 388.

68. *Id.*

69. *Id.*

Assisted by an interpreter, Negron conferred with his attorney for approximately twenty minutes prior to the trial.⁷⁰ During recesses, the interpreter met with Negron and his attorney for up to twenty minutes and summarized the testimony of those witnesses who testified in English during direct and cross-examination.⁷¹ When the interpreter was present during the trial, she failed to translate the English testimony.⁷²

The appellate court stated, “[t]o Negron, most of the trial must have been a babble of voices.”⁷³ Twelve out of fourteen of the prosecution’s witnesses testified against Negron in English.⁷⁴ Apart from the interpreter’s occasional summaries, “none of this testimony was comprehensible to Negron.”⁷⁵ A review of the record prompted the appellate court to state, “[n]ot only for the sake of effective cross-examination, however, but as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded.”⁷⁶

The Sixth Amendment’s guarantee of a right to be confronted with adverse witnesses includes the right to cross-examine those witnesses.⁷⁷ The court, however, admonished that the right “denied Negron seems to us even more consequential than the right of confrontation.”⁷⁸ In *Negron*, the court elevated the right to understand the events of one’s own trial and to consult with one’s own counsel above the right of confrontation.⁷⁹

The majority concluded that Negron’s language disability was “as debilitating to his ability to participate in the trial as a mental disease or defect. . . . [B]ut it was more readily . . . ‘curable’ than any mental disorder.”⁸⁰ The least that should be required is that a court, put on notice of a defendant’s severe language difficulty, make it “unmistakably clear to him that he has a right to have a competent translator assist him, at state expense if need be, throughout his trial.”⁸¹ Although the *Negron* court held that a defendant with a language barrier has a right to a *competent* interpreter, trial courts have often struggled with appointing an interpreter

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 390.

77. U.S CONST. amend. VI.

78. *Negron*, 434 F.2d at 389-90.

79. *Id.*

80. *Id.*

81. *Id.* at 390-91.

that is of the quality necessary to ensure a defendant's right to confrontation.⁸²

IV. QUALITY OF THE INTERPRETER

Another issue with respect to a criminal defendant's Sixth Amendment rights centers on the quality and effectiveness of the interpreter. The importance of this issue grows with the ever-increasing Latino population. Those who are unaware must understand that bilingual status—and I speak from personal experience—does not usually imbue someone with the unique ability to conduct either simultaneous or immediate interpretation.⁸³ One language expert states that “[c]ourtroom interpretation is a sophisticated art. It demands not only a broad vocabulary and instant recall, but also the ability to reproduce tone and nuance, and a good working knowledge of street slang.”⁸⁴

As a state and federal prosecutor and then as a state trial judge, I had the opportunity to witness the problems encountered by an accused and by the entire system of justice when an interpreter goes astray in his or her duties or when an interpreter misses the meaning entirely. The first case I will share is that of an accused facing a grand jury indictment for murder in a bar-fight stabbing. I was a state prosecutor, performing my duties as an appellate counsel, when a colleague asked me to interpret in the grand jury for a Latino accused. I did not feel at all comfortable. First, while Spanish was my first language, it was no longer my dominant language by 1977. Second, I sensed an immediate conflict. The grand jury prosecutor assured me that the accused agreed with his counsel to have me, a member of the very entity trying to indict him, serve as his interpreter.

Two positives arose from this tense encounter. First, I learned that there is an inherent linguistic prejudice in our system of justice. The Anglo foreman of the jury snapped at me as to why the accused could not communicate to them in English since he was somewhat bilingual. I interpreted the comments to the accused. He responded that he was uncomfortable with his English, especially when his life and liberty depended on it. The foreman continued his obstinate attitude, but he had to concede, since even the prosecutor in charge of the case wanted assistance. In response to the foreman's quite critical attitude, I told the grand jury that

82. *See id.* (emphasis added).

83. *See Garcia v. State*, 149 S.W.3d 135, 143 (Tex. Crim. App. 2004) (citing Virginia E. Hench, *What Kind of Hearing? Some Thoughts on Due Process for the Non-English-Speaking Criminal Defendant*, 24 T. MARSHALL L. REV. 251 (1999)).

84. Alain L. Sanders, *Libertad and Justice for All: A Shortage of Interpreters Is Leaving the Courts Speechless*, TIME, May 29, 1989, at 65.

a bilingual person in a stressful situation will better communicate in his dominant language. His nerves will sometimes obstruct his ability to “think” in his weaker language.⁸⁵

I proceeded to interpret that the accused did in fact intend to stab the deceased, but that he did so only after the victim, with whom he had an earlier verbal dispute, approached him in a threatening fashion with one arm behind his back. The accused thought that the victim might have been armed with a deadly weapon and he feared for his life. He reacted in self-defense. The second positive is that the grand jury refused to return a true bill, choosing not to indict the accused. An attempt to explain that story in his broken and limited English may have easily come across as a cold-blooded murder.

A second incident recalls my days as a federal prosecutor in the peonage prosecution of Benjamin Nelson in a Galveston, Texas federal court. A Spanish-speaking attorney represented Nelson. Since the majority of the Government’s witnesses spoke Spanish, the federal judge appointed an elderly bilingual person as the interpreter, even though he had no apparent training for this duty. The trial began and both defense counsel and I immediately noticed that the interpreter, an extremely pleasant and jovial man, was deviating from his duties. He would ask the witness in Spanish what I had asked in English well enough. However, he then began to converse with the witness, to get clarification perhaps. That is my job as a prosecutor. My concerns centered on the possible distortion of the evidence from having the interpreter perform the job of the lawyers in making the record. We approached the bench and informed the non-Spanish-speaking judge of what the interpreter did, and the judge released the “interpreter.” We successfully recommended a certified interpreter to continue with the trial.

A third and final incident deals with the necessity of an interpreter who has a good, working knowledge of both legal terminology and street slang. As a state trial judge in an urban setting, I noticed that the more capable interpreters were quickly committed to trials in a few of the thirty-seven high volume criminal courts of the county. Only these few were able to seize the limited number of highly capable interpreters while the other courts settled simply for anyone who could speak Spanish. Monolingual judges never discerned any problem.

Justice could not stop. The jury and the lawyers were waiting and

85. In 2008, I had the honor of addressing a group of lawyers and judges in Puebla, Mexico on their criminal justice reforms as they compare to our American system of justice. I faced an embarrassing situation when I faltered over a concept that I could not state in Spanish. I would obviously prefer to have lectured in English.

witnesses were lining up in the hallway. As a result, out of necessity, I once appointed a bilingual retired airline employee to interpret. He had learned Spanish while living and studying in Cuba. While any interpreter should be able to adjust to differences in the Spanish language spoken in various Latin and South American countries, this one could not.

We were in trial in a case that involved Mexican immigrant witnesses. A male witness testified that he addressed a young, unattractive girl by saying, “*ay mamacita*.” Normally, this comment would constitute a flirtatious-type compliment, but the circumstances indicated otherwise. The interpreter translated, “Oh, little mother.” The interpreter failed to grasp the situation, the culture, and the tone. I immediately called a recess and retired the gentleman from further service in the court.

What happens when an accused does not feel comfortable, or thinks his court appointed interpreter is not qualified? In *State v. Torres*, the court stated that “the decision to appoint an interpreter is based on the sound discretion of the trial court.”⁸⁶ Torres claimed he acted in self-defense, but he was convicted of murder and sentenced to life imprisonment.⁸⁷

The court appointed an interpreter to assist Torres, but she later became unavailable for trial.⁸⁸ The court then appointed Manuel Prince, but Torres tried to remove him on grounds that he “lacked the qualifications and expertise to serve as a trial interpreter.”⁸⁹ The judge denied his motion, and stated that Prince was qualified and had a sufficient command of the English language to be the court’s interpreter since he had taken English courses in college and previously served as a courtroom interpreter.⁹⁰ The Supreme Court of North Carolina held that the trial judge’s decision was not an abuse of discretion.⁹¹

Is an interpreter qualified if he or she speaks a different dialect from that of the accused? A Georgia court sentenced Roberto Ramos to eleven years for aggravated assault.⁹² Ramos filed a timely petition for writ of habeas corpus and then later a motion in which he requested an interpreter for his proceedings.⁹³ On the day of the hearing, the court delayed the hearing for an hour and a half to find an interpreter, a prison guard who knew

86. 368 S.E.2d 609, 611 (N.C. 1988).

87. *Id.* at 610-11.

88. *Id.* at 611.

89. *Id.*

90. *See id.* (noting that the interpreter was previously employed at several companies that required him to speak and understand English as part of his employment).

91. *Id.*

92. *Ramos v. Terry*, 622 S.E.2d 339, 340 (Ga. 2005).

93. *Id.* at 341.

Spanish.⁹⁴

Ramos appealed the denial of the writ, claiming that “the interpreter was not of Mexican descent and spoke a different dialect of Spanish . . . causing a communication gap that resulted in the termination of the habeas corpus hearing before Ramos presented all of his grounds for relief.”⁹⁵ The Supreme Court of Georgia held that the habeas court had abused its discretion by

appoint[ing] someone to serve as interpreter who is neither certified nor registered as an interpreter without ensuring that the person appointed is qualified to serve as an interpreter, without apprising the appointee of the role s/he is to play, without verifying the appointee’s understanding of the role, and without having the appointee agree in writing to comply with the interpreters’ code of professional responsibility.⁹⁶

The court also stated that there was no information on the record about the prison guard’s “background in language skills, e.g., whether she was a native of a country where Spanish is spoken, whether she was fluent in English, [and] whether she had previously translated in a court proceeding.”⁹⁷ Nevertheless, the court, despite its recognition of the habeas court’s abuse of discretion, ruled against Ramos, stating that Ramos waived objection to the interpreter’s qualifications by failing to raise the issue with the habeas court.⁹⁸ Our question is, what about the constitutional right to due process and fairness, and the ability in these common situations to address the Sixth Amendment protections of the right to confrontation and the effective assistance of counsel?

Simply being an experienced Spanish interpreter may not be enough to ensure that a defendant’s constitutional rights are protected. There are at least nineteen Spanish dialects.⁹⁹ Each dialect presents a potential language barrier to a Spanish speaker of a different dialect, a conflict that must be recognized by the court. For example, a Cuban man was convicted on drug charges when his interpreter stated for the record and the jury, “*Hombre, ni tengo diez kilos!*” which in Spanish means, “Man, I don’t even have ten kilos.”¹⁰⁰ However, a more experienced interpreter familiar with Cuban

94. *Id.*

95. *Id.*

96. *Id.* at 343.

97. *See id.* at 342 (finding additionally that the prison guard was not qualified because she never passed any interpreter exams in Georgia or any other state).

98. *Id.* at 343.

99. *See* Alexandre Rainof, *How Best to Use an Interpreter in Court*, 55 CAL. ST. B.J. 196, 196 (1980).

100. Michael B. Shulman, *No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 VAND. L. REV. 175, 176 (1993) (citing Sanders, *supra* note 84, at 65).

slang said the correct interpretation should be “Man, I don’t even have ten cents.”¹⁰¹ In a drug case, one word could be the difference between acquittal and life in prison.

V. CONCLUSION

The cases discussed above have one thing in common: an apparently monolingual trial court judge¹⁰² who is subjectively deciding whether to appoint an interpreter, whether an interpreter is qualified, or whether an interpreter is doing an adequate job. In *Flores v. State*, the trial judge denied an interpreter even though the accused nodded his responses¹⁰³ and his attorney described his client’s English as “very slow” and “halting,” as he was much more fluent in Spanish.¹⁰⁴ The court denied a request for an interpreter because “of the Defendant’s *obvious fluency* in the English language . . . both understanding and speaking.”¹⁰⁵ The judge based this finding on observations of the accused at a bond hearing.

The appellate court concluded that “the mere fact that an accused may be more fluent in speaking Spanish does not, in and of itself, make it incumbent upon a trial court to appoint an interpreter for an accused who speaks and understands the English language.”¹⁰⁶ The appellate court thus undermined the findings of “fluency”¹⁰⁷ by the trial court judge when it stated that fluency in Spanish does not require the provision of an interpreter. In a case like *Flores*, where evidence alerted all the participants to the limited linguistic abilities of the accused, the court needed to make a clearer record to avoid an abuse of discretion when a constitutional right is involved.

We renew our call for further research into this critical situation. While many different experts can study this area and provide meaningful findings, an obvious beginning is in the legal academy, in collaboration with

101. *Id.*

102. None of the cases mentioned in this article refer to a judge who claims knowledge of Spanish. My practice as a trial judge for sixteen years was to mention my bilingual abilities where appropriate for the record.

103. 509 S.W.2d 580, 581 (Tex. Crim. App. 1974).

104. *Id.*

105. *Id.* (emphasis added).

106. *Id.* My wife, who was born in Mexico, can respond to simple questions in limited English. After she immigrated to America, she reinforced her Spanish for twenty-five years living in South Texas along the Mexican border, until recently, when we married and she came to Houston. God forbid, but if she were charged with a crime, she would not qualify for an interpreter since under the *Flores* decision, she would be considered fluent in English. *Id.*

107. The word “fluent” is defined as “Ready in the use of words; voluble; ready; hence, flowing; smooth; facile; as, a *fluent* speaker.” WEBSTER’S NEW COLLEGIATE DICTIONARY 319 (1958).

language experts. These groups can conduct empirical research on this crucial question of the application of constitutional safeguards on the basis of evidence and not conjecture. While federal legislation does not bind state courts, a truly concerned member of the criminal justice system can begin with the language of the Federal Interpreter Act that provides protection for an accused who “*speaks only or primarily a language other than the English language* so as to inhibit such party’s comprehension of the proceedings or communication with counsel or the presiding judicial officer.”¹⁰⁸

The key question involved is the defendant’s ability to understand fully what is said in court. Where an accused does not understand what a witness is saying due to issues regarding a particular vernacular, the lack of an interpreter, or the presence of an unqualified interpreter, the unconstitutional results are the same.

Trial courts compromise the right to confrontation when judges do not err on the side of caution in making decisions about interpreters. Such judgments are often made by monolingual judges, in the absence of formal guidelines. Despite such a large Spanish-speaking population in the United States and all of the progress that has been made for Spanish-dominant and limited-English speakers, we as Latinos must continue to ask ourselves: is justice being done, or is the right to confrontation being compromised?

We close with a comment by the United States Supreme Court in a jury selection case where the prosecutor struck Spanish-speaking members of the panel on the basis of concerns that the bilingual Americans would not obey the oath to accept fully the interpreter’s translation. Even though the Court unfortunately provided a means to remove Latinos from juries on the basis of their bilingualism, the Court did make an interesting observation regarding the nation’s Spanish-speaking population:

[i]t would be common knowledge in the locality that a significant percentage of the Latino population speaks fluent Spanish, and that many consider it their preferred language, the one chosen for personal communication, *the one selected for speaking with the most precision and power*, the one used to define the self.¹⁰⁹

By the same token, if Spanish is the one selected for communication, it is also the language selected for understanding the content of the communication from witnesses. Courts need to recognize this as an essential component of the protections afforded by the Sixth Amendment and should appoint and utilize interpreters one hundred percent of the time in courtrooms accordingly. Until then, justice will not be actualized and

108. 28 U.S.C. § 1827(d)(1) (2006) (emphasis added).

109. *Hernandez v. New York*, 500 U.S. 352, 363-64 (1991) (emphasis added).

non-English dominant Latinos will remain lost in translation.