

# Why the Sixth Amendment Right to Counsel Includes an Out-of-Court Interpreter

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*ABSTRACT: The Sixth Amendment provides defendants the right to confer with counsel before trial and during recesses. The federal and most state court systems provide a court interpreter for in-court proceedings for indigent defendants who cannot speak English. However, neither the federal nor state systems provide an interpreter for out-of-court communications between attorneys and limited English proficiency (“LEP”) defendants. This Note argues that courts should provide out-of-court interpretation services for indigent, LEP defendants to protect their Sixth Amendment conferral rights.*

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## I. INTRODUCTION

The number of people in the United States who primarily speak a language other than English at home has steadily grown over the last thirty years.<sup>1</sup> Nearly 24.5 million people reported having some difficulty communicating in English.<sup>2</sup> These limited English proficiency (“LEP”)<sup>3</sup> individuals face difficult challenges in their interactions with the judicial system. LEP persons often require court interpreters to understand judicial proceedings and to participate in the judicial process.<sup>4</sup> Under most court systems in the United States, however, indigent LEP defendants are only entitled to communication assistance from court-appointed interpreters during formal, in-court criminal proceedings.<sup>5</sup> This leads LEP defendants to rely on inadequate substitutes for interpretation, such as police employees, co-defendants, and acquaintances who do not speak English fluently.<sup>6</sup> Consequently, LEP defendants may accept unfair plea bargains, fail to assert a valid defense at trial, or be falsely convicted due to an inability to investigate and strategize with their attorneys prior to the trial.<sup>7</sup>

In contrast to the right to an interpreter that courts have recognized only for in-court proceedings, the Supreme Court has held that the Sixth Amendment guarantees criminal defendants the right to confer with counsel before trial and during out-of-court recesses.<sup>8</sup> Courts do not recognize a corresponding right, however, for LEP defendants to have an interpreter appointed to facilitate these out-of-court communications.<sup>9</sup> The

1. HYON B. SHIN & ROBERT A. KOMINSKI, U.S. CENSUS BUREAU, LANGUAGE USE IN THE UNITED STATES: 2007, at 1 (2010), available at <http://www.census.gov/hhes/socdemo/language/data/acs/ACS-12.pdf>.

2. See *id.* at 3 (“Around 24.5 million people reported their English-speaking ability as something below ‘very well’ (that is, ‘well,’ ‘not well,’ or ‘not at all’).”).

3. The federal government defines LEP individuals as those “who do not speak English as their primary language and who have a limited ability to read, speak, write, or understand English.” *Frequently Asked Questions, LIMITED ENGLISH PROFICIENCY (LEP): A FEDERAL INTERAGENCY WEBSITE*, <http://www.lep.gov/faqs/faqs.html#OneQ1> (last visited May 27, 2014).

4. A court interpreter is an individual trained to render testimony or other speech in one language into a second language. Elena M. de Jongh, *Court Interpreting: Linguistic Presence v. Linguistic Absence*, FLA. B.J., July/Aug. 2008, at 21, 24. Interpreting can be done simultaneously (the interpreter renders the speech in the second language as it is given) or consecutively (the speaker pauses periodically to allow the interpreter to convey the speech in the second language). *Id.* at 26. Interpreting should be distinguished from translating, which is “the written rendition of textual information in one language by the equivalent textual material in another language.” *Id.*

5. See *infra* Part II.A (explaining the current state of interpreter laws).

6. See *infra* Part IV.A (describing cases of inadequate interpretation).

7. See *infra* Part IV (discussing cases in which lack of access to out-of-court interpretation had undesirable outcomes for LEP defendants).

8. See *infra* Part II.B (providing background on the evolution of the right to confer with counsel).

9. See *infra* Part II.A (demonstrating that courts generally appoint interpreters only for in-court proceedings).

result is that LEP defendants are forced to seek inadequate substitutes for interpretation or are denied their Sixth Amendment conferral right altogether.<sup>10</sup>

This Note argues that the Sixth Amendment guarantees indigent LEP defendants court-appointed interpreters for out-of-court communications with their attorneys.<sup>11</sup> Part II examines how the right to a court interpreter has evolved separately from the right to confer with counsel and how courts have yet to address the interrelatedness of the two rights. Part III considers the various rationales courts and the executive branch have given in support of providing court interpreters to indigent defendants and concludes that courts are generally motivated to implement the conferral and interpreter rights by similar considerations of fairness. Part IV demonstrates how the current system denies LEP defendants the right to confer with counsel, thereby producing undesirable results, including unreliable verdicts. Part V proposes that the next logical step in the evolution of the conferral and interpreter rights is for courts to recognize the right of indigent LEP defendants to access out-of-court interpretation services to confer with counsel. The Note concludes that courts must uphold the Sixth Amendment rights of all LEP defendants by ensuring access to court interpreters during both in-court and out-of-court proceedings.

## II. THE RIGHT TO AN APPOINTED INTERPRETER AT TRIAL AND THE RIGHT TO CONFER WITH COUNSEL

Neither the Supreme Court nor Congress currently recognizes the right to an appointed interpreter for out-of-court, attorney–client interactions. Thus far, the Supreme Court has acknowledged that criminal defendants have the right to out-of-court conferrals with their attorneys as part of their Sixth Amendment rights to counsel and a fair trial.<sup>12</sup> Because the Court recognizes a Sixth Amendment basis for the conferral right, the Constitution assures its equal application throughout the country.<sup>13</sup> Further, when the

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10. See *infra* Part IV (providing case examples in which LEP defendants were denied interpreters to aid in their right to confer with counsel).

11. At least one other scholar has also argued that out-of-court interpretation for indigent LEP defendants is already provided for under the Sixth and Fourteenth Amendments. See Joseph P. Van Heest, *Rights of Indigent Defendants in Criminal Cases After Alabama v. Shelton*, 63 ALA. LAW. 370, 371–72 (2002) (stating that felony defendants already have access to funds for expert witnesses and interpreters under the Sixth Amendment and arguing that the *Shelton* decision extends that right to misdemeanor defendants facing a suspended sentence as well).

12. U.S. CONST. amend. VI. The Sixth Amendment provides, in relevant part, that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” *Id.*; see also *infra* Part II.B (discussing the evolution of the conferral right out of the Sixth Amendment counsel guarantee).

13. See *Powell v. Alabama*, 287 U.S. 45, 59 (1932) (finding that the criminal defendant’s inability to communicate with his attorney prior to trial violated his right to assistance of counsel).

right to confer with counsel is denied, courts presume a prejudicial effect on the trial's outcome and reversal is more likely.<sup>14</sup> However, the Court has yet to acknowledge the constitutional basis of the right to an appointed court interpreter.<sup>15</sup> In contrast, Congress and various state legislatures have created the right to an appointed, *in-court* interpreter.<sup>16</sup> Because the state-created rights to interpreters are, at this point, grounded in statutory law, there is great variation among the states and between the state and federal court interpreter systems.<sup>17</sup> Additionally, appellate courts at both the state and federal level are highly deferential to trial court determinations regarding the need for an interpreter and the accuracy of interpretation.<sup>18</sup> The following Subpart explains and compares the federal and state statutes providing in-court interpretation. Part II.B analyzes the current law regarding the right to confer with counsel before trial and during court recesses.

A. *THE RIGHT TO AN APPOINTED INTERPRETER AT TRIAL AND DURING OTHER COURT PROCEEDINGS*

Federal law establishing court interpreter systems has created a degree of uniformity for LEP defendants, but states remain free to provide or deny access to interpreters as they deem necessary. This discrepancy results in defendants with similar language barriers receiving markedly different interpretation assistance, depending on which court hears their case.

1. The Federal System

Until the mid-twentieth century, neither courts nor legislatures recognized the right to a court-appointed interpreter for LEP defendants.<sup>19</sup> The decision to appoint an interpreter was largely dependent on the trial

14. See *Strickland v. Washington*, 466 U.S. 668, 687–96 (1984) (establishing the rule that a defendant must demonstrate actual prejudice to prevail on an ineffective assistance of counsel claim and creating limited exceptions for situations in which courts will presume prejudice); see also *infra* Part IV.B.

15. See *State v. Ibrahim*, 862 A.2d 787, 797 (R.I. 2004) (acknowledging the lack of a Supreme Court ruling on the right to a court interpreter).

16. See *infra* notes 27–33 and accompanying text (federal court interpreter statute); *infra* Part II.A.2 (state court interpreter statutes).

17. See *infra* Part II.A.1 (explaining the federal interpreter system). See generally Leslie V. Dery, *Disinterring the “Good” and “Bad Immigrant”: A Deconstruction of the State Court Interpreter Laws for Non-English-Speaking Criminal Defendants*, 45 U. KAN. L. REV. 837 (1997) (providing state-by-state analysis of the differences among interpreter statutes).

18. See generally Debra L. Hovland, Note, *Errors in Interpretation: Why Plain Error Is Not Plain*, 11 LAW & INEQ. 473, 481–87 (1993) (discussing deferential standards of appellate review of trial court interpreter determinations); see also *infra* Part IV.B (explaining standards of review for interpreter error and ineffective assistance of counsel).

19. Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. REV. 1, 2 (1990).

judge's discretion and the availability of a willing and able interpreter.<sup>20</sup> In 1970, however, the Second Circuit in *United States ex rel. Negron v. New York* recognized an indigent LEP defendant's need for an interpreter during trial.<sup>21</sup> The defendant in that case, Rogelio Nieves Negron, was indigent, poorly educated, and could neither speak nor understand English.<sup>22</sup> Although Negron was unable to communicate with his court-appointed attorney, the trial court provided only limited interpretation, permitting the prosecution's hired interpreter to summarize the proceedings for him during recesses.<sup>23</sup> The Second Circuit held that although the defendant did not request an interpreter, the trial court erred by failing to appoint one when it became apparent the defendant could not understand the proceedings.<sup>24</sup> The court reasoned that the lack of an interpreter effectively denied the defendant his Sixth Amendment rights to confront witnesses, consult with his attorney, and be present at his own trial, concluding that his "trial lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment."<sup>25</sup> Moreover, the court reasoned that as a "matter of simple humaneness, [the defendant] deserved more than to sit in total incomprehension as the trial proceeded."<sup>26</sup>

Following *Negron*, Congress enacted the Court Interpreters Act in 1978, which provided court interpreters to LEP criminal defendants during trial.<sup>27</sup> The Act requires federal judicial officers to utilize an interpreter for a defendant or witness who primarily speaks another language and cannot understand court proceedings.<sup>28</sup> Although the Act established a standardized rule requiring interpretation for LEP defendants, trial judges still retained a great deal of discretion.<sup>29</sup> Specifically, the Act requires the appointment of an interpreter only upon a judicial officer's *determination* that interpretation is necessary, prompted either by the defendant's request for an interpreter or the court's own decision that an interpreter is

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20. *See id.* ("[T]he appointment of an interpreter in a criminal proceeding was a matter resting solely in the trial court's discretion.")

21. *United States ex rel. Negron v. New York*, 434 F.2d 386, 390-91 (2d Cir. 1970).

22. *Id.* at 388.

23. *Id.*

24. *Id.* at 390-91.

25. *Id.* at 389 (quoting *United States ex rel. Negron v. New York*, 310 F. Supp. 1304, 1309 (E.D.N.Y. 1970)) (internal quotation marks omitted).

26. *Id.* at 390. The court also stated that "most of the trial must have been a babble of voices" to the defendant. *Id.* at 388.

27. 28 U.S.C. § 1827 (2012). The Act was amended in 1988 to clarify that the right to an interpreter applied to all "judicial proceedings," including pretrial hearings. *Id.* § 1827(j).

28. *Id.* § 1827(d). The Act also provides for interpretive services for hearing-impaired defendants and witnesses. *Id.*

29. *See id.* (stating that a judicial officer must provide an interpreter only "if the presiding judicial officer determines . . . that [a] party . . . 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").

necessary.<sup>30</sup> The only guidance the statute gives the judicial officer in deciding whether to appoint a court interpreter is to consider whether the defendant's English skills are so poor "so as to inhibit such party's comprehension of the proceedings or communication with counsel."<sup>31</sup> The language of the statute implies that "speak[ing] only or primarily a language other than . . . English" is not always enough to warrant an interpreter.<sup>32</sup> Rather, the judicial officer must make an independent judgment of whether the defendant's inability to speak fluent English inhibits his "comprehension of the proceedings or communication with counsel."<sup>33</sup> Judicial officers, therefore, have the discretion to determine that an LEP defendant is not inhibited by the language barrier, even if the defendant objectively speaks poor English and requests an interpreter.<sup>34</sup>

Although the *Negron* court's reasoning implicated various Sixth Amendment rights and Congress expressly acknowledged the importance of access to court interpreters by enacting the Court Interpreters Act, the Supreme Court has not yet recognized a constitutional right to an appointed court interpreter.<sup>35</sup> Rather, the Court has merely noted that access to an interpreter "is a matter largely resting in the discretion of the trial court" and reviewable only for abuse of discretion.<sup>36</sup>

## 2. State Interpreter Statutes

While the Court Interpreters Act provides a singular guideline for use in the federal courts, there is much greater variation among state interpreter laws.<sup>37</sup> Some states mirror the federal scheme, requiring the appointment of an interpreter upon a judicial determination that a defendant cannot

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30. *Id.* (stating that a judicial officer may appoint an interpreter "on such officer's own motion or on the motion of a party").

31. *Id.*

32. *Id.*

33. *Id.*

34. *See infra* note 42 (elaborating on judges' inability to accurately assess a defendant's fluency and need for interpretation).

35. Maxwell Alan Miller et al., *Finding Justice in Translation: American Jurisprudence Affecting Due Process for People with Limited English Proficiency Together with Practical Suggestions*, 14 HARV. LATINO L. REV. 117, 129 (2011).

36. *Perovich v. United States*, 205 U.S. 86, 91 (1907) (affirming that it was not error for the trial court to refuse to appoint an interpreter during the defendant's testimony when it appeared he answered questions adequately). The abuse-of-discretion standard is a weak protection for defendants because the Court Interpreters Act permits judicial officers to make an independent evaluation of the need for an interpreter. *See supra* notes 29–34 and accompanying text. With a standard that affords a great amount of discretion to judges, it is difficult for defendants to prove that judicial officers acted beyond their discretion.

37. *See generally* Dery, *supra* note 17 (analyzing differences in current state court interpreter laws); Miller et al., *supra* note 35, at 129–31 (describing various state interpreter laws and appointment rates among state courts).

comprehend the proceedings.<sup>38</sup> Other states afford even more discretion to judicial officers. For example, Delaware law provides only that “[t]he Court *may* appoint an interpreter of its own selection.”<sup>39</sup> The rule provides no guidance for judges making this determination.<sup>40</sup> Finally, a minority of states do not require the appointment of an interpreter for a criminal defendant at all.<sup>41</sup> In these states, trial judges must exercise a high degree of discretion in determining whether an indigent criminal defendant will have access to an interpreter.<sup>42</sup> This level of discretion is problematic because judges are not properly situated to assess a defendant’s level of fluency after only a few brief exchanges in the courtroom.<sup>43</sup> Additionally, a defendant’s ability to converse casually in English is not necessarily indicative of his or her ability to understand complex legal proceedings in English.<sup>44</sup>

### B. THE RIGHT TO CONFER WITH COUNSEL

The Sixth Amendment guarantees that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”<sup>45</sup> This right extends to criminal proceedings in state courts through the Due Process Clause of the Fourteenth Amendment.<sup>46</sup> Thus, unlike the right to a court interpreter, it is well-settled that in both state and federal criminal proceedings an accused has the right to assistance of

38. Dery, *supra* note 17, at 864–65.

39. DEL. CT. COMMON PLEAS CRIM. R. 28(b) (emphasis added).

40. *See id.*

41. *See* Miller et al., *supra* note 35, at 130 (noting that South Dakota only provides for witness interpretation and Wyoming statutes require an interpreter only for crime victims).

42. Michael B. Shulman, Note, *No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 VAND. L. REV. 175, 179–80 (1993). Relying on judicial discretion in appointing court interpreters is subject to numerous pitfalls:

The task of determining who may serve as an interpreter and when an interpreter is needed is left to the discretion of the trial court judge, and the frequent result is the appointment of an incompetent interpreter or no interpreter at all.

For the defendant’s right to an interpreter to be protected, the judge must recognize the need for an interpreter. Yet a judge often will have difficulty determining whether the defendant’s ability to speak English warrants the appointment of an interpreter. Some defendants have the ability to converse in very basic English but may not have the proficiency necessary to understand the level of English used at a trial. . . . Also, when the defendant speaks some English, judges may have little incentive to appoint an interpreter because the presence of the interpreter lengthens the trial. Furthermore, some judges are reluctant to authorize payment for interpreters who have to travel in from other states.

*Id.* at 179–80 (footnote omitted).

43. *Id.*

44. *See id.*

45. U.S. CONST. amend. VI.

46. *See* Gideon v. Wainwright, 372 U.S. 335, 342–45 (1963) (holding that the Sixth Amendment right to counsel is one of the fundamental due process rights incorporated by the Fourteenth Amendment).



counsel. The exact scope of what “assistance of counsel” entails has been the subject of much debate and has evolved with changing notions of fairness and equality.<sup>47</sup> The right to confer with counsel grew out of the general notion of effective assistance of counsel.

### 1. Supreme Court Recognition of the Conferral Right

The Supreme Court recognized that defendants are entitled to consult with their attorneys before trial as part of the Sixth Amendment right to counsel in *Powell v. Alabama*.<sup>48</sup> In *Powell*, a group of African American boys were charged with the rape of two white girls.<sup>49</sup> The trial court did not afford the defendants the time or opportunity to retain counsel; instead, the trial judge “appointed all the members of the bar for the purpose of arraigning the defendants.”<sup>50</sup> The court waited until the morning of trial to appoint specific counsel to represent the defendants.<sup>51</sup> The defendants were convicted and sentenced to death.<sup>52</sup>

On appeal, the Supreme Court recognized that denying the defendants the right to confer with counsel before trial seriously prejudiced their ability to put forth adequate defenses.<sup>53</sup> The Court emphasized that access to counsel during the pretrial stages was even more important than

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47. For example, the right to appointed counsel for indigent defendants evolved from applying only to felony proceedings to applying to any criminal proceeding in which an actual jail term is imposed on the defendant to applying to criminal proceedings in which even a suspended sentence is imposed on the defendant. *See Alabama v. Shelton*, 535 U.S. 654, 662 (2002) (affirming the “actual imprisonment” standard in which the right to counsel is triggered if the defendant, after conviction, is actually sentenced to jail *or* is sentenced to a suspended sentence for which jail time can be imposed (internal quotation marks omitted)); *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (holding that the right to appointed counsel extends beyond felony cases).

48. *Powell v. Alabama*, 287 U.S. 45, 59 (1932) (holding that the right to counsel includes the right to consult with one’s attorney before trial commences); *see also Strickland v. Washington*, 466 U.S. 668, 688 (1984) (imposing upon counsel an affirmative “dut[y] to consult with the defendant on important decisions and to keep the defendant informed of important developments”).

49. *Powell*, 287 U.S. at 49.

50. *Id.* It is unclear from the opinion how all the members of the bar were expected to represent the defendants. The practical effect, however, was that no member of the bar took responsibility for representing the defendants. *See id.* at 56–57.

51. *Id.* at 55–56. The court appointed one member of the local bar and permitted a lawyer from Chattanooga (sent by the defendants’ families) to aid the local lawyer. *Id.* Local counsel had not specifically handled the case prior to the day of the trial, and the attorney from Chattanooga stated on the record that he had not had time to prepare for trial, nor was he familiar with Alabama procedure or law. *Id.* at 55.

52. *Id.* at 50.

53. *See id.* at 57–58 (“The defendants . . . were thus put in peril of their lives within a few moments after counsel for the first time charged with any degree of responsibility began to represent them.”).

representation by counsel at trial.<sup>54</sup> Acknowledging that expediency and efficiency of the judicial process were important concerns, the Court nonetheless concluded that “a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense.”<sup>55</sup> The Court further noted that the defendant “requires the guiding hand of counsel at every step in the proceedings against him.”<sup>56</sup>

Since *Powell*, the Court has affirmed the right to confer with counsel and held that courts should limit the conferral right only in the rarest of circumstances.<sup>57</sup> In *Geders v. United States*, the trial judge ordered the defendant not to confer with his attorney during an overnight recess because the defendant was in the middle of testifying when the recess began.<sup>58</sup> The judge analogized the situation to the common practice of sequestering witnesses.<sup>59</sup> The Supreme Court disagreed, ruling that the conferral ban was improper.<sup>60</sup> The Court held that such bans are impermissible because a defendant will have many matters other than her testimony to discuss with counsel during a recess, whereas a non-party witness will have only his testimony to discuss with counsel.<sup>61</sup> A conferral ban serves its appropriate limited purpose with respect to a non-party witness, but risks impairing other important communications when applied to a testifying defendant.<sup>62</sup> Additionally, overnight recesses provide important breaks during which a defendant discusses and strategizes with his attorney.<sup>63</sup> Rather than banning all attorney–client communication, the Court stated that the trial judge should have found an alternative that did not infringe on the defendant’s conferral right.<sup>64</sup> The Court held that a

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54. *Id.* at 57 (“[D]uring perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.”).

55. *Id.* at 59.

56. *Id.* at 69.

57. *Geders v. United States*, 425 U.S. 80, 91 (1976).

58. *Id.* at 82.

59. *See id.* at 87 (“The aim of imposing ‘the rule on witnesses,’ as the practice of sequestering witnesses is sometimes called, is twofold. It exercises a restraint on witnesses ‘tailoring’ their testimony to that of earlier witnesses; and it aids in detecting testimony that is less than candid. Sequestering a witness over a recess called before testimony is completed serves a third purpose as well—preventing improper attempts to influence the testimony in light of the testimony already given.” (citation omitted)).

60. *Id.* at 91.

61. *Id.* at 88.

62. *See id.* at 88–89.

63. *Id.* at 88.

64. *Id.* at 91. The Court suggested that “coaching” was not a major concern because a skilled prosecutor could easily expose falsified testimony on cross-examination. *Id.* at 89–90

defendant's right to speak with his or her attorney is the most important concern,<sup>65</sup> and that a court should not deny a defendant this right during times when she needs to consult with her attorney.<sup>66</sup>

The right to confer applies to pretrial meetings in addition to mid-trial recesses.<sup>67</sup> While there is no minimum amount of time attorneys must spend conferring with their clients prior to trial, attorneys must confer long enough to fulfill the objectives of the conferral obligation.<sup>68</sup> It is the content of the conferral right, including the duties of pretrial investigation and client decision-making, that requires attorneys to consult with their clients before trial begins.

## 2. The Nature of the Conferral Right

The duty to confer compels attorneys to defer to their clients' wishes in certain circumstances.<sup>69</sup> The conferral requirement serves a variety of purposes:

First, it assures that the client will have the opportunity to assist with his own defense. . . . Second, the client's views and desires concerning the best course to be followed are relevant considerations that must be evaluated and taken into account by counsel. Without consultation, the views and desires of the client may not be known to counsel. Third, consultation serves to promote and maintain a cooperative client-counsel relationship.<sup>70</sup>

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(internal quotation marks omitted). Alternatively, the trial judge "may direct that the examination of the witness continue without interruption until completed" even if it involved postponing recesses. *Id.* at 90–91.

65. *See id.* at 91 ("To the extent that conflict remains between the defendant's right to consult with his attorney during a long overnight recess in the trial, and the prosecutor's desire to cross-examine the defendant without the intervention of counsel, with the risk of improper 'coaching,' the conflict must, under the Sixth Amendment, be resolved in favor of the right to the assistance and guidance of counsel.").

66. The Court limited its holding to the "17-hour overnight recess" at hand, refusing to address whether a communication ban might be appropriate in other circumstances. *Id.* Thirteen years later, the Court again addressed the issue, this time with a shorter recess at stake. *Perry v. Leeke*, 488 U.S. 272, 274 (1989). The Court upheld a conferral ban during a fifteen-minute recess that occurred during the defendant's testimony. *Id.* at 284–85. The Court distinguished *Ceders* by stating that a brief, fifteen-minute recess "was of a different character" than an overnight recess during which a defendant has an expectation of being able to discuss a variety of matters with counsel. *Id.* at 284. Despite the distinction, the Court reaffirmed the defendant's "absolute right" to consult with his lawyer while not on the stand. *Id.* at 281.

67. *See Mitchell v. Mason*, 325 F.3d 732, 744 (6th Cir. 2003) ("The Sixth Amendment guarantees more than a pro forma encounter between the accused and his counsel . . .").

68. *See id.* at 747.

69. *See* WAYNE R. LAFAVE ET AL., PRINCIPLES OF CRIMINAL PROCEDURE: POST-INVESTIGATION § 3.6(a) (2d ed. 2009) (explaining the difference between strategic decisions that can be made by counsel alone and personal decisions that require client input).

70. *Gov't of the V.I. v. Weatherwax*, 77 F.3d 1425, 1436 (3d Cir. 1996).

Furthermore, the ABA Model Rules of Professional Conduct impose an affirmative duty on attorneys to confer with their clients.<sup>71</sup> In addition to keeping one's client informed of the status of the case, an attorney must "consult with the client about the means by which the client's objectives are to be accomplished."<sup>72</sup> Although attorneys may decide issues of strategy unilaterally, the ABA considers certain substantive decisions to be so fundamental that clients must remain the ultimate decision-makers.<sup>73</sup> Among the fundamental decisions that attorneys must permit clients to make are the decision to plead guilty, the decision to waive constitutional rights, and whether to testify.<sup>74</sup>

### III. THE RIGHT TO CONFER AND ACCESS TO AN INTERPRETER: PROTECTING FAIRNESS FOR DEFENDANTS

Courts employ similar language in support of the right to confer with counsel and the right to a court interpreter, drawing on notions of fairness and equality in the judicial system.<sup>75</sup> Specifically, they have justified these two rights by asserting the need to protect vulnerable defendants,<sup>76</sup> the need to prevent government oppression,<sup>77</sup> and the concept of fairness as an inherent part of the American judicial system.<sup>78</sup> The President and Department of Justice have also recognized that out-of-court interpreter services are essential to fairness in our court systems, but the executive branch's attempts to improve interpreter services have been minimally successful.<sup>79</sup>

#### A. PROTECTING VULNERABLE DEFENDANTS

Concern for protecting defendants who are disadvantaged or otherwise unable to effectively represent themselves underlies many court decisions recognizing the right to an interpreter and the right to confer with counsel. For example, in *Powell*, the Court emphasized that the defendants were relatively young, alone in a faraway state, and African American.<sup>80</sup> Implicit in the Court's decision is the concern that these defendants were convicted

71. MODEL RULES OF PROF'L CONDUCT R. 1.4 (2011).

72. *Id.* R. 1.4(a)(2).

73. LAFAVE ET AL., *supra* note 69, § 3.6(a); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) ("[A] lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued.").

74. LAFAVE ET AL., *supra* note 69, § 3.6(a); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2(a).

75. *See* Shulman, *supra* note 42, at 178 ("Given that the court interpreter is the crucial link between the non-English speaking defendant and the jury, such a defendant cannot be tried *fairly* without a competent interpreter." (emphasis added)).

76. *See infra* Part III.A.

77. *See infra* Part III.B.

78. *See infra* Part III.C.

79. *See infra* Part III.D.

80. *Powell v. Alabama*, 287 U.S. 45, 51-52 (1932).

because of their collective status as second-class citizens, rather than by the weight of the evidence.<sup>81</sup> Similarly, in *Negron*, the Second Circuit noted that the defendant was foreign-born, indigent, and poorly educated.<sup>82</sup> Without the means to hire an interpreter and without English language skills of his own, *Negron* was tried and convicted without truly comprehending the proceedings.<sup>83</sup> In stating that *Negron* was denied his Sixth Amendment right to be present at trial because he did not speak or understand English, the Second Circuit acknowledged that a *meaningful* understanding of legal proceedings was a key concept of fairness to the defendant.<sup>84</sup>

Aside from special characteristics such as race, social status, and English fluency that might disadvantage a defendant, courts worry that even the average white, middle-class, English-speaking defendant might be unable to understand the judicial process without the professional aid of counsel:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with [a] crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.<sup>85</sup>

Similarly, the *Geders* Court referred to the average defendant as “ill-equipped to understand and deal with the trial process without” the aid of counsel.<sup>86</sup>

81. See *id.* at 52. After noting the demographic characteristics of the defendants, the Court stated that, however guilty the defendants may have been, or whatever their status as young, out-of-town African Americans, it was nevertheless the duty of the trial court “to see that they were denied no necessary incident of a fair trial.” *Id.* The plain import of this admonition is that the trial court failed in this duty by presuming the defendants’ guilt based on their aforementioned characteristics.

82. United States *ex rel.* *Negron v. New York*, 434 F.2d 386, 388 (2d Cir. 1970).

83. *Id.*

84. *Id.* at 389. Elena M. de Jongh has termed this meaningful understanding “linguistic presence.” de Jongh, *supra* note 4, at 21. Her definition of “linguistic presence” helps shed light on the *Negron* court’s underlying motives:

A number of courts have ruled that a defendant’s physical presence in the courtroom is not enough to constitute legal presence; for a defendant in criminal matters to be “meaningfully present,” everything that is being said in the case must be communicated in a language he or she can understand. This concept, known as “linguistic presence,” requires the services of a qualified foreign-language interpreter for non-English speakers and a sign language interpreter for the hearing-impaired.

*Id.*

85. *Powell*, 287 U.S. at 69.

86. *Geders v. United States*, 425 U.S. 80, 88 (1976).

Underlying these decisions is the recognition that the legal system is complex; the aid of counsel is not merely advantageous to the criminal defendant, but fundamental to the concept of fairness. When establishing the right to appointed counsel for all criminal defendants in *Gideon v. Wainwright*, the Supreme Court called it an “obvious truth” that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”<sup>87</sup> In holding that the Sixth Amendment right to counsel was a fundamental element of due process, the *Gideon* Court affirmed that *all* criminal defendants deserve the right to representation.<sup>88</sup> Ensuring the right to counsel for all defendants also enables the courts to protect the integrity of the trial itself, preventing the government from benefitting from a vulnerable, unprotected defendant.

### B. PREVENTING GOVERNMENT OPPRESSION

Courts’ recognition of the conferral and interpreter rights displays a desire to protect defendants from government oppression in the judicial process. In holding that the court could not presume the defendant had waived his right to an interpreter simply by his silence, the *Negron* court noted that defendants are not always aware of their rights and the state should not benefit from their ignorance.<sup>89</sup> The court emphasized the unfairness of presuming that *Negron* waived his interpreter right “by his passive acquiescence in the grinding of the judicial machinery.”<sup>90</sup> Foreign-born defendants lack familiarity with the American judicial system and are “unaccustomed to asserting ‘personal rights’ against the authority of the judicial arm of the state, [and] may well not have . . . the slightest notion that [they have] any ‘rights’ or [the] ‘privilege’ to assert [such rights].”<sup>91</sup>

Courts have also used historical examples of oppression to criticize the American judicial system for denying the conferral and interpreter rights. For example, the *Powell* Court denounced the English common-law practice of denying counsel in criminal prosecutions, calling it an oppressive doctrine.<sup>92</sup> Additionally, the Court held that conferring with counsel was essential to a fair hearing and that denial of this process “is judicial usurpation and oppression, and never can be upheld where justice is justly administered.”<sup>93</sup> Through decisions like *Negron* and *Powell*, the courts have made it clear that the right to confer with counsel and the right to a court

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87. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

88. *Id.*

89. *See Negron*, 434 F.2d at 390.

90. *Id.*

91. *Id.*

92. *Powell v. Alabama*, 287 U.S. 45, 64–65 (1932) (citing *Holden v. Hardy*, 169 U.S. 366, 386 (1898)).

93. *Id.* at 68 (quoting *Galpin v. Page*, 85 U.S. (18 Wall.) 350, 369 (1873)) (internal quotation marks omitted).

interpreter are essential to protecting criminal defendants from government oppression.

C. UPHOLDING THE VALUES OF THE AMERICAN JUDICIAL SYSTEM

Finally, when courts recognize defendants' conferral and interpreter rights, they are often motivated by the desire to protect the integrity of the American judicial system itself. The Supreme Court stated, "[t]he right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."<sup>94</sup> The *Powell* Court denounced the "casual fashion" in which the trial court deprived the defendants of the right to confer with counsel.<sup>95</sup> It held that the trial court's meager attempt to secure counsel for the defendants failed to fulfill the requirement of their constitutional right to counsel "in any proper sense."<sup>96</sup> Although the Court was concerned with the defendants' rights, this portion of the opinion reflects a concern with maintaining the formality and solemnity of proper judicial practice.<sup>97</sup> The distaste with which the Court regarded the trial court's "casual" practice indicates that the Court valued formal court procedure itself, finding it necessary to the concept of fairness.

Similarly, the *Negron* court upheld what it considered fundamental American values when it declared that Negron's status as an immigrant and non-English speaker could not deprive him of his basic rights at trial.<sup>98</sup> The court went on to say, "[p]articularly inappropriate in this nation where many languages are spoken is a callousness to the crippling language handicap of a newcomer to its shores, whose life and freedom the state by its criminal processes chooses to put in jeopardy."<sup>99</sup> This invocation of America's history of immigration indicates the court's opinion that judicial fairness must accommodate the diversity upon which the United States prides itself as a society.

Finally, both the *Negron* and *Powell* opinions reference the concept of "humaneness." In discussing the history of the right to counsel, the *Powell* Court quoted Blackstone, criticizing the denial of counsel "as not in keeping with the rest of the humane treatment of prisoners."<sup>100</sup> The *Negron* court condemned the trial court's failure to grant Negron an interpreter in moral

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94. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

95. *Powell*, 287 U.S. at 56. The Court referred specifically to the trial court's informal appointment of the entire bar to represent the defendants, rather than formally appointing one attorney to represent the defendants throughout the whole proceeding. *See supra* notes 50-51 and accompanying text.

96. *Powell*, 287 U.S. at 56.

97. *See id.* (stating that the trial court's half-hearted designation of counsel lacked the "clear appreciation of responsibility" or "sense of duty" implicit in the constitutional right).

98. *United States ex rel. Negron v. New York*, 434 F.2d 386, 390 (2d Cir. 1970).

99. *Id.*

100. *Powell*, 287 U.S. at 60.

terms: “Not 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.”<sup>101</sup> The courts’ statements on fairness and humaneness reflect two ideas: first, that the judicial system is basically “fair,” especially in comparison with historical or foreign criminal tribunals; and second, that denying defendants their necessary rights (like the right to confer and the right to an interpreter) threatens to undermine this fairness.<sup>102</sup> These principles of fairness and equality, espoused in the Sixth Amendment and required by due process, are integral components of the judicial system and are embraced by the judiciary and the executive alike.

D. EXECUTIVE BRANCH RECOGNITION OF THE RIGHT TO AN OUT-OF-COURT  
INTERPRETER

Although the judicial reasoning supporting both interpreter and conferral rights is similar, courts have yet to acknowledge the need for out-of-court interpretation.<sup>103</sup> The executive branch, however, has been more proactive in making federally sponsored services, such as public benefits programs, healthcare, and courts, accessible to LEP defendants. In 2000, President Bill Clinton signed Executive Order 13,166 entitled “Improving Access to Services for Persons with Limited English Proficiency.”<sup>104</sup> The Order requires all federal agencies and state agencies that receive federal funds to “implement a system by which LEP persons can meaningfully access [the agencies’] services.”<sup>105</sup> The Order states that failure to provide LEP access to federally sponsored services could violate Title VI of the Civil Rights Act of 1964 for discriminating on the basis of national origin.<sup>106</sup>

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101. *Negron*, 434 F.2d at 390 (emphasis added).

102. *See* *Gideon v. Wainwright*, 372 U.S. 335, 342–44 (1963) (holding that the Due Process Clause of the Fourteenth Amendment requires states to appoint counsel to indigent defendants as part of the Sixth Amendment right to counsel, designed to ensure fundamentally fair trials).

103. *See supra* Part II.

104. Exec. Order No. 13,166, 3 C.F.R. § 289 (2001).

105. *Id.*

106. *Id.* In 2001, the Supreme Court issued *Alexander v. Sandoval*, eliminating private causes of action for violations of the Civil Rights Act. *Alexander v. Sandoval*, 532 U.S. 275 (2001). The Department of Justice maintains that Executive Order 13,166 remains valid despite the *Sandoval* ruling, although other commentators have disagreed. Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,458 (June 18, 2002). For a more in-depth discussion of the implications of the *Sandoval* decision, see Adele P. Kimmel et al., *The Sandoval Decision and Its Implications for Future Civil Rights Enforcement*, FLA. B.J., Jan. 2002, at 24.



The Department of Justice created a guidance document to accompany the Order.<sup>107</sup> The document, available to all recipients of federal funds, recommends methods to standardize the implementation of LEP access.<sup>108</sup> In its recommendations to the courts, the Department of Justice specifically acknowledges the importance of court interpreters to uphold LEP defendants' out-of-court consultation right: "When a recipient court appoints an attorney to represent an LEP defendant, the court should ensure that either the attorney is proficient in the LEP person's language *or that a competent interpreter is provided during consultations* between the attorney and the LEP person."<sup>109</sup> This seemingly unequivocal statement in support of out-of-court interpretation rights is tempered, however, by the balancing test the Department sets forth for recipient agencies.<sup>110</sup> The test is designed to create "a flexible and fact-dependent standard" that is individualized to each agency's situation.<sup>111</sup> It permits agencies to consider both financial constraints and the number of LEP persons using the services in the area in deciding what measures to take to implement LEP access.<sup>112</sup> This means that in areas with lower LEP populations or in underfunded regions, interpreter accessibility for LEP defendants is a low priority.<sup>113</sup> This balancing test makes

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107. See generally Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455. The 2002 guidance document replaced the prior version published January 16, 2001. *Id.* at 41,455.

108. *Id.* at 41,457-58.

109. *Id.* at 41,471 (emphasis added).

110. *Id.* at 41,459.

111. *Id.*

112. *Id.* The entire four-prong test is as follows:

- (1) The number or proportion of LEP persons eligible to be served or likely to be encountered by the program or grantee; (2) the frequency with which LEP individuals come in contact with the program; (3) the nature and importance of the program, activity, or service provided by the program to people's lives; and (4) the resources available to the grantee/recipient and costs.

*Id.*

113. Since 2000, the Department of Justice has investigated lawsuits and complaints about lack of LEP accessibility and drafted memoranda of agreement with a number of agencies regarding their compliance with LEP accessibility standards. *DOJ Agreements and Resolutions*, U.S. DEP'T JUST., <http://www.justice.gov/crt/about/cor/agreements.php> (last updated Feb. 20, 2013). In the agreements, the agencies reaffirm their commitment to implementing LEP accessibility. See *id.* While three of the agreements are with courts or judicial branches, none of these agreements deals specifically with the right to an interpreter for out-of-court consultation. See *id.* Although the investigations resulting in the agreements were prompted by complaints of noncompliance, most of the agreements do not admit actual violations, focusing instead on future efforts to implement LEP access. See, e.g., Memorandum of Agreement Between the United States of America and the Colorado Judicial Department 1 (June 28, 2011), available at [http://www.justice.gov/crt/about/cor/agreements/Colorado\\_MOA\\_6\\_28\\_11.pdf](http://www.justice.gov/crt/about/cor/agreements/Colorado_MOA_6_28_11.pdf) (setting forth remedial actions for the future while stating, "[t]his Memorandum of Agreement (MOA) does not constitute an admission with regard to any specific allegations investigated in this matter").

the Department of Justice's mandate largely ineffective, since recipient agencies retain discretion to forego implementing LEP access.

Court compliance with Executive Order 13,166 has been incomplete and uneven. Ten years after the Executive Order was issued, the Assistant Attorney General for the Department of Justice, Civil Rights Division, Thomas E. Perez, addressed the courts' lack of progress in providing meaningful access for LEP defendants in a letter addressed to the state chief justices and court administrators.<sup>114</sup> Perez's letter, like the Department of Justice's 2002 guidance document, addressed the need for an LEP defendant to be able to consult with her attorney out of court:

Criminal defense counsel . . . and other such individuals who are employed, paid, or supervised by the courts, and who are required to communicate with LEP parties or other individuals as part of their case-related functions, must possess demonstrated bilingual skills or have support from professional interpreters. In order for a court to provide meaningful access to LEP persons, it must ensure language access in *all* such operations and encounters with professionals.<sup>115</sup>

Perez admonished the courts for failing to comply with Executive Order 13,166 and Title VI, noting their lack of progress in the decade since the order was issued<sup>116</sup> and denouncing budgetary concerns as an unacceptable excuse for noncompliance.<sup>117</sup>

Some state judicial administrators disagreed with Perez's interpretation of Executive Order 13,166 and Title VI as requiring interpreters outside the courtroom.<sup>118</sup> The Conference of Chief Justices and Conference of State Court Administrators, however, passed a resolution expressing support for an ABA resolution entitled "Standards for Language Access in the Courts" (formally adopted in ABA Resolution 113).<sup>119</sup> The Resolution sets out a

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114. Letter from Thomas E. Perez, Assistant Att'y Gen., U.S. Dep't of Justice, to Chief Justices/State Court Administrators 1 (Aug. 16, 2010), *available at* <http://www.courts.mo.gov/file.jsp?id=56442> ("[T]he Department of Justice (DOJ) continues to encounter state court language access policies or practices that are inconsistent with federal civil rights requirements.").

115. *Id.* at 3 (emphasis added).

116. *Id.* at 4 ("Reasonable efforts by now should have resulted in significant and continuing improvements for all recipients.").

117. *Id.* at 3 ("Language services expenses should be treated as a basic and essential operating expense, not as an ancillary cost."). Perez went on to state that "[f]iscal pressures . . . do not provide an exemption from civil rights requirements." *Id.* at 4.

118. Dave Collins, *Feds, States in Dispute over Court Interpreters*, YAHOO! NEWS (July 17, 2011, 12:29 PM), <http://news.yahoo.com/feds-states-dispute-over-court-interpreters-160137216.html> ("State judicial officials don't dispute the right of people to interpreters in the courtroom, but they take issue with claims that states must provide free interpreters in . . . non-courtroom settings.").

119. Conference of Chief Justices & Conference of State Court Adm'rs, Resolution: In Support of Passage of *Standards for Language Access in the Courts* per ABA Resolution 113 (Dec. 8,

series of standards “intended to assist courts in designing, implementing, and enforcing a comprehensive system of language access services.”<sup>120</sup> It suggests courts appoint an interpreter to facilitate communication between an LEP defendant and her appointed counsel.<sup>121</sup> The ABA further states that *all* lawyers have an affirmative duty to “communicate with their clients in a language the client understands” as part of the attorney’s duty to provide effective assistance of counsel.<sup>122</sup> The Resolution does not clarify, however, who should pay for the interpreter’s out-of-court services.<sup>123</sup>

ABA Resolution 113 requires, at a minimum, the appointment of an interpreter for out-of-court communication between a defendant and appointed counsel and advocates for effective communication during all attorney–client interactions. The Conference of Chief Justices and Conference of State Court Administrators both supported the passage of Resolution 113, but in its own report, the Conference of State Court Administrators specifically disavowed the right to out-of-court interpreters.<sup>124</sup> The Conferences’ positions with respect to the right to an appointed interpreter for out-of-court consultations therefore remain unclear. Despite the judiciary’s recognition of the importance of in-court interpretation and the executive branch’s acknowledgment that out-of-court interpreter services are also necessary for adequate representation, the right of access to out-of-court interpretation remains unclear and elusive.

#### IV. THE INTERPRETER AND CONFERRAL RIGHTS IN PRACTICE

Courts are reluctant to acknowledge the need for out-of-court interpretation, but a number of recent cases demonstrate how the violation of an LEP defendant’s consultation right produces undesirable results.

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2011), *available at* <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/12082011-Access-Justice-Passage-Standards-for-Language-Access.ashx>.

120. ABA, Resolution 113: Standards for Language Access in Courts 1 (Feb. 6, 2012), *available at* [http://www.americanbar.org/content/dam/aba/administrative/house\\_of\\_delegates/resolutions/2012\\_hod\\_midyear\\_meeting\\_113.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_midyear_meeting_113.authcheckdam.pdf).

121. *Id.* at 63–64.

122. *Id.* at 64 n.203.

123. *See id.* at 63–64 (failing to address payment for out-of-court interpretation).

124. CONFERENCE OF STATE COURT ADM’RS, WHITE PAPER ON COURT INTERPRETATION: FUNDAMENTAL TO ACCESS TO JUSTICE 18 (2007), *available at* <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/CourtInterpretation-FundamentalToAccessToJustice.ashx>. The Paper relied on established case law as the basis for a criminal defendant’s right to an in-court interpreter, noting that courts have held interpreters essential “to cover jury instructions and sentencing, as well as arraignment, entry of a guilty plea, and hearings such as those to change a plea . . . although not necessarily . . . to the defendant’s out-of-court discussions with privately retained counsel.” *Id.* (citations omitted). Presumably, the Paper did not address the right to an interpreter to aid in a defendant’s right to consult with an *appointed* attorney out-of-court because no case law establishes such a right. *See supra* Part II.A (providing background explaining courts have yet to recognize the right to an appointed, out-of-court interpreter).

Without an appointed interpreter, defendants are forced to rely on inadequate substitutes that can lead to conflicts of interest or misunderstandings. Additionally, courts do not agree on the proper standard of review for out-of-court interpretation problems, and jurisdictions differ on which entity must pay for out-of-court interpreters.

A. *CONFLICTS OF INTEREST IN THE ABSENCE OF QUALIFIED AND APPOINTED OUT-OF-COURT INTERPRETERS*

When a court denies an LEP defendant an interpreter to facilitate consultation with his attorney before proceedings, the defendant often must resort to inadequate substitutes to communicate with counsel. For example, a 2002 Colorado case, *People v. Cardenas*, demonstrates how a lack of access to out-of-court interpretation can lead to harmful conflicts of interest.<sup>125</sup> Benjamin Cardenas, an LEP defendant, was charged with driving under the influence.<sup>126</sup> The interpreter at his plea hearing was not only uncertified, but intended to testify against Cardenas in a different case and was employed by the local sheriff's department.<sup>127</sup> An attorney present in the courtroom during Cardenas's sentencing hearing recognized that the interpreter's bias presented a possible defense of a coerced plea and volunteered to represent the defendant pro bono.<sup>128</sup> The attorney could not speak Spanish, but the court would not permit her to use a court interpreter to confer with her client regarding the possible defense.<sup>129</sup> The court held that pursuant to Chief Justice Directive 90-01,<sup>130</sup> the state would provide

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125. *People v. Cardenas*, 62 P.3d 621 (Colo. 2002).

126. *Id.* at 621.

127. *Id.* at 626 (Hobbs, J., dissenting).

128. *Id.* at 623. It is unclear why Cardenas was not represented by counsel at his plea hearing, but the dissent speculates that he might not have qualified for appointed representation because the prosecutor was seeking a suspended sentence, not actual jail time. *Id.* at 626 & n.3. The *Cardenas* decision came in the same year as the Supreme Court's *Alabama v. Shelton* decision, which held that suspended jail sentences could not be imposed unless defendants were appointed representation. *See supra* note 47. It is likely that at the time of Cardenas's plea, a suspended jail sentence did not require the appointment of an attorney.

129. *Cardenas*, 62 P.3d at 623-24 (Hobbs, J., dissenting). In addition to denying her an interpreter to facilitate communication with her client, the judicial district's administrator rebuked the pro bono attorney for wasting the court interpreter's time and costing the court money while she attempted to clarify her client's situation. *Id.* at 624. The dissent cites a letter sent from the judicial district's administrator to the pro bono attorney: "The Judicial Department pays for *in-court* language interpreting. . . . As a convenience to the interpreter and to eliminate additional tracking of time for a few minutes, a hallway plea bargain *that interrupts court proceedings* is also paid through mandated costs." *Id.* (alterations in original) (internal quotation marks omitted). It is not apparent from the excerpt that the court administrator ever considered that simply letting the attorney use the court interpreter to confer with her client would have lessened the delay and diminished the costs.

130. OFFICE OF THE CHIEF JUSTICE, SUPREME COURT OF COLO., CHIEF JUSTICE DIRECTIVE 90-01: DIRECTIVE CONCERNING COURT APPOINTMENT AND COMPENSATION OF LANGUAGE INTERPRETERS (amended Aug. 16, 2001) (repealed & replaced by Chief Justice Directive 06-03), *reprinted in* COLO.

interpreters only to indigent defendants utilizing the public defender system, not to those represented by pro bono attorneys.<sup>131</sup> By the court's own admission, the attorney was "unable to have any substantive communication with her client" and "[h]er only information regarding the case was derived from her discussions with one of Defendant's friends, who apparently [spoke] some English."<sup>132</sup> Ultimately, the attorney was unable to ascertain enough information to determine if Cardenas should withdraw his guilty plea and Cardenas was sentenced instead.<sup>133</sup>

Cardenas's case is an unfortunate example of the undesirable results that occur when an LEP defendant is denied the right to confer with counsel. First, Cardenas was not afforded a neutral interpreter for his plea bargain and was unable to bring this conflict to the court's attention because he could not consult with his pro bono attorney. Second, although it was likely that Cardenas was indigent because he was unrepresented until the pro bono attorney volunteered, the court denied him an interpreter outright and refused to make an independent finding of indigency.<sup>134</sup> As the dissent indicates, this decision discourages pro bono representation by forcing interpreter costs upon the volunteering attorney.<sup>135</sup> Finally, the pro bono attorney was forced to resort to an insufficient alternative to communicate with Cardenas—the defendant's questionably bilingual friend—and was unable to ascertain sufficient information to present the defense to the court.<sup>136</sup> The result was that the court sentenced Cardenas on incomplete facts and an undeveloped defense due to his inability to communicate with his attorney. As the dissent notes, courts should provide interpreter services to "aid the just resolution of the case."<sup>137</sup> Denying a defendant access to interpreter services prevents her from conferring with counsel, inevitably leading to an unjust result.

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LAW., Nov. 2001, at 126. The Directive provides for state-paid interpreters for all "court proceedings" and defines that term "as any hearing or proceeding which takes place in a courtroom or in a judge's chambers, including the occurrence of a 'hallway plea bargain' that takes place in the midst of a court hearing." *Id.* The Directive further provides for the discretionary appointment of an additional interpreter to aid the defendant "when there is a finding of indigency as to that individual." *Id.* The dissent states that while a finding of indigency is a necessary prerequisite to the appointment of a public defender, Directive 90-01 does not require the court to use the same standard of indigency for the appointment of a public defender as for a court interpreter. *Cardenas*, 62 P.3d at 624 (Hobbs, J., dissenting). Therefore, if the defendant was ineligible for a public defender due to the fact that his potential sentence did not include jail time, nothing in the executive order prohibited the court from making a separate finding of indigency for the sake of appointing an interpreter. *See id.*

131. *Cardenas*, 62 P.3d at 623 (Hobbs, J., dissenting).

132. *Id.* at 622 (majority opinion).

133. *Id.*

134. *Id.* at 624 (Hobbs, J., dissenting).

135. *Id.* at 625-26.

136. *Id.* at 622 (majority opinion).

137. *Id.* at 626 (Hobbs, J., dissenting).

In *Cardenas*, the friend who tried to help the defendant communicate with his attorney was unable to provide accurate interpretation because of his language skills.<sup>138</sup> In other situations in which a defendant lacks access to an appointed, out-of-court interpreter, the defendant may have to use an interpreter with adequate language skills but who has an ulterior motive to provide inaccurate interpretation. For example, in *Alcazar v. Hill*, a freelance interpreter hired by the police department interpreted a police interview in which the defendant made inculpatory statements that contradicted his previous claims of innocence.<sup>139</sup> At trial, the same police interpreter testified about the questioning officer's demeanor during the interrogation, calling him "100 percent kind, total gentleman, very friendly."<sup>140</sup> The defendant alleged that the interpreter's testimony constituted "vouching" for the officer, in violation of the interpreters' professional ethics code requiring interpreters to remain impartial.<sup>141</sup> The court held that the ethics code was inapplicable to the interpreter because she provided interpretation during a police interview and the code was binding only upon "interpreters providing services 'in the courts.'"<sup>142</sup> The court's holding demonstrates that in the absence of the right to an out-of-court interpreter, a criminal defendant may be forced to use the services of a biased interpreter who is not bound by any ethical code.

The court's refusal to provide an out-of-court interpreter led to a conflict of interest with similarly negative results for the petitioner, Alvaro Bernal Medina, in *United States v. Medina*.<sup>143</sup> During plea discussions with his attorney, Medina's co-defendant acted as the interpreter.<sup>144</sup> As a result of these conversations, Medina pled guilty to three counts of robbery.<sup>145</sup> Medina moved to vacate his sentence, arguing that the co-defendant

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138. See *supra* note 132 and accompanying text.

139. *Alcazar v. Hill*, 98 P.3d 1121, 1122-23 (Or. Ct. App. 2004). The same officer conducted both interviews, but it appears that the court interpreter at issue interpreted only for the latter interview. *Id.* at 1122.

140. *Id.* at 1123 (internal quotation marks omitted).

141. *Id.* at 1125-26 (internal quotation marks omitted).

142. *Id.* at 1126 (emphasis added). The court alternatively held that the interpreter's statements did not constitute impermissible vouching because they were offered on rebuttal and pertained only to the interpreter's direct observations rather than inadmissible character evidence. *Id.* at 1125. The court further emphasized that the interpreter was not acting in her official role as a court interpreter during either the police interview or while testifying at trial. *Id.* at 1126. The court did not address the scenario in which a court interpreter acting in her official role is subsequently called to testify at a separate hearing about the prior, official interpretation.

143. *United States v. Medina*, CRIM. No. 82-224/318, 1988 WL 59537, at \*1 (D.N.J. May 24, 1988).

144. *Id.*

145. *Id.* Medina received a twenty-year maximum sentence and alleged that his attorney and the co-defendant, acting as an interpreter, had informed him that he would receive no more than fifteen years. *Id.* at \*2-3.

misinterpreted the conversations either because he lacked sufficient language skills or purposefully to protect his own interests.<sup>146</sup> The court held that the Court Interpreters Act did not require the trial court to appoint an interpreter for out-of-court, attorney–client discussions.<sup>147</sup> Nevertheless, the court acknowledged the very real possibility that the co-defendant’s misinterpretations may have led Medina to plead guilty without being fully informed and thus remanded the case for an evidentiary hearing.<sup>148</sup> The court reached a contradictory result, admitting that the co-defendant’s interpretation was problematic, but denying that the defendant had a right to an unbiased, appointed interpreter to discuss the plea with his attorney.<sup>149</sup> The court failed to address how the defendant could have avoided resorting to a biased interpreter when the court refused to provide him with an impartial one. As these cases demonstrate, courts’ failures to provide LEP defendants with access to out-of-court interpretation can lead to miscommunications and unjust convictions. Unfortunately, even when a defendant challenges a decision on the basis of a lack of access to out-of-court interpretation, he is unlikely to prevail due to appellate courts’ deferential standards of review.

#### B. STANDARD OF REVIEW

As shown in the previous Subpart, courts rarely grant defendants access to out-of-court interpreters to consult with counsel.<sup>150</sup> Similarly, appellate courts vary in determining which standard of review applies to a defendant’s claim that a lack of access to an interpreter deprived him of the right to consult with counsel. Courts have established that the standard of review for interpreter error requires a showing of plain error.<sup>151</sup> The standard for the denial of the consultation right is less stringent.<sup>152</sup> When an interpreter error *results* in the denial of a defendant’s consultation right, however, courts require a showing of actual prejudice before granting reversal.<sup>153</sup> Courts have not justified this higher standard of review for a claim of interpreter error depriving a defendant of his consultation right—a glaring

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146. *Id.* at \*3. Medina was originally charged with four counts of robbery and pled to only one of the original counts, and two additional robbery counts. *Id.* at \*1. The opinion does not reveal whether the co-defendant was also charged in all or only some of the original and additional robbery charges.

147. *Id.* at \*2. For an explanation and description of the federal Court Interpreter’s Act, see *supra* notes 27–34 and accompanying text.

148. *Medina*, 1988 WL 59537, at\*3–4.

149. *See id.* at \*2–3 (holding that the Court Interpreters Act does not apply to out-of-court communications, but agreeing that the nature of the out-of-court conversations at hand “cast[s] serious doubt upon the voluntariness of the plea”).

150. *See supra* Part IV.A.

151. *See infra* Part IV.B.1.

152. *See infra* Part IV.B.2.

153. *See infra* Part IV.B.3.

omission considering that any other error depriving a defendant of his consultation right is reviewed less stringently.

### 1. Plain Error Appellate Review Standard for Interpreter Error

In addition to the broad discretion trial judges have when appointing interpreters,<sup>154</sup> appellate courts are highly deferential to trial court determinations regarding the need for an interpreter and interpretation accuracy.<sup>155</sup> If the defendant's counsel does not object to an interpreter error at trial, the defendant must show on appeal that the mistake constituted plain error.<sup>156</sup> As a result of this highly deferential standard, it is difficult for a defendant to make a showing of harm sufficient to warrant reversal solely on the basis of an interpreter error.<sup>157</sup>

### 2. Standard of Review for Violations of the Right to Confer

Denial of the consultation right deprives a defendant of her Sixth Amendment right to effective assistance of counsel.<sup>158</sup> The Supreme Court, in *Strickland v. Washington*, established a two-prong test for analyzing claims of ineffective assistance of counsel: First, the defendant must demonstrate that her attorney's performance was actually deficient; second, the defendant must prove that the deficient performance was actually prejudicial, resulting in an unfair trial.<sup>159</sup> This "actual prejudice" standard is highly deferential to counsel's decisions and the trial court's judgment.<sup>160</sup> As an exception to the "actual prejudice" requirement, however, the Court has recognized a limited number of situations in which it will presume prejudice.<sup>161</sup> These include the total absence of an attorney, the complete failure of counsel to put forth a case, and finally, circumstances under which it is unlikely "that any lawyer, even a fully competent one, could provide effective assistance" of counsel.<sup>162</sup>

Supreme Court precedent indicates that when a defendant is denied the right to consult with his attorney, the Court will presume prejudice because even a competent lawyer would be unable to provide effective

154. *See supra* Part II.A.

155. *See generally* Hovland, *supra* note 18, at 481–87 (discussing the "plain error" standard for appellate review).

156. *Id.* at 481–82. Obviously, it is highly unlikely that an attorney who does not speak the language of interpretation will be able detect an interpretation error during proceedings. *See id.* at 487.

157. *Id.* at 482.

158. *See supra* Part II.B (providing history of the right to confer with counsel).

159. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

160. *See id.* at 689 ("[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance . . .").

161. *United States v. Cronin*, 466 U.S. 648, 659–60 (1984).

162. *Id.*



assistance of counsel in this scenario.<sup>163</sup> For example, in *Geders*, the Court did not consider the potential prejudice of the result and instead reversed based solely on the fact that the trial court prohibited attorney–client communication.<sup>164</sup> In a later opinion, the Court was more explicit, stating that when there is an actual denial of a defendant’s right to confer with his attorney, the defendant can prevail on appeal without showing prejudice.<sup>165</sup> Therefore, when a defendant can prove he was denied the right to consult with counsel, reversal is warranted without inquiring into actual harm.

### 3. Denial of the Consultation Right as the Result of Interpreter Error: Actual Prejudice Required

Although the Supreme Court has held that denial of a defendant’s consultation right warrants automatic reversal, when the denial is the result of inadequate interpretation, courts have generally required a showing of actual prejudice. For example, in *United States v. Ademaj*, Fredi Ademaj did not have an interpreter help him consult with his attorney during trial preparation.<sup>166</sup> The court undertook a two-part analysis, first determining that because the defendant was not “*totally* unable to communicate” in English and because he was appointed an interpreter for trial, he was not completely denied his consultation right.<sup>167</sup> The appellate court also based its decision on the fact that the trial judge had corresponded with Ademaj during the proceedings and did not find his language barrier to be severe.<sup>168</sup> The court therefore held that the *Cronic* presumption of prejudice did not apply.<sup>169</sup> Next, the court analyzed the defendant’s claim for actual prejudice under *Strickland*.<sup>170</sup> Due to his partial fluency in English, the court held that the defendant failed to show that his case was actually prejudiced by the lack of a pretrial interpreter.<sup>171</sup> The court stated that because the defendant was not “*totally* unable to communicate,” his communications with counsel were not “*severely* impeded” and he could not show actual prejudice.<sup>172</sup> The court’s language reflects a dangerous standard of accepting language skills

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163. See, e.g., *Geders v. United States*, 425 U.S. 80, 91 (1976) (stating that no showing of actual prejudice was required when the defendant demonstrated denial of his conferral right).

164. *Id.*

165. *Perry v. Leeke*, 488 U.S. 272, 278–79 (1989). The Court did, however, impose a limit on what time period it will consider to be an actual denial of the right to confer with counsel. *Id.* at 284; see *supra* note 66 (explaining that a fifteen-minute recess did not require the opportunity for the defendant to confer with his attorney, but that the trial court erred in preventing attorney–client conferral during a seventeen-hour overnight recess).

166. *United States v. Ademaj*, 170 F.3d 58, 61–62 (1st Cir. 1999).

167. *Id.* at 63 (emphasis added).

168. *Id.*

169. *Id.* at 62.

170. *Id.* at 64.

171. *Id.*

172. *Id.* at 63.

that are merely “good enough.” In addition to creating a slippery slope of acceptable comprehension standards, this line of reasoning contradicts the mandate of Executive Order 13,166 to implement a system of *meaningful* access to court services for LEP defendants.<sup>173</sup> The First Circuit diluted Ademaj’s consultation right by demanding a showing of *total* inability to communicate with his attorney.<sup>174</sup> The court ignored the fact that a defendant who is only partially fluent in English is likely to have little more than basic conversational skills and lacks the language skills necessary to discuss sophisticated legal strategy with his or her attorney.<sup>175</sup> Ademaj attempted to communicate with the court in English—an effort the court rewarded by denying him an interpreter to consult with his attorney prior to trial.<sup>176</sup> This perverse logic calls into question the fairness of a criminal justice system that requires a defendant to sit in incomprehension through his trial simply because he tried to learn, but has not mastered, the English language.

In *Rojas v. Roberts*, the defendant similarly received an unfair trial because of the lack of access to out-of-court interpretation.<sup>177</sup> The defendant alleged that due to a language barrier, his trial counsel was unable to “conduct any investigation, did not communicate with him concerning pretrial matters or the preliminary hearing, did not discuss the elements of the crimes charged, and did not discuss the penalties of the crimes charged.”<sup>178</sup> The court held that since the defendant did not express dissatisfaction with his counsel at the time he entered the plea, the ineffective assistance claim was subject to the *Strickland* “actual prejudice” standard of review.<sup>179</sup> Finding the record devoid of evidence of inadequate interpretation, the court denied his ineffective counsel claim.<sup>180</sup> The court failed to address the possibility that the defendant did not express dissatisfaction at the time of the plea because he did not know that he should have been dissatisfied due to his inability to communicate with his attorney. A defendant who receives advice in a language he does not

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173. See *supra* Part III.D.

174. *Ademaj*, 170 F.3d at 63–64 (stating that the court did not find an interpreter necessary because the defendant had shown *some* ability to communicate in English).

175. See *supra* notes 42–44 and accompanying text (explaining why judges are poorly situated to determine a defendant’s English competency based on limited interactions).

176. The court did not say how it would treat a defendant who spoke *no* English and who was in the same situation as Ademaj, merely noting that “the right to an interpreter during *pretrial preparation* is less than clear in the present circumstances.” *Ademaj*, 170 F.3d at 63.

177. *Rojas v. Roberts*, No. 92-3214, 1993 WL 53546, at \*1 (10th Cir. Feb. 17, 1993).

178. *Id.*

179. *Id.*

180. *Id.* at \*2. Echoing the *Ademaj* “good enough” language, the court stated that “the rulings of a state court regarding the appointment and qualifications of interpreters do not reach constitutional proportions” despite a language barrier, as long as the court finds a defendant can still understand the proceedings. *Id.*

understand cannot express either satisfaction or dissatisfaction with such representation because he cannot comprehend it, let alone evaluate it.

By denying defendants interpreters to consult with their attorneys in *Ademaj* and *Rojas*, the courts essentially ensured that the defendants would be unable to determine whether the assistance of their respective attorneys was effective. If the defendants were able to realize the ineffectiveness of their attorneys after trial or plea, however, the courts denied their claims because they did not raise an objection earlier and could not demonstrate actual prejudice at the appellate stage.

### C. PAYMENT

In the prior Subpart, courts refused to appoint out-of-court interpreters because they did not think it was necessary. When courts decide that an interpreter is necessary, however, they vary on the question of which party or entity is responsible for paying for the interpreter's services. For example, Tai Le was an indigent defendant who was appointed a public defender to assist with his felony case.<sup>181</sup> His public defender requested that the State Public Defender's office ("SPD") appoint an interpreter because Le spoke Vietnamese and did not understand English.<sup>182</sup> The SPD denied the request and Le's counsel moved for the trial court to appoint an interpreter.<sup>183</sup> The trial court granted the request and assessed the interpreter fees for out-of-court discussions between Le and his attorney against the SPD.<sup>184</sup> The Director of State Courts ("DSC") was responsible only for the interpreter fees accrued for services rendered while the court was in session.<sup>185</sup> The SPD disputed the costs, but the appellate court upheld the requirement that the SPD pay for out-of-court interpretation.<sup>186</sup> The appellate court reasoned that assuring the defendant's ability to communicate with his attorney was not part of the court's duty of judicial administration.<sup>187</sup> The appellate court also

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181. *In re Appointment of an Interpreter in State v. Le*, 517 N.W.2d 144, 146 (Wis. 1994).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 149.

187. *Id.* at 147-48. The court stated "[w]e have no doubt that clarity in out-of-court communications between counsel and client is vital to effective representation." *Id.* at 147. The court found, however, that the legislature codified the right to an attorney based on a case that "was concerned with judicial administration and fairness in and before the forum itself." *Id.* at 147-48 (citing *State v. Neave*, 344 N.W.2d 181, 184, 187-88 (Wis 1984)). The holding in that case "was explicitly limited to examining 'the defendant's ability to understand the *proceedings at trial*.'" *Id.* at 148 (quoting *Neave*, 344 N.W.2d at 183 n.2). A New Jersey court made a similar distinction when it required the Public Defender's office to pay for both in-court and out-of-court interpreter services. *State v. Linares*, 470 A.2d 39, 42 (N.J. Super. Ct. Law Div. 1983). The court agreed with the county's reasoning that although the right to an interpreter could not be denied to an LEP defendant, "an interpreter should be included in those services which are

found that the statutes codifying the right to an interpreter were limited to in-court interpretation only.<sup>188</sup> Finally, the court stated that the SPD had historically provided interpreters and was also better situated to oversee the use of out-of-court interpreters.<sup>189</sup>

Although the defendant in this case received the aid of an interpreter for out-of-court conferral with his attorney, the SPD vigorously protested having to pay for the interpreter's services.<sup>190</sup> This suggests that in future situations, the SPD will take whatever precautionary or evasive measures are necessary to avoid having to pay for out-of-court interpretation, whether it involves prohibiting public defenders from requesting out-of-court interpretation services or restricting the amount of money allotted for out-of-court interpretation. The end result will severely limit—if not eliminate—future LEP defendants' access to out-of-court interpretation services.

It is unfair to require public defender's offices to pay for interpretation services; some defendants may not qualify for an appointed attorney but still need access to out-of-court interpretation services. For example, in *People v. Cardenas*, the defendant was not entitled to an appointed attorney even though he was likely indigent and required an interpreter.<sup>191</sup> Courts reach similar results when they refuse to appoint even in-court interpreters for solvent defendants.<sup>192</sup> This, in effect, imposes a monetary sanction on a

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needed and required to a proper *defense* and which should therefore be provided for and paid by the Office of the Public Defender." *Id.* at 40 (emphasis added).

188. *Le*, 517 N.W.2d at 149. The relevant statutes provided for an interpreter for a criminal defendant whom the court determines cannot reasonably understand English. *Id.* at 145 (citing WIS. STAT. § 885.37 (1993)). A separate section states that "[i]n circuit court, the state shall pay the expense." *Id.* (citing WIS. STAT. § 885.37(4)(a)(2)). The statutes, on their face, do not distinguish between in-court or out-of-court interpretation. *See id.* The court read the in-court limitation into the statutes after determining that the legislature had enacted them pursuant to a case dealing strictly with in-court interpretation. *Id.* at 147–48 (citing *Neave*, 344 N.W.2d 181); *see also supra* note 187 (explaining the court's basis for distinguishing between fairness to the defendant and judicial administration).

189. *Le*, 517 N.W.2d at 148.

190. *Id.* at 145.

191. *See supra* note 128 (giving the dissent's reasoning as to why *Cardenas* was unrepresented at the plea hearing). In a contrary holding, the New Mexico Supreme Court held that an indigent defendant represented by pro bono counsel was entitled to equal public funding for experts as that available to defendants represented by public defenders. *State v. Brown*, 134 P.3d 753, 755 (N.M. 2006). The case dealt with expert witnesses rather than interpreters, but the pro bono/public defender distinction paralleled the situation in *Cardenas*—albeit with different results, as that court held pro bono defendants did not have the same rights as defendants represented by the public defender. *See supra* note 131 and accompanying text (demonstrating the court's refusal to appoint an interpreter for a defendant represented pro bono rather than by appointed counsel).

192. *See Arrieta v. State*, 878 N.E.2d 1238, 1245 (Ind. 2008) (holding that a non-indigent defendant is responsible for paying for an in-court interpreter). The court distinguished between a "defense interpreter" and a "proceedings interpreter," the former of which interprets English testimony solely for the defendant's benefit and the latter of which translates an LEP witness's

criminal defendant, simply because he cannot speak English. Whether an LEP defendant is denied his consultation right altogether or forced to pay more for it than an English-speaking defendant, the outcome is unfair, unequal, and unjust.

#### V. PRESERVING THE SIXTH AMENDMENT BY GIVING MEANING TO THE RIGHT TO AN INTERPRETER

The foregoing cases demonstrate that the current system fails to uphold LEP defendants' rights to confer with counsel. Lacking both comprehensive legislation and judicial recognition of the right to an interpreter for out-of-court communications with counsel, LEP defendants are often forced to turn to partially fluent friends, biased government employees, or to forego pretrial conferral completely.<sup>193</sup> Convictions secured under these circumstances are not the result of a careful weighing of unbiased, accurate evidence, but a culmination of confused facts and misinformation generated by a defendant's inability to communicate with his counsel prior to trial.<sup>194</sup> In the few cases where courts have acknowledged an unjust result due to the lack of an out-of-court interpreter, the remedy involved costly evidentiary hearings and potential retrials.<sup>195</sup> The current system is harming LEP defendants, impeding defense counsels' ability to represent clients effectively, and undermining the expediency, accuracy, and fairness of the criminal justice system as a whole. To uphold every defendant's constitutional rights, the Supreme Court should recognize that the Sixth Amendment right to counsel embodies the right of LEP defendants to confer with their attorneys prior to the commencement of judicial proceedings. Then, court systems can begin addressing the logistical challenges of providing out-of-court interpreters to all defendants who need them.

##### A. THE SUPREME COURT SHOULD RECOGNIZE THE RIGHT TO AN OUT-OF-COURT INTERPRETER FOR INDIGENT LEP DEFENDANTS

The Supreme Court should recognize that the Sixth Amendment requires the appointment of interpreters, at the expense of the state or federal government, to aid indigent defendants in out-of-court conferrals with their attorney. In *Powell*, the Court explicitly stated that a defendant's right to a trial is meaningless if he is not able to prepare for it by speaking

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testimony for the courtroom. *Id.* The court held that when only the non-indigent defendant requires interpretation, rather than other witnesses, she alone should bear the cost. *Id.*

193. See *supra* Part IV.A.

194. See *supra* Part IV.A.

195. See *supra* notes 146–48 and accompanying text (explaining that the court's refusal to appoint an out-of-court interpreter led to the appellate court remanding the case for an evidentiary hearing).

with his attorney.<sup>196</sup> The LEP defendant who cannot confer with his attorney prior to trial due to a language barrier is in the same position as the defendant who is not appointed counsel until the day of trial. In both situations, the defendants lack the expert guidance of an attorney who is familiar with both their case and the law. Both defendants are unable to fully understand the charges against them, are unaware of the options available to them, and are denied the valuable opportunity to strategize with their attorneys and make substantive decisions for themselves. The Supreme Court, in *Gideon*, recognized that representation by counsel is “fundamental and essential to fair trials,” and that “[f]rom the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”<sup>197</sup> Similarly, the Second Circuit denounced Negron’s trial without an interpreter as “lack[ing] the basic and fundamental fairness required by . . . due process.”<sup>198</sup> Denying LEP defendants their ability to speak with counsel before proceedings begin undermines the courts’ stated goals of equality and fundamental fairness, and creates a two-tiered system in which only English-speaking defendants enjoy the full extent of their Sixth Amendment right to counsel. The necessity of identifying the right to an appointed out-of-court interpreter becomes even stronger in light of the courts’ policy concerns in *Powell* and *Negron*.<sup>199</sup> The courts in both cases enumerated remarkably similar policy concerns in their reasoning: protecting defendants, preventing government oppression, and upholding the integrity of the American judicial system.<sup>200</sup> These same reasons require courts to provide LEP defendants with an out-of-court interpreter as well.

The courts’ concern for protecting defendants is well founded. Due to the language barrier and cultural differences, indigent LEP defendants are ill-equipped to understand and assert their rights.<sup>201</sup> Access to an interpreter before trial is necessary for these defendants to comprehend the charges against them, understand the defenses available to them, and know that they have the right to make certain decisions, such as the choice to testify.<sup>202</sup> The

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196. *Powell v. Alabama*, 287 U.S. 45, 59 (1932).

197. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

198. *United States ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970) (quoting *United States ex rel. Negron v. New York*, 310 F. Supp. 1304, 1309 (E.D.N.Y. 1970)).

199. *See supra* Part III (explaining the courts’ reasoning in the *Powell* and *Negron* decisions).

200. *See supra* Part III.

201. *Negron*, 434 F.2d at 390 (stating that the defendant, an indigent, non-English speaker, would be unlikely to know he has rights without the aid of an interpreter).

202. *See supra* notes 73–74 and accompanying text (explaining that certain decisions are so fundamental that the client must make them, not the attorney); *see also* Daniel J. Rearick, Note, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 543–53 (2004) (explaining how the intersection of race, language, and citizenship denies non-English speaking defendants access to the legal system).

*Powell* Court stated that the pretrial preparatory and investigatory stage was a critical step in the proceedings and that the defendants were entitled to the aid of counsel during such a critical period.<sup>203</sup> In light of this reasoning, it makes little sense that courts afford LEP defendants an interpreter during trial, but not during the planning and conferral stages that the Court deems so critical.

The courts' apparent concern with the potential for government oppression is also uniquely apparent for defendants who are disadvantaged socially, economically, and linguistically. While English-speaking defendants can at least voice their concerns to their attorneys when they feel unfairly treated, LEP defendants have no such ability without the aid of an interpreter.<sup>204</sup> Additionally, LEP defendants are frequently immigrants or other individuals who are unfamiliar with the American judicial system and thus have a special need for counsel during the pretrial stages to explain both the court system and the charges against them.<sup>205</sup> Out-of-court interpreters are also necessary to ensure that attorneys can properly investigate their LEP defendants' cases and obtain complete information pertaining to the circumstances of the charges and possible defenses.<sup>206</sup> Without access to an out-of-court interpreter to communicate with counsel, LEP defendants are far more likely to succumb to an unfair plea or fail to assert a valid defense, simply due to a lack of communication.<sup>207</sup> The Supreme Court has stated that the aim of our judicial system is "to assure fair trials before impartial tribunals in which *every* defendant stands equal before the law."<sup>208</sup> Denying LEP defendants the ability to confer with their attorneys prior to trial does not achieve the goal of fair and equal trials for all defendants. In cases in which an LEP defendant is denied her conferral right, a conviction demonstrates the government's unequal treatment of non-English speaking defendants.

Finally, denying LEP defendants the right to confer with counsel undermines the integrity of the judicial system. The formality of the judicial process that the *Powell* Court valued requires ensuring that *all* defendants' due process and Sixth Amendment rights, including the right to confer with

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203. *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

204. *See Negron*, 434 F.2d at 389 (stating that without "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," the defendant could not even be said to have been present for his trial (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)) (internal quotation marks omitted)).

205. *See id.* at 390 (stating that "an indigent, poorly educated Puerto Rican thrown into a criminal trial as his initiation to our trial system" is less likely to understand his own rights without the aid of counsel and an interpreter).

206. *See Powell*, 287 U.S. at 57, 58–59 (holding that attorneys must be able to confer with their clients prior to trial to acquaint themselves with the case and have time to conduct a thorough investigation).

207. *See Negron*, 434 F.2d at 390.

208. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (emphasis added).

counsel, are preserved at every stage of the prosecution, regardless of the defendants' fluency in English.<sup>209</sup> This includes treating denial-of-conferral-right claims that result from inadequate interpretation with the same presumptive prejudice standard used in all other denial-of-conferral cases.<sup>210</sup> Whether a defendant is denied conferral because of his language abilities or some other factor, the court should presume a prejudicial effect and automatically reverse. The two-tiered standard of review in these cases and the refusal to uphold LEP defendants' conferral rights demonstrate that the courts have failed to reach their goal of ensuring fair, impartial, and equal trials for all criminal defendants.<sup>211</sup> The *Gideon* Court worried that "[t]his noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."<sup>212</sup> The criminal justice system continues to fall short of this ideal because LEP defendants are forced to face their accusers without having the opportunity to confer with their attorneys.

### B. IMPLEMENTING THE RIGHT TO AN OUT-OF-COURT INTERPRETER

Following judicial recognition of the right to an appointed, out-of-court interpreter, the judicial infrastructure will need to accommodate this right. The situation will likely parallel the development of the public defender system following *Gideon*, which guaranteed all defendants the right to an attorney.<sup>213</sup> Following *Gideon*, the number of criminal defendants requiring appointed counsel greatly increased.<sup>214</sup> The public defender system grew out of this need as a way to provide standardized, quality, affordable defense services.<sup>215</sup> Similarly, once the Supreme Court or a majority of states or

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209. See *Powell*, 287 U.S. at 56–58 (expressing concern that the last-minute appointment of counsel was a mere gesture and “that [the] defendants were not accorded the right of counsel in any substantial sense”).

210. See *supra* Part IV.B.2–3 (explaining that the standard of review presumes prejudice in cases where a defendant is deprived of her conferral right for reasons other than lack of an interpreter).

211. See *Gideon*, 372 U.S. at 344 (“From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law.”).

212. *Id.*

213. See *supra* notes 45–47 and accompanying text (providing a brief history of the right to appointed counsel and effective assistance of counsel).

214. Suzanne E. Mounts & Richard J. Wilson, *Systems for Providing Indigent Defense: An Introduction*, 14 N.Y.U. REV. L. & SOC. CHANGE 193, 196 (1986).

215. *Id.* at 198–99. Mounts and Wilson go on to address what they see as the political manipulation and under-funding of the public defense system following its initial success. *Id.* at 199–201. Despite its flaws, the public defender system is nevertheless a vast improvement over the era in which defendants were afforded no counsel at all. See *id.* at 198–99. The shortfalls of the public defender system are a very real problem, but beyond the scope of this Note. While the court interpreter system will certainly face similar budgetary and political challenges, these



circuits recognize the right to an out-of-court interpreter, the number of indigent LEP defendants requiring court interpreters to confer with counsel will increase. This demand can be best met with the development of a comprehensive system of court interpretation that provides standardized training, wages, and full-time (rather than contract) work. In this manner, the court interpreter system can grow to fulfill the increasing needs of LEP defendants.

Although there has been little judicial or legislative recognition of the need for out-of-court interpretation, at least one scholar recognizing the need to improve Latino access to the legislative and legal systems has suggested that interpretation itself may be problematic.<sup>216</sup> Daniel Rearick suggests that concerns about misinterpretation militate against a comprehensive court interpreter system and in favor of bilingual attorneys and courtrooms.<sup>217</sup> This suggestion raises grave concerns about the costs in both time and money of training attorneys, judges, and other court staff in multiple languages. Furthermore, misinterpretation is likely to be more common among professionals who are required to learn a language as part of their existing career than among professionals who focus on interpretation as their sole job.<sup>218</sup> Finally, the suggestion also presents a number of unresolved logistical questions: What language will proceedings be recorded in? Will requiring dual-language proceedings double the time needed for proceedings and double the bulk of the resulting record,

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logistical setbacks should not overshadow the pressing need to develop a comprehensive interpreter system.

216. Rearick, *supra* note 202, at 557–58. Although Rearick identifies pretrial attorney–client communication as a problem, he views it as the result of a lack of bilingual attorneys, rather than as a failure of courts to uphold LEP defendants’ Sixth Amendment conferral rights. *See id.* at 574–75. Joseph P. Van Heest has also written on the need for pretrial interpretation in the context of the state of Alabama. Van Heest, *supra* note 11, at 371–72. He argues that out-of-court interpreters are already provided for under the Sixth and Fourteenth Amendments and must merely be extended to certain misdemeanor defendants following *Alabama v. Shelton*. *See id.* As Part III of this Note explains, however, in practice, out-of-court interpreters are not routinely provided to defendants. Thus, while this Note agrees with Van Heest’s argument that the Sixth Amendment requires out-of-court interpretation, courts do not uphold this right in reality. *See supra* Part IV. Rather than taking the right to an interpreter as a given, this Note argues that judicial recognition of the right to an out-of-court interpreter is the necessary next step to full implementation of an LEP defendant’s conferral right.

217. Rearick, *supra* note 202, at 574–75.

218. *See* Patricia Walther Griffin, *Beyond State v. Diaz: How to Interpret “Access to Justice” for Non-English Speaking Defendants?*, 5 DEL. L. REV. 131, 132–36 (2002) (explaining the difficulties of court interpreting and indicating that extensive training programs are necessary to ensure that certified court interpreters are able to provide competent interpretation). Griffin’s article demonstrates that even for trained professionals who have dedicated their career to interpretation, the task is challenging. *See id.* This suggests that judges or attorneys who are required to act as interpreters will face enormous challenges in obtaining the skills to do a proficient job. Non-interpreter professionals lack the years of training that certified, full-time court interpreters have. The costs of providing training to ensure that non-professional interpreters’ skills are adequate would be huge in terms of both money and time.

thereby increasing the bases for appeal and administrative costs? Would the languages an attorney is required to learn depend on the demographics of the city or district in which he lives or must all attorneys learn a set number of languages? How would the system deal with attorneys who are unwilling or unable to attain fluency in a foreign language?

The better, more realistic solution is to maintain high standards for the quality of court interpretation, provide affordable training to help interpreters meet those standards, and work to increase the number of available, qualified interpreters so that courts can affordably provide interpreters to all LEP defendants at every stage of the criminal process. This minimizes the risk of misinterpretation, encourages defendant–attorney communication, and minimizes the costs associated with appeals and retrials due to courts denying interpreters to defendants or as a result of interpreter error.

The development of a comprehensive court interpreter system to implement the Sixth Amendment conferral right is likely to face opposition from court administrators and other judicial officials concerned with administrative costs and judicial expediency.<sup>219</sup> Providing out-of-court interpreters, however, will reduce the costs of appeals and evidentiary hearings resulting from a defendant's inability to communicate with his attorney out of court.<sup>220</sup> Expanding the court interpreter system is likely to require a reallocation of funds, but the more important shift will be the true protection of LEP defendants' rights. Once courts recognize that depriving defendants of their conferral right by failing to provide an interpreter constitutes a violation of the Sixth Amendment, the monetary costs will pale in comparison to the cost of depriving defendants of their basic constitutional entitlements. As the *Gideon* Court stated, “[g]overnments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime,” but the system fails and a defendant “cannot be assured a fair trial unless counsel is provided for him.”<sup>221</sup> Similarly, the money spent to hire prosecutors and provide public defenders is wasted when LEP defendants do not receive fair trials as the result of being denied access to interpreters.

Additionally, a preoccupation with judicial expediency cannot take precedence over the need for thoroughness and fairness in the criminal

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219. See Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2066–68 (2000) (discussing the lack of political support for implementing indigent defense systems following *Gideon v. Wainwright*).

220. See *United States v. Medina*, CRIM. No. 82–224/318, 1988 WL 59537, at \*3–4 (D.N.J. May 24, 1988) (remanding the case for an evidentiary hearing to determine if the defendant was denied his right to counsel due to his co-defendant's misinterpretations of his attorney's advice during out-of-court discussions).

221. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

process.<sup>222</sup> The *Powell* Court recognized this important balance: “The prompt disposition of criminal cases is to be commended and encouraged. But in reaching that result a defendant, charged with a serious crime, must not be stripped of his right to have sufficient time to advise with counsel and prepare his defense.”<sup>223</sup> Although concerns about time and money are important practical considerations, the primary concern must always be protecting the basic rights of all criminal defendants.<sup>224</sup> After the courts’ holdings in *Powell* and *Negron*, it is apparent that indigent LEP defendants are entitled to an appointed, out-of-court interpreter to guarantee their right to confer with counsel. Judicial systems at every level must start working towards making this basic Sixth Amendment entitlement a reality.

## VI. CONCLUSION

Indigent LEP defendants are routinely denied their Sixth Amendment right to confer with counsel, due solely to the fact that they cannot speak English fluently. This injustice undermines the integrity of the American judicial system and jeopardizes the concept of fairness espoused in the Sixth Amendment. As the Supreme Court recognized, “It is vain to give the accused . . . counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case.”<sup>225</sup> The criminal justice system cannot function effectively while LEP defendants are denied a vital step in the adjudication process: conferring with their attorneys before trial begins and during breaks in court proceedings. Courts across the nation, and the Supreme Court in particular, must acknowledge that the Sixth Amendment requires meaningful access to counsel for all defendants, regardless of their linguistic abilities. Until LEP defendants can access out-of-court interpreters to communicate with their attorneys, the judiciary will remain an unfair mechanism for dispensing justice.

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222. See *Powell v. Alabama*, 287 U.S. 45, 58–59 (1932) (emphasizing the primacy of ensuring fair trials for all criminal defendants by upholding their conferral rights).

223. *Id.* at 59.

224. *Gideon*, 372 U.S. at 344 (stating that the American Constitution and laws have always aimed to assure fair trials and equal treatment to all defendants).

225. *Powell*, 287 U.S. at 59 (quoting *Commonwealth v. O’Keefe*, 148 A. 73, 74 (Pa. 1929)) (internal quotation marks omitted).