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NO COMPRENDO: THE NON-ENGLISH-SPEAKING DEFENDANT AND THE CRIMINAL PROCESS

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The non-English-speaking defendant in a criminal proceeding poses increasing problems for the administration of criminal justice. Minorities for whom English is not the principal language or who speak such unusual dialects of English as to cloud understanding and communication make up a discouraging proportion of offenders.[1] In areas of large ethnic enclaves where English is not the dominant tongue, officials have estimated that between thirty and forty per cent of criminal defendants require the aid of an interpreter fully to understand the proceedings against them.[2]

Thirty-five states make some statutory provision for appointment of interpreters in specified cases.[3] The Illinois statute is typical of one group:

> Whenever any person accused of committing a felony or misdemeanor is to be tried in any court of this State, the court shall upon its own motion or that of the defense or prosecution determine whether the accused is capable of expressing himself in the English language so as to be understood directly by counsel, court or jury. If the court finds the accused incapable of so understanding or so expressing himself, the court shall appoint an interpreter for the accused whom he can understand and who can understand him.[4]

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[1] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE, STANDARDS AND GOALS, COMMUNITY CRIME PREVENTION 151 (1973).

[2] Testimony before the U.S. Commission on Civil Rights 118, in Los Angeles (Aug. 17, 1968).

[3] States not providing for language interpreters are: Alabama, Colorado, Maine, Missouri, Montana, Nebraska, New Hampshire, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Vermont, Washington and West Virginia. Louisian makes provision for interpreters only in trials of stat military personnel. LA. REV. STAT. ANN. §29:12 (West 1975). Pennsylvania makes provision for ap pointment of interpreters to aid the court in th Court of Common Pleas only. PA. STAT. ANN. tit. 17 § 1875 (Purdon 162).

A number of states make generous provisions for deaf persons in criminal cases, but do not make any of the same provisions for those with language difficulty. *E.g.*, W. VA. CODE §57-5-7 (1974 Supp.); CONN. GEN. STAT. ANN § 17-137 k (West 1975): "(a) In any criminal or civil action involving a deaf person, the court shall appoint a qualified interpreter to assist such person throughout such proceeding." The only other relevant Connecticut statute relates to compensation of interpreters. Nebraska expressly recognizes that appointment of an interpreter for the deaf is necessary to protect the constitutional right of the defendant to participate in the preparation and trial of his case, yet the constitutional rights of the non-English speaking defendant are not considered. NEB. REV. STAT. § 25-2401 to § 25-2406 (1975). *Compare* ARIZ. REV. STAT. § 12-242 A-D (1974), providing for compulsory appointment of qualified interpreters for the deaf, *with* ARIZ. REV. STAT. § 12-241 *and* § 11-601 (5), providing for discretionary appointment of language interpreters with no reference to standards.

[4] ILL. REV. STAT. ch. 38, § 165-11 (1975). The Illinois statute is similar to section 752, chapter 4 of the California Evidence Code which provides for interpreters for witnesses. *See* CAL. EVID. CODE § 752(a) (West 1966). More common and the form Illinois used until 1973 are statutes patterned after rule 28 of the Federal Rules of Criminal Procedure:

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

FED. R. CRIM. P. 28. *E.g.*, ARIZ. REV. STAT. § 12-241 (1956); DEL. CT. C.P.R. 28; HAW. REV. STAT. § 606.9 (1969); IND. R. TR 43 (F); MISS. CODE ANN. § 99-17-7 (1972); OHIO REV. CODE ANN. § 2301.12 (Supp. 1974).

Most protective of the non-English-speaking defendant are statutes similar to Michigan's:

> If any person is accused of any crime or misdemeanor and is about to be examined or tried before any justice of the peace, magistrate or judge or a court of record and it appears to the magistrate or judge that such person is incapable of adequately understanding the charge or presenting his defense thereto because of a lack of ability to understand or speak the English language or inability adequately to communicate by reason of being deaf and/or mute, or that such person suffers from a speech defect or other physical defect which handicaps such person in maintaining his rights in such cause, the justice of the peace, magistrate or judge shall appoint a qualified person to act as an interpreter. . . .

MICH. STAT. ANN. § 28.1256 (1) (1971).

See also ARK. STAT. ANN. § 5-715 (1976); IOWA

Standards for interpretation are almost non-existent. Illinois requires the interpreter to swear "to truly interpret or translate all questions propounded or answers given as directed by the court."[5] But if the interpreter is translating off-the-record for the benefit of the defendant, there is no check on the accuracy of the translation.

Almost nowhere is statutory provision made for interpreters at early stages after arrest.[6] In almost every jurisdiction, once criminal charges are lodged the judge is given broad latitude to decide whether to appoint an interpreter, while no regular procedures are prescribed for determining need.[7] Reviewing courts rarely question the trial judge's decision if there is any evidence at all of the defendant's ability to understand or speak some English, or if any translation has been provided. When an appeal is made on the basis of a constitutional claim that the defendant did not understand the proceedings or that they were inadequately translated to him, there is no record of what the defendant heard and understood to settle the very question raised for review.

This article examines the problems inherent in arresting, setting bail for, arraigning, accepting a plea from and trying a defendant whose ability to understand and express himself in English is minimal or non-existent. A critical examination of the Illinois statutes on interpreters and Illinois decisions on the constitutional questions raised by failure to provide an interpreter suggests that Illinois is far behind the federal courts and the courts of some other states in protecting the interests of linguistically handicapped criminal defendants. Yet in those courts in Cook County where a professional interpreter is regularly available, there is developing a judicial practice of calling upon the interpreter when there is any indication of need, even at an early stage in the proceedings. This is far more than is required by Illinois decisions and even beyond that practice suggested by various circuits of the United States Court of Appeals. Although concentrating particularly on the problems of the Spanish-speaking defendant, a member of the largest linguistic minority in Cook County, this article makes criticisms and recommendations that apply equally as well to the handling of the case of any non-English-speaking defendant.

Scope of the Problem

The 1970 decennial census revealed that more than thirty-three million residents of the United States reported that their "mother tongue" was a language other than English.[8] More than twenty-two million residents were either first generation or second generation immigrants of foreign-speaking parentage.[9] Puerto Ricans, who are considered "native," are not included in this figure. As the 1970 census is known to have ignored large numbers of urban poor,[10] and as the foreign-speaking are largely concentrated in the metropolitan areas of the country, the number for whom English is not the primary language could be much higher. Some scholars have estimated the number as high as twenty-six million.[11]

Code Ann. § 622 A.1-1-6 (Supp. 1970); Kan. Stat. Ann. § 75-4351 to § 75-4355 (Supp. 1975); Md. Ann. Code art. 27, § 623 (a) (1968).

The New Mexico Constitution provides: "In all criminal prosecutions, the accused shall have the right . . . to have the charge and testimony interpreted to him in a language he understands." N. M. Const. art. 2, § 14.

Certain West Texas border counties make provision for conducting the proceedings in Spanish with English interpreters. Tex. Stat. Ann. art. 3737 d-1 (Supp. 1976).

[5] Ill. Rev. Stat. ch. 38, § 165-12 (1976).

[6] Kansas is unique in prohibiting interrogation without an interpreter if the defendant's "primary language is one other than English. . . . " Kan. Stat. Ann. § 75-4351 to § 75-4355 (Supp. 1975).

[7] Miss. Code Ann. § 99-17-7 (1972) is typical:

> **Interpreters.**
> In criminal cases, the court may appoint an interpreter when necessary, sworn truly to interpret, and allow him a reasonable compensation, not exceeding five dollars per day, payable out of the county treasury.

For a discussion of problems of trying a non-English-speaking defendant *see* Comment, *Right to an Interpreter*, 25 Rutgers Law Review 145 (1970); Comment, *Constitutional Law: Translators: Mandatory for Due Process*, 2 Conn. L. Rev. 163 (1969).

[8] "Mother tongue" means language spoken during childhood. United States Department of Commerce, Bureau of the Census, 1970 Census of Population, Country of Origin, Mother Tongue, and Citizenship of the United States 1 (Supp. 1974) [Publications from the 1970 census are hereinafter cited as 1970 Census of Population together with the title of the special publication].

[9] *Id.* at 3, Table 193.

[10] N.Y. Times, Nov. 30, 1975, § 4, at 7, col. 1. Estimates of the number of urban poor not counted in the 1970 census range as high as nine million persons.

[11] 2 T. Anderson & M. Boyer, Bilingual Schooling in the United States 25 (1970).

Although significant portions of this population probably have little or no language difficulty with English, those who have grown up in large and expanding ethnic neighborhoods, those who have migrated back and forth to the United States from Mexico or Puerto Rico, or those whose work groups them with others of the same language, have not had the same push to linguistic assimilation which other generations have experienced.[12]

More than nine million people identified by the 1970 census considered Spanish their first language or came from a household in which the father or mother was reported to have Spanish as a mother tongue.[13] This figure is undoubtedly low. In 1974, the Immigration and Naturalization Service estimated that there were between four and five million illegal aliens in the United States. In December, 1975, the estimate was eight million, the vast bulk of them Spanish-speaking.[14]

Sheer numbers have led to an infrastructure within the Spanish-speaking community which protects but also isolates the Spanish speaker from the English-speaking community.[15] In San Antonio, sixty-two per cent of those low-income Mexican-Americans living in census tracts with more than 400 Spanish-speaking people could speak little or no English. A similar survey in census tracts in Los Angeles with high concentrations of low-income Mexican-Americans revealed that fifty-one per cent of the residents could not speak any English.[16] Another study of Puerto Ricans in New York found more than seventeen per cent of the children and presumably almost twice that number of adults spoke little or no English.[17] A study of Spanish-speaking people in the southwest revealed that they averaged little more than eight years of education. When students left school, nearly three-fourths of them were below grade level.[18] Inadequately equipped by education and disabled by language from taking jobs outside of the Spanish-speaking community, they lost much of the English which they had learned, and became further isolated.[19]

The large number of Spanish-speaking residents in Chicago and their high concentration in certain areas of that city suggest the same experience of linguistic isolation. The 1970 census counted 247,343 Spanish-speaking residents in the city of Chicago;[20] some estimate that there may be at least another 100,000.[21] Fifty-three census tracts in the city were reported to have 400 or more Spanish-speaking residents.[22] Income and education levels among this group are low.[23] But even rising income, the usual route out of ethnic isolation, has affected Spanish-speaking residents less than earlier groups. Among white Spanish-speaking residents in Chicago above the poverty line, more than

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[12] L. GREBLER, J. MOORE AND R. GUZMAN, THE MEXICAN-AMERICAN PEOPLE at 87–94, 424–427 (1970) [hereinafter cited as GREBLER]. *See generally,* LANGUAGE LOYALTY IN THE UNITED STATES (J. Fishman ed. 1966).

[13] 1970 CENSUS OF POPULATION, PERSONS OF SPANISH ANCESTRY, PERSONS OF SPANISH LANGUAGE BY REGIONS, DIVISIONS AND STATES 9, Table 3 (Supp. 1973).

[14] *Hearings Before the Subcomm. on Immigration of the Comm. on the Judiciary,* 93d Cong., 2d Sess. 37 (Apr. 3 and June 25, 1974); Leonard F. Chapman, Comm'r, Immigration & Naturalization Service, *quoted in* N.Y. Times, Dec. 21, 1975, § 1, at 27, col. 1.

[15] Comment, *"Citado a Comparacer": Language Barriers and Due Process—Is Mailed Notice in English Constitutionally Sufficient?,* 61 CAL. L. REV. 1394, 1400 (1973).

[16] GREBLER, *supra* note 12, at 424, Table 18-1.

[17] U.S. PUERTO RICO COMM'N ON THE STATUS OF PUERTO RICO, STATUS DE PUERTO RICO 152 (1966) [herinafter cited as STATUS OF PUERTO RICO]. Only 58 per cent of Puerto Rican children in the New York schools were rated fluent in English.

[18] U.S. CIVIL RIGHTS COMM'N, THE UNFINISHED EDUCATION (1971). Among those who remain in school, 63 per cent are below grade level and 40 per cent have severe reading retardation (two or more years below grade level). *Id.* at 25–26.

[19] GREBLER, *supra* note 12, at chs. 5, 7, 18.

[20] 1970 CENSUS OF POPULATION, SOCIAL CHARACTERISTICS OF THE POPULATION. CHICAGO, ILL. 119, Table P-2. Almost one million residents of Chicago were of foreign or mixed parentage, or foreign-born. *Id.* The 1960 CENSUS did not count Spanish-language residents, 1960 CENSUS OF POPULATION, CENSUS TRACTS, CHICAGO, ILL. 19, Table P-1, but the Puerto-Rican population in Chicago had increased from 32,371 to 78,826 in 1970, the Mexican from 44,600 to 107,925. 1970 CENSUS OF POPULATION, PERSONS OF SPANISH ORIGIN 165, Table 14.

[21] Telephone interview, U.S. Immigration & Naturalization Service, Inspectors Division, (Nov. 4, 1975).

[22] 1970 CENSUS OF POPULATION, ECONOMIC CHARACTERISTICS OF PERSONS OF SPANISH LANGUAGE 559–568, Table P-8.

[23] Median income for a Spanish-language family of median size, 4.63 persons, was $8,983; median years of school, 9.2. The figures are markedly lower for Puerto Rican heads of households of whom only 15.9% completed high school. 1970 CENSUS OF POPULATION, PERSONS OF SPANISH ORIGIN, FAMILY INCOME, POVERTY STATUS 180 (Table 16, income), 112 (Table 9, education).

twenty-seven per cent continue to live in Spanish-speaking, low-income areas.[24]

The inability to cope in any but the most cursory way with the demands of the dominant culture affects the non-English-speaking resident in a host of areas,[25] but it is in confrontations with the law that the risks of incomprehension are highest. A study of the genesis of New York policemen's abuses of power revealed that many officers interpreted the Spanish-speaking resident's failure to answer their questions as a form of defiance.[26] One policeman told New York Civil Liberties Union lawyers that when a young Puerto Rican had answered an officer's questions in Spanish prompting laughter among his companions, the officer had slapped the boy to "maintain his authority."[27]

This same phenomenon was reported by the California State Advisory Committee to the United States Commission on Civil Rights.[28] In a series of cases where Spanish-speaking persons failed to comprehend what was said, the policemen were enraged by the lack of response to orders.[29] In Chicago, a Mexican-American, arriving at school late in the afternoon to see about his brother's truancy, asked directions to the principal's office and was ordered out of the school by an off-duty policeman serving as a school guard. He apparently misunderstood and pushed past toward the principal's office, leading to a fight and an assault charge.[30]

The Civil Rights Commission concluded after a series of hearings that the source of the trouble is often that the English-speaking policeman cannot comprehend the Spanish-speaker's intent from his speech.[31] The regular rise and fall of the Spanish intonation pattern, when accentuated by excitement, may be interpreted as a harangue. Thus, during a riot in East Los Angeles when police overheard a young Mexican attempting to quiet the crowd, they assumed that he was agitating it and arrested him.[32] Finally, misinterpretation of words similar to those in English can lead to miscomprehension and tragic consequences. When a mother complained to the police that her husband had drunkenly struck their daughter, the police took this to mean that the father was sexually molesting the child and arrested him. Understanding almost no English, the father did not object to the charge. The father remained in jail two months unable to make bail.[33] In Chicago, with a Spanish-speaking population of at least 9.4 per cent and a police force with fewer than 200 Spanish-speaking officers,[34] the potential for these misunderstandings is enormous.

More often, of course, arrest results not from misunderstanding but from probable cause. Once an arrest has been made, an interpreter may be necessary to warn the defendant of the right to counsel and the right to remain silent, and for effective questioning if those rights are waived. If the defendant speaks some English, it is almost impossible to show later that the warning was not understood or the waiver unknowing. Only Kansas requires appointment of

[24] 1970 CENSUS OF POPULATION, LOW INCOME NEIGHBORHOODS IN LARGE CITIES, CHICAGO ii (Supp. 1974). Only 16 per cent of non-Spanish-language whites who were below the poverty level lived in such neighborhoods. *Id.* In the low income neighborhood with the highest proportion of Spanish-language residents, Neighborhood 3 (41%), more than 60 per cent of the Spanish-language whites were above the poverty level. *Id.* at 1, Table A-1. More Mexicans live in Chicago than anywhere outside the Southwest. Only New York City has more Puerto Ricans. ILL. STATE ADVISORY COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS, BILINGUAL/BICULTURAL EDUCATION 4 (1974).

[25] Liebowitz, *English Literacy: Legal Sanction for Discrimination*, 45 NOTRE DAME LAW. 7, 51-67 (1969) (catalogues state statutes and regulations requiring knowledge of English).

[26] P. CHEVIGNY, POLICE POWER 69 (1969).

[27] *Id.* at 70. A similar incident happened when Haitian youths spoke Creole when approached by police.

[28] U.S. CIVIL RIGHTS COMM'N, MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE IN THE SOUTHWEST 66 (1970) [hereinafter cited as MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE].

[29] *Id.* at 67.

[30] Case of Carlos R., Nw. U. Legal Assistance Clinic (April 14, 1974).

[31] MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE, *supra* note 28, at 68.

[32] *Id.*

[33] *Id.* at 70.

[34] Telephone interview with Richard Phelan, Ass't Corp. Counsel, City of Chicago (Dec. 5, 1975). As of 1974, only one per cent of Chicago's police force was "Hispanic." During 1971-73, only twenty-three Hispanic officers were added to the police force. United States v. City of Chicago, 385 F. Supp. 543, 548-49 (N.D. Ill. 1974). At the City of Chicago Police Department, 14th District, located in a Latino neighborhood, there were only two Spanish-language officers as of June, 1974. Interview with Police Officer Durr, (July 9, 1974).

an interpreter at this time.[35] Arizona requires that upon the arrest of a deaf-mute, no interrogation of any kind shall take place prior to appointment of an interpreter and that there be a formal determination of the interpreter's competence.[36] But Arizona does not require comparable protection for the non-English-speaking defendant. No case in Illinois has held that the Illinois statute requires appointment of a language interpreter at the time bail is set for the defendant, although it could be argued that the determination of whether bail is excessive, in violation of the eighth amendment, cannot be made if the court is unable to communicate with the defendant.[37]

In *People v. Macias*,[38] the defendant, who spoke no English, and her companions, were charged with aggravated assault and carrying a concealed weapon. Taken before the magistrate at 2:00 A.M., the defendant was unable to explain that she had no arrest record, had been regularly employed for four years, had lived at the same address for three years, and was the mother of a three-year-old child whom she had left with a babysitter when she went to work that evening. All these were factors which the Bail Reform Act of 1966[39] suggested would be proper ones to weigh when considering whether to grant bail and which might have affected the judgment of the court that night as to the bond required. But until May, 1975, no interpreter was available in any Illinois court at this stage of the proceedings.[40]

It also appears that no right to an interpreter at the preliminary hearing is recognized by the Illinois foreign language interpreters statute.[41] This statute provides for appointment of an interpreter when a person accused of committing a felony or misdemeanor "is to be tried in any court of this State."[42] Arguably the prerequisite for implementation of the interpreters statute is not established until *after* the preliminary hearing. Therefore, the earliest stage in the criminal process when Illinois law recognizes that there may be a need for an interpreter for non-English-speaking defendants is at arraignment. On the other hand, Illinois law does require that both at the bond and preliminary hearings a qualified interpreter must be appointed by the court to interpret the proceedings to a deaf person.[43] No challenge has been made to the statute on equal protection grounds as applied to this stage of the criminal process, but it is hard to justify a distinction between the deaf person and the linguistically crippled.

Furthermore, the thrust of the two statutes is markedly different, as is their potential for protecting the defendant's constitutional rights. The statute providing for an interpreter for the deaf makes appointment obligatory, makes clear that the proceedings are to be interpreted to the defendant, and requires a "qualified interpreter of the deaf sign language."[44] The statute for language interpreters in criminal trials provides that the court shall determine upon its own motion or that of counsel whether the accused cannot understand the English language or make himself understood by court, counsel or jury.[45] The focus is on the court's ability to take testimony, not the accused's ability to understand the proceedings. The statute

[35] KAN. Stat. ANN. § 75-4351 (Supp. 1975):

A qualified interpreter shall be appointed in the following cases for persons whose primary language is one other than English, or who are deaf or mute or both:

(*e*) . . . . When such person is arrested for an alleged violation of a criminal law of the state or any city ordinance. Such appointment shall be made prior to any attempt to interrogate or take a statement from such persons.

[36] ARIZ. REV. STAT. ANN. 12-242 B (Supp. 1976).

[37] In Stack v. Boyle, 342 U.S. 1 (1951), the Supreme Court held that bail set at an amount more than is reasonably necessary to assure the defendant's appearance at trial is excessive.

[38] No. 74-01764 (Cook County Criminal Court, 1974). Macias remained in the Cook County House of Correction, Division 3, for more than three weeks without being provided an interpreter. Information obtained from the Nw. U. Legal Assistance Clinic (June, 1974).

[39] 18 U.S.C. § 3146(b) (1970).

[40] In May, 1975, at the urging of the Cook County Circuit Court Judge Wayne W. Olson, and through the action of Judge Eugene Wachowski, a full-time interpreter of Spanish was appointed to the Cook County Criminal Court Building in Chicago at an annual salary of $11,800 and an interpreter of French, Spanish and Italian was appointed to cover the Cook County Branch courts. These two interpreters were originally responsible for all other branches of the Cook County Criminal Court. Interview with Judge Wayne Olson, Cook County Criminal Court, Branch 44 (Dec. 2, 1975).

[41] ILL. REV. STAT. ch. 38, § 165-11 (1975).

[42] *Id.*

[43] ILL. REV. STAT. ch. 51, § 48.01 (1975).

[44] *Id.*

[45] ILL. REV. STAT. ch. 38, § 165-11 (1970).

contains no requirements of competence beyond those implied by the interpreter's oath,[46] which does not apply to testimony not offered to the court. Furthermore, there is no explicit requirement that the proceedings be interpreted to the defendant.

Because the procedures for determining need and for determining an interpreter's competence are not spelled out in the foreign language interpreters statute, the trial court has much greater latitude for the exercise of discretion than does the court in applying the interpreters-for-the-deaf statute. As a result, a reviewing court is less likely to find an abuse of discretion.

This deference to the trial court's implied conclusion that the defendant can "speak and understand English" is not unreasonable. Understandably, the reviewing court is hesitant to find error in a meagre record if there is *some* evidence to support the trial court. The written record is inadequate on the very question raised. Often the reviewing court has only a few isolated words by which to judge, particularly if the defendant has pleaded guilty or has not testified in his own defense. The principle of deference was articulated by the appellate court in *People v. Tripp*:[47]

> When the witnesses labor under the handicap of language difficulties, an appellate court, which sees only the written record, should pay more than ordinary deference to the conclusions drawn by the trial judge, who observed demeanor and gestures of the witnesses and heard possibly important variables of inflection and emphasis.[48]

That the court is able to make some sense of what the person said is not determinative of whether the defendant "speaks English" sufficiently well to manage without an interpreter. The question is whether the person understands the question addressed to him and can give an answer which conveys what he means to the court.[49] Whether the defendant's English is sufficient will depend also on the complexity of the issues for trial.

Undoubtedly, determination of the sufficiency of the defendant's English should be made by the trial court, but it should be done expressly. The First Circuit in *United States v. Carrion*[50] endorsed the vesting of broad discretion in the trial court, stressing, however, the consequent obligations on the trial court: (1) to inform the defendant of the right to an interpreter, (2) to appoint an interpreter if the defendant is indigent, and (3) to be alert for such language difficulty during the trial as would require a new determination of need. The First Circuit appeared to require a formal hearing on the question of need or, at least, clear evidence on the record demonstrating the trial court's continuing attention to the defendant's possible need.[51]

The Illinois courts have not met this standard. If the reviewing courts in Illinois are to continue to defer to the trial court, justice requires that even without a request from counsel, when the trial court has notice of language difficulty it should make some more formal determination of the defendant's ability to speak English before concluding that the statute is satisfied. Without such a formal determi-

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[46] ILL. REV. STAT. ch. 38, § 165-12 (1970).

[47] 19 Ill. App. 3d 200, 311 N.E.2d 168 (1974).

[48] *Id.* at 203, 311 N.E.2d at 170.

[49] This distinction is illustrated by People v. Ortiz, 22 Ill. App.3d 788, 317 N.E. 2d 763 (1974), in which the defendant claimed the witnesses needed the services of an interpreter. The victim of the assault had had little opportunity to observe and had made an error in identification. Four alibi witnesses, two of whom spoke virtually no English, attempted to testify that they had seen the defendant asleep in the living room of his father's apartment at the time of the assault. A review of the abstract of the record reveals a long series of unresponsive or confused answers.

Q: Isn't it a fact, Mr. Ortiz, that your son wasn't living at your house?
A: Yes.
Q: At that time?
A: He living in the house for that time, right.
Q: Mr. Ortiz, isn't it a fact he was living with May?
A: No.
Q: On that date?
A: No, he was not married.
Q: Do you remember the day he was arrested?
A: Oh, that time he got two children . . .
Q: . . . when Salvatore got arrested for this charge, was he living at home?
A: Yes, with me yes . . . with May then.

Abstract of Record 32. The judge however claimed that he understood the testimony and concluded "he brought four people up here to testified [sic] falsely. All four of them contradicted each other." Record of Proceedings at 120.

[50] 488 F.2d 12 (1st Cir. 1973).

[51] *Id.* at 14-15. The U.S. District Court for the Northern District of Illinois has not routinized such inquiries, although individual judges consider it wise. Interview with U.S. District Court Judge Prentice Marshall, (N.D. Ill.) (Nov. 15, 1976).

nation, the Illinois statute, despite its obligatory language, provides an inadequate and uncertain shield for a defendant's constitutional rights.

Constitutional Issues

The Illinois courts have been slow to recognize the constitutional questions inherent in trial of the non-English-speaking defendant. Even if he speaks some English, the constitutional requirement of a fair trial, that he understand the proceedings and be able to participate in his own defense, may not be met.[52] The courts seem to conclude that the trial court's finding that under the interpreters law the defendant speaks and understands enough English not to require an interpreter means that he must have understood the proceedings against him. The reviewing courts have therefore shown deference to the trial courts even when a constitutional claim is raised.[53] They have not required that there be a greater showing from the record when the question is whether the waivers were understandingly given or whether the defendant understood the testimony of adverse witnesses.

In a series of cases the Supreme Court has made clear that there must be a clear trial record to support a finding that constitutional rights have been knowingly waived. As the Court stated in *Johnson v. Zerbst*,[54] "'[C]ourts indulge every reasonable presumption against waiver' of fundamental constitutional rights and . . . we 'do not presume acquiescence in the loss of fundamental rights.'"[55]

The requirement for a record was well demonstrated in *Boykin v. Alabama*,[56] in which the Supreme Court reversed the conviction on a plea of guilty to armed robbery and remanded for trial despite the overwhelming evidence against the accused. The record was entirely barren on the question of whether the guilty plea was understandingly and voluntarily given. "So far as the record shows, the judge asked no questions of petitioner concerning his plea, and petitioner did not address the court."[57]

Even a record of express waiver may be insufficient and require further inquiry: "The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."[58]

The Illinois Supreme Court fully discussed the duty to assure that waiver of constitutional rights are understandingly and expressly made in *People v. Fisher*,[59] a jury waiver case. In *People v. Rambo*,[60] the Illinois appellate court recognized that in some cases, even a clear record that the defendant has been informed of his right to a jury trial and has signed the jury waiver form may require reversal. The court in that case reversed the conviction of a sixteen-year-old boy, stating that the youth of the boy and seriousness of the crime imposed an extra duty of care on the court to assure that the waiver was made with full knowledge of the consequences.[61] The court would not rely on the defense attorney's assent to the waiver of the jury to satisfy the requirement of the Constitution and its implementing statute[62] for an express, knowing waiver.

The Illinois courts have not provided the same protection of the right by jury to the linguistically infirm. Just as youth places special obligations on the judge to assure that the plea of guilty or jury waiver are understandingly made, so, too, should language disability. Yet in *People v. Melero*[63] the reviewing court upheld the bench trial conviction when the attorney alone assented to the jury waiver and the trial began:

> The Court: Could he go to trial without an interpreter?
> Mr. Gilbert: He will try to do it. He speaks Spanish.

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[52] *See* U.S. v. Dusky, 362 U.S. 402 (1960) discussing mental incompetency: Due process requires that the defendant have a "present ability to consult with his lawyer with a reasonable degree of rational understanding—and . . . a rational as well as factual understanding of the proceedings against him." *Id.* at 402.

[53] *See* People v. Rivera, 13 Ill. App. 3d 264, 300 N.E.2d 869 (1973); People v. Melero, 99 Ill. App. 2d 208, 240 N.E.2d 756 (1968); People v. Ayala, 8 Ill. App. 2d 393, 233 N.E.2d 80 (1967).

[54] 304 U.S. 458 (1938).

[55] *Id.* at 464.

[56] 395 U.S. 238 (1969).

[57] *Id.* at 239.

[58] Johnson v. Zerbst, 304 U.S. at 464.

[59] 340 Ill. 250, 265, 172 N.E. 722, 728 (1930).

[60] 123 Ill. App. 2d 299, 260 N.E.2d 119 (1970).

[61] *Id.* at 305, 260 N.E.2d at 122.

[62] Ill. Rev. Stat. ch. 38, § 103-6 (1975).

[63] 99 Ill. App. 2d 208, 240 N.E.2d 756 (1968).

> The Court: Do you want me to hear the case or do you want a jury trial?
> Mr. Gilbert: Waive the jury, Your Honor.
> The Court: State ready?
> Mr. Hackett: The State is ready.[64]

Turning the *Rambo* decision on its head, the Illinois appellate court considered this record and concluded: "If the jury waiver here was not understandingly made, this record does not show it."[65] The defendant was presumed to have assented to his attorney's waiver of a jury trial by not objecting. Yet the error raised on appeal was that the defendant was incompetent to know or understand what right was being waived.[66] Without a full exploration by the court of the defendant's ability to comprehend the proceedings, not merely to answer rehearsed questions in English, the conclusion that the waiver was understandingly made was improper.

Other appellate courts have refused to uphold the trial court in similar circumstances, even when the record reveals that the defendant speaks and understands some English. The requirements of due process have been used to narrow the scope of judicial discretion as to appointment of an interpreter. In *In re Muraviov*,[67] the California Court of Appeals, acting on a writ of habeas corpus, reversed and remanded a criminal conviction for wilful failure to support a minor child. The court found that the defendant had not knowingly waived his right to counsel. The trial court had asked Muraviov four perfunctory questions, all of which could be answered by "yes" or "no". The responses had provided the basis for the Appellate Department of the Superior Court to find a sufficient ability in English to sustain the trial judge's action in proceeding without an interpreter. After conducting its own hearing on the accused's ability to speak English, the appeals court concluded:

> [I]t should be obvious that if petitioner was unable to understand or speak English, his monosyllabic "yes" and "no" answers had no meaning.[68]

In a similar case, the Oklahoma Supreme Court in *Landeros v. State*[69] reviewed denial of a motion to withdraw a guilty plea. The court examined the record of an illiterate Mexican-American who had pleaded guilty to murder after having his constitutional rights, including his right to a jury trial, explained to him in English. Although the defendant spoke and understood some English, his use of English was so limited that the court concluded he could not have understandingly waived his constitutional rights. Citing an earlier Oklahoma case,[70] the court recommended appointment of an interpreter when language ability is limited as a "wholesome precautionary measure; and to assure that all of the defendant's waivers were knowingly and intelligently entered."[71]

Both cases reached the reviewing court with an addition to the bare record of the trial. In *Muraviov* the habeas proceeding made clear to the court that the defendant could not speak English. In *Landeros* the record of the hearing on the motion to withdraw the plea of guilty provided similar evidence. These California and Oklahoma cases suggest the constitutional insufficiency of the Illinois courts' position. Illinois courts should require a substantial record demonstrating the defendant's ability to speak and understand English before finding that a waiver is knowing.

[64] *Id.* at 211, 240 N.E.2d at 757.

[65] *Id.* An example of an Illinois trial judge more conscientiously fulfilling his responsibility is illustrated by People v. Castillon, 132 Ill. App. 2d 581, 270 N.E.2d 268 (1970), in which Judge Collins rejected the defense attorney's estimate of his client's ability to understand English and the jury waiver:

> THE COURT: I am sure you have done everything in your power to properly defend this man, however, I am not satisfied that we can proceed to trial without an interpreter. I want someone to tell this man in his own language what is transpiring and we are beginning right at the beginning with a waiver of a very basic constitutional right, the waiver of jury trial, and I am not satisfied that this record shows he understands that.

Id. at 583, 270 N.E.2d at 270.

[66] The theory is that the defendant knows and understands what his agent, that is, the attorney, understands. But surely this theory of agency must break down if the defendant and attorney cannot communicate. *Cf.* Dusky v. United States, 362 U.S. 402 (1962), where in discussing mental incompetency, the Court said due process requires an ability to consult with one's lawyer. *See also* People v. Hernandez, 8 N.Y.2d 345, 207 N.Y.S.2d 668, 170 N.E.2d 673, *cert. denied*, 366 U.S. 976 (1960).

[67] 192 Cal. App. 2d 604, 13 Cal. Rptr. 466 (1961).

[68] *Id.* at 606, 13 Cal. Rptr. at 467.

[69] 480 P.2d 273 (Okla. Crim. 1971).

[70] Parra v. Paige, 430 P.2d 834 (Okla. Crim. 1967).

[71] 480 P.2d at 275 (Okla. Crim. 1971).

Right of Confrontation and Cross-examination of Witnesses

The courts have long recognized that the sixth amendment right to confront witnesses "really means the right of the accused to hear the witnesses testify against him and to cross-examine them."[72] In a 1970 case, *United States ex rel. Negron v. New York*,[73] the Court of Appeals for the Second Circuit held that the right to an interpreter for the indigent non-English-speaking defendant was a necessary adjunct to protection of the defendant's constitutional right to confront the witnesses against him. The Second Circuit affirmed a district court decision sustaining a petition for writ of habeas corpus for an illiterate Puerto Rican migrant worker who had been convicted of murder. Although an interpreter was provided for the convenience of the court when Negron and two other witnesses testified and during a brief conference with Negron's lawyer, twelve English-speaking witnesses had testified without any translation for Negron nor communication between Negron and his attorney. The court found that Negron was linguistically incompetent to stand trial without an interpreter to aid him. "To Negron, most of the trial must have been a babble of voices."[74] Because Negron was indigent, the trial court was obliged to provide the interpreter.[75] The Second Circuit concluded that in no sense did Negron's silence constitute a waiver of his fundamental right to confront the witnesses against him through an interpreter, for his silence did not satisfy the constitutional standard for waiver: "an intentional relinquishment or abandonment of a known right."[76] Nor would Negron's attorney be found to have waived Negron's right when the right was previously so ill-defined.[77]

The Second Circuit recognized the precedential value of its decision for the defendant who speaks no English. But the decision did little for the defendant who, unlike Negron, speaks *some* English. The court suggested the parallel of the linguistically incompetent to the mentally incompetent.[78] But it did not explicitly hold, as the Supreme Court had held with respect to mental incompetence in *Pate v. Robinson*,[79] that when linguistic incompetence is a possibility, the court should hold a hearing *sua sponte* to determine competence.[80] Negron's linguistic incompetence was "obvious, not just a possibility."[81] By neglecting to suggest procedures for determining whether the defendant had a "severe language difficulty,"[82] the Second Circuit left intact the practice by which a reviewing court would examine the record for hints of the defendant's linguistic competence as a basis for upholding the trial judge's discretionary decision. It was because Negron came to the court on a writ of habeas corpus that the court looked beyond the record. Furthermore, the right to court appointment of an interpreter remained limited to indigent defendants. As the right to an interpreter is now clearly established, the court may presume a waiver of the right if the private attorney does not claim it.

Some of the deficiencies of *Negron* were overcome in *United States v. Carrion*[83] where the First Circuit recognized that protection of a defendant's constitutional rights to a fair trial and to confront witnesses may require an interpreter, even if the defendant has "some ability to understand and communicate" in English:

[72] United States v. Barricota, 45 F. Supp. 38 (S.D. N.Y. 1942).

[73] 434 F.2d 386 (1970).

[74] *Id.* at 388.

[75] The Second Circuit had earlier suggested that due process and the right to confront witnesses might require appointment of an interpreter. In United States v. Desist, 384 F.2d 889 (2d Cir. 1967), *aff'd on other grounds*, 394 U.S. 244 (1968), a Frenchman, charged with dealing in heroin, clearly had the resources to pay for an interpreter but disassociated himself from the interpreter when he learned he must pay for the service. Negron satisfied the implied requirement of indigency suggested in *Desist*. 434 F.2d at 389.

[76] 434 F.2d at 390, *citing* Johnson v. Zerbst, 304 U.S. 458 (1938).

[77] 434 F.2d at 390. The court seemed to recognize the danger that an attorney might not assert the right and yet try to carry it on appeal. The obvious cure is for the court on its own motion to hold a hearing on the need.

[78] *Id. citing* Pate v. Robinson, 383 U.S. 375 (1966).

[79] 383 U.S. 375 (1966).

[80] Of course, the Second Circuit decision was not legally binding on any courts except those of the Second Circuit. In People v. Rivera, 13 Ill. App. 3d 264, 267, 300 N.E.2d 869, 871 (1973) the court acknowledged that there might be such an obligation but that it was satisfied by asking the illiterate co-defendant to act as interpreter. *See* text accompanying notes 103 to 106 *infra*.

[81] 434 F.2d at 390.

[82] *Id.* at 391.

[83] 488 F.2d 12 (1st Cir. 1973).

> The right to an interpreter rests most fundamentally . . . on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.
>
> Yet how high must the language barrier rise before a defendant has a right to an interpreter? . . . Because the determination is likely to hinge upon various factors . . . considerations of judicial economy would dictate that the trial court, coming into direct contact with the defendant, be granted wide discretion in determining whether an interpreter is necessary. . . . But precisely because the trial court is entrusted with discretion, it should make unmistakably clear to the defendant who may have a language difficulty that he has the right to a court-appointed interpreter if the court determines one is needed, and, whenever put on notice that there may be some significant language difficulty, the court should make such a determination of need.[84]

The First Circuit suggested that the trial court must weigh the defendant's ability in English together with the complexity of the issues for trial.[85] In the exercise of its discretion, the trial court has an obligation to hold a formal hearing or to follow other procedures[86] to assure that the interpreter will be appointed if needed at any point during the trial.

The First Circuit did not suggest that the court's duty to determine *need* was lessened if the attorney did not ask for an interpreter or the defendant was not indigent. The initiative remained with the court. Even after counsel in *Carrion* stated that no interpreter was necessary, the trial court had continued to be aware of its responsibility to ensure the defendant understood the testimony.

As early as 1957, the Illinois Supreme Court recognized that if the defendant cannot understand the testimony of the witnesses against him because of a language barrier, the defendant has been deprived of his constitutional right to confront adverse witnesses. In *People v. Shok*,[87] the Illinois Supreme Court found an abuse of discretion in failure to appoint an interpreter for a prosecuting witness who spoke almost no English. The cross-examination had been severely limited by the witness's disability. The record was replete with evidence of the need for a competent interpreter.[88]

In *People v. Starling*,[89] it was again the prosecuting witness, and not the defendant who spoke no English. The appointed interpreter's translation was so inadequate that neither the court, counsel nor the defendant could follow the testimony. The interpreter was repeatedly chastised for carrying on an independent colloquy with the defendant. And the abortive cross-examination by defense counsel had to be reshaped to make any sense at all. In *Starling*, the Illinois appellate court recognized for the first time that:

> [T]he due process rights of persons charged with crimes cannot be short-cut by avoiding the ritual of translating each question and answer as required in section 2 of the Act relating to interpreters.[90]

The reviewing court again had an adequate record from which it could conclude that there had been an abuse of discretion.[91]

[84] *Id.* at 14-15.

[85] *Id.* This court is unique in recognizing the strain of following testimony in another language even if one has some ability to speak it.

[86] *Id.* at 15.

[87] 12 Ill. 2d 93, 145 N.E.2d 86 (1957). The fact that the court might glean what the witness meant from the witness's tone of voice and emotions could not compensate for an extensive record revealing the witness's difficulty in expressing herself.

[88] One could also argue that when a prosecuting witness is so hampered in his or her use of English that there is no way to make the testimony precise, definite and sure, and the testimony is critical to the conviction, then, as a matter of law, the defendant has not been proved guilty beyond a reasonable doubt.

[89] 21 Ill. App. 3d 217, 315 N.E.2d 163 (1974).

[90] *Id.* at 222, 315 N.E.2d at 168.

[91] In People v. Ortiz, 22 Ill. App. 3d 788, 317 N.E.2d 763 (1974), the defendant argued that his alibi witnesses needed an interpreter. Without one, their answers were "unresponsive and/or contradictory and therefore unconvincing to the court." He was therefore deprived of his right to present his defense. Brief for Appellant at 50-51. Here, despite the clear record of confusion, the appellate court barely acknowledged the argument since the trial court had "understood" the testimony. The issue in testing a witness's testimony should not be whether the witness's answers are decipherable, but whether the witness understood the question and gave responsive answers. The trial court's lack of recognition of the possibility of linguistic isolation during a long period of residency in the United States is revealed by the judge's impatience with the defendant's contention. At the trial the judge commented: "he brought four people up here to testified [*sic*] falsely. All four of them contradicted each other." Record at 120. At the post conviction hearing the judge said:

They are long term residents of this area. And it

But the Illinois courts have not yet held that there was an abuse of discretion in any case where the defendant claimed that he had not been afforded his right to confront witnesses because he did not have an interpreter for his own use or because the interpretation granted was deficient.[92] The record does not provide any support for his claim that he has not "heard" the testimony, and the Illinois courts appear loath to find an abuse of discretion absent a record of miscomprehension.

This is not to suggest the reviewing court need conclude from every incongruous question and answer or from a record containing only monosyllabic responses that there was error in not providing an interpreter. But where the record is inadequate to make *any* decision on the issue, and the question does not come to the reviewing court in a form where it can determine the defendant's competency through its own hearing, the case should be remanded for an explicit finding.[93]

Such a procedure would also prevent manipulation of the record by the defendant who claims he does not speak adequate English and then does not testify in order to preserve his language disability as grounds for later appeal or a writ of habeas corpus.[94] In *State v. Aguelara*,[95] the Missouri trial court in an *ex parte* hearing weighed the testimony that the defendant spoke Spanish at home and his own claims that he "couldn't get" the questions addressed to him and only knew a few English words sufficient for his job, together with testimony by a friend that she spoke no Spanish but had no difficulty communicating with the defendant. The court concluded that no interpreter was necessary. In upholding the trial court, the Missouri Supreme Court stated that in each instance where inability to understand the proceedings was claimed or apparent there must be an *express* determination of whether an interpreter was necessary before the court will support the decision not to provide an interpreter as a sound exercise of discretion.[96]

Quality of Interpretation

The court in *People v. Starling*[97] recognized that the quality of interpretation may determine whether the defendant has understood the testimony against him sufficiently to satisfy the constitutional requirement. Similarly, the quality of interpretation may affect whether the defendant has understood and knowingly waived his rights.

The interpreter-for-the-deaf statute provides more assurance that the defendant's constitutional rights will be protected than does the language-interpreter statute. The previous deaf-mute statute explicitly required a "qualified" interpreter;[98] the amended statute requires that the interpreter be a "qualified interpreter of the deaf sign language."[99] The Illinois appellate court in *Hudson v. Augustine's, Inc.*[100] found that an interpreter who was not formally trained to interpret for the deaf, but instead only knew what the deaf mute had taught him, did not satisfy the statutory requirement of competency. The interpreter had only been able to testify to what he understood the deaf mute to have said, a translation which the court did not find sufficiently "unequivocal and positive and definite in character."[101]

The language interpreters statute says nothing about qualifications. Policemen, state employees, and co-defendants are not disqualified solely on the ground that they may be interested parties.[102] The court, in the exercise of its

is like many times these people, once they didn't get what they want, then they didn't understand what happened.
Record at 191.

[92] People v. Rivera, 13 Ill. App. 3d 264, 300 N.E.2d 869 (1973); People v. Martinez, 7 Ill. App. 3d 1075, 289 N.E.2d 76 (1972).

[93] Since the obligation rests on the court as well as the defendant's counsel, the failure of the defendant's counsel to request an interpreter should not be taken as a waiver if there is an indication of need. *But see* People v. Melero, 99 Ill. App. 2d 208, 240 N.E.2d 756 (1968).

[94] This was the obvious concern of the court in People v. Rivera, 13 Ill. App. 3d 264, 300 N.E.2d 869 (1973) and People v. Ayala, 89 Ill. App. 2d 393, 233 N.E. 2d 80 (1967).

[95] 33 S.W.2d 901 (Mo. 1930).

[96] *Id.* at 904.

[97] 21 Ill. App. 3d 217, 315 N.E.2d 163 (1974).

[98] ILL. REV. STAT. ch. 51, § 48.01 (1963) (current version at ILL. REV. STAT. ch. 51, § 48.01 (1975)).

[99] ILL. REV. STAT. ch. 51, § 48.01 (1975).

[100] 72 Ill. App. 2d 225, 218 N.E.2d 510 (1966).

[101] *Id.* at 237, 218 N.E.2d at 516.

[102] Interview with Christina Ruiz, Cook County criminal court interpreter (Dec. 5, 1975). *See* People v. Murphy, 276 Ill. 304, 114 N.E. 609 (1916); People v. Torres, 18 Ill. App. 3d 921, 310 N.E.2d 780 (1974) (police officer); People v. Rivera, 13 Ill. App. 3d 264, 300 N.E.2d 869 (1973) (co-defendant); People v. Delgado, 10 Ill. App. 3d 33, 294 N.E.2d 84 (1973) (unsworn bailiff).

discretion, has used and continues to use relatives and friends or to press court clerical personnel into service.[103] Only one case reviewed revealed an inquiry by the court into the credentials of the interpreter; the burden is on the defendant to show lack of qualification.[104] In only a few cases have the Illinois courts found the interpreter incompetent; those involved translation of witnesses' testimony, where the confusion of court and counsel because of the interpreter's incompetence was clear on the record.[105]

Any subsequent challenge to the competence of the interpreter when the translation has been made for the benefit of the defendant and not the court suffers from the same disability as that presented when no interpreter is provided. *There is no record of the foreign language interpretation.* Yet behind the questions of competency of the interpreter and the quality of the interpretation lies the question of what the defendant heard and agreed to.

In *People v. Rivera*,[106] the Illinois appellate court found that appointment of a co-defendant as interpreter at the suggestion of the public defender satisfied the requirements of the statute. Any objection to the appointment had been waived by counsel's tender of the interpreter. The court looked at the careful instructions on jury waiver which the trial court had given to the defendants followed by the question, "He understand that?" and the defendant's answer, "Yes." Despite the absence of any record that the co-defendant had translated the court's words, the reviewing court refused to draw the negative inference that an inadequate translation had taken place.[107] Nor did the court find evidence of incompetence in the co-defendant translator's confession to the court that he did not know how to read, but would "tell" the defendant what the jury waiver form said.[108] This is similar to the Illinois court's practice in accepting interpretations which are not literal translations but merely substantially the same as the testimony.[109] Finally, the court did not question how the co-defendant could provide adequate interpretation once the preliminary proceedings were over and the trial of both defendants was under way.

In *People v. Martinez*,[110] there was no question about the competency of the defense attorney to speak and understand Spanish, but the adequacy of the interpretation which he gave to the defendant was at issue.[111] The defendant, a

[103] People v. Rardin, 255 Ill. 9, 99 N.E. 59 (1912). In July, 1974, the author, attending a preliminary hearing for a case handled by the Northwestern University Legal Assistance Clinic, was pressed into service as interpreter for two other cases at the Cook County Criminal Court Building. The same ad hoc procedure was observed during visits to Cook County Court, Municipal Division, Boy's, Gun, and Auto Theft branches, Nov., 1975.

The N.Y. Times, Nov. 7, 1976, § 1, at 48, col. 3, reports that at a pretrial hearing to determine whether a prosecutor-obtained interpreter had served as a prosecution informant, a member of the audience was drafted to interpret the proceedings for the Croatian defendant.

Judge Wayne W. Olson complains that without a professional interpreter it is almost impossible to obtain a translation which would make a record of the defendant's comprehension of the proceedings, since the interpreter is inclined to explain rather than translate, when the defendant doesn't understand. Interview with Judge Wayne W. Olson, Cook County Court, Branch 44 (Dec. 1, 1975).

[104] People v. Martinez, 7 Ill. App. 3d 1075, 289 N.E.2d 76 (1972).

[105] *E.g.*, People v. Starling, 21 Ill. App. 3d 217, 315 N.E.2d 163 (1974). In People v. Allen, 22 Ill. App. 3d 800, 317 N.E.2d 633 (1974), the interpreter, a friend of the complaining witness, was found disqualified as an interested party.

[106] 13 Ill. App. 3d 264, 300 N.E.2d 869 (1973).

[107] [T]he record . . . does not show that any interpretation in fact occurred. Defendant wishes us to indulge in the negative inference that therefore no interpretation did in fact occur; . . .

Such a negative inference is too slender a reed on which to predicate reversible error.

Id. at 268, 300 N.E.2d at 872.

[108] Abstract of Record at 5

[109] People v. Murphy, 276 Ill. 304, 114 N.E. 609 (1916). In *Murphy* the witness referred to the assailants in Greek as *"megalos"* [the big man] and *"mikros"* [the little man]; the interpreter substituted the names of the defendants for those references. *Id.* at 320-21, 114 N.E. at 615.

The insufficiency of summary translations was commented on by the court in United States *ex rel.* Negron v. New York, 434 F. 2d 386 (1970):

However astute [the] summaries may have been, they could not do service as a means by which Negron could understand the precise nature of the testimony against him during that period of the trial's progress when the state chose to bring it forth. Negron's incapacity to respond to specific testimony would inevitably hamper the capacity of his counsel to conduct effective cross-examination. . . . [A]s a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded.

Id. at 389–90.

[110] 7 Ill. App. 3d 1075, 289 N.E.2d 76 (1972).

[111] Although the fact that an attorney speaks the language of the accused has led courts to hold that no

Puerto Rican who neither spoke nor understood English, pleaded guilty to murder and two charges of attempted murder. On appeal he argued that his attorney had tricked him at the trial, taking the time allowed by the judge for translation of the judge's admonitions to tell him that if he did not plead guilty he would get 100–199 years. The defendant claimed that he believed he was pleading guilty to manslaughter. The court acknowledged that the record carried no indication of the defendant's knowing waiver of his right to a jury trial, but presumed that the attorney, whose ability to translate was established by the trial court, had properly translated the admonitions. Again, because of the absence of any record of the Spanish spoken to the defendant, the record necessary to determine the merits of the appeal was unavailable to the reviewing court. No English-speaking defendant suffers this disability when he asks the court to review the record for evidence of an involuntary plea.

The first solution would be to provide foreign language transcriptions of the interpreter's translation of the proceedings. The transcription could be checked against the English-language proceedings to determine whether sufficient translation was provided so that the defendant could understand the proceedings. One attorney has argued without success that foreign language transcriptions are required by chapter 37, section 163(F)(1) of the Illinois Revised Statutes, which calls for full stenographic notes of the proceedings.[112] The Illinois courts have, however, rejected the contention that the proceedings must be immediately and fully translated to the defendant.[113] An inexpensive and uncomplicated method of preserving the record would be to tape the interpretation for later transcription if necessary, should the competency of the translation be challenged. But there is no precedent in Illinois for even this modest method of assuring that the *substance* of the proceedings is communicated.

It is no real solution to be able to determine after the trial that the translation was insufficient. Despite the silence of the statute, the trial court is obliged to make an express determination of need if it has notice of language difficulty and to appoint competent interpreters. Neither obligation is relieved by the defense counsel's waiver of an interpreter, tender of an incompetent one, or failure to object to the quality of interpretation. The court should independently determine the competency of the interpreter, unless a professional one is provided by the state. California is almost unique in providing that judges may use examinations or "other suitable means" to assure the competency of interpreters.[114] The Illinois Supreme Court or Illinois legislature should implement similar measures.

Employment of a Professional Interpreter

The right to an interpreter to aid the non-English-speaking defendant in protection of his constitutional rights has been more effectively recognized in the federal courts and some other states than in Illinois. The federal courts have moved toward requiring regular procedures to determine need or substantive evidence that the trial judge has in fact made a determination of need whenever language difficulty has developed during a trial. Despite the fact that no standards for interpreters have been promulgated by the United States Supreme Court and no Supreme Court rule makes appointment obligatory, the various district courts of the Second, Fifth, Seventh and Ninth Circuits and of Puerto Rico now employ professional interpreters. Verbatim interpretation is therefore available for the convenience of the court in taking testimony and to translate the proceedings for the indigent defendant.

In the Fifth and Ninth Circuits and in Puerto

interpreter is necessary, it should be clear that the attorney cannot translate the substance of testimony and properly carry out his functions. *But see* People v. Martinez, *id.*, 289 N.E.2d 76; *cf.* People v. Pelgri, 39 Ill. 2d 568, 237 N.E.2d 453 (1968).

[112] Brief for Appellant at 14, People v. Martinez, 7 Ill. App. 3d 1075, 209 N.E.2d 76 (1972). The court reporter at any arraignment must take full stenographic notes of the proceedings, including the plea by the accused, the receipt and entry by the court, and the admonishment by the court. ILL. REV. STAT. ch. 37, § 661 (1975).

[113] People v. Torres, 18 Ill. App. 3d 921, 926, 310 N.E.2d 780, 784 (1974), *citing* Tapia Corona v. United States, 369 F.2d 388 (9th Cir. 1966).

[114] *See* CAL. CIV. PROC. CODE § 264 (West Supp. 1971). Kansas specifically disqualifies relatives of the first or second degree and provides that before appointment, the appointing authority shall make:

> a preliminary determination that the interpreter is able to readily communicate with the person whose primary language is one other than English . . . and is able to accurately repeat and translate the statement of said person.

KAN. STAT. ANN. § 75-4353(b) (Supp. 1975).

Rico, the interpreters are always available without regard to indigency.[115] In the United States District Court for the Northern District of Illinois the *right* to an interpreter at government expense is limited to the indigent defendant, although some district court judges will arrange for the interpreter and determine the source of compensation later.[116] Non-English speaking defendants who retain their own attorneys are often inadequately protected.[117] The federal interpreter may be called to appear at the bond hearing after the narcotics agent has informed the United States Attorney that the accused does not speak English, or the Federal Defender's office may call before arraignment. But if the defendant subsequently secures a private attorney, the federal interpreter may no longer be employed for the defendant's use. The defendant may then enlist a member of his family or a friend who is not trained to translate verbatim.

The Illinois decisions do not match those of the federal courts in protecting the non-English-speaking defendant, but the practice which is developing at the Cook County Criminal Court Building may provide even greater advantages than does the federal system. Until May, 1975, the branch courts located at the Cook County Criminal Court Building depended almost entirely on drafting ad hoc interpreters, relatives, clerical and court personnel, when the need arose. A list of interpreters was maintained for more drawn-out procedures, but quality of translation of the proceedings varied.[118]

The degree to which the need went unrecognized is indicated by the startling increase in the number of cases in which an interpreter has been employed since the judges became aware that the court had hired its first full-time salaried interpreter, skilled in verbatim translation. During the first month, the interpreter was utilized in twenty-four courtroom proceedings. The number of calls for courtroom work increased steadily, so that in the fifth month she made ninety-four courtroom appearances.[119]

While the Illinois language interpreters statute does not provide for an interpreter at the early stages of the criminal process, the practice at the Criminal Court Building exceeds the requirements of the law. The interpreter arrives at 8:30 A.M. and immediately consults with interviewers to determine which prisoners being held for bond hearings do not speak English. Each morning there are five to eight people in this category. "Before we even get

[115] MEXICAN AMERICANS AND THE ADMINISTRATION OF JUSTICE, *supra* note 28, at 72; 1966 JUD. CONF. REP. 59. All proceedings in U.S. District Court in Puerto Rico are required to be in English, 48 U.S.C. § 864 (1974). Since only 37.7% of the adult population speaks English, STATUS OF PUERTO RICO 152, *supra* note 17, the need for a full-time interpreter is manifest.

[116] Interview with U.S. District Court Judge Prentice Marshall (N.D. Ill.) (Nov. 15, 1976).

[117] Interview with U.S. District Court (N.D. Ill.) interpreter Alicia Haas, Dec. 3, 1975. Because Mrs. Haas is not salaried, the district court's position had been that she could not be made available to the defendant at government's expense without a showing of indigency; however, the district court is considering a proposal to provide regular court appointed interpreters. Interview with U.S. District Court Judge Prentice Marshall, Nov. 15, 1976. Mrs. Haas expressed dismay that the court had limited the right to court appointed interpreters to indigents based on the precedent of a case in which the defendant was a rich French narcotics dealer. U.S. v. Desist, 384 F.2d 889 (2d Cir. 1967), *aff'd on other grounds*, 394 U.S. 244 (1968). The usual case, she said, is a basically poor defendant who scrapes together money to pay the private attorney in advance. The private attorney is then often not interested in paying the $40-a-day rate. More recently, the district court judges have increasingly used Mrs. Haas' services without regard to defendant indigency. Rule 28 Federal Rules of Criminal Procedure makes provision for appointment.

Mrs. Haas reports that when an interpreter is present at the instigation of prosecutors rather than as an employee of the court, defendants and their attorneys may distrust the interpreter. Interview with Mrs. Haas, Nov. 10, 1976. The problem in using an interpreter obtained by prosecutors is illustrated in the recent case of Croatian nationalists charged with hijacking a jet. The prosecutions may be jeopardized because the interpreter is charged with also serving as a prosecution informant. N.Y. Times, Nov. 7, 1975, at 48, col. 3.

[118] Interview with Judge Wayne W. Olson, Dec. 2, 1975.

[119] Day book of Cook County Criminal Court interpreter, Christina Ruiz, May-Nov. 1975. Increasingly, the judges at the Cook County Criminal Court Building take precautionary measures when there is some doubt of the ability of the defendant to comprehend. One judge who formerly had been quick to conclude no interpreter was necessary now accounts for a substantial portion of the interpreter's caseload. Interview with Christina Ruiz, Dec. 2, 1975. Another judge stated that there was no doubt that the court, knowing that the interpreter is available, can now explore more carefully with the defendant his understanding of the pleading, waivers, and testimony. Interview with Judge Wayne W. Olson, Dec. 2, 1975.

started in the morning [the interpreter] has spotted the cases where she will be needed,"[120] one judge told an interviewer. The interpreter, appearing at the bond hearings, is able to have her schedule considered when later proceedings are being scheduled. When there are delays or continuances, the defendant does not find himself without an interpreter. If the need is not immediately apparent but becomes clear during the trial, the interpreter can be present after only a brief recess.[121]

Once the need for an interpreter is established, interpreter's services are provided at state expense. The availability of a professional interpreter means that the judges at the Cook County Criminal Court Building can recommend her services even when the defendant retains a private attorney. Although private counsel do not yet take proper advantage of the availability of a free interpreter, some judges regularly offer conference time for the private attorney to consult with his client through the interpreter.[122]

In the past there have been almost no standards for interpretation of courtroom proceedings to the non-English-speaking defendant unless and until he testifies. Even then the standards have varied widely. But with the introduction of a professional interpreter translating verbatim, the quality of the defendant's understanding becomes a part of the record. When there is confusion, when the defendant has not understood the court's admonitions, there is no longer a colloquy of explanation in the foreign language between the defendant and the interpreter. The defendant's questions are translated to the court and the court's further explanation provided to the defendant through the interpreter.[123]

Furthermore, when English-speaking witnesses, counsel or the court speak, the court can be confident that the proceedings are being translated. The interpreter has the powers of intense concentration necessary for interpretation and no other duties to distract from that obligation. A professional interpreter also can master the subtleties of dialect[124] and the specialized language of such fields as medical pathology. Moreover, the interpretation is not obtrusive.

For the defendant whose bond hearing is held elsewhere in Cook County or whose alleged criminal act carries him into some other courtroom in the state, the need for interpretation of the proceedings to the defendant continues to be ignored or inadequately met except when provided by conscientious counsel. Even at the Cook County Criminal Court Building, needs in languages other than Spanish are met in a more makeshift manner. And some judges still prefer to avoid using an interpreter's services unless the need is glaring.[125] Thus, protection of the defendant's rights is still somewhat arbitrary.

Conclusion

While recognizing that failure to provide an interpreter might violate a defendant's constitutional rights to a jury trial or confrontation of witnesses, the Illinois appellate court continues to give such deference to the trial court's discretion in cases where the defendant speaks little English that appeal is discouraging. The court's failure to insist on an adequate record of the defendant's comprehension of the proceedings to support the trial court's decision not to

[120] Interview with Judge Wayne W. Olson, Dec. 2, 1975.

[121] Personal observations of the author during a half day spent with Criminal Court interpreter, Christina Ruiz, Cook County Criminal Court, Dec. 2, 1975. In the first year of the program, the single interpreter was also on call to all branch courts, but she could not meet these demands and also meet the mass need at the central criminal court. A second interpreter now serves the southern branch courts. Interview with Judge Wayne W. Olson, Nov. 12, 1976.

[122] Public defenders also have a greater opportunity to prepare their cases involving non-English-speaking defendants. Common practice in interviews had been to use other Spanish-speaking prisoners. Conversation with Public Defender Thomas Moore, Cook County Criminal Court, Dec. 2, 1975.

[123] *See* People v. Starling, 21 Ill. App. 3d 217, 221 N.E.2d 163 (1974). Judge Olson reported that this was one of the most recurring and frustrating problems in that he could not know if the explanation contained the substance of the court's words. Interview with Judge Wayne W. Olson, Dec. 2, 1975.

[124] In People v. Starling, 21 Ill. App. 3d 217, 221 N.E.2d 163 the question whether the Spanish-speaking witness had been in a bar was misunderstood when the bailiff–interpreter apparently translated the word as "bara," a Caribbean usage. The witness denied being in the "bara." In Mexico the word is "cantina." Brief for Appellant at 15.

[125] Interview with Criminal Court interpreter Christina Ruiz, Dec. 2, 1975. One judge has not used the interpreter at all.

provide an interpreter means that appointment of any interpreter is often a matter of chance. Furthermore, even in those cases where an interpreter is used, since no provision is made for appointment of professional interpreters or for transcribing or recording the interpretation given, the trial record often reveals almost nothing of what an interpreter has in fact communicated to the defendant or whether the defendant has understood.

A hearing on a motion to withdraw a guilty plea, if appropriate and timely, or a petition on a writ of habeas corpus may be the only ways that such a defendant can create an independent record of his disability. It may even be more difficult to establish the incompetence of an interpreter who has translated nothing for the record.[126] Until the Supreme Court of Illinois or the Illinois legislature establishes clear procedures and standards to determine need and quality of interpretation, the non-English-speaking defendant's rights to trial by jury, to effective counsel, to confront adverse witnesses and to a fundamentally fair trial are not assured.

[126] *E.g.*, People v. Rivera, 13 Ill. App. 3d 264, 300 N.E. 2d 869 (1972).