

Providing Meaningful Language Access

to

LEP Litigants

Presented by:

Hon. Andrew W. Gould

Arizona Supreme Court

I. The Right to an Interpreter

A. Constitutional Protections – Criminal Cases

Providing an interpreter in a criminal case to an LEP (Limited English Proficient) defendant is necessary to protect his constitutional rights.

These constitutional rights include:

- **Fifth Amendment right to testify in one's own defense;**
- **Sixth Amendment and Fourteenth Amendment rights to a fair trial;**
- **Sixth Amendment right to be present at trial;**
- **Sixth Amendment right to confront and cross-examine witnesses;**
- **Sixth Amendment right to effective assistance of counsel;**
- **Fourteenth Amendment right to due process.**

Negron v. New York, 434 F.2d 386, 389-90 (2d Cir. 1970) (the right to a fair trial guaranteed under the due process clause of the Fourteenth Amendment, as well as the Sixth Amendment right to confront and cross-examine witnesses, require that a defendant who is unable to speak and understand English be provided with an interpreter at trial).

State v. Rios, 112 Ariz. 143, 144-45, 539 P.2d 900, 901-02 (1975) (a trial court's failure to provide a defendant, who did not understand English, with the continuous, simultaneous assistance of an interpreter throughout his trial constituted a denial of due process, the right to confront and cross-examine witnesses, and effective assistance of counsel).

State v. Natividad, 111 Ariz. 191, 193-94, 526 P.2d 730, 732-33 (1974) (holding that failure to provide a defendant who does not speak or understand English with the continuous assistance of an interpreter during all pretrial proceedings, as well as throughout trial, violates a defendant's right to a fair trial, right to confront and cross-examine witnesses, and right to effective assistance of counsel).

United State v. Mayans, 17 F.3d 1174, 1180-81 (9th Cir. 1994) (stating that a defendant's Fifth Amendment right to testify on his own behalf was violated when the trial court required him to testify without the assistance of an interpreter).

United States v. Edouard, 485 F.3d 1324, 1338 (11th Cir. 2007) (denial of an interpreter implicates a “defendant’s rights to due process, confrontation of witnesses, effective assistance of counsel, and to be present at his trial”).

See Standing Committee on Legal Aid and Indigent Defendants, *American Bar Association Standards for Language Access in Courts*, p. 22 (February 2012) (discussing cases holding that providing an interpreter is necessary to guarantee constitutional protections guaranteed by Fifth, Sixth and Fourteenth Amendments).

See also Michael L. Buenger, Nat’l Ctr. for State Courts, *Limited English Proficiency Requirements: The Legal Landscape, A Constitutional and Statutory Perspective* (October 2012) (compiling cases discussing constitutional protections for LEP litigants).

B. Civil Cases

Whether a litigant in a civil case is entitled to an interpreter requires consideration of federal cases and statutes, state constitutional provisions, and state cases and statutes.

Lizotte v. Johnson, 777 N.Y.S.2d 580, 596 (N.Y.Sup.Ct. 2004) (holding that petitioner seeking increase in foster care benefits for special needs child was deprived of due process and a meaningful opportunity to participate in foster care benefit hearing because the hearing officer failed to provide petitioner with adequate interpreter services; the court noted that, as a practical matter, “[F]or portions of the hearing, petitioner might as well not have been in the room...”).

In re Doe, 57 P.3d 447, 451 (Haw. 2002) (“We hold that parents who are in need of an interpreter because of their inability to understand English are entitled to the assistance of one at any family court hearing in which their parental rights are substantially affected.”); See *Michael M. v. Ariz. Dep’t of Econ. Sec.*, 202 Ariz. 198, 200, ¶ 8, 42 P.3d 1163, 1165 (App. 2002) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (internal citations omitted) (recognizing that “[a] parent’s right to ‘the companionship, care, custody, and management of his or her children’ is a fundamental, constitutionally protected right, as is the right of association with one’s children.”).

But see Jara v. Municipal Court, 578 P.2d 94, 97 (Cal. 1978) (holding that there is no constitutional right to the assistance of an interpreter in a civil case).

See Standing Committee on Legal Aid and Indigent Defendants, *American Bar Association Standards for Language Access in Courts*, p. 23 (February 2012) (discussing cases concerning the constitutional right to an interpreter in a civil case).

See also Michael L. Buenger, Nat'l Ctr. for State Courts, *Limited English Proficiency Requirements: The Legal Landscape, A Constitutional and Statutory Perspective* (October 2012) (discussing cases concerning the constitutional right to an interpreter in a civil case).

1. Title VI of the Civil Rights Act of 1964

The right to an interpreter in a civil case may be based on the nondiscrimination provisions of Title VI of the Civil Rights Act. Some courts have determined that failure to provide language access to LEP persons constitutes unlawful discrimination based on national origin under Title VI.

a. Section 601 of Title VI (42 U.S.C. § 2000d (2006)) provides:

“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

b. Section 606 of Title VI (42 U.S.C. § 2000d-4a (2006)) defines the terms “programs” and “activities” receiving federal financial assistance broadly.

See Michael L. Buenger, Nat'l Ctr. for State Courts, *Limited English Proficiency Requirements: The Legal Landscape, A Constitutional and Statutory Perspective* (October 2012) (discussing cases construing Section 606 of Title VI).

c. Connection Between Language Access and Discrimination

Lau v. Nichols, 414 U.S. 563, 569 (1974), *abrogated on other grounds*, *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (holding that school district's failure to provide English instruction to students of Chinese descent denied students a meaningful opportunity to participate in public education and violated Title VI).

United States v. Maricopa Cnty., Arizona, 915 F.Supp. 2d 1073, 1079 (D.Ariz. 2012) (stating that “longstanding case law, federal regulations and agency interpretation of those regulations hold language-based discrimination constitutes a form of national origin discrimination under Title VI.”).

2. The Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. § 3789d (2006))

Prohibits discrimination based on national origin by any program or activity funded by the Act, which includes financial assistance to state and local law enforcement. *See, e.g.* 42 U.S.C. §§ 3712, -3713 - 3714, -3716, -3721

3. The Court Interpreters Act (28 U.S.C. § 1827 (1978))

Requires federal courts to appoint an interpreter in criminal cases and in civil cases brought by the federal government where a party or witness “speaks only or primarily a language other than English” such that it “inhibits” the party’s “comprehension of the proceedings or communication with counsel or the presiding judicial official” and/or “inhibits” a “witness’ comprehension of questions and the presentation” of the witness’ testimony. 28 U.S.C. § 1827(d)(1).

4. Executive Order No. 12250 (45 Fed. Reg. 72,995 (November 2, 1980))

Provides that the Department of Justice is tasked with ensuring implementation and compliance with Title VI; the Attorney General is delegated authority to promulgate rules, regulations and orders to implement and enforce Title VI.

5. Executive Order No. 13166 (65 Fed. Reg. 50,123 (August 16, 2000))

Mandates improved access to government agencies, including the courts, for LEP persons.

Applies to all Federal agencies and any State agencies, including courts that receive federal assistance.

Requires standards for language access to be developed by Department of Justice (DOJ).

Requires implementation of standards that are “practical, effective, fiscally responsible...[and] can be readily implemented.”

6. Executive Order No. 13166 was reaffirmed by Attorney General Eric Holder on February 17, 2011.

See Office of Attorney General Memorandum Re “Federal Government’s Renewed Commitment to Language Access Obligations Under Executive Order 13166,” dated February 17, 2011.

Several requirements are set forth in this Memorandum and the “Supplement to the Attorney General’s Memorandum,” including the submission of updated LEP plans within six months of the date of the memorandum, e.g., July, 2011.

7. Arizona Constitution

- a. Ariz. Const., art. 28, § 2 - “The official language of the state of Arizona is English.”
- b. Ariz. Const., art. 28, § 4 - “Official actions shall be conducted in English.”

The phrase “official action” is defined broadly to include “the performance of any function or action on behalf of this state or a political subdivision of this state or required by state law that appears to present the views, position or imprimatur of the state or political subdivision or that binds or commits the state or political subdivision...” Ariz. Const., art. 28 § 1 (2). One exception to this provision are “[a]ctions that protect the rights of victims of crimes or criminal defendants.” Ariz. Const., art. 28 § 1 (2)(e).

8. Arizona Statutes

A.R.S. § 12-241 (2014) states that providing a court interpreter is not mandatory, but rests in the discretion of the court. (“The court may when necessary appoint interpreters, who may be summoned in the same manner as witnesses, and shall be subject to the same penalties for disobedience.”)

But cf. A.R.S. § 12-242 (provision of a sign language interpreter for a deaf person is mandatory); Americans With Disabilities Act, 42 U.S.C. § 12101, *et. seq.* (deaf persons are a protected class under the ADA).

9. Many States have statutes or court rules requiring the appointment of an interpreter in all civil cases.

See Standing Committee on Legal Aid and Indigent Defendants, *American Bar Association Standards for Language Access in Courts*, p. 24 & notes 28-30 (February 2012) (listing states with statutes and court rules requiring the appointment of interpreters in civil cases.)

II. Providing an Interpreter

A. Determining an Individual's Level of English Proficiency

State v. Hansen, 146 Ariz. 226, 232, 705 P.2d 466, 472 (App. 1985) (holding that the interpretation services afforded a defendant were inadequate despite the fact there was "some indication that the [defendant] possessed some understanding of English").

State v. Grubbs, 117 Ariz. 116, 119, 570 P.2d 1289, 1292 (App. 1977) (trial court did not abuse its discretion by appointing an interpreter to provide language assistance to a rape victim; while victim appeared to show adequate English proficiency, her request to have the assistance of an Apache language interpreter during cross-examination was a matter that rested "within the sound discretion of the trial judge," and "her allegedly arbitrary insistence on an interpreter was for the jury to consider in assessing her credibility.").

Torres v. United States, 929 A.2d 880, 886-88 (D.C. 2007) (trial court did not abuse its discretion in denying defendant's motion to suppress where arresting officers failed to provide defendant, a native of Puerto Rico, with an interpreter prior to questioning; the record showed that during several interactions with police during two separate arrests, defendant had no problem effectively communicating with the officers in English, and throughout his interaction with the police the defendant showed no signs of confusion or lack of understanding of English).

Gado v. State, 882 N.E.2d 827, 831 (Ind. Ct. App. 2008) (trial court's denial of defendant's request for an interpreter was affirmed on appeal; appellate court noted that trial court "essentially found that [defendant] intentionally was attempting to frustrate his prosecution by faking inability to communicate in any language other than Djerma, a rare language for which it is very difficult to find interpreters." The appellate court also stated that "[w]e do not believe a trial court has to accept at face value a defendant's

professed lack of understanding of English, anymore than it must accept an assertion of incompetency to stand trial”; there was sufficient “evidence in the record to support [the trial court’s] conclusion that [defendant] adequately understood English, and possibly French, so as to proceed with his trial without the aid of a Djerma interpreter.”).

People v. Smith, 759 N.Y.S.2d 315, 317 (N.Y.Sup.Ct. 2003) (holding that trial court properly determined that a victim who spoke Krio, a language derived from English spoken in Sierra Leone, required the assistance of a Krio interpreter during his testimony, even though the Krio language used many English words).

Abukar v. Commonwealth of Kentucky, 2014 WL 2916879 (Ky.App. 6/27/14) (vacating a defendant’s conviction for rape on the grounds the trial judge denied defendant’s constitutional right to the assistance of an interpreter during pretrial proceedings and trial. The appellate court stated that while defendant, based on the videotape of his police interrogation, may have shown “a sufficient grasp on the English language to enable him to converse with the police [during the interrogation], a higher mastery of the language might be necessary to thoroughly understand all of the complexities of a trial. In order to ensure [defendant’s] basic constitutional rights at trial, his right to take the stand in his own defense, his right to confront and examine the witnesses, and to understand the proceedings against him, this Court is of the opinion that in the interest of caution and safeguarding those rights, the appointment of an interpreter is necessary.”)

- B. A summary of proceedings is not acceptable; an interpreter must provide an immediate, simultaneous interpretation.

Negron v. New York, 434 F.2d 386, 389-90 (2d Cir. 1970)

State v. Natividad, 111 Ariz. 191, 193-94, 526 P.2d 730, 732-33 (1974)

State v. Hansen, 146 Ariz. 226, 232, 705 P.2d 466, 472 (App. 1985)

- C. For indigent defendants/litigants, interpreters must be provided at government expense.

State v. Rios, 112 Ariz. 143, 144-45, 539 P.2d 900, 901-02 (1975)

Giraldo-Rincon v. Dugger, 707 F.Supp. 504, 507 (M.D. Fla. 1989) (stating that a trial court’s discretion in appointing an interpreter “must be tempered with reason and concern for the rights of the defendant seeking the

assistance of an interpreter,” and that a “trial judge’s refusal and failure to inquire into [defendant’s] need for and ability to pay for an interpreter,” despite defendant’s repeated requests for an interpreter, “violated [defendant’s] Sixth Amendment right to confrontation and his right to due process of law.”).

D. Written Translation of Documents

A request for translation of documents by an indigent defendant is subject to a showing that the translation is “reasonably necessary” for the defendant to adequately prepare a defense. A court is not required to order, at government expense, an indigent defendant’s blanket request for translation of voluminous documents. Moreover, if bilingual counsel has been appointed for the defendant, “it is incumbent upon [defendant’s] bilingual counsel to identify particular documents likely to yield meaningful input from [defendant] if they were translated rather than merely interpreted by bilingual counsel.” *Calderon-Palomino v. Nichols*, 201 Ariz. 419, 422 ¶¶ 5-6, 36 P.3d 767, 770 (App. 2001).

E. Telephonic/Remote Interpreting

Use of telephonic/remote interpreting is permissible as long as (1) the interpreter provides the defendant with “continuous, simultaneous translation” of the proceedings, and (2) the defendant has the ability to consult privately with counsel during the proceedings. *In re: MH 2007-001895*, 221 Ariz. 346, 212 P.3d 38 (App. 2009).

Note: In reaching its decision, the court recognized that, “[a]s a matter of public policy, prohibiting qualified telephonic interpretation services may hinder the ability of the court system to function efficiently. Rural counties may particularly be subject to difficulties when dealing with citizens with limited English abilities.” *In re: MH 2007-001895*, 221 Ariz. at 349 n.3, 212 P.3d 41 n.3.

III. Jury Selection

A. In Arizona, the court is not required to provide an LEP juror with a language interpreter.

A.R.S. § 21-202(B)(3) (2014) provides:

“On timely application to the court, the following persons shall be excused temporarily from service as a juror if the judge or jury commissioner finds that any of the following applies: . . . the prospective juror is not currently capable of understanding the English language.”

State v. Cota, 229 Ariz. 136, 143 ¶¶ 13-16, 272 P.3d 1027, 1034 (2012) (upholding A.R.S. § 21-202(b)(3) as constitutional; non-English speakers are not a distinctive group and there is a legitimate state interest in not having to interpret for non-English speaking jurors); *See State v. Sanderson*, 182 Ariz. 534, 539, 898 P.2d 483, 488 (App. 1995) (inability to comprehend English “is an appropriate ground to be excused from [jury] service.”).

Note: Because deaf jurors are a protected class, a sign interpreter must be provided.

United States v. Dempsey, 830 F.2d 1084 (10th Cir. 1987) (holding that deafness does not make a juror unqualified for jury service, and that the presence of an interpreter in the jury room did not deprive defendant of a fair trial); *State v. Marcham*, 160 Ariz. 52, 55, 770 P.2d. 356, 359 (1988) (finding no error where the court appointed a sign interpreter for a deaf juror and the deaf juror was assisted by an interpreter during the trial and in the jury room during deliberations).

Cf. A.R.S. § 12-242 (providing that the appointment of a sign language interpreter for a deaf person is mandatory); Americans With Disabilities Act, 42 U.S.C. § 12101, *et. seq.*

- B. However, striking bilingual jurors as a pretext for striking jurors based on ethnicity or national origin violates equal protection and is not permitted.

Hernandez v. New York, 500 U.S. 352 (1991) (holding that prosecutor’s use of peremptory strikes on two prospective bilingual jurors was based on a race neutral factor under *Batson* and did not violate equal protection where the strikes were based on the prosecutor’s concern that the bilingual jurors would have difficulty in deferring to official translation of the court interpreter. The United States Supreme Court noted that the prosecutor did not base his strikes solely on the prospective jurors’ Spanish language abilities, but also on the jurors’ demeanor and specific responses during voir dire. In reaching its decision, the Supreme Court did not directly address whether a juror’s bilingual ability may be used as the sole factor in exercising a peremptory strike. However, the Supreme Court stated that “we make clear, a policy of

striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination. But that case is not before us.”).

People v. Gonzales, 81 Cal. Rptr. 3d 205 (Cal.Ct.App. 2008) (holding that where prosecutor struck four Hispanic jurors on the grounds they were bilingual, the prosecutor’s strikes were based on ethnicity, and therefore prohibited by *Batson* and the equal protection clause).

- C. Bilingual jurors must accept the official translation of an interpreter with respect to foreign language testimony.

United States v. Perez, 658 F.2d 654, 662-63 (9th Cir. 1981) (juror dismissed for not accepting interpreter’s official translation).

United State v. Cabrera-Beltran, 660 F.3d 742, 749-50 (4th Cir. 2001) (“[W]e hold that the for-cause striking of prospective jurors based on their perceived inability to accept an interpreter as the final arbiter of what was said or written does not violate the Equal Protection Clause of the Fourteenth Amendment.” The court further stated, “It is integral to the promise of a fair trial that all jurors in a particular case base their decision on the same evidence,” and that “a juror who, during trial, refuses to accept a court-approved translation, in favor of his own interpretation of a language, is effectively deciding to base his verdict in the case on evidence different than that considered by the other jurors. Fundamental to our jury process is the requirement that all jurors consider the same evidence.”).

See Arizona Revised Jury Instructions (Criminal), Third Edition (State Bar of Arizona 2013); Preliminary 21 (Short Version) – Jury to be Guided by Official English Translation/Interpretation; Preliminary 21 (Long Version) – Jury to be Guided by Official English Translation/Interpretation. See also Preliminary 21.1 – Interpreter for Defendant.

IV. Interaction with Counsel: Interpreter Ethics

A. Conflicts of Interest

Attorneys may not use interpreters to explain documents, proceedings or give legal advice.

“A Court Interpreter shall realize the importance of remaining impartial and objective in the performance of his duties, as well as striving to maintain the

appearance of impartiality. Any condition which impacts on the objectivity or impartiality of the Court Interpreter or affects his professional integrity constitutes a conflict of interest. If the Court Interpreter is acquainted with any of the parties to the action, or if he is perceived as not being independent of the adversary parties or agencies, he shall disclose to all parties any actual or apparent conflict of interest.” Arizona Court Interpreters Association (“ACIA”), Code of Ethics.

See National Association of Judiciary Interpreters & Translators (“NAJIT”), Code of Ethics and Professional Responsibility, Canon 2 (“Impartiality and Conflicts of Interest”).

See Standing Committee on Legal Aid and Indigent Defendants, *American Bar Association Standards for Language Access in Courts*, pp. 54-55, 58 (February 2012) (discussing conflicts of interests and the proper role of interpreters in court proceedings and in interactions with litigants and counsel).

B. Confidentiality/Waiver of Attorney-Client Privilege

“The nature of the role of the Court Interpreter imposes upon him the obligation of confidentiality with those for whom he interprets, as well as for his colleagues.” ACIA Code of Ethics.

See NAJIT Code of Ethics and Professional Responsibilities, Canon 3 (“Confidentiality”).

See Standing Committee on Legal Aid and Indigent Defendants, *American Bar Association Standards for Language Access in Courts*, pp. 54-55 (February 2012) (discussing interpreter confidentiality).

V. Accuracy of Translation: Interpreter Competency

A. Competency

The determination of an interpreter’s competency “is left to the sound discretion of the trial court.” *State v. Mendoza*, 181 Ariz. 472, 475, 891 P.2d 939, 942 (App. 1995); see *In re: MH 2007-001895*, 221 Ariz. 346, 349, ¶ 9, 212 P.3d 38, 41 (App. 2009).

The requirement set forth in Arizona Rule of Evidence 604 (“An interpreter must be qualified and must give an oath or affirmation to make a true translation”) must be read in conjunction with Arizona Rule of Evidence 702 regarding the qualification of expert witnesses. In short, an interpreter must

be qualified “just as any other expert witness.” *In re: MH 2007-001895*, 221 Ariz. at 349, ¶ 9, 212 P.3d at 41.

See State v. Fonseca, 705 N.E.2d 1278, 1280-81 (Ohio Ct. App. 1997) (defendant’s sentence based on a guilty plea was vacated where defendant did not understand English and “some unidentified person” in the courtroom “acted as defendant’s interpreter”).

B. Accuracy

The burden is on the defendant to show that he was denied a fair trial on the grounds an interpreter’s translation or interpretation was deficient. *Rios*, 112 Ariz. at 144, 539 P.2d at 902; *Mendoza*, 181 Ariz. at 475, 891 P.2d at 942; *In re: MH 2007-001895*, 221 Ariz. at 349, ¶ 12, 212 P.3d at 41.

While inaccurate interpretation may result in reversible error, in general, “minor or isolated inaccuracies, omissions, interruptions, or other defects in translation are inevitable and do not warrant relief from a criminal conviction or judgment, where the translation is on the whole reasonably timely, complete, and accurate and the defects do not render the proceeding fundamentally unfair.” *See* Thomas D. Fleming, *The Right of an Accused to Have Evidence or Court Proceedings Interpreted, Because Accused or Other Participant in Proceedings is not Proficient in Language Used*, 32 A.L.R. 5th 149 § 72, p. 288 (1995 & Cum.Supp.) (citing cases from several jurisdictions in support of this statement of law).

Ouanbengboune v. State, 220 P.3d 1122, 1127-29 (Nev. 2009) (holding that an interpreter’s mistakes in a first-degree, premeditated murder case “fundamentally altered the context of the defendant’s trial testimony.” Interpreter’s translation “made it appear as though [defendant] acknowledged re-cocking the gun” prior to firing the second, fatal shot to the victim’s head, when in reality it was [defendant’s] “testimony that he did not re-cock the gun,” and “the State used [defendant’s] misinterpreted answers to prove he acted with premeditation when he shot and killed” the victim. Defendant’s conviction, however, was affirmed on the grounds that despite the interpreter’s errors, there was overwhelming evidence of premeditation).

State v. Rodriguez, 635 So.2d 391, 395-96 (La. App. 1994) (court found defendant was not denied due process or equal protection under the law “because the court-appointed interpreter was ineffective in her translation and because she failed to adequately communicate the defendant’s emotions and passions.”).

VI. Video Remote Interpreting

Several courts in Arizona have collaborated with the Arizona Administrative Office of the Courts in initiating a pilot project that addresses the needs and rights of LEP litigants through the provision of interpreter services by two-way video ("VRIS").

VRIS is differentiated from other video conference systems by the addition of video conference telephones. This system allows for the proper mode of interpretation to be heard by the appropriate party.

The VRIS system also has features that allow attorneys to conduct confidential communications with their clients in the courtroom.

VRIS provides high definition visual cues, clear audio transmission and the ability to deliver sound to the appropriate parties.