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Inadequate Interpreting Services in Courts and the Rules of Admissibility of Testimony on Extrajudicial Interpretations

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Inadequate Interpreting Services in Courts and the Rules of Admissibility of Testimony on Extrajudicial Interpretations

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"There is no greater inequality than the equal treatment of unequals."¹

I. INTRODUCTION

Our judicial system is guilty of creating inequality by providing inadequate interpreting services for judicial proceedings. To ensure the administration of justice, courts must appoint and permit the use of an interpreter at trial when a party or a witness is unable to communicate or understand the proceedings.² An interpreter is used to assist in the questioning of a non-English speaking person, to facilitate a non-English speaking person's understanding of the proceedings, and to aid in communication between individuals and attorneys.³ These vital needs, however, are not sufficiently fulfilled by the United States legal system.⁴

A hypothetical situation illustrates the need for adequate interpreting services. Suppose A, a Spanish-speaking individual, has a conversation with an English-speaking individual, B, concerning a drug deal. They cannot directly communicate due to their language barrier, which

1. *Dennis v. United States*, 339 U.S. 162, 184 (1950) (Frankfurter, J., dissenting) (referring to the inequity of subjecting a non-English speaking individual to participation in proceedings he can not understand).

2. See Carlos A. Astiz, *But They Don't Speak the Language*, 25 JUDGES' J., 32, 33 (1986); Williamson B.C. Chang & Manuel U. Araujo, Comment, *Interpreters for the Defense: Due Process for the Non-English-Speaking Defendant*, 63 CAL. L. REV. 801, 805-06 (1975).

3. See Chang & Araujo, *supra* note 2, at 801-02.

4. *Id.* at 802.

requires them to employ the services of *C*, a bilingual individual and a friend of *B*, to act as an interpreter. *A* is later arrested and charged with drug dealing. *A*'s public defender only speaks English. This hypothetical raises the following dilemmas: How will *A* understand the judicial proceedings against him? How will *A* testify on his own behalf if he so chooses? How does the court determine whether *A* deserves to have a court appointed interpreter? Does it matter whether *A* speaks any English at all? Does it matter whether *A* requests an interpreter? How will *A* communicate with his attorney to aid in his defense at trial? If *A* were entitled to an interpreter to aid his understanding of the proceedings and/or to aid him in testifying, would *A* still be entitled to an interpreter if his counsel happened to be bilingual?

In addition, problems arise from introducing *B*'s account of *A*'s statements from their conversation. Are these statements inadmissible because *B* only heard *C*'s interpretation of what *A* said? Does it matter that *C* is *B*'s friend? What if *C* were *A*'s friend; would that make a difference? Does it matter whether *C* was charged as a co-conspirator in this case? Would it matter if *C* were a police informant? The judicial response to these questions is not settled or clear.

Congress and state legislatures have enacted rules to address the problems of in-court interpretation. Rule 604 of the Federal Rules of Evidence provides that "[a]n interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation."⁵ The requirement of the oath or affirmation, to attempt to assure that testimony is truthful, is found in Rule 603.⁶ A person is qualified as an expert by Rule 702, which requires knowledge, skill, experience, training, or education in the applicable field.⁷ Although these rules suggest that a qualified interpreter, under oath, may be utilized in judicial proceedings, the rules offer little guidance on when the use of an interpreter is required or even permitted.⁸ Rule 43(f) of the Federal Rules of Civil Procedure,⁹ Rule 28(b) of the Federal Rules of Criminal Procedure,¹⁰ the Court Interpret-

5. FED. R. EVID. 604.

6. FED. R. EVID. 603.

7. FED. R. EVID. 702.

8. *See* FED. R. EVID. 706. Rule 706 provides that the court may appoint any expert of its own selection or one agreed upon by the parties. The compensation of the expert is fixed by the court and payable from funds provided by law in criminal cases and Fifth Amendment just compensation proceedings and from the parties as directed by the court in other civil actions.

9. "The court may appoint an interpreter of its own selection and may fix the interpreter's reasonable compensation . . . paid out of funds provided by law or by one or more of the parties as the court may direct" FED. R. CIV. P. 43(f).

10. "The court may appoint an interpreter of its own selection and may fix the reasonable

ers Act,¹¹ state statutes,¹² and case law¹³ offer some guidance. The uncertainty of existing law, however, allows for diverse treatment of the issues of appointment and use of interpreters and the admission of testimony recounting statements heard only as translated by an interpreter.¹⁴

The issue of admissibility of extrajudicial statements understood only through an interpreter has received disparate treatment by the courts.¹⁵ State and federal judges alike are plagued by the issue of whether and when to admit testimony regarding these out-of-court statements. Courts disagree on such issues as how to test the admissibility of these statements,¹⁶ whether they constitute a hearsay exception or an exemption,¹⁷ whether it matters who the interpreter was,¹⁸ whether it matters if the interpreter testifies to authenticate his translation,¹⁹ and

compensation of such interpreter . . . paid out of funds provided by law or by the government, as the court may direct." FED. R. CRIM. P. 28.

11. 28 U.S.C. § 1827 (1988).

12. *E.g.*, FLA. STAT. ch. 90.606 (1991); N.M. STAT. ANN. § 38-10-7 (Michie 1978); N.Y. JUD. LAW § 380-90 (McKinney 1992).

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

14. *See infra* part III.B.-D.

15. *See infra* part III.B. & C.

16. *Compare* *United States v. Nazemian*, 948 F.2d 522, 527 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 107 (1992) (holding an interpreter should be treated as a language conduit or as an agent of both parties, removing the hearsay problems which prevent the admission of statements understood only through an interpreter) *and* *State v. Felton*, 412 S.E.2d 344, 355 (N.C. 1992) (finding an interpreter is presumed to be the agent of an individual who accepts the benefit of the proffered translation, even if the interpreter was selected by a law enforcement officer) *with* *State v. Letterman*, 616 P.2d 505, 508 (Or. Ct. App. 1980), *aff'd*, 627 P.2d 484 (Or. 1981) (finding an extrajudicial statement understood only through an interpreter to be admissible based on the necessity of the use of the testimony and the circumstantial guarantees of trustworthiness present in the case).

17. *Compare* *Nazemian*, 948 F.2d at 527 (basing admissibility on the hearsay exemption in Rule 801(d)(2)(C), (D), (E), due to agency) *with* *Letterman*, 616 P.2d at 508 (basing admissibility on the hearsay exception in Rule 803(24), due to the necessity of the use of the testimony and the circumstantial guarantees of trustworthiness).

18. *Compare* *United States v. Da Silva*, 725 F.2d 828, 831 (2d Cir. 1983) (finding testimony on extrajudicial statements understood only through an interpreter to be admissible as not hearsay, notwithstanding that the interpreter was an employee of the government) *with* *People v. Romero*, 581 N.E.2d 1048, 1051 (N.Y. 1991) (finding an officer's testimony of a defendant's extrajudicial statement understood only through an interpreter not admissible under the agency theory, where the interpreter was a paid informant whose remuneration depended upon the prosecutability of the case against the defendant).

19. *Compare* *People v. Bartree*, 566 N.E.2d 855, 857-58 (Ill. App. Ct. 1991) (requiring the interpreter to be called to verify the accuracy of her translation before the officer's testimony on the extrajudicial statements of the defendant made through the interpreter would be admissible) *and* *United States v. Alvarez*, 755 F.2d 830, 860 (11th Cir.), *cert. denied*, 474 U.S. 905 (1985), *and cert. denied*, 482 U.S. 908 (1987) (finding testimony on an extrajudicial statement understood only through an interpreter is presumed admissible with the interpreter acting only as a dual agent of the parties even where the interpreter does not testify to the accuracy of his/her translation) *with* *Romero*, 581 N.E.2d at 1051-52 (finding testimony on the defendant's extrajudicial statement

whether it is a question of admissibility or of weight of the evidence.²⁰

The Federal Rules of Evidence define hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."²¹ Statements found to be hearsay are inadmissible at trial unless they fall within an exemption or exception provided by the Federal Rules of Evidence, by other rules prescribed by the Supreme Court pursuant to statutory authority, or by an Act of Congress.²² The hearsay rule excludes statements, based on concerns of unreliability, where the declarant was not under oath, there was no opportunity for the jury to observe the demeanor of the declarant, and there was no opportunity for the party the statement was made against to contemporaneously cross-examine the declarant.²³

Nevertheless, hearsay statements should be admitted, as necessary, when there is no other evidence that is more probative on the particular issue.²⁴ To admit hearsay statements based on necessity, there also must exist circumstantial guarantees of trustworthiness, particularly in a case where an interpreter testifies to the accuracy of an interpretation.²⁵ Testimony based on statements only understood through an interpreter that would fall within an exception or an exemption if the declarant and the witness spoke the same language should be admitted even though it (the testimony of *B* regarding what *C* interpreted *A*'s statement to be) does not fall within a traditional exception to the hearsay rule. The issue of trustworthiness should be determined by the jury weighing the credibil-

made through an interpreter was inadmissible even though the interpreter testified, where the interpreter's credibility was at issue).

20. Compare *United States v. Felix-Jerez*, 667 F.2d 1297, 1299 (9th Cir. 1982) (stating the agency-language conduit theory was inapplicable where the interpreter was not named or chosen by the defendant to act as his agent and there was an obvious conflict of interest between the defendant and the interpreter, a prison guard) with *United States v. Beltran*, 761 F.2d 1, 9 (1st Cir. 1985) (finding the testimony of a government agent based on notes he took during an interview with the defendant, understood by the government agent only through an interpreter, was admissible, stating that any inaccuracies went toward the evaluation of credibility rather than admissibility).

21. FED. R. EVID. 801(c).

22. FED. R. EVID. 802.

23. George V. Matlock, Note, *Admissibility of Third-Party Testimony on Out-of-Court Statements Made to a Witness Through an Interpreter* — *Chao v. State*, 478 So.2d 30 (Fla. 1985), 14 FLA. ST. U. L. REV. 371, 372 (1986); see Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 184 (1948); see also Ted Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence*, 14 STAN. L. REV. 682, 684 (1962) (litigants should have an opportunity to cross-examine individuals that the court is asked to rely upon because cross-examination is "the greatest legal engine ever invented for the discovery of truth").

24. See *State v. Letterman*, 616 P.2d 505, 508 (Or. Ct. App. 1980), *aff'd*, 627 P.2d 484 (Or. 1981).

25. *Id.*

ity of the translation.²⁶ Many courts are reluctant to support this interpretation of the hearsay rule.²⁷ Commentators have argued that admitting testimony recounting an extrajudicial interpretation may undermine the basic hearsay rule functions of minimizing the risk of mistakes in memory and perception.²⁸ Yet in the interest of equity and justice, it is unfair to allow a language barrier to disadvantage individuals otherwise allowed to admit certain extrajudicial statements into evidence.

This Comment will first examine the issues of whether there is or should be a right to an interpreter. Second, this Comment examines the federal treatment of this issue under the Court Interpreters Act, the qualifications for an interpreter, the reasons for the lack of qualified interpreters, and the problems arising from in-court interpreters. Finally, this Comment examines the various theories courts apply when considering whether and when to admit out-of-court statements made through interpreters. This Comment argues that the agency theory is a plausible theory.

II. IN-COURT INTERPRETATION

A. *The Right to an Interpreter in Judicial Proceedings*

Prior to 1970, the appointment of an interpreter in criminal proceedings was entirely within a court's discretion.²⁹ In 1970, however, the Second Circuit Court of Appeals in *United States ex rel Negron v. New York*³⁰ held that the Confrontation clause of the Sixth Amendment,

26. *United States v. Beltran*, 761 F.2d 1, 10 (1st Cir. 1985).

27. See, e.g., *Garcia v. State*, 68 N.W.2d 151, 159 (Neb. 1955); *People v. Romero*, 581 N.E.2d 1048, 1051 (N.Y. 1991); *State v. Huynh*, 742 P.2d 160, 167-68 (Wash. Ct. App. 1987).

28. Michelle Gorman, Case Comment, *Evidence: Testimony Recounting A Translated Conversation Not Hearsay if Implied Agency Exists*, 37 U. FLA. L. REV. 1067, 1067, 1072 (1985); see also John M. Maguire, *The Hearsay System: Around and Through the Thicket*, 14 VAND. L. REV. 741, 743-44 (1961); Morgan, *supra* note 23, at 218.

29. *Cervantes v. Cox*, 350 F.2d 855 (10th Cir. 1965) (finding no constitutional right to the assistance of court-appointed counsel, although under extreme circumstances the inability to communicate with counsel may deny a party the right to effective representation, and therefore, may result in an involuntary or unknowing plea); *United States v. Desist*, 384 F.2d 889, 902-03 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1969) (holding the right to a court-appointed interpreter could not be stronger than the right to a court-appointed counsel, which is only available to indigents; thus, court's failure to appoint an interpreter not reversible error where the individual could afford and communicate with counsel); see also Chang & Araujo, *supra* note 2, at 813-14 (the right to confrontation was usually satisfied as long as the defendant's counsel understood English, even if counsel could not communicate with his client); cf. *United States v. Coronel-Quintana*, 752 F.2d 1284 (8th Cir.), *cert. denied*, 474 U.S. 819 (1985) (no abuse of discretion in denying defendant's motion to have the entire voir dire proceeding translated into Spanish where the defendant had lived and worked in the United States for at least seven years and had an interpreter seated with him at the defense table throughout the proceeding).

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

applicable to the states through the Fourteenth Amendment's Due Process Clause, required that non-English speaking defendants be informed of their right to simultaneous interpretation of proceedings at the government's expense.³¹ The court believed the defendant would otherwise be unable to assist his counsel in the effective cross-examination of witnesses testifying against him.³² The court based its finding on cases holding that the constitutional guarantees of the right to be heard, to know the nature and cause of the accusation, and to be confronted by witnesses who are testifying against him are meaningless and vain if the accused is unable to understand the proceedings.³³

Following the reasoning of *Negron*, Congress enacted the Court Interpreters Act in 1978.³⁴ The Act required United States District Court officers to employ competent interpreters in criminal or civil actions initiated by the government when a party or witness speaks only or primarily in a language other than English, is hearing impaired, or is physically unable to speak at an audible level.³⁵ A request by the party is not necessary because the Court Interpreters Act permitted the court to appoint an interpreter on its own motion.³⁶ The Act does not require that an individual be incapable of speaking any English but rather that the witness or party be unable to comprehend the proceedings or communicate with counsel or the presiding judicial officer.³⁷ In addition, the Director of the Administrative Office of the United States Courts must determine the qualifications of those who may serve as certified interpreters, must provide guidelines to courts for the selection of its own qualified interpreters where there are no certified interpreters available, and must maintain a list of all certified and otherwise qualified interpreters to ensure that the highest standards of accuracy are maintained in all judicial proceedings.³⁸

31. *Id.* at 389; *see also* *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding indigent criminal defendants have the fundamental right to have assistance of counsel at trial); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (finding the right to court-appointed counsel exists where the defendant could possibly be incarcerated); *cf.* *State v. Kounelis*, 609 A.2d 1310 (N.J. Super. Ct. App. Div. 1992) (illustrating that this reasoning has not been abandoned and holding the court's failure to appoint an interpreter for a Greek-speaking defendant, who could not afford an interpreter, to be reversible error because it violated his federal and state constitutional rights to confrontation and effective assistance of counsel).

32. *Negron*, 434 F.2d at 389-90; *see* *Chang & Araujo*, *supra* note 2, at 813.

33. *E.g.*, *Terry v. State*, 105 So. 386 (Ala. Ct. App. 1925).

34. 28 U.S.C. § 1827 (1988).

35. 28 U.S.C. § 1827(d)(1) (1988); *see also* *State in re R.R.*, 398 A.2d 76 (N.J. 1979) (listing case law from several states consistent with this provision).

36. 28 U.S.C. § 1827(d)(1) (1988); *see* *Valladares v. United States*, 871 F.2d 1564, 1565 (11th Cir. 1989); *United States v. Tapia*, 631 F.2d 1207, 1209 (5th Cir. 1980); *Hrubec v. United States*, 734 F. Supp. 60, 67 (E.D.N.Y. 1990).

37. 28 U.S.C. § 1827(d)(1) (1988).

38. 28 U.S.C. § 1827(b) (1988); *cf.* BILL PIATT, *¿ONLY ENGLISH?: LAW AND LANGUAGE*

Although the Act provides guidelines, it has not been effective in providing qualified interpreters to non-English speaking individuals. In most federal³⁹ and state⁴⁰ judicial proceedings, the trial judge still has wide discretion in the determination of the need to appoint an interpreter. The Court Interpreters Act only limits this discretion by requiring that the court inquire whether the failure to have an interpreter throughout the proceedings would inhibit a non-English speaking individual's comprehension of the proceedings and communication with his counsel.⁴¹ This limit, however, is minimal because after the inquiry the court may appoint or refuse to appoint an interpreter within its own discretion. The court's decision not to appoint an interpreter, in accordance with the Court Interpreters Act or the applicable state statute, will not be reversed absent a clear abuse of discretion.⁴²

Appellate courts often decide whether the failure to obtain an interpreter is reversible error by determining whether the outcome of the case was affected rather than whether the party's constitutional right to an interpreter was violated. In 1983, the United States Court of Appeals for the Second Circuit held that the defendant's exercise of his rights to testify and to articulate his defense were not violated by the failure to provide an interpreter because his inability to understand English did not affect the verdict.⁴³ The verdict was based on the testimony of others —

POLICY IN THE UNITED STATES 83, 85 (1990) (some states maintain listings of certified interpreters, and in the absence of certified interpreters, the trial judge must be satisfied that the interpreter demonstrates sufficient education, training, and experience to render accurate and competent translations).

39. *E.g.*, *United States v. Coronel-Quintana*, 752 F.2d 1284, 1291 (8th Cir.), *cert. denied*, 474 U.S. 819 (1985); *United States v. Salsedo*, 607 F.2d 318, 320 (9th Cir. 1979); *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973), *cert. denied*, 416 U.S. 907 (1974); *United States v. Sosa*, 379 F.2d 525 (7th Cir.), *cert. denied*, 389 U.S. 845 (1967); *Hardin v. United States*, 324 F.2d 553 (5th Cir. 1963); *Suarez v. United States*, 309 F.2d 709, 712 (5th Cir. 1962); *Pietrzak v. United States*, 188 F.2d 418, 420 (5th Cir.), *cert. denied*, 342 U.S. 824 (1951); *cf.* *United States v. Addonizio*, 451 F.2d 49, 68 (3d Cir.) (finding the trial court did not abuse its discretion in allowing the witness's wife to act as his interpreter, where the trial court fully examined her ability to interpret his mumbling and her possible motives to misinterpret), *cert. denied*, 405 U.S. 936, *reh'g denied*, 405 U.S. 1048 (1972).

40. *Watson v. State*, 190 So. 2d 161, 167 (Fla. 1966), *cert. denied*, 389 U.S. 960 (1967); *Monte v. State*, 443 So. 2d 339, 341 (Fla. 2d DCA 1983).

41. *United States v. Tapia*, 631 F.2d 1207, 1209 (5th Cir. 1980); *Pietrzak*, 188 F.2d at 420; *see Salsedo*, 607 F.2d at 320 (finding the trial court did not abuse its discretion because it held a thorough hearing with the government witness, without the presence of the jury, to determine if it was necessary to appoint an interpreter).

42. *Coronel-Quintana*, 752 F.2d at 1291; *Sosa*, 379 F.2d at 527; *Monte*, 443 So. 2d at 341; *Kaelin v. State*, 410 So. 2d 1355, 1357 (Fla. 4th DCA 1982); *People v. Starling*, 315 N.E.2d 163 (Ill. App. Ct. 1974); *State in re R.R.*, 398 A.2d 76, (N.J. 1979); *see also State v. Kounelis*, 609 A.2d 1310, 1314 (N.J. Super. Ct. App. Div. 1992).

43. *United States v. Maniego*, 710 F.2d 24, 26 (2d Cir. 1983).

not of the defendant.⁴⁴ But, the court made no mention of whether the lack of interpretation could have interfered with effective cross-examination. This is not fair to a defendant, such as A, who may not be able to understand the proceedings or understand the testimony of others in order to inform his counsel of false or misleading statements. A's right to a fair trial should not be diminished merely because he speaks a language other than English. This is particularly problematic in areas, such as major cities, where an inability to comprehend and speak English is not a rare occurrence.

In addition, courts have held that the failure to appoint an interpreter is not reversible error if the party has validly and expressly waived his right to an interpreter or if other circumstances existed that enabled him to comprehend the proceedings.⁴⁵ Similarly, the reviewing court is unlikely to find the proceeding was fundamentally unfair due to an inadequate translation, absent a contemporaneous objection.⁴⁶ In *Valladares v. United States*,⁴⁷ the Eleventh Circuit stated that

[o]nly if the defendant makes any difficulty with the interpreter known to the court can the judge take corrective measures. To allow a defendant to remain silent throughout the trial and then, upon being found guilty, to assert a claim of inadequate translation would be an open invitation to abuse.⁴⁸

In addition, courts usually will not appoint an interpreter unless one is requested.⁴⁹ In *Suarez v. United States*,⁵⁰ the Fifth Circuit Court of Appeals held that the failure to appoint an interpreter for a defendant who spoke primarily Spanish was not an abuse of discretion because the defendant could speak some English and the issue was being raised on

44. *Id.*

45. *Monte*, 443 So. 2d at 342; *Kounelis*, 609 A.2d at 1314; *see also* *United States v. Miller*, 806 F.2d 223 (10th Cir. 1986) (holding that the defense counsel cannot claim that the trial court erred in appointing an interpreter without qualifying her as an expert, as required by Rule 604 of the Federal Rules of Evidence, if the defense counsel expressly and affirmatively consented in the trial court to the appointment of the interpreter); *Chang & Araujo*, *supra* note 2, at 802, 818 (citing cases that have held the failure to request an interpreter constitutes waiver of the right).

46. *Valladares v. United States*, 871 F.2d 1564 (11th Cir. 1989).

47. *Id.*

48. *Id.* at 1566; *see also Miller*, 806 F.2d at 223 (holding failure to qualify interpreter as an expert, as required by Rule 604 of the Federal Rules of Evidence, is not plain error and therefore will not be reversed in the absence of a contemporaneous objection); *Suarez v. United States*, 309 F.2d 709, 712 (5th Cir. 1962) (finding the court did not abuse its discretion by failing to appoint an interpreter, but also mentioning that the defense raised this issue for the first time on appeal); *Kounelis*, 609 A.2d at 1314 (holding the constitutional right of an indigent non-English speaking defendant is not waived by his mere acquiescence or nonverbal conduct).

49. *Suarez*, 309 F.2d at 709.

50. 309 F.2d 709 (5th Cir. 1962).

appeal for the first time.⁵¹ Many courts find the lack of an interpreter or the inadequate provision of an interpreter is not reversible error where the individual has only a superficial understanding of English or the inadequacies of the interpretation are not significant in the outcome of the case.⁵² This position ignores the suggestion by *Negron* and the Court Interpreters Act that a constitutional or statutory right to an interpreter exists.⁵³ Other courts have held that an individual's rights to understand the proceedings, confront his accusers, and waive his rights knowingly and intelligently are undermined by the absence of an interpreter.⁵⁴ One court found a trial judge's refusal and failure to inquire whether an interpreter was needed was a violation of a defendant's Sixth Amendment right to confrontation and the defendant's right to due process of law.⁵⁵

One's ability to converse in English does not necessarily mean that one can sufficiently understand judicial proceedings consisting of sophisticated legal terminology. The constitutional right to an interpreter alluded to in *Negron* appears to be more illusory than real, because of the deference a court's determination of this issue is granted by appellate courts. A's understanding of English may be so limited that he cannot understand the complexities of the legal proceeding. Nevertheless, because he can form comprehensible phrases and sentences in English, an appellate court will find sufficient support of a trial judge's discretionary decision to forgo the appointment of an interpreter. In

51. *Id.* at 712 (although the prosecutor raised the issue of an interpreter twice, the defense counsel failed to raise the issue at trial).

52. *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980), *cert. denied*, 450 U.S. 994 (1981); *State v. Topete*, 380 N.W.2d 635 (Neb. 1986) (holding that failure to appoint an interpreter was not an abuse of discretion where judges or witnesses overhear the person speak in English); *PIATT*, *supra* note 38, at 83-84; *see United States v. Bennett*, 848 F.2d 1134, 1140 (11th Cir. 1988) (finding a single interpreter sufficient to aid three defendants during trial); *United States v. Lim*, 794 F.2d 469 (9th Cir.) (holding defendants' ability to understand the proceedings and communicate with counsel was not impaired when several times, the court borrowed the defendants' interpreter to assist a witness in testifying when the defendant had a second court interpreter at the defense table, the borrowed interpreter used a microphone once, no objection was made at trial, and no evidence was submitted at the supplemental hearing to indicate that the defendants did not actually understand any portion of the trial), *cert. denied sub nom. Dong Joon Ahn v. United States*, 479 U.S. 937 (1986).

53. *See supra* notes 31-37 and accompanying text.

54. *United States v. Cirrincione*, 780 F.2d 620 (7th Cir. 1985) (relying on *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970) and on *Augustin v. Sava*, 735 F.2d 32 (2d Cir. 1984), which held that a hearing for admission into the United States is "of no value when the alien and the judge are not understood"). In this case the court held that the defendant understood and spoke English, based on extensive proof; *Id.* *See also* *Giraldo-Rincon v. Dugger*, 707 F. Supp. 504, 507 (M.D. Fla. 1989).

55. *Giraldo-Rincon*, 707 F. Supp. at 507 (finding failure to inquire regarding the need for an interpreter a violation of the fundamental fairness required by the due process clause and requiring a new trial, regardless of any probability of guilt).

addition, A may have been able to live in an English-speaking community and hold a job that requires him to speak in English yet have such a superficial understanding of the English language and its idiosyncratic idioms that he cannot keep up with the pace and difficulty of a legal proceeding. This type of individual will be wrongfully denied the aid of an interpreter.

Individuals who are physically incapable of speaking and those who cannot speak English could possibly be deprived of due process and equal protection by this wide discretion, in violation of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment, which assure these rights to English-speaking individuals.⁵⁶ A's inability to speak English does not justify affording him less protection of his constitutional rights than an English-speaking individual.

Courts disagree of whether the right to an interpreter exists only in criminal proceedings or whether it also extends to civil and administrative proceedings. The courts' extension of the right to an interpreter has been inconsistent, with some courts holding that there is no constitutional right to an interpreter in civil proceedings⁵⁷ and other courts requiring full and continuous interpretation of the entire proceedings in civil cases.⁵⁸ Some courts have held that there is no constitutional right to an interpreter in administrative proceedings.⁵⁹ Yet others have followed the principles of fairness and due process applied in criminal cases and hold there is a right to an interpreter during administrative proceedings.⁶⁰ The diverse treatment of the issue of when the right to an interpreter exists is accounted for, to some degree, by the varying state constitutions and statutes.⁶¹

56. See *United States v. Maniego*, 710 F.2d 24, 26 (2d Cir. 1983) (holding the court did not err in failing to appoint an interpreter where the defendant's understanding of the proceedings did not affect the verdict); *United States v. Sosa*, 379 F.2d 525, 527 (7th Cir.), *cert. denied*, 389 U.S. 845 (1967) (holding the court did not err in failing to appoint an interpreter where the judge understood the defendant's language); Debra S. Groisser, *A Right to Translation Assistance in Administrative Proceedings*, 16 COLUM. J.L. & SOC. PROBS. 469, 495 (1981); see also *United States v. Desist*, 384 F.2d 889, 902 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1969) (holding the right to a court-appointed interpreter could not be stronger than the right to a court-appointed counsel, which is only available to indigents; thus the court's failure to appoint an interpreter not reversible error where the individual can afford and communicate with counsel); *supra* notes 31-33, 49-55 and accompanying text.

57. *E.g.*, *Jara v. Municipal Court*, 578 P.2d 94, 96-97 (Cal. 1978), *cert. denied*, 439 U.S. 1067 (1979); see PIATT, *supra* note 38, at 80.

58. *E.g.*, *Gardiana v. Small Claims Court*, 130 Cal. Rptr. 675, 678 (Cal. Ct. App. 1976).

59. *E.g.*, *Guerrero v. Carleson*, 512 P.2d 833 (Cal. 1973), *cert. denied sub nom. Guerrero v. Swoap*, 414 U.S. 1137 (1974).

60. See *Kropiwka v. Department of Indus., Labor & Human Relations*, 275 N.W.2d 881 (Wis.), *cert. denied*, 444 U.S. 852 (1979); see also Groisser, *supra* note 56, at 495.

61. *E.g.*, CAL. CONST. art. I, § 14; FLA. STAT. ch. 90.606 (1991); N.M. STAT. ANN. § 38-10-7 (Michie 1978); N.Y. JUD. LAW § 380-390 (Consol. 1992).

B. *Inadequate Qualification Standards for Interpreters*

The appointment of an interpreter does not necessarily solve the problems of non-English speaking and linguistically disabled individuals. The remaining problems include the lack of minimum standards for qualification,⁶² the issue of what degree accuracy of translation is guaranteed,⁶³ the conflict regarding what role the interpreter should adopt,⁶⁴ and the difficulties inherent in interpreting from one language to another.⁶⁵ These impediments to comprehending the proceedings can deprive individuals of the right to a fair trial.

An ideal court interpreter would have an education that included at least two years of college education in two or more languages, would be familiar with professional and technical terminology, particularly legal terms, and would be knowledgeable of the phrases and slang used in the area by those speaking the particular language.⁶⁶ But without standards to measure qualifications, there is no clearly defined pool of competent interpreters.⁶⁷ The Director of the Administrative Office of the United States Courts, attempting to comply with the Court Interpreters Act, instituted a broad scale study, employing some of the most qualified and esteemed experts, to develop an effective test for certifying interpreters.⁶⁸ The tests were created to ensure that interpreters would have a good vocabulary in both languages, strong interpreting skills, and an ability to interpret with precision the style and tone of the language used in court.⁶⁹ The tests devised have been challenged and upheld as reasonable and not beyond the powers provided under the Court Interpreters Act.⁷⁰ These efforts have generated a pool of interpreters, but their effectiveness remains questionable.

A study in the mid-1980s, supported by the United States Department of Justice, found that the pool of interpreters is mostly Spanish-English speaking, not often employed by the courts, and unevenly distributed geographically.⁷¹ Researchers also found that there are very

62. See *infra* notes 66-79 and accompanying text.

63. See *infra* notes 86-90, 97-111 and accompanying text.

64. See *infra* notes 97-106 and accompanying text.

65. See *infra* notes 112-131 and accompanying text.

66. Astiz, *supra* note 2, at 35; see also Alexandre Rainof, *How to Best Use an Interpreter in Court*, CAL. ST. B.J., MAY 1980, at 196, 198.

67. Astiz, *supra* note 2, at 35.

68. Seltzer v. Foley, 502 F. Supp. 600, 603 (S.D.N.Y. 1980).

69. *Id.* at 604-08.

70. *Id.* at 608.

71. Astiz, *supra* note 2, at 35. See PIATT, *supra* note 38, at 92-93 (reporting that as of 1986, the Administrative Office of the U.S. Courts had spent \$1,000,000 to develop and administer interpretation certification tests and had administered the Spanish interpretation test more than 7,000 times but had only certified 292 interpreters).

few institutions of higher education that extensively train and certify interpreters and that agencies providing interpreting services lack quality control mechanisms.⁷² Interpreters and criminal justice administrators admitted that they fail to use the large pool of competent interpreters that exists within international organizations and certain government agencies.⁷³

The inability to find and employ qualified, if not certified, interpreters has led to the widespread use of unqualified and incompetent individuals as interpreters. In 1985, a New Jersey Task force reported that state and municipal court judges had allowed friends, neighbors, and young children of litigants to interpret court proceedings.⁷⁴ One of the greatest misconceptions is that if a person is bilingual he is capable of interpreting judicial proceedings; this is not true, especially considering the frequent use of legal terms uncommon to everyday communication.⁷⁵ The use of janitors, secretaries of judges, clerks of libraries, local residents, witness' friends and relatives, and other unqualified individuals as interpreters results in inadequate translations.⁷⁶ Yet the task force often found the civil servants who were official interpreters to be less competent than the lay interpreters.⁷⁷ In more than half of the 142 cases studied, interpretation was so deficient that it had a "potential negative effect on the outcome of the proceeding or interfered substantially with one's understanding of the proceeding."⁷⁸ Among the cases studied, at least one mistrial and three appeals resulted from misinterpretation.⁷⁹ Supplying inadequate interpreters does not promote equality of treatment between people with linguistic disabilities or non-English speaking individuals and people who are capable of effectively communicating in the English language. In fact, these interpreters may possess such inade-

72. Astiz, *supra* note 2, at 35.

73. *Id.* at 56. These organizations and government agencies are located in areas such as New York City and Washington, D.C., including the United Nations, the World Bank, the Organization of American States, the United States Department of State, the Central Intelligence Agency, and the National Security Agency.

74. Bruce S. Rosen, *N.J. Study Charges Interpreters Impede Justice*, NAT'L L.J., Aug. 26, 1985, at 8 (quoting Professor W. Marshall Prettyman, Acting Director of Clinical Services at Seton Hall University School of Law, who said that in some state courts interpreters are provided, but it is not unusual for young children to translate for their parents in housing cases).

75. *Seltzer v. Foley*, 502 F. Supp. 600, 603 (S.D.N.Y. 1980); *see also* PIATT, *supra* note 38, at 79 (offering an example based on personal knowledge to support the formal findings that being bilingual does not make a person qualified to be a court interpreter).

76. *Seltzer*, 502 F. Supp. at 607; *see also* Charles M. Grabau & David-Ross Williamson, *Language Barriers in Our Trial Courts: The Use of Court Interpreters in Massachusetts*, 70 MASS. L. REV. 108, 110 (1985); PIATT, *supra* note 38, at 85-86.

77. Rosen, *supra* note 74, at 8.

78. *Id.*

79. *Id.*

quate interpretation skills that the individual seeking such services may be more disadvantaged than if no interpreter were provided at all.

Furthermore, a party may choose to hire an interpreter, but in a case where the Act applies, that party must use a court appointed interpreter while testifying.⁸⁰ This requirement is not to burden the court with extraneous costs, but to insure an accurate and unbiased translation.⁸¹ But a hired interpreter may provide a more accurate interpretation, because one who hires an interpreter likely will require assurance that the interpreter is sufficiently qualified.

Many courts allow, or even require, a bilingual defense attorney to serve as the interpreter for his non-English speaking or linguistically disabled client.⁸² A few cases have found that the dual role of advocate and translator cannot possibly satisfy the Confrontation Clause and Due Process Clause concerns.⁸³ The argument against the use of counsel as interpreter is based on the belief that this arrangement interferes with the traditional view of the attorney's duty of zealous advocacy.⁸⁴ This arrangement could result in the failure to interpret the proceedings as required by law, ineffective assistance of counsel, or both, thereby, violating constitutional guarantees.⁸⁵ The attorney with such a dual role would have the almost impossible task of interpreting all of the proceedings completely and accurately for his client, while also formulating and planning his trial strategies. In one instance, it may be helpful for a defendant, like A, to be able to freely communicate with his counsel. Yet if the appointment of bilingual counsel is intended to replace rather than complement an interpreter, A's defense may suffer significantly. Requiring the attorney to take on both roles of counsel and interpreter may result in the failure of the attorney to represent A to the best of his ability. This denial of due process of law for individuals requiring the services of an interpreter can be equated with the inequality of treatment resulting from the failure to provide an interpreter at all or perhaps even the failure to provide an attorney. In some cases, mandating that the

80. *United States v. Moon*, 718 F.2d 1210, 1231-32 (2d Cir. 1983), *cert. denied*, 466 U.S. 971 (1984).

81. *Id.* at 1232.

82. Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. Rev. 1, 9 (1990); see Chang & Araujo, *supra* note 2, at 822-23; see also *People v. Sepulveda*, 302 N.W.2d 256, 257 (Mich. Ct. App. 1980), *rev'd on other grounds*, 313 N.W.2d 283 (Mich. 1981) (finding the court has wide discretion in deciding whether to appoint an interpreter; failure to appoint one was not an abuse of discretion where counsel was bilingual and no request was made at the trial); *Baltierra v. State*, 586 S.W.2d 553, 559 n.11 (Tex. Crim. App. 1979) (stating appointed bilingual counsel provides the ability to communicate with the client but does not satisfy the right of confrontation).

83. *Id.*

84. Piatt, *supra* note 82, at 10.

85. *Id.*

attorney perform both jobs could cause the individual to be in a less favorable position than if he had been represented by a monolingual counsel.

C. *The Right to a Competent and Accurate Interpretation*

Even where the court does find that the right to an interpreter exists, the right is meaningless unless it actually includes the right to a *competent* and *accurate* interpretation. Otherwise, the situation is equivalent to not providing an interpreter at all.⁸⁶ Most courts have instituted the legislative intent of the Court Interpreters Act, which requires continuous word for word translation of everything relating to the trial that a defendant conversant in the English language would be privy to hear.⁸⁷ This requirement is to ensure that "the quality of translation does not fall below a constitutionally permissible threshold."⁸⁸ These courts have held that interpreters should not summarize or embellish when translating live testimony; but defendants have no constitutional right to flawless, word for word translations.⁸⁹ Therefore, despite innocent mistakes, improper embellishments, deliberate misinterpretations, or errors in translation, trial will be found to be fundamentally fair as long as the outcome of the case was not prejudiced.⁹⁰

Courts also have held that the Court Interpreters Act does not mandate the appointment of individual interpreters where more than one party is entitled to an interpreter.⁹¹ But a separate interpreter should be provided for each party if the court finds the purposes of the Act cannot

86. Astiz, *supra* note 2, at 33.

87. United States v. Joshi, 896 F.2d 1303, 1309 (11th Cir.), *cert. denied sub nom.* Panchal v. United States, 498 U.S. 986 (1990); *see* United States v. Tapia, 631 F.2d 1207, 1209 (5th Cir. 1980); United States v. Diaz Berrios, 441 F.2d 1125, 1127 (2d Cir. 1971); H.R. REP. No. 1687, 95th Cong., 2d Sess. 8 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4652, 4658-59 (requiring and defining simultaneous, continuous translation); *see also* United States v. Huang, 960 F.2d 1128, 1135-36 (2d Cir. 1992); United States v. Gomez, 908 F.2d 809, 811 (11th Cir. 1990), *cert. denied*, 498 U.S. 1035 (1991) (holding that occasional lapses from continuous word for word translation, such as embellishing or summarizing live testimony, will not render the trial fundamentally unfair).

88. Gomez, 908 F.2d at 811; *accord* Joshi, 896 F.2d at 1309; *see also* Valladares v. United States, 871 F.2d 1564, 1565-66 (11th Cir. 1989).

89. Gomez, 908 F.2d at 811 (citing Joshi, 896 F.2d at 1309, for the proposition that occasional lapses from word for word translation will not render the trial fundamentally unfair as long as the evidence against the defendant in all other respects was overwhelming and an interpreter included what he felt the witness meant to say in an interpretation of the testimony); *accord* Huang, 960 F.2d at 1135-36; Valladares, 871 F.2d at 1565-66.

90. Gomez, 908 F.2d at 811.

91. United States v. Bennett, 848 F.2d 1134 (11th Cir. 1988); *see also* Chavira Gonzales v. United States, 314 F.2d 750, 752 (9th Cir. 1963). The court held that the failure to appoint a separate interpreter was not reversible error in a multi-defendant case where an interpreter was present and available. Further, the court found that at the point of the case in which the defendant felt that her defense was crucial, the lack of a separate interpreter was inconsequential.

be met using a single interpreter.⁹² In addition, the Act does not require the appointment of a second interpreter when the testimony of witnesses must be translated and the party needs an interpreter to facilitate communication with his attorney.⁹³ A second interpreter, however, would be required if the client were precluded from communicating with his counsel through an interpreter when necessary, such as during liberally granted recesses.⁹⁴ Courts are less sensitive to the need of an interpreter to aid in the effective communication between a client and his counsel than they are to the need of an interpreter to aid a witness or party in testifying.⁹⁵ Courts tend to find an individual's right to an interpreter is not violated by the failure to provide an interpreter to facilitate communication, as long as there was some aided discussion permitted at some point in time. The significance of attorney-client communication during trial should not be undervalued. A defendant is entitled to a fair trial, regardless of the outcome. Yet all of the interpretations of the Court Interpreters Act support the view that a violation of the rules of interpretation will not be reversible error because of fundamental unfairness, unless the outcome of the trial is prejudiced.⁹⁶

The applicable legal definition of an interpreter is a person sworn at trial to interpret, which is "to translate orally from one tongue to another."⁹⁷ To clarify the intended meaning of this term, Judge Roettger of the United States District Court for the Southern District of Florida expressly replaced the term "interpreter" with "translator," because the individual is actually translating the spoken or written word from one language to another.⁹⁸ When interpreting judicial proceedings, the emphasis is on accuracy and is not "interpretive," — attempting to account for cultural or educational inadequacies of the defendant or witness.⁹⁹ For example, A does not deserve more aid in testifying or in

92. *United States v. Sanchez*, 928 F.2d 1450, 1455 (6th Cir. 1991); see *Valladares*, 871 F.2d at 1566; *United States v. Lim*, 794 F.2d 469, 470 (9th Cir.), *cert. denied sub nom. Dong Joon Ahn v. United States*, 479 U.S. 937 (1986).

93. *Bennett*, 848 F.2d at 1141; see *Joshi*, 896 F.2d at 1311 n.8; *Lim*, 794 F.2d at 471; *PIATT*, *supra* note 38, at 89.

94. *Bennett*, 848 F.2d at 1141; see *Joshi*, 896 F.2d at 1311 n.8; *Lim*, 794 F.2d at 471.

95. *Chang & Araujo*, *supra* note 2, at 803-04.

96. See *supra* note 89.

97. *BLACK'S LAW DICTIONARY* 817-18 (6th ed. 1990); see also Alan Crouch, *Interpreters, Translators and Legal Services: Toward a Better Understanding*, 55 L. INST. J. 264 (1981) (Interpreting and translating are distinguished by describing the former as being primarily concerned with the spoken word, and the latter being primarily concerned with the written word; but neither requires departing in any way from what is being said. The primary concern is to render accurately the entire sense of what is being conveyed without adding to or detracting from it.).

98. *United States v. Kramer*, 741 F. Supp. 893, 894 (S.D. Fla. 1990).

99. *Astiz*, *supra* note 2, at 34.

understanding the proceedings than an individual who is unintelligent or who may have the same cultural inadequacies but can speak and understand English.

This seems logical, yet many interpreters and judges do not agree that an interpreter's role is merely to provide continuous word for word translation of everything relating to the trial that a defendant conversant in the English language would be privy to hear. A study conducted with the support of the National Institute of Justice disclosed that many judges, administrators, and attorneys expect the interpreter to take an "adaption role" and become a liaison between them and the individual requiring interpretation.¹⁰⁰ Interpreters also indicated they considered it part of their duty to simplify and outline the court proceedings for individuals they believe would not understand an accurate translation or the proceedings themselves.¹⁰¹ This view of the role of an interpreter is not supported by the rights guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. It also does not fulfill the requirement of continuous word for word translation intended by the Court Interpreters Act.¹⁰²

First, the constitutional guarantees of due process and equal protection require interpretation to put the individual in the *same position* as if he were able to converse in English.¹⁰³ Interpretation should not adjust for education, ability to understand the proceedings, and knowledge of what is transpiring because this would reverse the inequity by placing those requiring interpreters in a better position than those who do not.¹⁰⁴ Second, the inadequate recruiting process and the knowledge that most challenges to an interpreter's performance come from the defense lead interpreters to employ this adaptation role.¹⁰⁵ Their desire is to please the non-English speaking or linguistically disabled individual, which disregards the duty of the interpreter to provide an accurate translation to ensure equality of treatment. Furthermore, it ignores the legislative intent of the Court Interpreters Act and the case law regarding interpreters in judicial proceedings, which require continuous and accurate translations.¹⁰⁶

Another method for assuring the accuracy of translation is the requirement that the interpreter be sworn by oath or affirmation to make

100. *Id.*

101. *Id.*

102. *See supra* notes 31-33, 43-44, 52-55, 56 and accompanying text.

103. *Id.*

104. Astiz, *supra* note 2, at 34-35; *see* Rainof, *supra* note 66, at 198.

105. Astiz, *supra* note 2, at 35.

106. *See supra* notes 86-88, 97-102 and accompanying text; *infra* notes 107-111 and accompanying text.

a true translation.¹⁰⁷ Failure to administer the oath does not constitute plain error, even where the translated testimony was crucial to the case.¹⁰⁸ Therefore, absent an objection, this error will not compel reversal. Furthermore, in *United States v. Kramer*,¹⁰⁹ the court held that failure to administer an oath or affirmation to make a true translation at a deposition did not constitute plain error.¹¹⁰ If a witness must take an oath when testifying, then plain error should be found when an interpreter fails to take an oath when interpreting a witness's testimony. In *Kramer*, the court concluded that translation at a deposition could be ratified by the trial judge, upon inquiry, at an evidentiary hearing prior to the allegedly infirm testimony being offered at trial and subsequent to administering of an oath or affirmation of the interpreter to tell the truth.¹¹¹ Again, this would be impermissible if a witness failed to take an oath at the deposition. Therefore, an exception should not be made for an interpreter.

D. Difficulties Encountered in Interpreting

Many other obstacles hinder accurate and precise translations. An interpreter may be fluent in a foreign language without knowing all of the dialectal differences within that language.¹¹² In one case, the court pointed out that it hires interpreters only after they pass a rigorous exam,

107. FED. R. EVID. 603, 604; e.g., FLA. STAT. ch. 90.606(3) (1991).

108. *United States v. Perez*, 651 F.2d 268, 272-73 (5th Cir. 1981) (applying Rule 52(b) of the Federal Rules of Criminal Procedure, which only permits appellate notice of plain errors or defects not objected to at trial if they affect substantial rights).

109. 741 F. Supp. 893 (S.D. Fla. 1990).

110. *Id.* at 894.

111. *Id.* at 895. The court placed substantial emphasis on the extensive qualifications possessed by the interpreters. *Id.* The court also proposed two other bases for admitting the deposition. The court relied on *United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985) to suggest that the translations could have been admissible based on what the translator heard at the scene under Rule 803(1) of the Federal Rules of Evidence, the Present Sense Impression hearsay exception. *Kramer*, 741 F. Supp. at 896. The court also proposed Rule 803(24) of the Federal Rules of Evidence, the Other Exceptions hearsay exception, as a basis for admitting the deposition, despite the failure to swear in the interpreter. *Id.* Under this exception, the evidence could be admitted if the court determines that the statement is offered as evidence of a material fact, it is more probative on the issue for which it is offered than any other evidence the proponent can procure through any reasonable efforts, and the general purposes of the Federal Rules of Evidence and the interests of justice would be served by the admission of the statement into evidence. FED. R. EVID. 803(24). The statement must also be made known to adverse parties sufficiently in advance of the trial or hearing to provide a fair opportunity to prepare to meet it, as was done here. *Kramer*, 741 F. Supp. at 896.

112. Rainof, *supra* note 66, at 196 (illustrating the difficulty of translating languages with many dialectal variations, by listing the nineteen major dialects of Spanish and examples of the various minor variations); cf. *United States v. Tijerina*, 412 F.2d 661 (10th Cir.), *cert. denied*, 395 U.S. 990 (1969) (admitting testimony on a translation where the officer spoke idiomatic New Mexican Spanish, the declarant addressed an assembly of Spanish-speaking New Mexicans in "pure" Spanish and the statement was not being used to prove the truth of the matter asserted).

but that the test does not account for dialectal differences.¹¹³ In that case, the Spanish-speaking plaintiff described the velocity of a train's stop as a "crash," but the interpreter translated it as a "bump."¹¹⁴ A Spanish-speaking juror discovered the error and reported it in a private meeting with the judge, the interpreter, the court reporter, and counsel.¹¹⁵ After the meeting, the plaintiff was recalled to clarify her testimony.¹¹⁶ The juror was instructed to rely only on the interpreter's translations, despite his own knowledge of the foreign language.¹¹⁷ However, the judge did inform the juror that any large discrepancies should be brought to the court's attention.¹¹⁸ This is consistent with the approach taken by many courts to deal with minor errors in translation as insignificant and harmless error.¹¹⁹

The interpreter may also have trouble accurately translating certain words that have multiple meanings, particularly if he is unaware of the context within which the statement is being made or if the witness uses idiomatic expressions.¹²⁰ For example, a question arose in one case regarding whether the witness had said that a man had forced his affections on a woman or whether the man had physically forced himself upon a woman.¹²¹ Another error, mentioned in the dissent, was that the arresting officer gave the arrestee an improper Miranda warning by stating that an attorney would be "furnished," as in to "fill a room with furniture," rather than as in to be "provided."¹²² These errors were not fatal in this case. The court stated the term "force" has the same connotation in English as in Spanish, Italian, and Portuguese, and the defendant admitted he understood what his rights were.¹²³ Yet an error such as the one discounted by this court could affect the outcome of the case in states where the former definition is viewed as a non-criminal act of seduction and the latter is considered the criminal act of rape.¹²⁴

Complications arise in deciding how to handle the possibility of differences in translations, including requiring a court reporter to take down what is said in a foreign language.¹²⁵ Some languages, such as the

113. *Santana v. New York City Transit Auth.*, 505 N.Y.S.2d 775, 780 (N.Y. Sup. Ct. 1986).

114. *Id.* at 777-78.

115. *Id.* at 777.

116. *Id.* at 780.

117. *Id.* at 779-80.

118. *Id.*

119. *See supra* notes 87-88 and accompanying text.

120. Rainof, *supra* note 66, at 197.

121. *People v. Gutierrez*, 187 Cal. Rptr. 130, 132 (Cal. Ct. App. 1982).

122. *Id.* at 135.

123. *Id.* at 131, 135-36.

124. Although this difference is noted, no comment is intended on whether this difference should matter in determining whether an individual's act was rape.

125. *Gutierrez*, 187 Cal. Rptr. at 132.

various Asian languages, have entirely different alphabets, making it impossible for court reporters to even try to write out the statements phonetically.¹²⁶ One suggestion is for the witness to write down all of his own statements for the record.¹²⁷ But this is time consuming and impractical, particularly during long periods of questioning.¹²⁸ Another possibility is for counsel to insist that testimony be tape recorded.¹²⁹

Providing word for word translations is also difficult due to complex, long sentences, and syntax problems.¹³⁰ Finally, English pronouns that are gender neutral may cause an error in translation to a language that has masculine and feminine forms of the word.¹³¹ Only with adequate training and system-wide control over the quality of interpreters will the eradication of these obstacles to accurate translations of judicial proceedings be plausible.

These difficulties in interpretation cannot be eliminated. Courts must do whatever is reasonably possible to detect errors in translation. Courts must develop procedures for correcting these errors either at trial or on appeal. Delegating this task to court reporters is inadequate, and thus other methods must be adopted. In addition to having the witness write down his statements or tape recording testimony, the court could have a second interpreter in the courtroom to detect errors. The attorney could assist this process by bringing his own interpreter to protect his client's interests, or the court could appoint an additional interpreter.¹³² In *State v. Van Pham*,¹³³ the court appointed several interpreters.¹³⁴ Other courts have held that the right to a second interpreter did not exist where counsel was bilingual.¹³⁵ It may appear that a second interpreter is extraneous where counsel is bilingual, but if the attorney were to detect an error he would be prohibited ethically from both testifying to

126. *Id.* at 136.

127. *Id.* at 132.

128. *Id.*

129. Piatt, *supra* note 82, at 8.

130. Rainof, *supra* note 66, at 198 (sentences in Spanish, for example, are considerably longer than in English and the order of the noun and the qualifier are reversed in Spanish; as a result the interpreter cannot even begin to translate the sentence until the noun is mentioned).

131. *Id.* at 198-99 (illustrating the problem with a translation of "cousin" from English into Spanish, which resulted in the incorrect answer that the witness did not have a cousin when the witness meant that she did not have a female cousin).

132. Piatt, *supra* note 82, at 7-8 & n.48.

133. 675 P.2d 848 (Kan. 1984).

134. *Id.* at 856 (appointing one interpreter for the court and one for the defendant).

135. See *People v. Aranda*, 230 Cal. Rptr. 498 (Cal. Ct. App. 1986) (holding defendant has no constitutional right to an interpreter where the defense counsel is bilingual); *People v. Estrada*, 221 Cal. Rptr. 922, 924-25 (Cal. Ct. App. 1986) (recognizing right to a second interpreter, but not necessarily a certified one, and also finding right is waived where defense counsel is bilingual and defendant approves).

the error and still continuing as counsel.¹³⁶ Therefore, an attorney will not inform the court of an error unless it significantly prejudices his client's case.

E. *Interpreting Tape Recorded Conversations*

Another issue concerning interpretation arises when the statement in a foreign language is not spoken in court but instead has been recorded at a previous time, such as situations in which the out-of-court conversation between A and B had been recorded. Courts typically employ the same rules to the questions of whether the tape must be played in court, whether a translated transcript must be provided, and what remedies exist in case of alleged errors in the transcript. First, courts agree that playing tapes in court is not an absolute right.¹³⁷ If a party fails to request that a tape be played, that party cannot successfully appeal on the grounds that he was prejudiced by the jury's failure to listen to it.¹³⁸ Even if a request is made, the decision regarding whether to allow the tape to be played is within the sound discretion of the trial court.¹³⁹

Second, the federal courts of appeal also agree that the purpose of the translated transcript is to aid the jury in evaluating the evidence.¹⁴⁰ The courts disagree on whether the transcripts can be introduced as substantive evidence.¹⁴¹ Some courts believe transcripts should be introduced as substantive evidence, but only to aid to the jury in determining the real issue presented, the content, and the meaning of the tape record-

136. Piatt, *supra* note 82, at 11-12.

137. See *United States v. Valencia*, 957 F.2d 1189, 1194 (5th Cir.), *cert. denied*, 113 S. Ct. 254 (1992).

138. *Id.*

139. *Id.* at 1194; *United States v. Font-Ramirez*, 944 F.2d 42, 47 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 954 (1992); *United States v. Llinas*, 603 F.2d 506, 508 (5th Cir. 1979), *cert. denied*, 444 U.S. 1079 (1980).

140. *Valencia*, 957 F.2d at 1194 (relying on *United States v. Cruz*, 765 F.2d 1020, 1023 (11th Cir. 1985), and *United States v. Onori*, 535 F.2d 938, 948-49 (5th Cir. 1976), to find that the transcript is admissible as substantive evidence and extending this holding to cases where the transcript is admissible even when the tape itself is excluded); see *United States v. Rizk*, 842 F.2d 111 (5th Cir.), *cert. denied*, 488 U.S. 832 (1988); *United States v. Rengifo*, 789 F.2d 975, 983 (1st Cir. 1986) (allowing translated transcripts to be introduced without the tapes themselves where no objection); *cf.* *United States v. Sutherland*, 656 F.2d 1181, 1201 (5th Cir. 1981) (stating that the proponent of a translated transcript of a tape must introduce the testimony of a qualified witness to authenticate and verify the translation), *cert. denied*, 455 U.S. 949 (1982); *Llinas*, 603 F.2d at 509 n.3, 510 (explaining the trial court properly denied the jury access to the transcript because the appellant failed to produce the interpreter at trial to attest to the making and the accuracy of the translation).

141. See *Font-Ramirez*, 944 F.2d at 48-49 (holding a tape recording and not the transcript of the tape is the evidence in the case; but citing *Rengifo*, 789 F.2d at 983, the court allowed an English-speaking jury to evaluate evidence of a tape recorded conversation).

ings.¹⁴² It is possible that listening to the tapes will permit the jury to observe the mood or tone of the speakers, but tapes of conversations in a foreign language may not be helpful at all. In fact, such tapes may tempt bilingual jurors to make their own translations and wrongfully disregard the translator's version.¹⁴³ If a discrepancy between the tape and the transcript does arise in a case where the tape is the evidence and the transcripts are just an aid to the jury to understand the tape, the tape is controlling.¹⁴⁴ But if the jurors understand the foreign language, they must ignore errors and accept the translator's transcript where both counsel have stipulated to its accuracy.¹⁴⁵ This seems absurd, as the stipulation is usually not based on the attorney's beliefs but on the reliance on an interpreter to detect errors. It is unfair to allow errors to remain in the transcripts merely because an interpreter failed to detect the errors. Generally tapes are virtually useless to the jury because they either cannot understand the tapes or must adhere to the transcript translation. The tapes may even confuse or mislead the jury, which provides a basis for excluding the tapes under Rule 403 of the Federal Rules of Evidence.¹⁴⁶ Therefore, listening to the tapes is more likely to prejudice the case than to aid the jury in rendering a fair determination.

The proper procedure for the use of translated transcripts of tapes begins with an effort by the parties to produce an "official" or stipulated transcript.¹⁴⁷ If the parties are unable to come to an agreement, each side should introduce its own translation. To preserve the issue for appeal, an objection to the translation must be made at trial.¹⁴⁸ In the absence of a challenge, it is not plain error for the translator to add his own commentary to the translation.¹⁴⁹ The courts are also in agreement that the challenger must provide his own translation or at least point out

142. See *United States v. Bahadar*, 954 F.2d 821 (2d Cir.), *cert. denied*, 113 S. Ct. 149 (1992) (stating the generally accepted and preferred practice of playing the tapes and allowing the transcripts only as an aid, but finding no abuse of discretion by allowing the transcripts to be read and brought into the jury room because listening to the tapes is a long and cumbersome task and the translator was cross-examined on her competence).

143. *Valencia*, 957 F.2d at 1194-95; see *Santana v. New York City Transit Auth.*, 505 N.Y.S.2d 775, 777-80 (N.Y. Sup. Ct. 1986) (demonstrating the reality of the temptation of a bilingual juror to translate for himself).

144. *Valencia*, 957 F.2d at 1195; see *United States v. Camargo*, 908 F.2d 179 (7th Cir. 1990).

145. *Valencia*, 957 F.2d at 1195; *Camargo*, 908 F.2d at 183. But see *Rengifo*, 789 F.2d at 983.

146. FED. R. EVID. 403; *Valencia*, 957 F.2d at 1194-95.

147. *United States v. Briscoe*, 896 F.2d 1476, 1491 (7th Cir.), *cert. denied*, 498 U.S. 863 (1990); *United States v. Zambrana*, 864 F.2d 494, 498 (7th Cir. 1988); *Rengifo*, 789 F.2d at 983; *United States v. Llinas*, 603 F.2d 506, 509 (5th Cir. 1979), *cert. denied*, 444 U.S. 1079 (1980).

148. *United States v. Font-Ramirez*, 944 F.2d 42, 48 (1st Cir. 1991), *cert. denied*, 112 S. Ct. 954 (1992); *Zambrana*, 864 F.2d at 497; *United States v. Zambrana*, 841 F.2d 1320, 1335 (7th Cir. 1988).

149. *United States v. Rizk*, 842 F.2d 111, 112 (5th Cir.), *cert. denied*, 488 U.S. 832 (1988).

the specific inaccuracies in his opponent's transcript.¹⁵⁰ If inaccuracies exist, the translation is not prejudicial if the transcripts are found sufficiently clear and accurate to assist the jury in obtaining a true picture of what actually transpired between the parties to the conversation.¹⁵¹ It is widely accepted that translations never convey exactly the same idea as was intended, and it is unrealistic to require precision.¹⁵² Once discrepancies are pointed out in court, however, it becomes the jury's role to evaluate the different versions and decide which is more accurate.¹⁵³ This determination is often arbitrary, because jurors usually will not understand the language spoken on the tape and will therefore base their determination on what "sounds" right.

III. THE ADMISSIBILITY OF TESTIMONY ON OUT-OF-COURT INTERPRETATIONS OF CONVERSATIONS

A. *Past and Present Theories of Admissibility*

Traditionally, courts have found that testimony of a witness regarding an out-of-court statement made by another person through an interpreter was inadmissible as hearsay because the witness understood the statement not as originally given but only as translated by an interpreter not then under oath.¹⁵⁴ The courts believed this testimony was inadmissible because the witness, who only understood the statement as translated, was not testifying from personal knowledge.¹⁵⁵ The courts distinguished this from in-court interpretation, which would not be "obnoxious to the hearsay rule, because both the original witness and the interpreter are under oath and subject to cross-examination."¹⁵⁶ This view persevered through the middle of this century because the credibility of the interpreter and his interpretation could not be effectively judged in the absence of the oath and there was no observation of the

150. *United States v. Armendariz-Mata*, 949 F.2d 151, 156 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 2288 (1992); *Font-Ramirez*, 944 F.2d at 48; *Zambrana*, 864 F.2d at 497; *Zambrana*, 841 F.2d at 1336; *Llinas*, 603 F.2d at 509.

151. *Zambrana*, 864 F.2d at 498; *United States v. Vega*, 860 F.2d 779, 791 (7th Cir. 1988), *abrogated on other grounds, sub nom. United States v. Durrive*, 902 F.2d 1221 (1990); *Zambrana*, 841 F.2d at 1337.

152. *E.g.*, *Zambrana*, 841 F.2d at 1337.

153. *Id.* at 1337; *Llinas*, 603 F.2d at 510.

154. *Kalos v. United States*, 9 F.2d 268 (8th Cir. 1925); *People v. Petruzo*, 110 P. 324, 326 (Cal. Ct. App. 1910); *State Farm Mut. Auto. Ins. Co. v. Ganz*, 119 So. 2d 319 (Fla. 3d DCA 1960); *State v. Fong Loon*, 158 P. 233, 257 (Idaho 1916); *Garcia v. State*, 68 N.W.2d 151, 159 (Neb. 1955); *State v. Terline*, 51 A. 204, 208 (R.I. 1902); *State v. Lopez*, 631 P.2d 420, 422 (Wash. Ct. App. 1981). *But see Meacham v. State*, 33 So. 983, 983-84 (Fla. 1903); *Commonwealth v. Vose*, 32 N.E. 355 (Mass. 1892).

155. *Fong Loon*, 158 P. at 237; *Terline*, 51 A. at 208.

156. *Fong Loon*, 158 P. at 237; *Terline*, 51 A. at 208.

asserter's demeanor by the jury or cross-examination of the asserter.¹⁵⁷ The courts recognized an exception, which provided that this type of testimony could be admitted if the interpreter was selected by, and was therefore the agent of, the person who made the statement and against whom the statement was offered.¹⁵⁸ Various jurisdictions have held that this type of testimony is admissible as a statement of a party-opponent because the interpreter was merely acting as a medium of communication, assumed to be trustworthy.¹⁵⁹ The theory employed in cases such as *Meacham v. State*¹⁶⁰ is termed the "adoption theory" because the words of the interpreter were adopted by the parties as their own.¹⁶¹ These cases have laid the foundation for the application of the common law theory of agency to admit testimony on extrajudicial translations. But the courts still have not reached a consensus on how to treat statements made out-of-court with the use of an interpreter.

Recent case law strongly supports applying variations of the agency theory to admit this type of evidence.¹⁶² Some courts treat the interpreter as a language conduit, as if the individuals were speaking directly to each other in the same language. This theory avoids the problem of an extra level of hearsay.¹⁶³ A few cases have relied on the Rule 803(24) hearsay exception to admit testimony of extrajudicial translations as necessary evidence possessing circumstantial guarantees of trustworthiness.¹⁶⁴ Some courts have admitted this type of testimony only if the interpreter has authenticated the translation.¹⁶⁵ Other courts refuse to admit this type of testimony unless it is not offered to prove the truth of the matter asserted and therefore is not hearsay at all.¹⁶⁶ These theories are not applied consistently, and the decisions often do not follow the rules of hearsay or successfully address their underlying concerns.

B. The Agency Theory

Despite past differences,¹⁶⁷ most federal and state courts recently

157. *Ganz*, 119 So. 2d at 321; *Garcia*, 68 N.W.2d at 159 (citing *Terline*, 51 A. at 208); see *supra* note 23 and accompanying text.

158. *Terline*, 51 A. at 208.

159. *Guan Lee v. United States*, 198 F. 596, 601 (7th Cir. 1912); *Meacham v. State*, 33 So. 983 (Fla. 1903); *Commonwealth v. Vose*, 32 N.E. 355 (Mass. 1892).

160. 33 So. 983 (Fla. 1903).

161. *Matlock*, *supra* note 23, at 376-77.

162. See *infra* notes 168-73 and accompanying text.

163. See *infra* notes 177-78 and accompanying text.

164. See *infra* notes 211-12 and accompanying text.

165. See *infra* notes 219-23 and accompanying text.

166. See *infra* notes 230-34 and accompanying text.

167. Compare *Garcia v. State*, 68 N.W.2d 151, 191 (Neb. 1955) (finding a witness' testimony

have adopted the agency theory.¹⁶⁸ The courts view the statements translated by an interpreter to be the witness's own words, constituting exempt admissions of a party under Rule 801(d)(2)(C) or (D) of the Federal Rules of Evidence.¹⁶⁹ The courts in these cases consider the statements hearsay but hold that the statements are admissible under the hearsay exemption for statements made by an authorized person or agent. The "conscious reliance" on the interpreter's translations constitutes an authorization for the interpreter to become one's agent.¹⁷⁰ Therefore, the interpreter becomes the joint agent of the individuals relying on him, and his language presumptively becomes their own.¹⁷¹ This theory is logical because the statement in question would have been admissible against a party under Rule 801(d)(2)(A) had the parties been capable of communicating in the same language without an interpreter.¹⁷² This approach raises several issues: should the interpreter properly considered the speaker's agent in all circumstances? Should C

on an extrajudicial statement was hearsay where the witness only understood the statement, not as originally made, but as translated by an interpreter who was not under oath) and *State v. Terline*, 51 A. 204, 208 (R.I. 1902) (holding a witness is not qualified to testify to extrajudicial statements that are only understood by the witness as interpreted) with *Meacham v. State*, 33 So. 983, 983-84 (Fla. 1903) (finding one who understands a conversation only as translated can testify to what was said because the fact that the conversation was only understood through an interpreter affects the weight, not the competency, of the evidence) and *Commonwealth v. Vose*, 32 N.E. 355, 355 (Mass. 1892) (holding a witness or a party to a conversation understood only through an interpreter can testify on what was said as the parties adopted a mode of communication in which they assumed the interpreter was trustworthy, making the interpreter's language presumptively their own).

168. *United States v. Nazemian*, 948 F.2d 522, 526 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 107 (1992); *United States v. Beltran*, 761 F.2d 1, 9 (1st Cir. 1985); *United States v. Alvarez*, 755 F.2d 830, 859-60 (11th Cir.), *cert. denied*, 474 U.S. 905 (1985), and *cert. denied*, 482 U.S. 908 (1987); *United States v. Da Silva*, 725 F.2d 828, 831-32 (2d Cir. 1983); *People v. Torres*, 262 Cal. Rptr. 323, 329 (Cal. Ct. App. 1989); *Chao v. State*, 478 So. 2d 30 (Fla. 1985) (overruling *Rosell v. State*, 433 So. 2d 1260 (Fla. 1st DCA 1983), which rejected the agency theory, disregarding *Meacham v. State*, 33 So. at 983); *Herrera v. State*, 532 So. 2d 54 (Fla. 3d DCA 1988); *State v. Felton*, 412 S.E.2d 344, 355 (N.C. 1992).

169. A statement is not hearsay if

(2) Admission by party-opponent. The statement is offered against a party and is . . .

(C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship

FED. R. EVID. 801(d)(2)(C), (D).

170. *Daniel J. Capra, Admission by Agents*, N.Y. L.J., Mar. 13, 1992, at 3.

171. *Id.*

172. "A statement is not hearsay if

(2) Admission by party-opponent. The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity"

FED. R. EVID. 801(d)(2)(A).

be considered *A*'s agent even though *C* is *B*'s friend? If *C* was an informant being paid by the government, is *C* still considered *A*'s agent? Many courts believe these issues are irrelevant when determining admissibility, since *A* has adopted *C* as an agent by agreeing to allow *C* to interpret the conversation between *A* and *B*.¹⁷³

When the interpreter is a co-conspirator of the defendant, courts may find that the interpreter is the party's agent and apply Rule 801(d)(2)(E) of the Federal Rules of Evidence to admit a witness's testimony as statements of a co-conspirator.¹⁷⁴ A witness may testify to statements made by a party and translated by an interpreter provided by that party.¹⁷⁵ Courts do not agree regarding whether the interpreter must lay a foundation by testifying that he gave an accurate interpretation of the party's statements.¹⁷⁶ If the interpreter is available at trial, his testimony may be helpful. But the interpreter may be dishonest enough to lie on the stand, under oath, if he was dishonest enough to willfully misinterpret the out-of-court conversation.

Some courts have expanded upon the theory of agency by classifying the interpreter as no more than a language conduit and admitting testimony on extrajudicial interpretations under the same exception to the hearsay rule that would apply if the witness and the defendant had directly conversed in the same language.¹⁷⁷ These cases specify that the interpreter, as merely a language conduit, does not create an additional level of hearsay.¹⁷⁸ The conversation is regarded as if it were directly between the two parties. The court still must consider the possibility of inadvertent or willful misinterpretation.

Conflicting interests prevent the courts from reaching a definitive and consistent answer on which interests should prevail. Although courts commonly apply the agency theory, no agreement exists on the issue of what the agency theory actually entails. In *United States v. Felix-Jerez*,¹⁷⁹ the court suggested in dicta that it would adopt a rigid application of the agency theory. Admissibility would require the court to appoint or the defendant to provide an interpreter for testimony on the

173. See *infra* notes 177-78 and accompanying text.

174. *United States v. Lopez*, 937 F.2d 716, 724 (2d Cir. 1991).

175. *People v. Bartee*, 566 N.E.2d 855, 857-58 (Ill. App. Ct.), *appeal denied*, 575 N.E.2d 917 (Ill.) and *cert. denied*, 112 S. Ct. 661 (1991).

176. See *id.* (requiring the interpreter testify to the accuracy of his interpretation). But see *Chao v. State*, 478 So. 2d 30 (Fla. 1985) (relying on *Commonwealth v. Vose*, 32 N.E. 355 (Mass. 1892) and *Meacham v. State*, 33 So. 983 (Fla. 1903), to admit a witness' testimony of statements of a party as translated by an interpreter supplied by that party).

177. *Lopez*, 937 F.2d at 724; *United States v. Koskerides*, 877 F.2d 1129, 1135 (2d Cir. 1989); *United States v. Ushakow*, 474 F.2d 1244 (9th Cir. 1973).

178. E.g., *Koskerides*, 877 F.2d at 1135.

179. 667 F.2d 1297 (9th Cir. 1982).

out-of-court translation.¹⁸⁰ A court appointed interpreter would assure an unbiased interpretation, and an interpreter chosen by the party would be considered his agent. But the same court later held that this strict approach would create an arbitrary distinction between English and non-English speaking individuals and between non-English speaking individuals who bring their own translators and those who do not.¹⁸¹ An individual who allows his conversation to be interpreted has adopted the interpreter as his agent, regardless of who supplied the interpreter. It may not always be possible to supply one's own interpreter, and it will rarely be possible to employ a court appointed interpreter. If the conversation took place before any criminal charges arose, the court could not possibly appoint an interpreter. Similarly, if an informant is trying to obtain incriminating evidence against the non-English speaking individual, it is unlikely this individual will make a stranger privy to his illegal dealings.

Many cases applying the agency theory have suggested the use of a "case by case determination,"¹⁸² which commences with a presumption of agency if the interpreter had a sufficient capacity and no motive to misrepresent existed.¹⁸³ Courts would apply this test to establish an indicia of reliability concerning the translation.¹⁸⁴ Factors recognized in these cases as possibly relevant to this determination include which party supplied the interpreter, whether the interpreter had a motive to misrepresent, what the interpreter's qualifications and linguistic skills are, and whether subsequent actions were consistent with the statements as they were translated.¹⁸⁵ Terming this a case-by-case approach is misleading, however, because agency is almost always found to exist.¹⁸⁶ In fact, these cases generally hold that governmental provision of an interpreter is an insufficient basis to negate the presumption of agency with-

180. *Id.* at 1299, 1300 n.1.

181. *United States v. Nazemian*, 948 F.2d 522, 527 & n.7 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 107 (1992) (explaining that a rigid application of the agency theory would hamper undercover activities requiring an interpreter because the law enforcement officer may not be "in the position to dictate which side provides an interpreter").

182. *Id.* at 527.

183. *E.g.*, *People v. Romero*, 581 N.E.2d 1048, 1051 (N.Y. 1991); *see* 4 JACK B. WEINSTEIN & MARGARET A. BERGER, *WEINSTEIN'S EVIDENCE* ¶ 801(d)(2)(C)[01] at 801-217 & n.34 (1992); 6 JOHN H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 1810(2) at 376 (James H. Chadbourne rev. ed. 1976); 3 Wigmore, *supra*, § 812(4) at 283 (1976).

184. *Romero*, 581 N.E.2d at 1051.

185. *E.g.*, *United States v. Santana*, 503 F.2d 710, 717 (2d Cir.), *cert. denied*, 419 U.S. 1053 (1974).

186. *United States v. Alvarez*, 755 F.2d 830 (11th Cir.), *cert. denied*, 474 U.S. 905 (1985); *United States v. Da Silva*, 725 F.2d 828 (2d Cir. 1983); *State v. Felton*, 412 S.E.2d 344 (N.C. 1992).

out other contributing circumstances.¹⁸⁷ Whether the interpreter is supplied by the government or is a government employee, he still may act as the agent of the declarant, creating a dual agency.¹⁸⁸

There have been a few cases which apply this test and find that an agency relationship does not exist. For example, in *People v. Romero*,¹⁸⁹ the Court of Appeals of New York found that the interpreter did not act as an agent because he was a paid informant who would benefit financially if his activities resulted in a "prosecutable case," which provided him with a motive to lie.¹⁹⁰ Such cases create an exception that interferes with the proper procedure for determining the question of credibility. Many believe that the interpreters' agency role is prima facie correct, and questions of credibility only affect the weight attributed to the evidence — not the competency of it.¹⁹¹ This belief is supported by many recent cases.¹⁹² Some courts, however, continue to find these statements inadmissible.¹⁹³

In *Romero*, the interpreter testified to the accuracy and truth of his out-of-court translation, but the court found the police informant still possessed a motive to lie.¹⁹⁴ This holding ignores the purpose of the hearsay rule: to exclude evidence that is untrustworthy based on the failure to take an oath, the jury's inability to observe the demeanor of the declarant, and the lack of an opportunity to effectively cross-examine the declarant.¹⁹⁵ In *Romero*, these concerns were satisfied; thus, the question should have been one of credibility and weight determined by the jury and not of admissibility of the testimony based on the extrajudicial translation.¹⁹⁶ A rule excluding evidence as hearsay when a substantial

187. *Alvarez*, 755 F.2d at 859-60; *Da Silva*, 725 F.2d at 832; *Felton*, 412 S.E.2d at 355. But see *People v. Chin Sing*, 152 N.E. 248 (N.Y. 1926).

188. *Da Silva*, 725 F.2d at 832 (citing the RESTATEMENT SECOND OF AGENCY § 392 (1958) to find dual agency is permitted).

189. 581 N.E.2d 1048 (N.Y. 1991).

190. *Id.* at 1049, 1051.

191. *Meacham v. State*, 33 So. 983 (Fla. 1903) (quoting *Commonwealth v. Vose*, 32 N.E. 355 (Mass. 1892)); see *Henao v. State*, 454 So. 2d 19 (Fla. 3d DCA 1984); *State Farm Mut. Auto Ins. Co. v. Ganz*, 199 So. 2d 319 (Fla. 3d DCA 1960). But see *Rosell v. State*, 433 So. 2d 1260 (Fla. 1st DCA 1983) (indicating the contrary rule without discussing opposing precedent, but overruled by *Chao v. State*, 478 So. 2d 30 (Fla. 1985)).

192. See *Chao*, 478 So. 2d at 32 (citing *Vose*, 32 N.E. at 355). See also *United States v. Beltran*, 761 F.2d 1, 10 (1st Cir. 1985) (finding the inadequacy or incompleteness of the interpreter's notes, recollections or observations would factor into the evaluation of his credibility rather than admissibility of testimony based on the interpreter's translations).

193. *Romero*, 581 N.E.2d at 1051; see *State v. Huynh*, 742 P.2d 160, 167-68 (Wash. Ct. App. 1987) (holding agency did not exist where interpreter was related to the victim and was brought by the officer to question the defendant).

194. *Romero*, 581 N.E.2d at 1051.

195. See *supra* note 23 and accompanying text.

196. *Capra*, *supra* note 170, at 3.

motive to lie exists would prevent witnesses who had made a deal with the prosecution from testifying against a criminal defendant, regardless of whether an interpreter was necessary for communication.¹⁹⁷ Bargained-for testimony would always be found inadmissible as untrustworthy based on the witness's substantial motive to lie.¹⁹⁸ Therefore, within our judicial system, questions of credibility should be determined by the trier of fact and should affect the weight and not the competence of the evidence.

Perhaps the only situation when there should be a question of admissibility under the agency theory is where the interpreter, *C*, is a government agent and does not testify regarding the accuracy of his translation and *B* is also a government agent. If *C* is unavailable to testify and *B* is going to testify regarding *A*'s extrajudicial admission, understood by *B* only through *C*, then this testimony should be excluded unless it is found to meet the criteria of hearsay exception 803(24).¹⁹⁹ It could be argued that *C*, as a government agent, could not be *A*'s agent. *B* could have avoided this problem if he had employed an interpreter who would have been available to testify. Yet, *B* may have actually believed *C* would be able to testify, but *C* was prevented by unforeseen circumstances. By basing admissibility on whether the interpreter testifies, bargained-for testimony or governmental testimony to a defendant's extrajudicial statements would often be admitted. This would assure that non-English speaking individuals are not treated differently regarding the admissibility of their out-of-court conversations. Conversations would be admitted both against and in favor of these defendants, if the interpreter were available to testify to the competency and accuracy of his translation or if the court found that hearsay exception 803(24) applied to the particular facts of the case.

C. *The Application of Hearsay Exception 803(24)*

Before the rise in the use of the agency theory, courts admitted interpreted extrajudicial statements based on the necessity of interpretation for the parties to communicate and the necessity of the testimony to

197. *Id.*

198. *Id.*

199. FED. R. EVID. 803(24). Under this exception, the evidence could be admitted if the court determines, as it could here, that the statement is offered as evidence of a material fact, it is more probative on the issue for which it is offered than any other evidence the proponent can procure through any reasonable efforts, and the general purposes of the Federal Rules of Evidence and the interests of justice would be served by the admission of the statement into evidence. The statement must also be made known to adverse parties sufficiently in advance of the trial or hearing to provide a fair opportunity to prepare to meet it, as was done here. See *infra* notes 200-18 and accompanying text.

prove the case.²⁰⁰ But many jurisdictions upheld the theory that testimony recounting extrajudicial interpretations was inadmissible hearsay.²⁰¹ Individuals should not escape justice merely because the evidence against them is a conversation that had to be translated due to a language barrier, when the same testimony would be admissible against the individual had the parties understood the same language. To exclude this type of evidence where the translation is sufficiently trustworthy would be inequitable. The possibility of false or mistaken interpretation, however, remains. As a result, the testimony must also possess circumstantial guarantees of trustworthiness to fall within the "other exceptions" or catch-all hearsay exception of Rule 803(24) of the Federal Rules of Evidence.²⁰² Under this exception, a translation which is technically hearsay is admissible if the court finds that the statement is being offered as evidence of a material fact; it is more probative on the particular issue than any other reasonably procurable evidence; admission of the statement would best serve the interests of justice and the general purposes of the Federal Rules of Evidence; and the proponent has made known to the adverse parties sufficiently in advance of the proceedings the proponent's intentions to use the statement in court.²⁰³

In *Commonwealth v. Vose*,²⁰⁴ the Supreme Judicial Court of Massachusetts explained that testimony on statements understood only through an interpreter are admissible because the parties assume the interpreter is trustworthy by conversing through that interpreter.²⁰⁵ The court actually classified the interpreter as the joint agent of the parties.²⁰⁶ But the underlying basis for admitting the statement was the necessity of a mode of communication between the parties and the trustworthiness of the interpreter. The court explained that the parties desired to communicate and they chose the interpreter as their mode of communication.²⁰⁷ "[I]t matters not whether the interpreter be selected by him or some other person in order to make his statement original evidence."²⁰⁸ The parties are adopting a mode of communication in which they assume that the interpreter is trustworthy. If no difference exists between the parties' respective relations to the interpreter, they may not complain if the lan-

200. *People v. Randazzio*, 87 N.E. 112, 116 (N.Y. 1909).

201. See *supra* note 154 and accompanying text.

202. *State v. Letterman*, 616 P.2d 505, 508-09 (Or. Ct. App. 1980), *aff'd*, 627 P.2d 484 (Or. 1981).

203. *United States v. Kramer*, 741 F. Supp. 893, 896 (S.D. Fla. 1990).

204. 32 N.E. 355 (Mass. 1892).

205. *Id.*

206. *Id.*

207. *Id.*

208. *People v. Randazzio*, 87 N.E. 112, 116 (N.Y. 1909).

guage of the interpreter is taken as their own.²⁰⁹ The court found that the interpreter becomes the parties' joint agent, but only if nothing appears to show that the parties' respective relations to the interpreter differ.²¹⁰ This requirement implies that the interpreter is unbiased by a personal interest. Whether the court categorizes the interpreters as agents, language conduits, or modes of communication, the basis for admissibility of translated statements stems from the necessity for a medium of communication and circumstantial guarantees of trustworthiness. For example, if *A* and *B* could not communicate without *C*'s aid and *C* is found to be an unbiased and qualified interpreter, then the testimony of *B* regarding *A*'s extrajudicial statements will be admissible. In *State v. Letterman*,²¹¹ the court pointed out that the underlying basis of the admission of testimony recounting extrajudicial interpretations is the necessity for interpreters to facilitate communication, the necessity for the use of evidence to prove one's case, and the circumstantial guarantees of trustworthiness.²¹² As a result, this evidence should be admissible.

Yet some courts have held contrary views. In *Durbin v. Hardin*,²¹³ the Court of Appeals of Texas refused to overrule precedent in that jurisdiction dating back to 1938 and held that an interpreter's translation to a third party was inadmissible.²¹⁴ The court refused to apply the reasoning of *Letterman* to admit the testimony under rule 803(24) of the Federal Rules of Evidence. The court's refusal was based on the two requirements common to most hearsay exceptions: necessity for use of the evidence and circumstantial guarantees of trustworthiness. The Texas court, following similar logic to that applied in *Letterman*, supported the requirement of testimony from the interpreter concerning the declarant's statement.²¹⁵ The Texas court implied that the translator was incompetent because he spoke Spanish poorly.²¹⁶ It seemed to believe the interpreter was not trustworthy. The court held that agency only exists if expressly requested,²¹⁷ which differs from the approach in the other cases supporting the agency theory by finding that the implied relationship of agency exists when the individual allows the interpreter

209. *Vose*, 32 N.E. at 355.

210. *Id.*

211. *State v. Letterman*, 616 P.2d 505 (Or. Ct. App. 1980), *aff'd*, 627 P.2d 484 (Or. 1981).

212. *Id.* See *United States v. Kramer*, 741 F. Supp. 893, 896 (S.D. Fla. 1990); *Randazzio*, 87 N.E. at 116; *Vose*, 32 N.E. at 355.

213. 775 S.W.2d 798 (Tex. Ct. App. 1989).

214. *Id.* at 801 (refusing to overrule *Gulf, Cent. & Santa Fe R.R. Co. v. Guin*, 116 S.W.2d 693 (Tex. Ct. App. 1938)).

215. *Durbin*, 775 S.W.2d at 801.

216. *Id.*

217. *Id.*

to translate.²¹⁸

The courts should apply a uniform test for reliability and admissibility. A solution to the disparate and contradictory treatment of testimony on extrajudicially translated statements is a case by case determination of whether the interpreter was required for communication between the parties, whether the interpreter was competent and trustworthy, and whether the parties to the conversation treated the interpreter as an agent by permitting the translation of their conversation. This determination would address the concerns of the hearsay exclusionary rule, while admitting evidence that would normally be admitted if the parties could converse in the same language. It would also prevent incompetent translations from being admitted, while eradicating the inequitable result of excluding all testimony understood only by translation.

D. *Interpreter's Testimony to Authenticate Translations*

A solution to the problem of the interpreter's possibly having a motive to lie is to have the interpreter testify to the authenticity and veracity of his translation.²¹⁹ This would allow the jury to observe the interpreter's demeanor while the interpreter was under oath. In addition, opposing counsel could cross-examine the interpreter on his credibility and possible motive to misinterpret. In situations where the interpreter is available, hearsay concerns could be addressed even where a dispute as to the interpreter's accuracy and veracity exists.

Many courts have held that a third party's testimony of extrajudicial interpretations is admissible if the interpreter testifies as well.²²⁰ The interpreter's testimony satisfies hearsay concerns by the presence of an oath or affirmation, jury observation of demeanor, and opposing counsel's opportunity to cross-examine. Statements made through an interpreter at a former judicial proceeding are admissible because the interpreter was sworn to make an accurate translation at the time.²²¹ When the statement was not made at a judicial proceeding, most courts only require the interpreter to attest that he rendered an accurate and trustworthy translation.²²² Some courts require that the interpreter cor-

218. See *supra* notes 168-73 and accompanying text.

219. Cf. *supra* note 23 and accompanying text (listing the hearsay concerns).

220. *People v. Bartee*, 566 N.E.2d 855, 857-58 (Ill. App. Ct.), *appeal denied*, 575 N.E.2d 917 (Ill.), and *cert denied*, 112 S. Ct. 661 (1991); *People v. DeJesus*, 389 N.E.2d 260, 262 (Ill. App. Ct. 1979); *People v. Chin Sing*, 152 N.E.2d 248, 249 (N.Y. 1926).

221. *DeJesus*, 389 N.E.2d at 261.

222. *Bartree*, 566 N.E.2d at 857-58; *State Farm Mut. Auto Ins. Co v. Ganz*, 119 So. 2d 319, 321 (Fla. 3d DCA 1960); *Commonwealth v. Storti*, 58 N.E. 1021, 1022-23 (Mass. 1901); *Chin Sing*, 152 N.E. at 249; see also *State v. Letterman*, 616 P.2d 505 (Or. Ct. App. 1980), *aff'd*, 627

roborate the testimony by describing the content of the statements he translated.²²³ But requiring the interpreter's testimony is unfair because this excludes testimony that would have otherwise been admissible if not for the language barrier and the unavailability of the interpreter to testify at trial. Further, if the interpreter willfully rendered an inaccurate interpretation, it is possible that he would be dishonest again on the witness stand.

Some courts have held that the interpreter's testimony that he accurately translated the statements made under interrogation is "not a required predicate" to admission of an interrogating officer's testimony of the declarant's statements.²²⁴ These courts believe the interpreter's testimony only affects the weight and not the admissibility of the testimony of the interrogating officer.²²⁵ The reasoning of the majority of the cases is that under the agency theory the jury determines the credibility of the interpreter and the interpretation.²²⁶ Requiring the interpreter to authenticate his translation would be beneficial in cases where a question of competency or a motive to misinterpret arises. But such testimony should not be a prerequisite to the admission of testimony relying upon an interpreter's translations because it may be difficult to find the interpreter,²²⁷ often he has no reason to lie,²²⁸ and in most cases there will not be a challenge to the accuracy of his interpretation.²²⁹ It would be inequitable to impose such rigid requirements that would exclude evidence that would be admissible in the absence of a language barrier.

Most modern courts admit testimony recounting out-of-court inter-

P.2d 484 (Or. 1981) (allowing testimony on extrajudicial translation although interpreter only testified to the accuracy of the translation and was unable to remember the content of the conversation); *Guan Lee v. United States*, 198 F. 596 (7th Cir. 1912) (allowing interpreter to refresh his recollection from his report and admit the testimony of the listener even though the interpreter actually only testified to the accuracy of his translation).

223. *See Heskett v. United States*, 58 F.2d 897, 900 (9th Cir.), *cert. denied*, 287 U.S. 643 (1932).

224. *Chao v. State*, 453 So. 2d 878, 880 n.4 (Fla. 3d DCA 1984) (The Third District Court of Appeal of Florida stated the interpreter's testimony authenticating his translation is not necessary to admit an interrogator's testimony recounting the declarant's translated statements. However, the Supreme Court of Florida did not address this issue in its opinion affirming the conviction.), *aff'd*, 478 So. 2d 30 (Fla. 1985); *see State v. Felton*, 412 S.E.2d 344, 355, 355 n.1 (N.C. 1992). *But see People v. John*, 69 P. 1063 (Cal. 1902) (holding the admission of testimony taken through an interpreter at a preliminary examination was erroneously admitted as hearsay, even though the interpreter testified at trial both to the accuracy of his translation and to the content of the statements translated).

225. *Chao*, 453 So. 2d at 880 n.4.

226. *See supra* notes 191-92 and accompanying text.

227. *See United States v. Nazemian*, 948 F.2d 522, 525 n.3 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 103 (1992).

228. *United States v. Koskerides*, 877 F.2d 1129, 1135 (2d Cir. 1989).

229. *State v. Felton*, 412 S.E.2d 344, 335 (N.C. 1992); *State v. Letterman*, 616 P.2d 505, 506 (Or. Ct. App. 1980), *aff'd*, 627 P.2d 484 (Or. 1981).

pretations. They differ only on the theory or the requirements for authentication. In the past, however, courts have held that this testimony was only admissible to prove that the statement was made and not for the truth of the matter asserted.²³⁰ No theory unique to interpreters was created because evidence offered only to prove a statement was made and not to prove the truth of the matter asserted is not hearsay.²³¹ In fact, the case most known for relying on this theory, *United States v. Tijerina*,²³² relied on precedent that did not involve extrajudicial interpretations.²³³ The court stated that because the statement was only understood through an interpreter, it was not excluded as hearsay and only affected the weight and not the admissibility of the testimony.²³⁴ This theory only mimics the principle of hearsay and adds nothing to the solution of the problem concerning out-of-court translations.

IV. CONCLUSION

Due process requires the right to a court-appointed interpreter for indigent non-English speaking or linguistically disabled individuals, regardless of whether one is requested. This class of people deserves the same rights to a fair trial as others, but equality can only be attained by providing special services to account for this unique predicament. Requiring individuals participating in judicial proceedings to speak English creates a duty to ensure that no one is being discriminated against as a result. The constitutional guarantees of the right to be heard, to know the nature and cause of the accusation, to confront one's accusers, and to waive one's rights knowingly and intelligently are meaningless and vain if the accused is unable to understand the proceedings.

Providing an interpreter to those who need one does not give them an advantage over English-speaking individuals but rather promotes equality. But only if the system provides a standardized interpreting service to ensure accurate, word for word, simultaneous translations will the requirements of the Sixth and Fourteenth Amendments to the United States Constitution and the Court Interpreters Act be satisfied. Interpret-

230. *United States v. Tijerina*, 412 F.2d 661, 664 (10th Cir.) (holding testimony recounting extrajudicially translated statements was not inadmissible hearsay because it was only offered to prove the statements were made, not to prove the truth of the matter asserted), *cert. denied*, 396 U.S. 990 (1969); *see also* *Salminen v. Ross*, 185 F. 997 (C.C. Mass.) (holding the physician's testimony concerning the examination of a patient requiring an interpreter to communicate was not inadmissible hearsay because the testimony was only offered to show the basis of his diagnosis and not as proof of the injured person's condition as a matter of fact), *aff'd*, 191 F. 504 (C.C.A. 1 Mass. 1911).

231. FED. R. EVID. 801(c).

232. 412 F.2d 661 (10th Cir.), *cert. denied*, 396 U.S. 990 (1969).

233. *Id.* at 664.

234. *Id.*

ers must be trained to avoid simplifying and explaining the proceedings because this would unfairly provide services that are unavailable to English-speaking individuals. Judges, administrators, and attorneys must also be aware that the interpreter is not a liaison between the system and the individual requiring translation.

Further, the courts should not possess such wide discretion in determining whether appointment and use of an interpreter is necessary. Trial judges should not be able to deprive these individuals of a fair trial by failing to appoint an interpreter when one is necessary.

In a system that requires English to be spoken in judicial proceedings, those who cannot meet this requirement should be provided with special services to ensure they are given an equal opportunity to receive a fair trial. These special services must be available in civil and administrative proceedings, as well as criminal trials, because principles of fairness and due process would be otherwise violated.

Another area of the law in which the courts have ignored the rights of this class of people concerns the admission of testimony recounting extrajudicial interpretations. Courts tend to exclude this type of testimony as hearsay because they do not address the concerns of unreliability. Some argue that this testimony is not the same as if the parties had directly communicated with each other because the interpreter may have a motive to lie or may not be competent to interpret accurately. These concerns could be addressed by having the interpreter testify to the authenticity, veracity, and accuracy of his translation when challenged. The jury could weigh the testimony by observing the interpreter's demeanor while under oath and the cross-examination of the interpreter on his credibility and possible motives. In addition, requiring the interpreter to authenticate his translation would be beneficial in cases where there is a possibility of a motive to misinterpret. This, however, should not be a prerequisite to the admission of the testimony. The interpreter may be difficult to find and may have no reason to lie. Usually no challenge is made to the accuracy of his interpretation. Therefore, the interpreter should only be required to testify in cases where he was clearly incompetent to interpret or had a possible motive to misinterpret, as in the case of a government agent or informant.

These issues concerning the credibility of the interpreter should be addressed by allowing the jury to determine the weight that the statement should be afforded, unless the interpreter is unavailable to testify regarding his translation. Whether one had a motive to lie is not a question of law determined by the court but a factual issue that is decided by the trier of fact. The court should only determine whether the interpreter is qualified. This assures fair treatment of individuals under the consti-

tution and applicable statutory law and fair application of the rules of hearsay. These approaches to the issues concerning in-court interpreters and the admissibility of testimony recounting out-of-court statements understood only through an interpreter provide an equitable and consistent treatment of individuals who cannot speak English or are linguistically disabled, granting them the same rights afforded to English-speaking individuals.

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