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Defendant 'effectively absent' without translator: appeal

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SPRINGFIELD — A defendant who speaks little English is challenging his 25-year drug sentence before the Illinois Supreme Court, arguing that he was "effectively absent" from jury selection because no translator was provided.

Hector Herrero's attorney stated that his client would go forward with jury selection without the interpreter. Then Cook County Associate Judge Marcus R. Salone asked Herrero in English if he could understand the discussion.

"I understand a little bit," Herrero answered. Salone then asked the defendant if he objected to proceeding, and Herrero said, "No."

Jury selection then commenced without any further explanations to Herrero, according to his petition for leave to appeal filed with the high court on Wednesday.

"This court should grant review to consider whether before commencing jury selection, a non-English speaking defendant must personally make a knowing and voluntarily waiver of his right to an interpreter," wrote Herrero's appellate counsel, Jennifer Bonjean, in the petition.

Herrero was convicted of possession of a controlled substance with intent to deliver after Chicago police found six kilos of cocaine in a red Buick owned by Herrero's co-defendant.

The police testified that they saw Herrero enter the car, dip below the dashboard, and leave the car with a grocery bag wrapped around a brick-like object, which they thought was a kilo of cocaine.

They arrested the pair after the two defendants entered Herrero's apartment at 4400 W. Armitage Ave. and then returned to the car.

In the petition, Herrero pointed to a 1994 Illinois Appellate Court case that determined that a defendant

was effectively absent from the questioning of two witnesses because no interpreter was on hand for the non-English speaking defendant during their testimony. *People v. Escalante*, 256 Ill.App.3d 239, 627 N.E.2d 1222, 1228 (2d Dist. 1994)

The *Escalante* court held that the defendant's inability to understand the proceedings amounted to a violation of his Sixth Amendment right to confront witnesses.

In Herrero's case, the omission violated the defendant's due process guarantees, Bonjean wrote.

"To hold otherwise would be to ignore the obvious effect of sitting through a court proceeding without understanding the words spoken during that proceeding. A defendant who cannot understand the language used during voir dire is no more able to participate in the selection of his jury than is a defendant who is physically absent from the proceeding," she wrote.

A panel of the 1st District Appellate Court did not buy that argument.

First, the reviewing court noted that Herrero did not ask for an interpreter during the jury selection and he did not raise the issue when asking for a new trial, which meant he waived the issue.

In a decision written by Justice Ellis E. Reid, the appeals court also held that the absence of an interpreter did not seem to result in an unfair trial, the harm to Herrero was "minimal and harmless."

"At best, he is claiming he was constructively absent from the process, because he does have some command of the English language and was represented by counsel during the proceedings in question," Reid wrote.

"He was not actively excluded from the jury selection process but rather chose to proceed in spite of the absence of an interpreter," he continued.

The high court is expected to decide whether to take the case during the first week of February. The case is docketed as *People v. Hector Herrero*, No. 92688.