

No. \_\_\_\_\_

**In the**

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2001

\_\_\_\_\_  
Hector Herrero, *Petitioner*,

v.

People of the State of Illinois, *Respondent*.

\_\_\_\_\_  
On Petition for Writ of Certiorari to the Appellate Court of Illinois

\_\_\_\_\_  
**PROOF OF SERVICE**

Dora Eason states on oath that she served the Motion for Leave to Proceed *in Forma Pauperis* and Petition for Writ of Certiorari in the above-entitled cause on the State's Attorney of Cook County and the Attorney General of Illinois by personally delivering a copy at their offices to their employee in charge of acceptance of service on May 6, 2002. All parties required to be served have been served and the Attorney General is served pursuant to 28 U.S.C. § 2403(b).

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\_\_\_\_\_  
DORA EASON

SUBSCRIBED AND SWORN TO BEFORE ME  
on May 6, 2002.

\_\_\_\_\_  
NOTARY PUBLIC

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*. The Petitioner has previously been granted leave to proceed *in forma pauperis* in the Illinois Appellate Court, and, as a result, in the Illinois Supreme Court. Petitioner's declaration in support of this motion is attached hereto.

Respectfully submitted,

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**PETITION FOR WRIT OF CERTIORARI**

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## **QUESTIONS PRESENTED**

1. Whether the due process clause of the federal constitution guarantees a non-English speaking defendant the right to an interpreter during jury selection, and if so, whether the absence of an interpreter during jury selection can be harmless error.

2. Whether counsel for a non-English speaking defendant can waive the defendant's right to an interpreter or whether the trial court must obtain a knowing and voluntarily waiver personally from the defendant and in the defendant's native tongue.

## TABLE OF CONTENTS

QUESTIONS PRESENTED. . . . .	i
TABLE OF AUTHORITIES. . . . .	iii
OPINION BELOW. . . . .	1
JURISDICTION. . . . .	1
CONSTITUTIONAL PROVISION INVOLVED. . . . .	2
STATEMENT OF THE CASE. . . . .	3
A.    Jury Selection. . . . .	3
B.    Proceedings Below. . . . .	5
REASONS FOR GRANTING THE PETITION. . . . .	6
I.    This Court Should Consider the Important Question of Whether a Non-English Speaking Defendant Is Constitutionally Entitled to an Interpreter During the Jury Selection Phase of Trial, and Whether The Absence of an Interpreter Can be Harmless Error. . . . .	7
II.   Courts Are Split on the Question of Whether Defense Counsel for a Non-English Speaking Defendant May Waive the Defendant’s Right to an Interpreter, or Whether, the Defendant Must Personally Make a Knowing and Intelligent Waiver of his Right to an Interpreter. . . . .	14
CONCLUSION. . . . .	19
APPENDIX A (Opinion Below). . . . .	A-1
APPENDIX B (Denial of Petition for Rehearing). . . . .	A-2
APPENDIX C (Denial of Petition for Leave to Appeal to Illinois Supreme Court). . . . .	A-3

## TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Gonzalez v. People of Virgin Islands</i> , 109 F.2d 215 (3d Cir. 1940). . . . .	16
<i>The Japanese Immigrant Case</i> , 189 U.S. 86 (1903). . . . .	7
<i>Johnson v. Zerbst</i> , 304 U.S. 458 (1938). . . . .	15
<i>Luu v. People</i> , 841 P.2d 271 (Col. 1992). . . . .	11
<i>Pate v. Robinson</i> , 383 U.S. 375 (1966). . . . .	13
<i>People v. Aguilar</i> , 677 P.2d. 1198 (Cal. 1984). . . . .	13, 18
<i>People v. Herrero</i> , 324 Ill. App. 3d 876, 756 N.E.2d 234 (1st Dist. 2001) . . . . .	<i>passim</i>
<i>People v. Ramos</i> , 258 N.E.2d 197 (N.Y. 1970). . . . .	16
<i>Perovich v. United States</i> , 205 U.S. 86 (1907). . . . .	8
<i>State v. Gonzalez-Morales</i> , 979 P.2d 826 (Wash. 1999) . . . . .	10, 11
<i>State v. Kounelis</i> , 609 A.2d 1310 (N.J. Super 1992). . . . .	17
<i>State v. Natividad</i> , 526 P.2d 730 (Ariz. 1974). . . . .	8, 16
<i>State v. Neave</i> , 344 N.W.2d 181 (Wis. 1984). . . . .	6, 8, 17
<i>State v. Rios</i> , 539 P.2d 900 (Ariz 1975). . . . .	12
<i>State v. Vasquez</i> , 121 P.2d 903 (Utah 1942). . . . .	8
<i>Suarez v. Florida</i> , 481 So.2d 1201 (Fla. 1985). . . . .	10
<i>Szukiewicz v. Warden of Maryland Penitentiary</i> , 131 A.2d 390 (Md. 1957). . . . .	16
<i>United States v. Bennett</i> , 848 F.2d 1134 (11 <sup>th</sup> Cir. 1988). . . . .	9
<i>United States v. Carrion</i> , 488 F.2d 12 (1 <sup>st</sup> Cir. 1973). . . . .	8
<i>United States v. Cirrincione</i> , 780 F.2d 620 (7 <sup>th</sup> Cir. 1985). . . . .	8

<i>United States v. Gallegos-Torres</i> , 841 F.2d 240 (8 <sup>th</sup> Cir. 1988).	8
<i>United States v. Huang</i> , 960 F.2d 1128 (5 <sup>th</sup> Cir. 1992).	10
<i>United States v. Johnson</i> , 248 F.3d 655 (7 <sup>th</sup> Cir. 2001).	8, 9, 16
<i>United States v. Joshi</i> , 896 F.2d 1301 (11 <sup>th</sup> Cir. 1990).	10
<i>United States v. Mayans</i> , 17 F.3d 1174 (9 <sup>th</sup> Cir. 1994).	8, 9
<i>United States v. Negrón</i> , 434 F.2d 386 (2d Cir. 1970).	8, 9, 12
<i>United States v. Osuna</i> , 189 F.3d 1289 (10 <sup>th</sup> Cir. 1999).	16
<i>United States v. Tapia</i> , 631 F.2d 1207 (5 <sup>th</sup> Cir. 1980).	16
<i>United States v. Yee Soon Shin</i> , 953 F.2d 559 (9 <sup>th</sup> Cir. 1992).	10
<i>Valladres v. United States</i> , 871 F.2d 1564 (11 <sup>th</sup> Cir. 1989).	10, 14
<u>State Constitutional Provisions</u>	
Cal. Const. Art. I, § 14.	9
N.M. Const., Art. II, § 14.	9
<u>Statutes</u>	
28 U.S.C.S. § 1827 (2002).	9, 10
Tex. Code. Crim. Proc. Art. 38.30.	9
D.C. Code § 31-2711(c)(1).	9
Idaho Code § 9-205.	9
Fla. Stat. § 90.606(1).	9
<u>Miscellaneous</u>	
Schmidley, A. Dianne, U.S. Census Bureau, Current Populations Report, Series P23-206, <i>Profile of the Foreign-Born Populations of the United States: 2000</i> , (December 2001).	6

U.S. Census Bureau, Census 2000 Supplementary Survey Summary Tables, P035, *Age by Language Spoken at Home by Ability to Speak English for the Population 5 years and over (2000)*..... 6

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v.

PEOPLE OF THE STATE OF ILLINOIS, *Respondent*.

---

*PETITION FOR WRIT OF CERTIORARI TO THE  
APPELLATE COURT OF ILLINOIS*

---

Hector Herrero respectfully petitions for a writ of certiorari to review the judgment of the Appellate Court of Illinois.

**OPINION BELOW**

The opinion of the Appellate Court of Illinois, First District is reported at *People v. Herrero*, 324 Ill. App. 3d 876, 756 N.E.2d 234 (1st Dist. 2001). (Appendix A)

**JURISDICTION**

The judgment of the Appellate Court of Illinois was entered on June 29, 2001. (Appendix A). A petition for rehearing to the Appellate Court of Illinois was timely filed and denied on September 26, 2001. (Appendix B) A petition for leave to appeal to the Supreme Court of Illinois was denied on February 6, 2002. (Appendix C) This petition is being filed within 90 days of the denial of the petition for leave to appeal. No petition for rehearing was filed in this case. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## **CONSTITUTIONAL PROVISION INVOLVED**

The Fourteenth Amendment to the Constitution of the United States provides, in relevant part, that “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV.

## STATEMENT OF THE CASE

The State of Illinois charged Hector Herrero with possession of a controlled substance with intent to deliver. After a joint jury trial with his co-defendant, Herrero was convicted of possession of a controlled substance with intent to deliver. The trial court sentenced Herrero to a term of 25 years' imprisonment in the Illinois Department of Corrections. (R. C 90)

### A. Jury Selection

Before jury selection, defense counsel informed the court that an interpreter was unavailable to translate the voir dire proceedings for Mr. Herrero, a Spanish-speaking individual. (R. E 18-19) Defense counsel relayed that Mr. Herrero wanted to proceed with jury selection despite the absence of an interpreter. (R. E 19) The following colloquy occurred:

MR. BASTOUNES: Mr. Herrero is a Spanish speaking individual. We ordered an interpreter and he isn't here. He understands well enough that if you want you can admonish him on the record. He understand well enough what is going on in terms of picking this jury. He doesn't have a problem and wants to proceed this way. Perhaps we should put that on the record and tomorrow morning when we do opening statements and evidence –

THE COURT: Mr. Herrero would you step up here, please.

MR. BASTOUNES: – I'm for sure that we would have an interpreter.

MS. BRODE: We would like to put on the record that neither one of these individuals ever needed an interpreter.<sup>1</sup>

---

<sup>1</sup> Although the prosecutor stated that Mr. Herrero never previously required an interpreter, the record directly contradicts this assertion. At a previous bond hearing, Herrero utilized the services of a Spanish interpreter. (R. B 3). Moreover, Officer Manuel Colon, a prosecution witness, testified that when he questioned Herrero before searching his car, he spoke to Herrero in Spanish, because Herrero indicated that he could not understand English. Officer Colon also asked Herrero to sign a Consent to Search which was written in Spanish and English. (R. F 143-144) Additionally, the trial court acknowledged that Herrero was entitled to an interpreter since the court stated that it would make a request for an interpreter, and an interpreter was made available to Herrero at the beginning of opening statements and throughout trial. (R. E

MR. BASTOUNES: I think the first time I was here with Mr. Herrero at the bond hearing didn't we? I just wanted to be sure that the record is clear and that there is no alleged error later on we will want an interpreter for the trial and it should be no problem getting one tomorrow.

For the record I have discussed with my client Mr. Herrero his desire to proceed this afternoon with picking the jury and he has indicated to me that he understands and wish well enough [sic] for that portion of the trial and wants to proceed.

Mr. Herrero, is it your desire now to proceed with picking the jury?

DEFENDANT HERRERO: Yes.

MR. BASTOUNES: Without an interpreter?

DEFENDANT HERRERO: Yes.

MR. BASTOUNES: Do you understand what I'm saying to you now, is that correct?

DEFENDANT HERRERO: Yes.

MR. BASTOUNES: Okay. Judge, if you want to inquire further.

THE COURT: Mr. Herrero, have you understood the conversation that has taken place in the last ten minutes or so?

DEFENDANT HERRERO: I understand a little bit.

THE COURT: Mr. Herrero, do you have any objection to picking the jury now without the interpreter?

DEFENDANT HERRERO: No.

THE COURT: Okay. All right, then we can proceed. We're going to try to get an interpreter.

MR. BASTOUNES: I did try earlier.

THE COURT: We're trying now, I put in the request. (R. E 18-20)

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20; F 3) An interpreter was also present when Herrero waived his right to testify. (R. G 7-8) The Illinois Appellate Court did not dispute that Herrero was entitled to interpretive assistance at trial. *People v. Herrero*, 324 Ill. App. 3d 876, 756 N.E.2d 234, 242-45 (1st Dist. 2001)

The court proceeded with jury selection despite the absence of an interpreter.

**B. Proceedings Below**

Herrero appealed his conviction and sentence to the Appellate Court of Illinois, First District. Among other claims, Herrero argued that he was denied a fair trial when the court conducted jury selection without an interpreter, and the record failed to establish that Herrero made a knowing and voluntary waiver of his right to have the proceedings translated so that he might participate in jury selection. In a published decision, the Appellate Court of Illinois affirmed Herrero's conviction, holding that Herrero waived the issue by failing to request an interpreter and that Herrero's waiver of his right to an interpreter was sufficient. *People v. Herrero*, 324 Ill. app. 3d 876, 756 N.E.2d 234 (1st Dist. 2001) (Appendix A). Moreover, the appellate court concluded that, because Herrero was not actively excluded from jury selection but at most was constructively excluded, Herrero was not denied a fair trial. (Appendix A).

Herrero filed a Petition for Rehearing in the Appellate Court of Illinois which was denied on September 9, 2001. (Appendix B) Herrero filed a timely Petition for Leave to Appeal to the Supreme Court of Illinois which was denied on February 6, 2002. (Appendix C)

## REASONS FOR GRANTING THE PETITION

Immigration to the United States has rapidly increased over the past three decades. Between 1970 and 2000, the United States' foreign-born population increased from 9.6 million to 28.4 million. Schmidley, A. Dianne, U.S. Census Bureau, Current Populations Report, Series P23-206, *Profile of the Foreign-Born Populations of the United States: 2000*, (December 2001). In March 2000, the U.S. Census Bureau estimated that 10.4 percent of the U.S. population was foreign-born. *Id.*

Nearly 75 percent of the foreign-born population immigrated to the United States from Latin America or Asia. *Id.* In contrast to immigrant communities from continental Europe, these new groups speak and understand languages other than English and often reside in culturally insulated communities where they find it unnecessary to speak English fluently or at all. *State v. Neave*, 344 N.W.2d 181, 184 (Wis. 1984). Thus, it should come as no surprise that almost 45 million U.S. residents, or roughly 17 percent of the U.S. population, speak a language other than English in the home. U.S. Census Bureau, Census 2000 Supplementary Survey Summary Tables, P035, *Age by Language Spoken at Home by Ability to Speak English for the Population 5 years and over* (2000). In fact, of that 45 million, roughly a quarter speak no English at all or do not speak English well. *Id.*

With this explosive migration to the United States, the percentage of non-English speaking individuals facing criminal charges has inevitably increased. As a result, criminal courts have grappled with the challenges of protecting the constitutional rights of non-English speaking defendants. Although most courts agree that a non-English speaking defendant is entitled to the services of an interpreter, courts have struggled with implementing this general

proposition. Many American jurisdictions have enacted their own statutes and rules for governing the appointment of an interpreter. However, what protections our federal constitution offers non-English speaking defendants is still an unanswered question, at least by this Court. Of greater uncertainty is the scope of a non-English speaking defendant's right to interpretive assistance, and under what circumstances a non-English speaking defendant is entitled to a new trial when he is denied interpretive services during a portion of his trial proceedings. Also unresolved is the question of whether defense counsel may waive a non-English speaking defendant's right to interpretive assistance or whether the right to an interpreter must be waived personally by the defendant.

This case provides an opportunity to resolve the questions left open by the lower courts concerning the scope of a non-English speaking defendant's right to interpretive assistance at trial. This Court should grant certiorari since resolution of this case will provide well-needed guidance to judges balancing a non-English speaking defendant's constitutional rights to confrontation and due process against the public's interest in the economical administration of criminal law.

**I. This Court Should Consider the Important Question of Whether a Non-English Speaking Defendant Is Constitutionally Entitled to an Interpreter During the Jury Selection Phase of Trial, and Whether Absence of an Interpreter is Subject to Harmless Error Analysis.**

This Court has never determined whether a non-English speaking defendant enjoys a constitutional right to an interpreter. In *The Japanese Immigrant Case*, 189 U.S. 86 (1903), this Court held that no translator was necessary to meet the requirements of the due process clause in

a deportation hearing; however, an asylum proceeding is a civil proceeding at which the defendant has no constitutional right to be present. *United States v. Cirrincione*, 780 F.2d 620, 634 (7<sup>th</sup> Cir. 1985). In *Perovich v. United States*, 205 U.S. 86, 91 (1907), this Court considered the defendant's claim that the trial court erred in refusing to appoint an interpreter, but summarily rejected the claim, finding that the decision to appoint an interpreter rests in the discretion of the court. However, the discretion referred to in *Perovich* is to determine the factual question of whether an interpreter is needed, not whether the trial court has discretion to deny an interpreter to a defendant who is clearly in need of one. See *State v. Neave*, 344 N.W.2d 181, 183 (Wis. 1984).

The lower federal courts and state courts widely recognize that the fundamental guarantees of the due process clause, and the Sixth Amendment include the right to an interpreter for an accused who does not understand or speak English well enough to adequately comprehend or communicate in the proceedings that may result in his loss of liberty. See, e.g., *United States v. Negron*, 434 F.2d 386, 389 (2<sup>d</sup> Cir. 1970); *United States v. Carrion*, 488 F.2d 12, 14 (1<sup>st</sup> Cir. 1973); *United States v. Gallegos-Torres*, 841 F.2d 240, 242 (8<sup>th</sup> Cir. 1988); *United States v. Mayans*, 17 F.3d 1174, 1180-81 (9<sup>th</sup> Cir. 1994); *United States v. Johnson*, 248 F.3d 655, 663 (7<sup>th</sup> Cir. 2001); *State v. Gonzales-Morales*, 979 P.2d 826, 827 (Wash. 1999) *State v. Neave*, 344 N.W.2d 181 (Wis. 1984); *State v. Natividad*, 526 P.2d 730, 733 (Ariz. 1974); *State v. Vasquez*, 121 P.2d 903 (Utah 1942).

Specifically, the due process clause guarantees to the accused the right to an interpreter so that he may be present and participate in the proceedings, may know and defend against the charges lodged against him, and may testify on his own behalf. See, e.g., *Negron*, 434 F.2d at

389-90; *Johnson*, 248 F.3d at 663; *Mayans*, 17 F.3d at 1179-81; *Natividad*, 526 P.2d at 733. The Sixth Amendment guarantees an accused the right to an interpreter so as to assure meaningful confrontation and cross-examination of adverse witnesses, and to secure the effective assistance of counsel. *See, e.g., Negron*, 434 F.2d at 389; *Carrion*, 488 F.2d at 14; *Natividad*, 526 P.2d at 733. In fact, many American jurisdictions have enacted either a constitutional provision, statute, or judicial rules to govern a non-English speaking defendant's right to an interpreter. *See, e.g.,* 28 U.S.C.A. § 1827; Cal. Const. Art. I., § 14; NM Const, Art II., § 14; Tex. Code. Crim. Proc. Art. 38.30; D.C. Code § 31-2711(c)(1); Idaho Code § 9-205; Fla. Stat. § 90.606(1).

While defendants who demonstrate their inability to fully understand the proceedings in English are generally entitled to an interpreter throughout their trial proceedings, the question of what constitutes “throughout the trial proceedings” is somewhat less clear. Moreover, courts have rendered conflicting opinions on whether a trial court's failure to appoint an interpreter during a trial proceeding should result in the reversal of the defendant's conviction. Guidance from this Court is greatly needed to resolve these ever-present concerns.

In 1978, Congress passed the Court Interpreters Act (“CIA”), a statutory provision governing the appointment of an interpreter to non-English speaking defendants in federal courts. 28 U.S.C.S. § 1827 (2002). *United States v. Bennett*, 848 F.2d 1134, 1140 (11<sup>th</sup> Cir. 1988). The CIA was not enacted to “create new constitutional rights for defendants or expand existing constitutional safeguards”; rather, the CIA was enacted “to mandate the appointment of interpreters under certain conditions and to establish statutory guidance for the use of translators in order to ensure that the quality of the translation does not fall below a constitutionally permissible threshold.” *United States v. Johnson*, 248 F.3d 655, 661 (7<sup>th</sup> Cir. 2001).

The CIA calls for continuous word-for-word translation of everything relating to the trial a defendant conversant in English would be privy to hear. *United States v. Joshi*, 896 F.2d 1301 (11<sup>th</sup> Cir. 1990). However, the federal courts have occasionally lapsed from the standard, holding that giving summaries rather than word-for-word translation is not plain error and deviations from the ideal do not automatically require reversal. *United States v. Huang*, 960 F.2d 1128, 1136 (1992). *See also Valladares v. United States*, 871 F.2d 1564, 1565-66 (11<sup>th</sup> Cir. 1989). Many courts hold that even where the statute is not complied with, the defendant must show that his trial was fundamentally unfair in order to receive a new trial, particularly if the defendant voiced no objection at trial. *Id.*

In *Valladares*, the defendant alleged that he was entitled to a new trial because the trial court failed to provide him with a “continuous translation” of the trial proceedings. *Valladares*, 871 F.2d at 1566. On the first day of trial, the defendant received interpretive assistance from a Spanish-speaking attorney who accompanied the defendant’s trial attorney to court. *Id.* at 1565. The “interpreter” assisted in communications between the defendant and his attorney and summarized the testimony of the witnesses. *Id.* The Eleventh Circuit noted that “continuous translation” may not have been provided, however in such situations, the reviewing court must determine whether the purposes of the Act were adequately met. *Id.* at 1566. The ultimate question is whether any inadequacy in the interpretation made the “trial fundamentally unfair.” *Id.* *See also United States v. Yee Soon Shin*, 953 F.2d 559 (9<sup>th</sup> Cir. 1992) (holding that trial court’s failure to appoint separate interpreters to co-defendants did not violate right to continuous translation of the trial proceedings). *See also Suarez v. Florida*, 481 So.2d 1201, 1204 (Fla. 1985) (holding that a court does not have duty to assure that an interpreter provide simultaneous

translation of the entire trial).

In this case, the Illinois Appellate Court reached a similar conclusion. The Illinois Appellate Court did not dispute that the defendant was entitled to an interpreter during jury selection, but refused to reverse his conviction, finding that the failure to appoint an interpreter was not plain error, and did not result in a denial of the defendant's fundamental right to be present and participate in the proceedings. *People v. Herrero*, 324 Ill. App. 3d 876, 756 N.E.2d 234, 243-44 (1st Dist. 2001). The appellate court reasoned that at most the absence of an interpreter rendered the defendant constructively absent from the proceedings, rather than physically absent. *Id.* The court found that the presence of the defendant is a condition of due process to the extent that a fair and just hearing would be thwarted, and because the absence of an interpreter did not seem to have resulted in an unfair trial, any error was minimal and harmless. *Id.*

Although the federal courts have never decided whether the failure to appoint an interpreter can be harmless error, the Colorado Supreme Court has answered that question in the affirmative. In *Luu v. People*, 841 P.2d 271 (Col. 1992), the Colorado Supreme Court refused to reverse a defendant's conviction who was denied an interpreter during closing arguments. In *Luu*, the court recognized that inherent in the right to be present and to participate in one's trial, is the right to understand the proceedings; however, the court refused to grant the defendant a new trial, finding that any error in the failure to provide an interpreter was harmless beyond a reasonable doubt. *Id.* at 275. The court rejected the defendant's argument that the harmless error doctrine is not appropriately applied to the denial of the right to be present at a critical stage of trial.

In contrast to the above cases, some courts have adhered strictly to the proposition that a non-English speaking defendant is entitled to “continuous word-for word” translation of his trial, and have refused to require the defendant to show that his trial was fundamentally unfair in order to receive a new trial. For example, in *Rios*, the Arizona Supreme Court reversed a non-English speaking defendant’s conviction where the defendant did not receive continuous translation from a competent attorney, but rather received interpretive assistance at various points through the proceedings by the bailiff. *State v. Rios*, 539 P.2d 900, 902 (Ariz. 1975). The court reversed the defendant’s conviction, even though defense counsel did not object to the arrangement and actually requested that the bailiff serve as the interpreter. Moreover, in granting a new trial, the reviewing court did not require the defendant to show that his trial was rendered fundamentally unfair as a result of the bailiff acting as an interpreter.

In *United States v. Negron*, 434 F.2d 386 (2d Cir. 1970), the defendant was a non-English speaking indigent from Puerto Rico. *Id.* at 388. At various points through the pre-trial proceedings and trial, the defendant received interpretive assistance; however, during a significant portion of his case, the defendant did not have the services of an interpreter. *Id.* The Court held that regardless of the probabilities of his guilt, Negron’s trial lacked the basic and fundamental fairness required by the due process of the Fourteenth Amendment. *Id.*

The Second Circuit declined to find the issue waived even though the defendant did not object at the time of trial. The court stated: “[N]or are we inclined to require that an indigent poorly educated Puerto Rican thrown into a criminal trial as his initiation to our trial system, come to that trial with a comprehension that the nature of our adversarial processes is such that he is in peril of forfeiting even the rudiments of a fair proceeding unless he insists upon them.”

*Id.* at 390. The court analogized the scenario to a defendant's ability to waive his right to have a court determine his capacity to stand trial. In *Pate v. Robinson*, 383 U.S. 375 (1966), this Court observed that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly and intelligently waive his right to have the court determine his capacity to stand trial." *Id.* Likewise, the *Negron* court argued, it is contradictory that a defendant who cannot understand the proceedings due to a language barrier is deemed to have knowingly and intelligently waived his right to interpretive service when he fails to voice an objection.

California, through its State constitution, guarantees a non-English speaking defendant a distinct right to an interpreter throughout the trial proceedings, and has faithfully applied this standard liberally in favor of the defendant. In *Aguilar*, the California Supreme Court reversed a defendant's conviction, finding that he was denied his state constitutional right to an interpreter through the trial proceedings when the trial court borrowed the defendant's interpreter to translate for the prosecution's witnesses. *People v. Aguilar*, 677 P.2d 1198 (Cal. 1984). The California Supreme Court noted that "at moments crucial to the defense—when evidentiary rulings and jury instructions are given by the court, when damaging testimony is being introduced—the non-English speaking defendant who is denied the assistance of an interpreter is unable to communicate with the court or with counsel and is unable to understand and participate in the proceedings which hold the key to freedom." *Id.* at 1201.

The *Aguilar* court observed that prior to the 1974 amendment of article I, section 14 of the California Constitution, an interpreter was only required wherever it was "necessary" as a matter of due process. After the amendment, a non-English speaking defendant is guaranteed the distinct right to an interpreter *throughout the proceedings*. "Nothing short of a sworn interpreter

at defendant's elbow," will satisfy the defendant's constitutional rights." *Id.* Critically, the *Aguilar* court did not engage in any harmless error analysis and did not require the defendant to show that his trial was fundamentally unfair in light of the error.

As the above cases make clear, a defendant who the court determines is unable to fully understand the trial court proceedings is generally entitled to interpretive assistance. Less clear is whether a non-English speaking defendant is entitled to continuous word-for-word translation at every stage of trial and whether failure to provide the defendant with this service warrants reversal of his conviction.

Specifically at issue here is whether a non-English speaking defendant who was denied interpretive assistance during a portion of his trial proceedings has the burden of demonstrating that his trial was rendered fundamentally unfair by the absence of an interpreter as required in *Valladres* and the case at bar, or whether failure to provide a competent interpreter throughout the trial proceedings is so offensive to our notions of fairness that reversal is required regardless of whether the defendant can show that a fair and just proceeding was thwarted by his absence. Also at issue is whether the absence of an interpreter during a critical stage of trial can be harmless error as the Colorado Supreme Court held, or whether, as *Negron* points out regardless of the probabilities of his guilt, the defendant is entitled to a new trial where he is denied interpretive assistance during critical portions of trial. For the above reasons, this Court should grant certiorari to resolve these important questions.

**II. Courts Are Split on the Question of Whether Defense Counsel for a Non-English Speaking Defendant May Waive the Defendant's Right to an Interpreter, or Whether, the Defendant Must Personally Make a Knowing and Intelligent Waiver**

**of his Right to an Interpreter.**

This case raises an additional question that has been met with varying treatment in the lower courts, that is, whether defense counsel can waive a defendant's right to an interpreter, or whether the right to an interpreter falls into that category of rights that must be knowingly and intelligently made by the defendant himself. *Johnson v. Zerbst*, 304 U.S. 458 (1938). Of added concern is whether a defendant can waive his right to an interpreter in a language foreign to him, or whether to effectuate a valid waiver, an interpreter must be present during the waiver proceedings.

In this case, defense counsel indicated that defendant Herrero wished to proceed with jury selection despite the absence of an interpreter. Defense counsel explained to the court that he was not waiving an interpreter for the trial itself, but only for jury selection. Defense counsel stated, “[H]e understands well enough what is going on in terms of picking a jury. He doesn't have a problem and wants to proceed this way.” Nothing in the record showed that defense counsel spoke Spanish.

The trial court directly asked Mr. Herrero whether he understood the conversation that had taken place in the previous ten minutes, to which Herrero replied, “I understand a little bit.” The trial court never told Herrero that the trial could be postponed until an interpreter could be secured, nor did the court explain to Herrero the importance of jury selection or the consequences of waiving an interpreter during jury selection. The Appellate Court of Illinois held that Herrero could not complain of his attorney's waiver, because Herrero failed to object to the attorney's waiver either at trial or in a post-trial motion.

The decision from the Illinois Appellate Court accords with a minority of cases. For

example, in *Gonzalez v. People of Virgin Islands*, 109 F.2d 215 (3d Cir. 1940), the Third Circuit held that where a defendant fails to tell the court that he cannot understand the language of the prosecution witnesses and both he and his attorney fail to request an interpreter, his right is deemed waived. Similarly in *People v. Ramos*, 258 N.E.2d 197 (N.Y. 1970), the Court of Appeals of New York held that where the defendant is represented by counsel and fails to request an interpreter, the defendant cannot later claim to have been denied due process of law.

In *Szukiewicz v. Warden of Maryland Penitentiary*, 131 A.2d 390 (Md. 1957), a factually analogous case to the one presented here, the defendant filed a writ of habeas corpus complaining that his right to a fair trial was violated where he spoke Polish, could not understand English, and no interpreter was provided to him during his trial proceedings. The court rejected his claim finding that defense counsel's assertion that the defendant "can get along" without an interpreter was sufficient to waive his rights to an interpreter. *Id.* at 391-92.

These cases conflict, however, with the a more recent trend of cases holding that a defendant must personally make a knowing and voluntary waiver to the right of interpreter. The federal circuits are largely in agreement that the right to waive the services of an interpreter is personal to the defendant. *See, e.g., United States v. Tapia*, 631 F.2 1207 (5<sup>th</sup> Cir. 1980); *United States v. Osuna*, 189 F.3d 1289 (10<sup>th</sup> Cir. 1999); *United States v. Johnson*, 248 F.3d 655 (7<sup>th</sup> Cir. 2001).

Moreover, several states highest courts have reached the same conclusion. In *State v. Natividad*, 526 P.2d 730 (Ariz. 1974), the defendant was an indigent Mexican national who had worked in the United States as a farm worker for eighteen years. *Id.* at 732. The record was devoid of any reliable indication as to the defendant's ability to comprehend the English

language. *Id.* at 733. Finding that the defendant’s constitutional rights under the Sixth and Fourteenth Amendments may have been violated if the defendant was forced to observe the proceedings without comprehension, the court remanded the case so that a hearing could be held to determine the severity of the language difficulty and determine whether the defendant was entitled to be informed of his right to an interpreter. *Id.*

The court rejected the State’s argument that the issue was waived since neither the defendant nor his counsel requested the assistance of an interpreter. *Id.* The court held that “a defendant who passively observes in a state of complete incomprehension that complex wheel of justice grind on before him can hardly be said to have satisfied the classic definition of a waiver as “the voluntary and intentional relinquishment of a known right.” *Id.* See also *State v. Neave*, 344 N.W.2d 181, 185-87 (Wis. 1984); *State v. Kounelis*, 609 A.2d 1310, 1314 (N.J. Super 1992).

Although the current trend favors a rule that any waiver of interpretive services must be an intentional relinquishment or abandonment of a known right made personally by the defendant, the Illinois Appellate Court declined to follow these cases. The Illinois Appellate Court concluded that defense counsel’s assertion to the trial court that Herrero understood well-enough to proceed with jury selection without an interpreter was sufficient to waive Herrero’s right to an interpreter. The trial court reached this determination despite Herrero’s personal admission that he only understood a “little bit” of the exchange that resulted in the waiver.

This case not only raises the serious question of whether defense counsel may waive a non-English speaking defendant’s right to interpretive assistance, but also, whether a non-English speaking defendant must be provided with an interpreter in order to knowingly and intelligently waive his right to an interpreter. Although no court has expressly held this, the California

Supreme Court in *Aguilar* suggests that an interchange that results in a waiver of the defendant's right to an interpreter must be in a language understood by the defendant. *Aguilar*, 677 P.2d at 1202 n. 6.

In sum, this case presents an opportunity to resolve many questions concerning the non-English speaking defendant's constitutional rights. This Court should determine the scope of a non-English speaking defendant's right to interpretive service and whether failure to provide interpretive service to the non-English speaking defendant requires a new trial, even where the defendant cannot show that his trial was rendered fundamentally unfair by the failure to appoint an interpreter. This Court should grant certiorari to consider the related question of whether failure to provide interpretive service can be subject to a harmless error analysis. Finally, this Court should determine whether defense counsel can waive a non-English speaking defendant's right to an interpreter or whether such a waiver must be made personally by the defendant in his native tongue. This Court should grant certiorari since resolution of this case will provide well-needed guidance to judges balancing the non-English speaking defendant's constitutional rights to confrontation and due process against the public's interest in the economical administration of criminal law.

## CONCLUSION

The petition for writ of certiorari should be granted.

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## **APPENDIX A**

## **APPENDIX B**

## **APPENDIX C**