

*¿QUÉ DIJO?*  
THE PLAIN ERROR RULE’S EFFECTIVE  
DENIAL OF DUE PROCESS TO  
NON-ENGLISH-SPEAKING CRIMINAL DEFENDANTS

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I. INTRODUCTION

The official court interpreter took the stand outside the presence of the jury and admitted that he had mistranslated a critical term during questioning between the court and Ramon Santos.<sup>1</sup> Santos was facing multiple fraud and conspiracy charges and would later argue on appeal that the mistranslation had affected the testimony of other Spanish-speaking witnesses.<sup>2</sup> Santos’s argument directly implied that the error in interpretation had led witnesses to improperly bias the jury against his credibility and to overstate the ease with which he could have committed the crimes.<sup>3</sup>

In a thirty-six word footnote, the Eleventh Circuit dismissed that argument, stating summarily that Santos could not demonstrate plain error, and that any actual error was harmless.<sup>4</sup> Although the court noted in its Opinion that the “translator’s confusion and likely error [was] troubling,” its analysis of the error was limited to stating the standard of review and concluding that

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1. United States v. Santos, 397 F. App’x 583, 588 (11th Cir. 2010).

2. *Id.* at 588 n.4.

3. *Id.* at 586, 588.

4. *Id.* at 588 n.4.

it had not been met.<sup>5</sup> Sadly, the plain error rule has rendered such a cursory analysis par for the course.<sup>6</sup>

The Court Interpreters Act grants federal courts discretion to utilize both court-certified and non-certified interpreters to aid criminal defendants that speak a primary language other than English.<sup>7</sup> Neither that Act nor the Federal Rules of Criminal Procedure, which reaffirm that the appointment of an interpreter is subject to the court's discretion, require that criminal defendants be informed of their prospective right to an interpreter during court proceedings.<sup>8</sup> Consequently, criminal defendants who do not understand the charges against them or the proceedings related to those charges are dependent upon the courts to recognize their lack of comprehension and on their counsel to bring their language deficiency to the court's attention.<sup>9</sup>

When criminal defendants fail to object to inadequate interpretation at trial, reviewing courts will apply the plain error standard of review.<sup>10</sup> To prove plain error, a defendant must establish that there was a clear error or defect that "affected the outcome of the district court's proceedings."<sup>11</sup> Furthermore, even if such an error is proven, federal courts of appeals retain the "discretion to remedy the error if it 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'"<sup>12</sup> Failing to object to inadequate interpretation at trial may bar a defendant from relief even when that failure "undoubtedly violates the defendant's rights."<sup>13</sup> Predictably, reversals based on plain error in this context are rarely granted.<sup>14</sup>

A failure to object to inadequate interpretation at trial may also trigger a claim to ineffective assistance of counsel.<sup>15</sup> In *Strickland v. Washington*,<sup>16</sup> the Supreme Court held that a successful claim of ineffective assistance must establish that counsel made serious errors, and that those errors prejudiced the defense. Just as the plain error rule essentially requires enormous deference to the district courts, the *Strickland* standard provides that "[j]udicial scrutiny of counsel's performance must be highly deferential."<sup>17</sup> Thus, a defendant's failure to object to inadequate interpretation at trial

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5. *Id.* at 588.

6. See generally Lynn W. Davies et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, 7 HARV. LATINO L. REV. 1 (2004) (summarizing appellate cases in which defendants brought challenges based on inadequate interpretation).

7. 28 U.S.C. § 1827 (2010).

8. *Id.*; FED. R. CRIM. P. 28.

9. See, e.g., Mollie M. Pawlosky, Note, *Case Note: When Justice is Lost in the "Translation"*: *Gonzalez v. United States, an "Interpretation" of the Court Interpreters Act of 1978*, 45 DEPAUL L. REV. 435, 489-90 (1996).

10. Davies et al., *supra* note 6, at 7.

11. *United States v. Olano*, 507 U.S. 725, 734 (1993); see also FED. R. CRIM. P. 52(b) (defining plain error as one "that affects substantial rights").

12. *Puckett v. United States*, 556 U.S. 129, 129 (2009) (emphasis in original) (citation omitted).

13. *Id.* at 130.

14. Davies et al., *supra* note 6, at 7.

15. See, e.g., *Gonzalez v. United States*, 33 F.3d 1047 (9th Cir. 1994).

16. *Strickland v. Washington*, 466 U.S. 668 (1984).

17. *Id.* at 689.

triggers heavy presumptions against that defendant from obtaining relief on appeal under both the Court Interpreters Act and *Strickland*.

This Note will contend that the plain error rule unduly disadvantages criminal defendants who are not fluent in the English language in violation of the Due Process Clause of the Fourteenth Amendment.<sup>18</sup> Part II will discuss federal cases in which defendants appealed their convictions under the Court Interpreters Act but were unable to overcome the plain error standard on appeal. Part III will argue that non-English-speaking defendants face a double penalty under *Strickland* when their original counsel fails to object on grounds of inadequate interpretation. Finally, Part IV will propose new policies and substantive protections to remedy the general disadvantages that such defendants face and ensure that the rights of non-English-speaking defendants comport with the requirements of due process.

## II. THE CURRENT LANDSCAPE UNDER THE PLAIN ERROR RULE AND THE COURT INTERPRETERS ACT

Although the Supreme Court has never explicitly addressed the issue, numerous federal courts of appeals have held that the Due Process Clause requires federal courts to provide interpreters or otherwise ensure that non-English-speaking criminal defendants understand their proceedings.<sup>19</sup> While not every Circuit has ruled on the matter, it is generally undisputed that “when an interpreter is indeed necessary to facilitate essential communication between a defendant and those participating in his or her trial, the Due Process Clause requires that an interpreter be provided.”<sup>20</sup>

Despite the apparently universal acceptance of the fundamental nature of a non-English-speaking defendant’s right to understand, the plain error rule has rendered that right violable. The cases discussed in the following subsections are demonstrative of the superficial nature of the right and of the virtually insurmountable burden that non-English-speaking defendants face when trying to enforce it on appeal.

### A. Application of the Rule in the Federal Courts

In *United States v. Camejo*, the defendant challenged his conviction on the ground that the court interpreter made errors during witness testimony that violated the defendant’s right to a fair trial.<sup>21</sup> Because no objection was made at trial, the Sixth Circuit applied the plain error standard of review in assessing the claim.<sup>22</sup> Before beginning its analysis, the court noted that “the

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18. U.S. CONST. amend. XIV, § 1.

19. See, e.g., *United States v. Johnson*, 248 F.3d 655, 664 (7th Cir. 2001); *Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970).

20. Todd E. Pettys, *Counsel and Confrontation*, 94 MINN. L. REV. 201, 256 (2009).

21. *United States v. Camejo*, 333 F.3d 669, 672 (6th Cir. 2003).

22. *Id.*

record supports defendant's contention that there were, at times, difficulties."<sup>23</sup>

The *Camejo* court made four findings as to why the defendant's burden was not satisfied under plain error review. First, the court noted that "the interpreter's translation was not sufficiently poor so as to provoke objection."<sup>24</sup> Second, the court observed that, "though the interpreter struggled, the district judge handled the problems as they arose."<sup>25</sup> Third, the court found it important that the testimony that was alleged to have been poorly translated "did not involve the testimony of the *defendant*."<sup>26</sup> Finally, in what the court said was "perhaps most telling of all[—]both defendant *and his lawyer* spoke Spanish."<sup>27</sup>

After making these findings, the court concluded that any error in translation had "no substantive effect on the proceedings" and was certainly "not plain."<sup>28</sup> The court did not elaborate on the specifics of the translation errors, nor did it go in to detail as to exactly how the defendant had claimed that those errors had made his trial unfair.<sup>29</sup>

*United States v. Gonzales* also involved a defendant challenging the adequacy of interpretation at trial.<sup>30</sup> There the defendant claimed that an Iowa district court had violated the Court Interpreters Act when "it failed to appoint a certified interpreter or to determine whether a certified interpreter was reasonably available before appointing uncertified interpreters for the proceedings."<sup>31</sup> Unlike the *Camejo* court, the Eighth Circuit found in *Gonzales* that the alleged error "may [have] indeed constitute[d] plain error."<sup>32</sup> The court noted that "once a district court decides to use an interpreter, it is obligated to use a certified interpreter, unless a certified interpreter is not reasonably available."<sup>33</sup>

Although the *Gonzales* court conceded that a plain error may have occurred, it still ultimately held against the defendant.<sup>34</sup> The court's brief analysis centered on the fact that the defendant had failed to prove that his "plea agreement was not entered into knowingly, voluntarily and intelligently."<sup>35</sup> Because of this, the court held that the defendant had not demonstrated that the error had "affected his substantial rights."<sup>36</sup> The stringency of the plain error rule essentially forced the court to assume that the defendant had

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23. *Id.* at 672.

24. *Id.* at 673.

25. *Id.*

26. *Id.* (emphasis in original).

27. *Camejo*, 333 F.3d at 673 (emphasis in original).

28. *Id.* at 673.

29. *See id.*

30. *United States v. Gonzales*, 339 F.3d 725 (8th Cir. 2003).

31. *Id.* at 727.

32. *Id.* at 728.

33. *Id.*

34. *Id.* at 730.

35. *Id.* at 729.

36. *Gonzales*, 339 F.3d at 728.

understood the plea agreement as if it had been in his own language, which allowed for a swift dismissal of his claim.<sup>37</sup>

Possibly the most striking example of the extraordinary burden that the plain error rule places on non-English-speaking defendants comes from *United States v. Mata*.<sup>38</sup> The defendant in *Mata* had been found guilty of possessing marijuana with the intent to distribute, and appealed his conviction on the grounds that the “Spanish interpreters at his trial were unable to either effectively interpret the proceedings for him during trial or to translate his testimony for the court.”<sup>39</sup> The Fourth Circuit held that even though an explicit requirement of the Court Interpreters Act had not been met, namely that the translation be “continuous” and “word-for-word,” the error was still found harmless.<sup>40</sup>

As the basis of its holding, the *Mata* court found it crucial that the defendant had some “passing familiarity with the English language.”<sup>41</sup> The court further relied on undisputed circumstantial evidence that placed the defendant at the crime scene.<sup>42</sup> Importantly, this evidence put the defendant in possession of the bags containing the drugs, but did not speak to his knowledge of the contents of those bags, which was a crucial element of the offense.<sup>43</sup> Finally, the court noted that the “lack of an objection during trial weigh[ed] heavily against granting relief to [the defendant].”<sup>44</sup>

The *Mata* court held that even though the defendant’s testimony was improperly translated, and even though his “only defense was that he was unaware that the bags contained a controlled substance,” the translation problems could not be said to “render the trial fundamentally unfair.”<sup>45</sup> As in *Gonzales* and *Camejo*, the court in *Mata* did not elaborate as to precisely what the translation errors were, or how those errors were alleged to have improperly influenced the trial.<sup>46</sup>

### B. The Failure to Reach the Merits

Perhaps the most obvious common element of the holdings in *Camejo*, *Gonzales*, and *Mata* is the circular reasoning that the Courts of Appeals employed when applying the plain error rule. In all three cases, the courts noted the absence of an objection to inadequate interpretation at trial and used the absence of an objection as a critical rationale for denying relief.<sup>47</sup>

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37. *See id.*

38. *United States v. Mata*, No. 98-4843, 1999 WL 427570 (4th Cir. June 25, 1999).

39. *Id.* at \*3.

40. *Id.*

41. *Id.* (internal quotation marks omitted).

42. *Id.*

43. *Id.*; *see also* 21 U.S.C. § 841(a)(1) (1994) (requiring a showing of knowledge or intent).

44. *Mata*, 1999 WL 427570 at \*3.

45. *Id.* at \*3.

46. *See id.*

47. *Gonzales*, 339 F.3d at 728; *Camejo*, 333 F.3d at 672; *Mata*, 1999 WL 427570 at \*4.

The problem with the courts' reasoning in this regard is that the same failure that triggered the application of the plain error rule also served as a basis for ruling against the defendants to whom it was applied. Such reasoning renders the rule little more than a self-defeating pretext that allows for summary dismissal of the claims of defendants seeking review.

In addition to the circular logic utilized in the application of the rule, none of the courts discussed the substantive effects the mistranslations could have potentially had on the trials. In *Camejo*, the court noted that there were certain safeguards that happened to be in place, such as the defendant's attorney's ability to speak Spanish, but it failed to address the effects of the translation errors that apparently slipped past that attorney.<sup>48</sup> That court also found that the district court judge "handled problems as they arose," which was peculiar, as there was no intimation that the district judge spoke or understood any Spanish, and thus probably could not have even identified translation problems as they arose.<sup>49</sup>

The *Gonzales* court also sheltered itself underneath the presumptions demanded by the plain error rule. Tellingly, the court in *Gonzales* neither identified nor discussed a single mistranslated word in its discussion.<sup>50</sup> Although the *Gonzales* court stated that an error had occurred, the presumptions of the rule instilled no need for a more critical analysis.<sup>51</sup>

The decision in *Mata* represents an even more severe outlook for defendants, essentially stating that the need for analysis stops where circumstantial evidence accumulates and that a defendant's "passing" understanding of the proceedings is a sufficient guarantor of due process.<sup>52</sup> The element of the defendant's offense to which the mistranslated testimony would have been most relevant—his knowledge of what he actually possessed—was not considered at all by the court before it dismissed his claim.<sup>53</sup>

These three cases are representative of the general application of the plain error rule across the United States Courts of Appeals.<sup>54</sup> They demonstrate that review under plain error in this context is perfunctory at best and that any actual errors or omissions in interpretation may never be addressed on appeal. The plain error rule thus provides a mechanism for federal Courts of Appeals to easily dispense with due process claims under the Court Interpreters Act, while at the same time offering little more than a pretense of protection to non-English-speaking criminal defendants. For defendants who have for probably very obvious reasons missed their opportunity to object at trial, the merits of their claims are likely to never be reached.

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48. *Camejo*, 333 F.3d at 673.

49. *Id.*

50. *See Gonzales*, 339 F.3d at 729.

51. *See id.*

52. *Mata*, 1999 WL 427570 at \*3.

53. *Id.* at \*4.

54. *See Davies et al.*, *supra* note 6, at 25.

### III. THE INTERSECTION OF STRICKLAND AND THE COURT INTERPRETERS ACT

Defendants who object to inadequate interpretation at trial may also make claims of ineffective assistance of counsel under *Strickland v. Washington*. While the Court Interpreters Act seeks to ensure that district courts appoint interpreters when necessary, the *Strickland* test is meant to provide relief for defendants whose counsel was deficient. However, because the tests are so highly deferential to the judgment of the trial court and original counsel, respectively, defendants fight equally insurmountable burdens when making claims related to interpretation on either theory.

#### A. One Error, Two Penalties

In *Gonzalez v. United States*,<sup>55</sup> the defendant made distinct claims under the Court Interpreters Act and under *Strickland*. There Gonzalez's counsel had not objected to the lack of an interpreter when Gonzalez entered a guilty plea on drug trafficking charges.<sup>56</sup> The Ninth Circuit dismissed Gonzalez's claim under the Court Interpreters Act on the same rationale as the courts in the cases discussed above, noting that the district court had not clearly erred in failing to appoint an interpreter, even though the defendant's responses had been brief, inarticulate, and extraordinarily inculpatory.<sup>57</sup>

Gonzalez also made a distinct claim of ineffective assistance of counsel under *Strickland*, arguing that his appointed counsel's failure to object to the lack of an interpreter prejudiced his defense.<sup>58</sup> The court swiftly dismissed that claim as well, referring back to its previous rationale on Gonzalez's Court Interpreters Act claim, holding that the need for a qualified interpreter could not "have been obvious to competent counsel."<sup>59</sup>

Additionally, because Gonzalez had "responded affirmatively" at sentencing when asked by the court if he "was satisfied with [his counsel]'s representation of him," he could not claim that he was prejudiced by an alleged gross error of counsel.<sup>60</sup> The court held that Gonzalez could not prove that his counsel had been deficient on either argument; he therefore failed the first prong of the *Strickland* test, and the court did not proceed to analyze the alleged prejudice to his case.<sup>61</sup>

Recently, the Ninth Circuit upheld the *Gonzalez* ruling in *United States v. Finze*,<sup>62</sup> reaffirming that the burden is on a defendant to object when he

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55. *Gonzalez*, 33 F.3d at 1048 (not to be confused with *United States v. Gonzales*, the Eighth Circuit Case cited above).

56. *Id.* at 1048-51.

57. *Id.* at 1050-51.

58. *Id.* at 1051.

59. *Id.*

60. *Id.* at 1052.

61. *Gonzalez*, 33 F.3d at 1052.

62. *United States v. Finze*, 428 F. App'x 672 (9th Cir. 2011).

has difficulty communicating with the court or counsel.<sup>63</sup> The court noted that counsel will not be held to be deficient for failing to request an interpreter absent this communication.<sup>64</sup> Thus, the heaviest burden is placed on the defendant with the least capacity to communicate, as that defendant will necessarily have the most difficulty expressing his lack of comprehension to his counsel and the court.

One error on either the part of a defendant or counsel thus leads to two extraordinarily difficult burdens on appeal. A defendant's lack of an objection will trigger the application of the plain error rule on his Court Interpreters Act claim, usually leading to a swift dismissal of that claim.<sup>65</sup> Additionally, where a defendant cannot communicate his difficulty understanding to his attorney, the attorney may fail to request an interpreter, which will often foreclose prospective *Strickland* claims as well.<sup>66</sup>

### B. Paying for Counsel's Mistake, and Then Some

The *Gonzalez* majority conceded that the defendant could not read the plea agreement that he ultimately signed and that he had not received assistance from a qualified interpreter before entering his plea.<sup>67</sup> Yet the result of the appeal was that Gonzalez remained bound by his original plea agreement, which resulted in a sentence of 168 months in federal prison.<sup>68</sup> Had Gonzalez prevailed on either his Court Interpreters Act claim or his *Strickland* claim, both his plea *and* his sentence would have been reviewed on their merits, new hearings would have taken place with a qualified interpreter present, and Gonzalez's new attorney would have likely been able to argue for a lower sentence under the Sentencing Guidelines.

The failure to object to the lack of an interpreter at trial struck the very heart of the case. Gonzalez never had a chance to fully understand his plea agreement, nor did he receive a proper defense at sentencing. Both of these failures can be traced directly to his English language deficiency, yet because the burden on defendants who do not object to inadequate interpretation at trial is so high, appealing those errors was ultimately a futile endeavor.

The standards under both *Strickland* and the Court Interpreters Act place a burden on non-English-speaking defendants to communicate their lack of understanding and punish those defendants if they or their counsel fail to request interpretive assistance. As Judge Reinhardt noted in his dissent in *Gonzalez*, such a standard makes "fairness and due process take an

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63. *Id.* at 676-77.

64. *Id.*

65. *See, e.g., Gonzalez*, 33 F.3d at 1048-51.

66. *See, e.g., id.* at 1051-52.

67. *Id.* at 1050-51.

68. *Id.* at 1047.

unnecessary beating in the courts” and fails to “afford individuals the full rights Congress provided them.”<sup>69</sup>

## V. PROPOSED REMEDIES

Because the standard for proving ineffective assistance of counsel under *Strickland* is unlikely to change, the most plausible way to ensure non-English-speaking defendants’ right to understand is to amend the standard of review for claims made under the Court Interpreters Act. To meet the requirements of the Due Process Clause, any standard of review should adequately ensure that the substantive right that is to be protected actually receives protection.<sup>70</sup> As should be clear from the cases discussed in this Note, the plain error standard of review does not protect the substantive right of non-English-speaking defendants to understand and participate in their proceedings. The same inaction that triggers the application of the rule—the failure to object at trial—can be a byproduct of the fact that the defendant does not understand what is happening in the first place. A new standard of review is thus necessary to ensure that the right to an interpreter and the right to understand are not rights that merely exist in a procedural vacuum. Further, because the standard of proving ineffective assistance of counsel under *Strickland* is unlikely to change, the best way to ensure the right to understand is to modify the standard of review under the Court Interpreters Act.

### A. Choosing a New Standard of Review

The eradication of the plain error rule in this context would be a beginning towards ensuring due process to non-English-speaking defendants. As a basis for comparison, when a defendant objects to the quality of interpretation at trial, thus avoiding the plain error rule, the error is reviewed for abuse of discretion.<sup>71</sup> The basic inquiry under that standard is simply whether the error made the trial “fundamentally unfair.”<sup>72</sup>

Although the abuse of discretion standard appears at first blush to be comparable to plain error, a recent case from the Eleventh Circuit demonstrates the greater substantive protections that non-English-speaking defendants receive under the abuse of discretion standard.<sup>73</sup> In *United States v. Edouard*, the court reprinted a large portion of the trial transcript containing dialogue between the defendant and the court, which the defendant al-

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69. *Id.* at 1052 (Reinhardt, J., dissenting).

70. *See* *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (noting that “specific guarantees in the Bill of Rights have penumbras, formed by emanation from those guarantees that help give them life and substance.”).

71. *See, e.g.*, *United States v. Tapia*, 631 F.2d 1207, 1209 (5th Cir. 1980).

72. *Id.* at 1210.

73. *United States v. Edouard*, 485 F.3d 1324 (11th Cir. 2007).

leged was demonstrative of his failure to understand.<sup>74</sup> Upon review of the transcript, the court found that the defendant's "follow-up question regarding his appeal indicated that comprehension of legal ramifications, rather than language difficulties, were at issue."<sup>75</sup> Although the court did not address the benefits that a translator could have hypothetically provided, it did at least delve significantly into the substance of the defendant's understanding.<sup>76</sup> More importantly, the court inferred the defendant's comprehension based on the defendant's own conversations with his attorney and the court, whereas under the plain error rule those conversations may not have been addressed.<sup>77</sup>

Other commentators have suggested that courts use the even more stringent *de novo* standard of review for defendants alleging inadequate interpretation on appeal.<sup>78</sup> Used as the standard of review in immigration appeals, *de novo* review incorporates the "better translation" rule, which states that courts must find reversible error when "a better translation would have made a difference in the outcome of the hearing."<sup>79</sup>

The better translation rule provides defendants with greater substantive protections both because the defendant's burden is lower and because the evidence that a reviewing court must consider is greater.<sup>80</sup> The Ninth Circuit has identified three types of evidence which tend to prove that a translation was unsatisfactory: direct evidence of incorrectly translated words, unresponsive answers by a witness, and a witness's expression of difficulty understanding what is said.<sup>81</sup> Under the *de novo* standard of review, a defendant has met his burden if the reviewing court can identify any way in which such evidence adversely affected the outcome of a trial for the defendant.<sup>82</sup>

Under the better translation rule, a defendant has less to prove and can use more to prove it. An appellate court reviewing a claim of inadequate interpretation under this standard would be forced to consider the merits of a defendant's claim and address mistranslations that occurred at trial.<sup>83</sup> Ultimately, the better translation rule would protect defendants from having their language barrier define the results of their trial.

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74. *Id.* at 1338-41.

75. *Id.* at 1341

76. *Id.*

77. See *id.*; *cf.* Camejo, 333 F.3d at 673 (where review under plain error entailed no need for citation to the transcript, even though the court noted that the interpreter struggled and that there had been problems with the translation).

78. Davies et. al., *supra* note 6, at 24; see also Annabel Chang, Note, *Lost in Interpretation: The Problem of Plea Bargains and Court Interpretation for Non-English-Speaking Defendants*, Note, 86 WASH. U. L. REV. 445, 471 (2008).

79. *Perez-Lastor v. I.N.S.*, 208 F.3d 773, 784 (9th Cir. 2000); see also Chang, *supra* note 78, at 472.

80. See *Perez-Lastor*, 208 F.3d at 778.

81. *Id.*

82. *Id.* at 780.

83. See *id.* at 779-80.

*B. Greater Substantive Protections at the Outset*

Amending the Court Interpreters Act would provide further protection to non-English-speaking defendants. One option might be to insert a rebuttable requirement that an interpreter be present any time English is not a defendant's dominant language. The logistics of providing interpreters is relatively quick and seamless, given modern technology.<sup>84</sup> Furthermore, the presence of an interpreter alone could prevent later appeals from arising in the first place, because the problem would be addressed at the district level.

Such an amendment would also remove judicial discretion regarding the decision to appoint an interpreter, preventing federal judges who are not trained in linguistics or psychology from making decisions regarding an individual's language capacity. As it currently stands, judges alone have almost complete discretion to assess a defendant's language competence.<sup>85</sup> Taking the decision out of judges' hands would do more to ensure even-handed and objective treatment to all defendants.

Amending the Court Interpreters Act might also relieve counsel of the obligation to assess their client's language ability and comprehension. The proposed standard would likely prevent many future *Strickland* claims because interpreters would be present more often at trial.

A universal presumption that non-English-speaking defendants have an interpreter at their district court proceedings would ensure that they receive the same access to the courts as English-speaking defendants. While locating and providing an interpreter may not be feasible in every circumstance, a provisional requirement of access to an interpreter, coupled with a stricter standard of review regarding interpreter performance, would level the playing field considerably for non-English speaking defendants.

## VI. CONCLUSION

Plain error review simply does not provide non-English-speaking defendants with any meaningful protection of their right to understand and participate in criminal proceedings against them. If the Due Process Clause truly does endow criminal defendants with the unalienable rights to confrontation, to be present, to consult with counsel and assist in their own defense, and to be competent, then it must necessarily entail the right to understand.<sup>86</sup> This right can only be protected if it is enforced, and it can only be enforced if courts are willing to look to the substance of defendants' claims.

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84. This remark is based on the author's own observations in United States District Courts. In one sentencing hearing that the author observed, the court was able to locate a Kanjobal interpreter via telephone while the proceeding was in progress. The interpreter had not been scheduled to be present, and there were reportedly less than 100,000 native Kanjobal speakers in the world at the time of the proceeding.

85. See 28 U.S.C. § 1827(d)(1)(2006).

86. See, e.g., *Negron*, 434 F.2d at 388 (noting that a trial that "must have been a babble of voices" to the defendant was not consistent with the requirements of Due Process).

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Federal case law demonstrates that under the plain error rule non-English-speaking criminal defendants are not granted the same access to their proceedings as those who speak English.<sup>87</sup> Leveling the playing field requires stricter requirements imposed on courts of first impression in providing interpreters in the first place. While such additions may impose some logistical costs on the court system, “due process does come with a price, and whether the funding sources like it or not, the legal system is expected to pay that price.”<sup>88</sup> Language barriers alone should not continue to usurp fundamental rights that are meant to be equally ascribed to all.

*Will Turner\**

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87. See, e.g., Davies et al., *supra* note 6, at 25. (concluding that “the concept of equal access to the courts for linguistic minorities is meaningless without the pivotal component of an educated bar regarding court interpretation jurisprudence.”).

88. Michael LaVigne, *An Interpreter Isn't Enough: Deafness, Language, and Due Process*, 2003 WIS. L. REV. 843, 935 (2003).

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