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ARTICLES

THE ROLE OF COUNSEL AND THE COURTS IN ADDRESSING FOREIGN LANGUAGE AND CULTURAL BARRIERS AT DIFFERENT STAGES OF A CRIMINAL PROCEEDING

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INTRODUCTION

With the growing racial, ethnic, and linguistic diversity of the United States, issues of language and cultural barriers to equal justice are increasingly confronting prosecutors, defense counsel, and the courts. In 1990, in Massachusetts alone, 350,000 persons, or 6.2% of all Massachusetts residents over the age of five did not speak English adequately or at all.[1] Nationally, it is "estimated that . . . in 1990 the number of home speakers of non-English languages was nearly 32 million or approximately 12.6% of the total population."[2]

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1. *See* U.S. DEP'T OF COMMERCE, ECONOMICS AND STATISTICS ADMINISTRATION, 1990 CENSUS OF POPULATION AND HOUSING: SUMMARY SOCIAL, ECONOMIC, AND HOUSING CHARACTERISTICS, MASSACHUSETTS tbl.2, at 10 (1990).

2. State v. Santiago, 542 N.W.2d 466, 471 n.4 (Wis. Ct. App. 1995) (citing WILLIAM E. HEWITT, NATIONAL CENTER FOR STATE COURTS, COURT INTERPRETATION: MODEL GUIDES FOR POLICE AND PRACTICE IN THE STATE COURTS 11 (1995)).

For a criminal defendant, the ability to understand all proceedings and communicate and consult with counsel at all times has a direct impact on the defendant's right to a fair trial and to other constitutional protections. The prosecution must also confront the issue of language. If a victim cannot communicate adequately in court, the state will have difficulty in meeting its burden of proof.

English language difficulty hinders the right of equal access to the criminal justice system. Even if a defendant, victim, or witness speaks some English, he or she may not communicate or comprehend English adequately for a legal proceeding. In order to avoid significant misunderstandings, a hurdle of constitutional importance, the defendant or witness may need an interpreter. This is not due solely to the legal terms and more sophisticated forms of English used in courtrooms, but also because many persons who use English as a second language have difficulty speaking or comprehending English in a pressured or highly charged situation, or in a location that is not part of their common experience, such as in a courtroom or at a police station.[3]

Given these language barriers, the role and competence of the interpreter is critical. Competent interpretation includes the ability to speak, understand, and accurately interpret the dialect of the foreign language witness, victim, or defendant. Misinterpretation of particular words or idioms may cause prejudice where an interpreter provides meanings or voice inflection that the defendant or witness did not intend.[4] Dialect differences may be significant. The words used in one dialect to describe an emotion or idea may be quite different from those same words used in another dialect. Idioms or colloquial expressions from one dialect to another may not be able to be interpreted at all. For example, because the meaning of some words differs from country to country, an interpreter who grew up in the United States, and who speaks the Spanish used in the United States, may make critical errors in interpreting the Spanish spoken by a defendant or witness born and raised in Columbia.[5] A proper voir dire may be necessary to ensure

3. *See* Commonwealth v. Pana, 364 A.2d 895, 898-99 (Pa. 1976); *see also* Commonwealth v. Sanabria, 385 A.2d 1292, 1298 (Pa. 1978) (Manderino, J., dissenting).

4. *See* Santana v. New York City Transit Auth., 505 N.Y.S.2d 775, 779-80 (N.Y. Sup. Ct. 1986); *see also* United States v. Gaviria, 775 F. Supp. 495, 501 (D.R.I. 1991); State v. Her, 510 N.W.2d 218, 220 (Minn. Ct. App. 1994) (three bilingual interpreters examined audio tape and transcript of trial for appeal; all agreed there were errors in translation, but disagreed as to "the extent of the problem and the degree of prejudice, as well as the correct translation of specific testimony").

5. *See, e.g.*, United States v. Castrillon, 716 F.2d 1279, 1283 (9th Cir. 1983) (refer-

that even a court certified interpreter is qualified to interpret for a particular defendant or witness.

Other translation challenges confront even qualified court interpreters. At times, an interpreter is unable to interpret adequately because the concept at issue does not exist in the foreign culture. Furthermore, "[c]ourts have recognized that words in one language may not be capable of exact translation into another language, and it is therefore impossible in certain circumstances for an interpreter to convey the precise language of the witness to the court, jury, or defendant."[6] It may be difficult to interpret certain legal concepts since many immigrants come from countries with legal systems very different from that of the United States. If no jury trial exists in the legal system of the defendant's home country, how does an interpreter explain the right to trial by jury so as to ensure a voluntary and knowing waiver of that right?

Many individuals born and raised in foreign countries confront other practical obstacles to obtaining justice.[7] Some lived in a country where police and authority figures terrorize its citizens. Immigrants from these countries often distrust and fear the police in the United States. Many immigrants lack familiarity with our legal system or have limited, if any, understanding of constitutional rights and procedures.

Some defendants, victims, or witnesses from different cultures may be misunderstood, or their actions, appearance, or demeanor misinterpreted by police, parties, jurors, or the court itself. This is because social and behavioral norms of persons from a foreign country may appear suspect because they are not within the common experience of native-born Americans. Excessive and exaggerated hand gestures, for example, may be incorrectly interpreted as a sign of threatening behavior or emotional instability rather than behavior learned as a child in a foreign culture to accentuate a point.

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ring to the district court's comment "that the Spanish spoken in North America differs from that spoken in South America, which would create confusion on the part of the government agents" and the defendant); *see also* State v. Mitjans, 408 N.W.2d 824, 831-32 (Minn. 1987).

6. State v. Casipe, 686 P.2d 28, 33 (Haw. Ct. App. 1984); *see also Her*, 510 N.W.2d at 223 ("Any translation is inevitably a screen placed between the witness and the jury, affecting the jury's ability to assess credibility from demeanor, inflection of voice, nuances of language, and details of testimony."); State v. Fung, 907 P.2d 1192, 1194 (Utah Ct. App. 1995).

7. *See Her*, 510 N.W.2d at 221 ("The apparent differences between Hmong and American cultures in their treatment of rape, adultery, and female sexuality were a major element of the trial.").

Prejudicial misimpressions may result because a defendant fails to make eye contact with the police or jury, speaks in a voice unnaturally loud or soft, or appears without emotion. These and other forms of non-verbal communication may be misinterpreted because of cultural differences. An understanding of cultural norms may be relevant and necessary to the accurate evaluation of a defendant's demeanor and behavior in interactions with the police, in assessing witness credibility, as well as in determining the level of culpability and contrition of a defendant for sentencing purposes.

Cultural and language barriers may affect whether a defendant is able to make a voluntary confession,[8] knowingly and voluntarily consent to a search,[9] waive the right to trial by jury,[10] or fully understand the elements of the charge,[11] the rights waived,[12] and the effect of the plea in a plea bargain proceeding.[13] Lack of knowledge of the American legal system, rights under the Constitution, English language difficulties, and cultural background differences, along with other factors, have been considered in judicial assessments of whether there is a voluntary and knowing waiver of such rights.[14]

Courts have made clear that there is a legal duty and requirement to accommodate those with linguistic and cultural barriers.[15] But what does that really mean? This Article surveys the contours of the right to an interpreter and the impact of cultural differences in the context of specific court determinations. Proceeding step-by-step through the criminal justice system from the establishment of the professional relationship to the sentencing hearing, linguistic and cultural issues are examined, with a focus on the broad array of trial and appellate issues at play.

I. Overview of the Legal Right to an Interpreter

The right to a court-appointed interpreter in criminal proceed-

8. *See infra* part III.B.
9. *See infra* part III.C.
10. *See infra* part III.G.
11. *See infra* part III.H.
12. *See infra* part III.H.
13. *See infra* part III.H.
14. *See, e.g.*, United States v. Gallego-Zapata, 630 F. Supp. 665, 674-75 (D. Mass. 1986); United States v. Nakhoul, 596 F. Supp. 1398, 1401 (D. Mass. 1984), *aff'd sub nom.* United States v. El-Debeib, 802 F.2d 442 (1st Cir. 1986).
15. *See* United States v. Gallegos-Torres, 841 F.2d 240, 242 (8th Cir. 1988) (defendant who has difficulty with language has right to interpreter).

ings is squarely within the discretion of the trial judge.[16] Only in limited circumstances have appellate courts held that the failure of trial courts to afford adequate interpreter services constituted an abuse of discretion or was clearly erroneous in violation of a defendant's federal or state constitutional or statutory rights.[17]

Although different judicial tests have been applied to determine if failure to provide an interpreter was error, appellate courts appear to focus the inquiry on whether a defendant had been denied a fair trial or whether the proceedings were fundamentally unfair, considering the totality of the circumstances. The review is highly factual and varies from case to case. Where a trial court has failed to appoint a qualified interpreter, the burden falls on the criminal defendant to show that his lack of comprehension of the proceeding was so complete that the trial was fundamentally unfair.

The California Supreme Court has described in vivid detail the breadth of the criminal defendant's right to, and need for, an interpreter at every stage of a criminal proceeding:

> The defendant's right to understand the instructions and rulings of the judge, the questions and objections of defense counsel and the prosecution, as well as the testimony of the witnesses is a continuous one. 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.[18]

II. DENIAL OF INTERPRETER ASSISTANCE: GENERAL CONSIDERATIONS

Several courts in criminal cases have discussed whether the lack of continuous, competent interpreter services personal to the defendant rises to the level of a constitutional or statutory deprivation.[19] In determining whether the trial court's failure to appoint an

16. *See* United States v. Rosa, 946 F.2d 505, 508 (7th Cir. 1991) (matters regarding use of interpreter left to discretion of district court); State v. Van Tran, 864 S.W.2d 465, 475 n.3 (Tenn. 1993) (collecting cases).

17. *See* People v. Escalante, 627 N.E.2d 1222, 1224, 1227-28 (Ill. App. Ct. 1994) (defendant's right to fair trial denied by court's refusal to wait for interpreter to appear before beginning examination of state witness).

18. People v. Mata Aguilar, 677 P.2d 1198, 1201 (Cal. 1984) (in bank).

19. *See, e.g.*, People v. Truong, 553 N.W.2d 692, 697 (Mich. Ct. App. 1996).

interpreter denied the defendant a fair trial or rendered the criminal proceeding fundamentally unfair, appellate courts ask the following questions:

(1) Did the non-English speaking defendant have counsel, and, if so, was the defendant able to consult with and assist his or her attorney?[20]

(2) Did the defendant possess sufficient fluency in English to understand the testimony heard, the charges alleged, and the rights recited, or was he or she significantly inhibited in the ability to comprehend any portion of the proceedings?[21]

(3) Did the defendant understand and respond to questions during examination without substantial difficulty?[22]

(4) Did the defendant inform the trial court that he or she required an interpreter in order to make each and every aspect of the criminal proceeding comprehensible, or should the trial court have recognized that the defendant's comprehension at trial was significantly inhibited by language difficulties, and, if so, was interpretation provided at all times?[23]

(5) Were the indictment and other critical written documents translated and provided in writing to the non-English speaking defendant in his or her own language?[24]

(6) Was the defendant actually prejudiced by his or her inability to comprehend any portion of the proceedings?[25]

(7) Did the defendant knowingly and voluntarily waive the right to have an interpreter at trial?[26]

Other questions asked by appellate courts to ensure that criminal proceedings themselves were fundamentally fair and that the defendant preserved his or her legal rights include:

(1) Was the interpreter "certified" or "qualified"?[27]

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20. *See, e.g.*, People v. Avila, 797 P.2d 804, 806 (Colo. Ct. App. 1990).

21. *See, e.g.*, Ton v. State, 878 P.2d 986, 987 (Nev. 1994).

22. *See, e.g.*, United States v. Rosa, 946 F.2d 505, 508 (7th Cir. 1991).

23. *See, e.g.*, Chao v. State, 604 A.2d 1351, 1362 (Del. 1992).

24. *See, e.g.*, United States v. Mosquera, 816 F. Supp. 168 (E.D.N.Y. 1993), *aff'd*, 48 F.3d 1214 (2d Cir. 1994); People v. Torres, 310 N.E.2d 780, 783 (Ill. App. Ct. 1974).

25. *See, e.g.*, State v. Her, 510 N.W.2d 218, 223 (Minn. Ct. App. 1994) (to succeed on appeal, defendant must show "tangible prejudice from the specific errors identified"); State v. Langarica, 822 P.2d 1110, 1112 (Nev. 1991) (finding no prejudice to defendant regarding guilty plea resulting from language barrier).

26. *See, e.g.*, State v. Rodriguez, 682 A.2d 764, 770-71 (N.J. Super. Ct. Law Div. 1996).

27. *See, e.g.*, United States v. Huang, 960 F.2d 1128, 1135 (2d Cir. 1992) (Court Interpreters Act, 28 U.S.C. § 1827(d)(1) (1994) requires interpreters be certified or otherwise qualified). *But see* Mendiola v. State, 924 S.W.2d 157, 161 (Tex. App. 1995)

(2) Was the interpreter competent and impartial?[28]
(3) Was the interpretation generally accurate?[29]
(4) Did the defendant alert the court in a timely fashion of the deficient qualifications or lack of impartiality of the interpreter or timely object to the lack of accuracy of the interpreter services provided?[30]

Factors that courts consider in determining a defendant's need for an interpreter are the defendant's length of stay in the United States, the nature of his or her professional or social interaction while residing in this country, as well as occupation, education, intelligence level, and citizenship status. Some courts will focus only on the defendant's level of fluency in speaking English.[31]

III. Pre-Trial Stage of Criminal Proceedings

A. *Establishing the Professional Relationship*

Consideration of linguistic barriers for those who speak little or no English, or who come from a different country or culture, begins from the moment that counsel establishes a professional relationship with the defendant, complainant, or witness.

The first question that a defense attorney must consider is: "Can I adequately communicate with the defendant?" A prosecutor must ask a similar question in working with complainants. If the defendant or complainant does not speak English and if counsel is not fluent in this foreign language, a competent interpreter should be immediately obtained. Even if the defendant or complainant speaks some English, counsel should retain an interpreter in order to ensure that confusion and misunderstandings do not develop.

Defense counsel should also explore with the defendant any

(interpreter not required to be certified under state law, but must have sufficient skill in interpreting and familiarity with slang).

28. *See* Gonzales v. State, 372 A.2d 191, 192-93 (Del. 1977) (reversible error for trial judge not to appoint unbiased and impartial interpreter); State v. Tamez, 506 So. 2d 531, 533-35 (La. Ct. App. 1987) (guilty plea vacated where co-defendant interpreted plea colloquy and trial court failed to try to find impartial interpreter); *Mendiola*, 924 S.W.2d at 162 (bailiff found competent to serve as defendant's interpreter).

29. *See* Chavez v. State, 534 N.E.2d 731, 738 (Ind. 1989) (where accuracy of translation subject to grave doubt, defendant denied due process); People v. Truong, 553 N.W.2d 692, 696 (Mich. Ct. App. 1996) (minor lapses in translation did not render trial unfair or deprive defendant of constitutional rights).

30. *See, e.g.*, *Her*, 510 N.W.2d at 222-23; People v. Gordillo, 594 N.Y.S.2d 60, 61 (N.Y. App. Div. 1993).

31. *See, e.g.*, United States v. Lim, 794 F.2d 469, 470 (9th Cir. 1986) (collecting cases).

cultural biases or barriers that could affect his or her representation, including the preparation and presentation of the defendant's case. The defendant may have emigrated from a country with a criminal justice system vastly different from ours. Defense counsel should take the time to explain the nature of the criminal justice system, the jury system, the role of police and prosecutors, and the rights of a criminal defendant. It may be necessary for the prosecutor to take similar steps with complainants.

From the outset, defense counsel must also examine his or her own cultural biases, as well as those the defendant is likely to encounter in the ordinary course of criminal proceedings. Counsel needs to determine if he or she has any biases that might interfere with the ability to serve as an effective advocate on behalf of this defendant. Defense counsel must consider if others (police, prosecutors, judges, or jurors) likely have biases which may lead, or which have already led them to misunderstand the defendant's actions, attitude, motives, or demeanor because of differences in cultural background. Many of the same inquiries may be appropriate for a prosecutor to consider in working with complainants, as well as for the purpose of ensuring the defendant a fair trial and avoiding reversal on appeal.

B. *The Arrest and the Interrogation*

Questioning by police can be upsetting to anyone. Consider, then, the potential for confusion and anxiety of someone subjected to an arrest or interrogation who does not speak English. Defense counsel as well as prosecutors should probe thoroughly all aspects of the arrest to ensure that language barriers or cultural background did not taint the investigation, lead to a violation of rights, or to an unknowing or involuntary waiver during interrogation.

Counsel should begin the inquiry with any statements the defendant may have made before being advised of his or her constitutional rights. Who was present? What were the circumstances? Who interpreted? Was the interpretation accurate? Did the police record it accurately?

If the defendant made statements after being given *Miranda* warnings, counsel should carefully examine the circumstances to ensure that his or her rights were "knowingly and intelligently" waived.[32] This means much more than the fact that the police

32. *See* Miranda v. Arizona, 384 U.S. 434, 444 (1966) (indicating that a defendant,

translated the *Miranda* warnings into the defendant's language. Counsel must consider, in addition to the defendant's background, understanding of the American legal system, and all the surrounding circumstances to determine the adequacy of the warnings and the sufficiency of the waiver.

In this regard, an important case is *United States v. Nakhoul*.[33] Considering motions made by three Middle Eastern defendants to suppress post-arrest statements on the grounds of an invalid waiver, the federal district court of Massachusetts stated that the appropriate inquiry should cover "all the circumstances surrounding the interrogation, including the defendants' age, experience, education, background, and intelligence."[34] The *Nakhoul* court allowed the suppression motion of one defendant, a Lebanese national living in the United States, who "was locked up, alone, in a small windowless room for a period of time and then questioned by two unfamiliar" investigators.[35] The court reasoned that Nakhoul's understanding of American law, customs, and constitutional rights may have been too limited and the warnings too inadequate in this situation to permit him to understand his rights.[36] Another important case is *United States v. Short*,[37] where the Sixth Circuit found English-only *Miranda* warnings insufficient for a West German defendant who had been in the United States only three months, barely spoke English, was socially isolated while living on an army base, and was unfamiliar with the American criminal justice system.[38]

Other courts have also affirmed the relevance of alienage and lack of familiarity with the American legal system to the judicial inquiry, while denying the motion to suppress based on the totality of the facts presented in the particular case.[39] In *United States v. Yousef*,[40] however, one defendant, charged with conspiring to de-

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after being informed of his rights, "may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly, and intelligently").

33. 596 F. Supp. 1398 (D. Mass. 1984), *aff'd sub nom.* United States v. El-Debeib, 802 F.2d 442 (1st Cir. 1986).

34. *Id.* at 1401.

35. *Id.*

36. *See id.* at 1401-02.

37. 790 F.2d 464 (6th Cir. 1986).

38. *See id.* at 469.

39. *See* United States v. Yunis, 859 F.2d 953, 964-65 (D.C. Cir. 1988); United States v. Trabucco, 424 F.2d 1311, 1316-17 (5th Cir. 1970); Liu v. State, 628 A.2d 1376, 1380-82 (Del. 1993) (cultural experts testified at suppression hearing that it was extremely unlikely that a Chinese immigrant would fail to submit automatically to a police request).

40. 925 F. Supp. 1063 (S.D.N.Y. 1996).

stroy an airplane, among other allegations, unsuccessfully argued that the voluntariness of his confession made to the FBI was affected by the alleged torture and physical abuse he had suffered for three months while in the custody of Philippine law enforcement officials. The court refused to impute the coercive nature of his Philippine detention to American law enforcement officials, since no American "official coercion" was claimed.[41]

To succeed in a motion to suppress, it may at times be necessary for the defense to use an expert linguist who personally evaluates the defendant's lack of English language comprehension. In *United States v. Higareda-Santa Cruz*,[42] the federal district court in Oregon, relying in part on an expert linguist's testimony about the defendant's English language limitations, granted the motion of a Mexican drug defendant to suppress evidence and statements because the defendant did not understand what rights he was waiving.[43] The district court concluded that the prosecution had not shown that the defendant had made a valid waiver.[44]

Does a subsequent request for interpreter services necessarily invalidate prior statements given without the presence of an interpreter? One court has held that the fact that a defendant requests an interpreter for his court proceedings renders suspect, but does not automatically invalidate, *Miranda* warnings given without the aid of an interpreter.[45] The federal district court in *United States v. Granados*[46] determined that *Miranda* warnings provided solely in English were constitutionally sufficient, even where a non-English speaking defendant had requested an interpreter at trial, since the police officer had explicitly asked the defendant if he understood those rights. The transcript of the interrogation by police revealed that the defendant spoke and understood English fairly well.[47]

Most appellate courts, ruling on the adequacy of interpretations of *Miranda* warnings to individuals with some form of lan-

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41. *Id.* at 1077 (citing Oregon v. Elstad, 470 U.S. 298, 304-05 (1985)) (stating that the Fifth Amendment is only "concerned with moral and psychological pressures to confess emanating from . . . official coercion").

42. 826 F. Supp. 355 (D. Or. 1993).

43. *See id.* at 358-60.

44. *See id.* at 360. *But see* United States v. Heredia-Fernandez, 756 F.2d 1412, 1415 (9th Cir. 1985); *Liu*, 628 A.2d at 1380.

45. *See* United States v. Lizardo-Acosta, No. 93-40030-020-SAC, 1994 U.S. Dist. LEXIS 6351, at *26-27 (D. Kan. Apr. 4, 1994).

46. 846 F. Supp. 921 (D. Kan. 1994).

47. *See id.* at 924-25; *see also* Campaneria v. Reid, 891 F.2d 1014, 1020 (2d Cir. 1989).

guage or cultural barrier, have relied upon practical tests to determine whether defendants' waivers were voluntary. For example, in *United States v. Abou-Saada*,[48] the First Circuit denied the defendant's appeal, relying in part on the defendant's ability to provide, in English, to an interrogating agent of the Drug Enforcement Agency, a detailed medical description of a complicated neck injury.[49] Similarly, the United States Court of Appeals for the Ninth Circuit, in *United States v. Bernard S.*,[50] relied on the fact that after the law enforcement officer had explained to the defendant in English each of his rights, the defendant affirmatively stated that he understood those rights. The defendant, whose primary language was Apache, also stated that he did not have any questions.[51]

Many courts, applying the clearly erroneous standard, have affirmed trial courts' findings of a voluntary waiver. In *Commonwealth v. Colon*,[52] the Supreme Judicial Court of Massachusetts concluded that the trial court had not erred in finding that the waiver was knowing and intelligent despite the defendant's allegations that he was unable to speak English.[53] The court also discredited the defendant's allegation that he was beaten during interrogation.[54]

Generally, when police show a card containing *Miranda* warnings in the non-English speaking defendant's language, it is sufficient to permit a waiver of rights if the defendant has read the card and indicates an understanding of what he has read.[55] In *United States v. Toscano-Padilla*,[56] a conviction for drug traffic conspiracy was affirmed by the Ninth Circuit where the Spanish-speaking defendant understood and waived his *Miranda* rights read to him from a card preprinted in Spanish, even though the *Miranda* waiver form he signed was written in English. An INS agent testified that he translated the waiver form into Spanish, paragraph by paragraph, before the form was initialed and signed by Toscano-Pa-

48. 785 F.2d 1 (1st Cir. 1986).

49. *See id.* at 10.

50. 795 F.2d 749 (9th Cir. 1986).

51. *See id.* at 752.

52. 558 N.E.2d 974 (Mass. 1990).

53. *See id.* at 980; *see also* Blanco v. Singletary, 943 F.2d 1477, 1509-10 (11th Cir. 1991) (Cuban-born Spanish-speaking police officer interpreted for defendant); Commonwealth v. Garcia, 399 N.E.2d 460, 466 (Mass. 1980) (Spanish-speaking police officer translated and explained *Miranda* warnings to defendant).

54. *See Colon*, 558 N.E.2d at 980.

55. *See* Commonwealth v. Perez, 581 N.E.2d 1010, 1015 (Mass. 1991).

56. No. 92-30247, 1993 U.S. App. LEXIS 15411 (9th Cir. June 16, 1993).

dilla.[57] The agent's translation ability was not questioned at trial.[58] The Ninth Circuit held that the execution of a written waiver, printed in the defendant's own language, while preferable, is not mandatory for the waiver to be valid.[59]

To create a record on which to appeal a court's ruling that *Miranda* warnings were adequately interpreted, a defendant must introduce evidence of the questionable interpretation practices of the interpreter, the terms or legal concepts misused, or evidence demonstrating a defendant's lack of comprehension.[60] In *Commonwealth v. Colon-Cruz*,[61] the defendant's attorney unsuccessfully challenged the linguistic adequacy of translated *Miranda* warnings. During cross examination, he asked a bilingual police officer to repeat the *Miranda* warnings he had given in Spanish to the Spanish-speaking defendant on the night of the arrest.[62] The court interpreter then was requested to evaluate the competence of the officer's interpretation.[63] Based on the interpreter's testimony, the trial court found, and the Supreme Judicial Court affirmed, that despite two minor errors, there was no evidence that the warnings had been distorted or were inaccurate.[64]

The issue of the bias or competence of the interpreter who provided *Miranda* warnings should be raised by defense counsel, when appropriate. However, a defendant does not have a constitutional right to an independent, non-police translator when questioned prior to trial.[65] In addition, a defendant does not have a right to an interpreter with the advanced language skills of a court interpreter, since at this stage of the criminal process the standards for court interpreters have no application.[66] However, in *State v. Santiago*,[67]

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57. *See id.* at *2-3.

58. *See id.* at *3.

59. *See id.* at *3 n.1.

60. *See* United States v. Lopez-Parra, No. 91-50747, 1993 U.S. App. LEXIS 13077, at *2-3 (9th Cir. May 28, 1993); State v. Roman, 616 A.2d 266, 269-70 (Conn. 1992) (defendant did not challenge interpreter's competence and stated that he understood what had transpired during police interview); Commonwealth v. Maldonado, 451 N.E.2d 1146, 1149 (Mass. 1983) (defendant who testified in English presented no evidence that he did not understand English).

61. 562 N.E.2d 797 (Mass. 1990).

62. *See id.* at 803.

63. *See id.*

64. *See id.* at 804.

65. *See, e.g.*, Commonwealth v. Alves, 625 N.E.2d 559, 561 (Mass. App. Ct. 1993).

66. *See, e.g.*, People v. Marquez, 822 P.2d 418, 427 (Cal. 1992); *see also* State v. Mitjans, 408 N.W.2d 824, 829-31 (Minn. 1987).

67. 542 N.W.2d 466 (Wis. Ct. App. 1995).

a defendant successfully appealed a drug conviction where he received *Miranda* warnings in Spanish from a Milwaukee police officer who had no formal training in Spanish and could neither read nor write Spanish, but could speak the language fluently.[68] The officer testified that the words he had actually used were not close to those on the commonly available Spanish language *Miranda* card, but instead gave a "street language" version.[69] Although defense counsel requested that the officer recite the Spanish words he had used to provide the *Miranda* warnings, and that the court-appointed interpreter translate those words into English for the record, the trial court refused to allow this procedure.[70] Unable to write in Spanish, the officer could not provide a written version. In the absence of a clear and accurate record of the actual *Miranda* warnings given, the Wisconsin Court of Appeals concluded that there was insufficient evidence to permit review. The court then vacated and reversed the conviction and remanded the case for further evidentiary hearings.[71]

C. *The Consent to Search*

If the defendant consented to a search, many of the above considerations would also apply. Counsel must determine whether the defendant's consent was voluntary; that, in turn, requires counsel to examine the totality of the circumstances. English language comprehension, cultural background, and understanding of the American legal system may be relevant factors.[72]

Lack of English language comprehension caused the federal district court of Illinois, in *United States v. Yambo*,[73] to grant a Spanish-speaking Puerto Rican defendant's motion to suppress physical evidence from a search at O'Hare Airport in Chicago. Relying in part on the defendant's linguistic expert, the court found that although the defendant understood that the law enforcement officers wanted to search his luggage, he lacked sufficient English language comprehension to realize that he had a right to refuse the

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68. *See id.* at 468, 472.

69. *Id.* at 469.

70. *See id.* at 469, 472.

71. *See id.* at 472.

72. *See, e.g.*, State v. Loera, Nos. 11586-1-III, 11854-1-III, 1994 Wash. App. LEXIS 224, at *9 (Wash. Ct. App. May 19, 1994); State v. Xiong, 504 N.W.2d 428, 431-32 (Wis. Ct. App. 1993).

73. No. 88 CR 320, 1989 U.S. Dist. LEXIS 905 (N.D. Ill. Jan. 26, 1989).

search.[74] Similarly, in *United States v. Restrepo*,[75] the court suppressed the evidence of cocaine obtained from a car search because the defendant's limited English led him to sign the consent form "without comprehending what it said about the scope of the search or his right to refuse."[76] In *United States v. Gaviria*,[77] the federal district court of Rhode Island held that the prosecution had failed to prove by a preponderance of the evidence that the defendant's consent to search his plastic shopping bag at a bus terminal was voluntary or knowing. Therefore, the court granted the defendant's motion to suppress the cocaine found. The court, relying upon a court-certified interpreter's testimony that "any native Spanish speaker would have found it difficult or impossible to understand much of the detective's Spanish,"[78] concluded that the linguistic competence of the police detective who questioned the Spanish-speaking defendant, partly in English and partly in Spanish, was inadequate.[79] Other factors supported the finding that the consent was not voluntary, including the defendant's age (twenty-one), his limited formal education (only in Columbia), the presence of three detectives during this encounter, the retention of his green card throughout the questioning, and the fact that the defendant had neither read nor signed a written consent form in Spanish.[80] On the other hand, in *State v. Montano*,[81] the court found that the Cuban defendant understood English well enough to know that he was consenting to a search of his residence, and held that failure to comply with the state's interpreter statute at the time of the custodial interrogation was not per se grounds for the suppression of evidence.[82]

The defendant's cultural background is also relevant to the in-

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74. *See id.* at *4, 6-7.

75. 890 F. Supp. 180 (E.D.N.Y. 1995).

76. *Id.* at 197; *see also* United States v. Castrillon, 716 F.2d 1279, 1283-84 (9th Cir. 1983) (holding that where the issue of voluntary consent to search is raised, a trial court must carefully review and make specific factual findings as to a defendant's language comprehension); United States v. Higareda-Santa Cruz, 826 F. Supp. 355, 359-60 (D. Or. 1993) (indicating that consent was not valid where defendant did not have sufficient knowledge of English to realize he could refuse to consent).

77. 775 F. Supp. 495 (D.R.I. 1991).

78. *Id.* at 500 n.6.

79. *See id.* at 496, 500.

80. *See id.* at 500, 502. The court noted that Hispanic suspects are "doubly disadvantaged" by having English language difficulty while also lacking familiarity with Fourth Amendment rights to the Constitution. *See id.* at 502.

81. 855 P.2d 979 (Kan. Ct. App. 1993).

82. *See id.* at 983-84.

quiry of whether consent was given and may lead to the granting of a motion to suppress. For example, in *United States v. Gallego-Zapata*,[83] the federal district court of Massachusetts rejected the prosecution's claim of consensual search of the Columbian defendant's bag and jacket at a stop upon his arrival at Logan Airport, from a flight from New York, and granted the defendant's motion to suppress the cocaine seized. The court relied upon the defendant's extremely limited fluency in English, in combination with the defendant's young age (twenty-two), his limited education (seven years in Columbia), and his employment in Columbia (as a truck driver).[84] The court also found that as a result of the defendant's recent arrival in the United States (four months), he "probably lacked familiarity with his rights under the United States Constitution, including his right to insist that the officers obtain a search warrant," nor was he told "that he could refuse to allow them to search."[85] Although the police are not required to inform a defendant of his right to refuse a search, the failure "can be part of the totality of the circumstances that indicate that consent was not truly voluntary."[86] The court concluded that the law enforcement agents lacked a reasonable, articulable suspicion to justify the defendant's seizure or the resulting limited search, and lacked probable cause to justify the more intrusive search.[87]

A defendant's subjective fear of a police beating based on his or her cultural background or national origin may also be a relevant factor in determining if the consent was coerced, so long as such fear is reasonable and is based on some objective conduct by government officials.[88] However, in *State v. Vu*,[89] the defendant, who was from Vietnam, unsuccessfully argued that a comprehensive explanation of the warrant process and the protections it was meant to afford was required before consent could be voluntary.[90] The court held that while differing cultural values might, in the abstract, render consent to search involuntary, the defendant himself failed to argue at trial that his cultural background caused him to be co-

83. 630 F. Supp. 665 (D. Mass. 1986).
84. *See id.* at 675.
85. *Id.*
86. *Id.* at 668.
87. *See id.* at 672-75.
88. *See* United States v. Castrillon, 716 F.2d 1279, 1283 n.1, 1284 (9th Cir. 1983) (citing United States v. Mendenhall, 446 U.S. 544, 558-59 (1980); Schneckloth v. Bustamonte, 412 U.S. 218, 229 (1973)).
89. 770 P.2d 577 (Or. 1989).
90. *See id.* at 579-80.

erced into compliance.[91]

The Wisconsin Court of Appeals, in *State v. Xiong*,[92] also found both cultural and language barriers relevant in ruling upon a motion to suppress. The court declared that "consent did not have to be fully informed; it merely had to be given in an atmosphere free of coercive influences."[93] According to the court, the defendant's wife, who provided consent to search their home, lacked knowledge of the American judicial system, lacked understanding of American customs, had language difficulties, and did not understand the word "warrant."[94] However, the court affirmed the denial of the motion to suppress, holding the consent voluntary, while nonetheless recognizing that "language barriers make a determination of voluntariness more difficult."[95] The court stated that "[t]he more vulnerable a person is because of his or her unique characteristics, the more easily he or she may be coerced by subtle means."[96] According to the court, "[i]f effective communication is not provided, then that is a form of coercion."[97] Despite this careful analysis of the role that language difficulties and cultural background may play in creating coercion, the court found coercion absent, and based on the totality of the circumstances, found the consent to search valid.[98]

D. *Lineup and Identification*

Can a defendant effectively argue that a lineup is unduly suggestive because a non-English speaking participant is unable to follow the police officer's directions in English? In *People v. Marquez*,[99] the court held that a lineup was not unnecessarily suggestive, even though the defendant, who spoke Spanish, did not move as directed when police instructions were stated in English. Other lineup participants moved only when the instructions were stated in Spanish, while still others moved when commands were made in English.[100] All six lineup participants were Hispanic males

91. *See id.* at 580.
92. 504 N.W.2d 428 (Wis. Ct. App. 1993).
93. *Id.* at 432.
94. *Id.* at 430-31.
95. *Id.* at 432.
96. *Id.* at 431.
97. *Id.* at 432.
98. *See id.*
99. 822 P.2d 418 (Cal. 1992).
100. *See id.* at 427.

of similar build.[101] The court reached this conclusion even though the victim believed that the perpetrator did not speak English. The court did not indicate, however, how it would have ruled if the defendant had been the only lineup participant who responded to Spanish commands.

E. *The Grand Jury*

In what circumstances can a defendant successfully object to the composition of the grand jury as a denial of the defendant's right to due process? This question was raised in *Commonwealth v. Slaney*,[102] where the Supreme Judicial Court of Massachusetts stated that "the defendant has the burden of proving that the absence of a certain class from a jury list resulted from an 'arbitrary and systematic' policy of exclusion directed against an 'identifiable group in the community which may be the subject of prejudice.'"[103]

In *People v. Guzman*,[104] the defendant, of Hispanic origin, claimed that Hispanics were deliberately excluded from the jury pool despite their forming a recognizable, distinct class. Affirming the denial of the defendant's motion to dismiss the indictment, the court held that underrepresentation by Hispanics on the grand jury was not due to purposeful discrimination, but rather to Hispanics' lower response to summonses, their lower qualifying rate due to English literacy deficiencies, and other factors. Only purposeful discrimination would lead to a valid constitutional challenge.[105]

F. *Preliminary Hearings and Pretrial Proceedings*

During any pretrial proceeding, it is critical for the defense and prosecution to ensure that an interpreter is present on behalf of the defendant. This does not mean merely that there must be someone in the courtroom who speaks the defendant's language. The interpreter should be available exclusively to the defendant to provide continuous sentence-by-sentence interpretation of the proceedings, including the court's rulings and open-court colloquy between the bench and counsel.[106] In Massachusetts, without evidence of preju-

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101. *See id.*

102. 215 N.E.2d 177 (Mass. 1966).

103. *Id.* at 179 (citations omitted) (quoting Swain v. Alabama, 380 U.S. 202, 205 (1965); Hoyt v. Florida, 368 U.S. 57, 59 (1961)).

104. 454 N.Y.S.2d 852 (N.Y. App. Div. 1982), *aff'd*, 457 N.E.2d 1143 (N.Y. 1983).

105. *See id.* at 863.

106. *See, e.g.*, People v. Menchaca, 194 Cal. Rptr. 691, 693-94 (Cal. Ct. App. 1983).

dice, use of an informal interpreter such as a fellow prisoner (or relatives and friends) at the pretrial stage has been held not to violate a defendant's rights. However, the Supreme Judicial Court has stated that the use of an impartial interpreter is preferred, even for pretrial conferences.[107]

Defense counsel and prosecutors may also have an obligation to attempt to ensure that the defendant obtain the translation of critical legal documents. In *United States v. Mosquera*,[108] involving the narcotics prosecution of eighteen Spanish-speaking defendants, each with separate counsel, the court held that due process and the Confrontation Clause required that the criminal defendants be given written translations of the indictment, relevant parts of cited statutes, and other documents. An oral description by an interpreter of the contents of the critical documents was held to be insufficient to satisfy these requirements. Otherwise defendants "would have to rely on their memory of an oral interpretation that occurred under circumstances where they might feel ill-at-ease and have difficulty concentrating."[109]

The Seventh Circuit, however, in *Canizales-Satizabal v. United States*,[110] distinguishing in part and rejecting in part the ruling in *Mosquera*, held that a defendant does not have a constitutional right to have the indictment or other trial documents "translated into his own language."[111] The court also declared that the federal interpreter statute did not require written translation of documents, and that the defendant had not been prejudiced by the lack of translation. The defendant had been read the indictment in Spanish and discussed it with his attorney.[112]

G. *Waiver of Jury Trial*

If the defendant waives a jury trial, the presence or absence of an interpreter during the waiver colloquy, as well as the defendant's cultural background, are factors relevant to the question of whether

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107. *See* Commonwealth v. Garcia Brito, 525 N.E.2d 383, 388 (Mass. 1988) (holding is clouded by issues of defendant's waiver and lack of timely objection); *see also* Commonwealth v. Garcia, 399 N.E.2d 460, 469 n.6 (Mass. 1980).

108. 816 F. Supp. 168 (E.D.N.Y. 1993), *aff'd*, 48 F.3d 1214 (2d Cir. 1994).

109. *Id.* at 175.

110. No. 95-1831, 1995 U.S. App. LEXIS 38214 (7th Cir. Dec. 20, 1995), *cert. denied*, 116 S. Ct. 1057 (1996).

111. *Id.* at *3 n.2.

112. *See id.* at *4; *see also* People v. Torres, 310 N.E.2d 780, 783 (Ill. App. Ct. 1974) (stating that the defendant was not required to be provided written translation of the indictment where the defendant was fully informed orally of the charges).

a waiver was knowing and voluntary. In *Commonwealth v. Abreu*,[113] the Supreme Judicial Court of Massachusetts held that the trial court's finding of waiver of the right to a jury trial was erroneous where the record indicated that the defendant spoke little English, came from a foreign nation which did not have jury trials, and where the record showed that the trial judge asked the defendant one single question, "phrased in conclusory terms."[114]

The insufficiency of the non-English speaking defendant's waiver of the right to jury trial was also successfully raised based on a one word affirmative response to the judge's question, without any colloquy, in *Lopez v. United States*.[115] The District of Columbia Court of Appeals remanded the case for further proceedings on the issue. The defendant had only five years of education in her native Honduras, and had been working as a janitor in the United States for a year.[116] The court took judicial notice that the jury system did not exist in Honduras.[117] In contrast, in *United States v. Rosa*,[118] a Spanish-speaking defendant was unsuccessful in challenging her waiver of a jury trial on the ground that she did not have the assistance of an interpreter. The court found that the defendant adequately understood both the English language and the waiver proceeding.[119]

H. *The Plea Bargain*

Culture and language can also present barriers to a defendant's knowing and intelligent participation in a plea bargain. Understanding of the elements of the charge and the rights waived are critical factors. For example, in *Valencia v. United States*,[120] the defendant sought a writ of habeas corpus, contending that when he had entered his guilty plea, he had not understood the essential elements of the drug offense charged. The First Circuit agreed, finding that the defendant, who was arrested on a vessel in international waters but subject to United States jurisdiction, did not receive clear guidance from the court or counsel on the complex legal ques-

113. 463 N.E.2d 1184 (Mass. 1984).
114. *Id.* at 1186-87.
115. 615 A.2d 1140 (D.C. 1992).
116. *See id.* at 1147.
117. *See id.*
118. 946 F.2d 505, 508 (7th Cir. 1991).
119. *See id.* at 508.
120. 923 F.2d 917 (1st Cir. 1991).

tions involved.[121] The defendant had little education or familiarity with the American legal system but had been assisted by an interpreter.[122] The First Circuit also provided instructions to the district court. It stated that a trial court should personally address the defendant in open court, inform the defendant of, and determine that a defendant understands, every essential element of each alleged offense to which the plea is offered with due regard for their complexity and the individual characteristics of the particular defendant.[123] In *State v. Orozco*,[124] the Spanish-speaking defendant from El Salvador had his plea of guilty vacated after the appellate court found that the defendant lacked an intelligent understanding of the elements of the charge (attempted possession of cocaine) compounded by his lack of understanding of English.[125] Similarly, in *Diaz v. State*,[126] the signing of untranslated waivers and trial documents by a defendant caused the defendant's guilty plea for aggravated possession of marijuana to be vacated since it was not knowingly, intelligently, and voluntarily made.[127] The defendant, an indigent Mexican laborer unable to read, write, or understand English, signed the waivers without an understanding of their meaning and of the constitutional guarantees implicated.[128]

Language barriers combined with cultural background differences led the district court of Illinois, in *United States v. Leung*,[129] to permit the defendants to withdraw their guilty pleas to illegal gambling. The court held that the defendants' linguistic difficulties and lack of cultural understanding rendered their guilty pleas involuntary and unknowing.[130] There had been some difficulty with the interpreter, and the defense stated that counsel's conversations with the eighty-four year old defendant were "handicapped" by the defendant's "unwillingness to express disagreement, a Chinese cultural trait."[131]

Where a trial court enters a plea based on the statement of the interpreter to the court that the defendant fully understood the

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121. *See id.* at 921-22.
122. *See id.* at 921.
123. *See id.*
124. 609 So. 2d 1043 (La. Ct. App. 1992).
125. *See id.* at 1046.
126. 905 S.W.2d 302 (Tex. Ct. App. 1995).
127. *See id.* at 309.
128. *See id.* at 306, 309.
129. 783 F. Supp. 357 (N.D. Ill. 1991).
130. *See id.* at 360-61.
131. *Id.* at 359.

court instructions and the effect of the plea, without an interpreted colloquy on the record between the court and the defendant, the plea will be vacated for prejudicial error.[132] In *Parra v. Page*,[133] the appellate court vacated the entry of a plea of guilty for murder that had been made without an interpreter present at any stage of the proceeding, where the record reflected that the defendant, an uneducated Mexican migrant worker, had a poor knowledge of the English language.[134]

A defense counsel must fully inform his or her non-English speaking client of the plea bargain and the rights waived. Testimony by an interpreter that the defense attorney failed to fully inform the defendant of a plea bargain has led to vacation of a plea and remand.[135] Furthermore, allegations that a court interpreter deliberately failed to interpret accurately the communications between the defense attorney and the defendant about prison time to be served under the plea bargain may lead to vacation of a guilty plea, based on a claim of ineffective assistance of counsel.[136]

It is incumbent on defense counsel to point out to the court the defendant's need for an interpreter at the plea hearing, and to make a timely objection if the interpreter is not provided or is not competent. For example, in *United States v. Japa*,[137] the First Circuit found that a Spanish-speaking defendant's plea was knowing and voluntary where there had been no suggestion to the trial court that the defendant did not understand what was being said and there had been no objection to the competency of the interpreter.[138] Similarly, in *United States v. Perez*,[139] the defendant, a Mexican citizen who had resided in the United States for nineteen years, twice assured the magistrate that he understood the plea proceedings and did not require an interpreter.[140] The Fifth Circuit held that in the absence of a judicial finding that the defendant's comprehension of the proceedings was inhibited by language difficulties, the guilty

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132. *See* State v. Pina, 361 N.E.2d 262, 265-66 (Ohio Ct. App. 1975); *see also* Monte v. State, 443 So. 2d 339, 341 (Fla. Dist. Ct. App. 1983).

133. 430 P.2d 834 (Okla. Crim. App. 1967).

134. *See id.* at 836-37.

135. *See, e.g.*, United States v. Navarrette, No. 93-35193, 1994 U.S. App. LEXIS 14423 (9th Cir. June 10, 1994).

136. *See, e.g.*, Chacon v. Wood, 36 F.3d 1459, 1464-65 (9th Cir. 1994).

137. 994 F.2d 899 (1st Cir. 1993).

138. *See id.* at 904.

139. 918 F.2d 488 (5th Cir. 1990).

140. *See id.* at 489-90.

plea was valid.[141]

IV. Trial Stage of Criminal Proceedings

A. *Jury Composition*

Is the absence or underrepresentation of members of the defendant's racial or ethnic group a constitutional violation? In *Commonwealth v. Rodriguez*,[142] the Supreme Judicial Court of Massachusetts held that while a defendant is constitutionally entitled to a jury selection process free of discrimination against his group in the community, the absence of any member of defendant's racial or ethnic group in a petit jury pool is not a per se constitutional violation.[143] However, absence of jurors from the defendant's racial or cultural group may be held to violate the defendant's due process rights in some instances.[144]

To succeed in challenging the venire, a defendant must show that there had been systematic or purposeful exclusion by a prosecutor of jurors on the basis of race.[145] Nor may a defendant use peremptory challenges in a racially discriminatory manner.[146] The challenge must be timely; before a juror is sworn.[147] Even if the exclusion is purposeful, however, there is no constitutional right to have a jury composed of non-citizens or of non-English speaking members.[148]

B. *Voir Dire—Jury Selection Process*

If there is to be a jury, defense counsel and prosecutors should prepare voir dire questions relevant to the defendant's or a witness's language or cultural barriers. Prospective jurors should be

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141. *See id.* at 491; *see also* Corado v. State, 1991 Tex. App. LEXIS 2960, at *3-4 (Tex. App. Nov. 27, 1991).

142. 300 N.E.2d 192 (Mass. 1973).

143. *See id.* at 196-97.

144. *See, e.g.*, Alvarado v. State, 486 P.2d 891, 902-05 (Alaska 1971).

145. *See* Powers v. Ohio, 499 U.S. 400, 409 (1991); Batson v. Kentucky, 476 U.S. 79, 93-99 (1986); *see also* Commonwealth v. Colon, 558 N.E.2d 974, 986 (Mass. 1990); Commonwealth v. Soares, 387 N.E.2d 499, 508-16 (Mass. 1979); *id.* at 516 ("group affiliations which may not permissibly form the basis for juror exclusion: sex, race, color, creed or national origin"); *Rodriguez*, 300 N.E.2d at 196-97.

146. *See* Georgia v. McCollum, 505 U.S. 42, 55-59 (1992); *see also* Commonwealth v. Harris, 567 N.E.2d 899, 903 (Mass. 1991) (stating that a peremptory challenge of the only member of a protected class by the prosecution or the defendant is presumptively discriminatory and improper).

147. *See Rodriguez*, 300 N.E.2d at 196.

148. *See* Commonwealth v. Acen, 487 N.E.2d 189, 194-96 (Mass. 1986).

prepared for the fact that the defendant or witness will be using an interpreter during the trial and they should be asked questions to determine whether they have any linguistic or cultural biases.

However, information provided to prospective jurors by defense counsel about the illegal immigrant status of the defendant that may create prejudicial misconceptions about the defendant, even if the reference was part of a supposed defense voir dire strategy, may create grounds for reversal for ineffective assistance of counsel.[149] In *Hernandez v. New York*,[150] the United States Supreme Court held that prosecutors did not discriminate by challenging for cause and striking Spanish and English-speaking bilingual prospective jurors whose conduct suggested that they might be unwilling to agree to rely solely on the interpreter's official interpretation of a Spanish-speaking witness's testimony.[151] The prosecution based its juror challenges on the "specific responses and the demeanor" of the two prospective jurors during voir dire, and not their language proficiency alone.[152]

Does counsel need to ensure that an interpreter is available for a non-English-speaking defendant during the voir dire? One federal appeals court has held that a trial judge's failure to ensure that the voir dire was interpreted did not violate a Spanish-speaking defendant's right to be present and participate in jury selection.[153] The defendant had lived and worked in the United States for over seven years and had an interpreter present and readily available to him so that he could consult with his counsel throughout the voir dire.[154] However, in *Martinez v. State*,[155] the Indiana Court of Appeals held that since jury selection is a critical stage of a criminal proceeding, the absence of an interpreter during jury selection jeopardized the defendant's right to "assistance of counsel and his right to be meaningfully present at every stage of the proceedings."[156]

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149. *See, e.g.*, *Ex parte* Guzmon, 730 S.W.2d 724, 726-27, 734-36 (Tex. Crim. App. 1987) (en banc) (holding that the defense was prejudiced by the ineffective assistance of counsel).

150. 500 U.S. 352 (1991).

151. *See id.* at 369-70.

152. *Id.* at 360; *see also* Commonwealth v. Festa, 341 N.E.2d 276, 282-83 (Mass. 1976) (without regard of prejudice, court assumed that two Italian-speaking jurors properly followed the judge's instructions to disregard witness testimony made in Italian not interpreted into English).

153. *See* United States v. Coronel-Quintana, 752 F.2d 1284, 1291-92 (8th Cir. 1985).

154. *See id.*

155. 449 N.E.2d 307 (Ind. Ct. App. 1983).

156. *Id.* at 310.

C. *Trial and Trial Examinations*

As the United States Court of Appeals for the First Circuit has stated, "[t]he right to an interpreter rests most fundamentally . . . on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment."[157] Similarly, the Arizona Supreme Court declared, in *State v. Natividad*,[158] that holding a trial for a defendant who is unable to understand the English language without an interpreter "would be as though a defendant were forced to observe the proceedings from a soundproof booth . . . , being able to observe but not comprehend the criminal processes whereby the state had put his freedom in jeopardy. Such a trial comes close to being an invective against an insensible object."[159]

In the most sweeping decision upholding a non-English-speaking defendant's constitutional right to an interpreter under the Sixth and Fourteenth Amendments, the United States Court of Appeals for the Second Circuit, in *United States ex rel. Negron v. New York*,[160] held that the summary interpretation of testimony at a murder trial for an illiterate, indigent Puerto Rican defendant rendered the trial constitutionally infirm.[161] Similarly, the Appeals Court of Massachusetts has also stated in dicta, in *Commonwealth v. Turell*,[162] that "the assistance of an interpreter may well be a matter of right 'where the indigent defendant has little or no understanding of English.'"[163] It has also been held that when defense counsel also serves as an interpreter during any stage of the criminal proceeding, a defendant is denied his constitutional rights, and

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157. United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973); *see also* United States v. Tapia, 631 F.2d 1207, 1209-10 (5th Cir. 1980) (holding that a defendant should not be inhibited from comprehending the proceedings or testimony given against him in English); People v. Mata Aguilar, 677 P.2d 1198, 1201-05 (Cal. 1984) (outlining the parameters of the constitutional right to an interpreter throughout criminal proceedings); People v. Escalante, 627 N.E.2d 1222, 1227-28 (Ill. App. Ct. 1994) (constitutional right of confrontation requires the presence of an interpreter during cross-examination of police officers); State v. Kounelis, 609 A.2d 1310, 1313-14 (N.J. Super. Ct. App. Div. 1992) (stating that a defendant who is unable to speak or understand English has a constitutional right to have the trial proceedings translated to permit the defendant to participate in the defense).

158. 526 P.2d 730 (Ariz. 1974).

159. *Id.* at 733.

160. 434 F.2d 386 (2d Cir. 1970).

161. *See id.* at 388-90.

162. 381 N.E.2d 1123 (Mass. App. Ct. 1978) (rescript).

163. *Id.* at 1124 (quoting *Negron*, 310 F. Supp. at 1307); *see also* Parra v. Page, 430 P.2d 834, 837 (Okla. Crim. App. 1967); Villarreal v. State, 853 S.W.2d 170, 172 (Tex. Ct. App. 1993).

his conviction requires reversal.[164]

Citing the defendant's Sixth Amendment right to be present at a trial and to confront witnesses against him, the Illinois Court of Appeals, in *People v. Escalante*,[165] reversed and remanded a conviction for burglary of a motor vehicle after a bench trial because of the court's failure to wait for the interpreter or to grant a continuance. Such judicial conduct was held to constitute an abuse of discretion, rendering the non-English-speaking defendant, in essence, not present at trial.[166]

It is generally the duty and burden of the defendant to raise the need for an interpreter in a timely fashion.[167] However, once the defendant requests an interpreter through counsel, the trial court must conduct an inquiry into the defendant's ability to speak and understand English.[168] Even if the defendant fails to raise the need for an interpreter, a court has a duty to inquire "as to the need for an interpreter when a defendant has apparent difficulty with English."[169]

Since the trial court is in a superior position to evaluate a defendant's fluency in the English language, wide discretion is granted by an appellate court in making this assessment. In Massachusetts, it has been held that the trial judge has broad discretion to determine the level of a defendant's language barrier, the stage in a proceeding at which an interpreter must be provided, and how much

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164. *See* People v. Chavez, 177 Cal. Rptr. 306, 313-14 (Cal. Ct. App. 1981).

165. 627 N.E.2d 1222, 1227-28 (Ill. App. Ct. 1994).

166. *See id.* at 1228. However, the remedy for any failure to provide a qualified interpreter at a default judgment hearing in the state district court in Massachusetts is to give the defendant a rehearing with an interpreter. *See, e.g.*, Commonwealth v. Espinoza, 546 N.E.2d 376, 379 (Mass. App. Ct. 1989).

167. *See* United States v. Torres, No. 94-1113, 1995 U.S. App. LEXIS 264, at *20 (6th Cir. Jan. 4, 1995), *cert. denied*, 115 S. Ct. 2628 (1995).

168. *See* United States v. Carrion, 488 F.2d 12, 15 (1st Cir. 1974); *see also* Giraldo-Rincon v. Dugger, 707 F. Supp. 504, 508 (M.D. Fla. 1989); State v. Neave, 344 N.W.2d 181, 188-89 (Wis. 1984).

169. Valladares v. United States, 871 F.2d 1564, 1565 (11th Cir. 1989) (citing the Court Interpreters Act, 28 U.S.C. § 1827); *see also* United States v. Tapia, 631 F.2d 1207, 1209 (5th Cir. 1980); *Carrion*, 488 F.2d at 15; Hrubec v. United States, 734 F. Supp. 60, 67 (E.D.N.Y. 1990) (holding that the trial court must determine the need for an interpreter only when it is evident that the defendant has language difficulties which inhibit his comprehension of the proceedings or communication with counsel or the judge); State v. Yang, 549 N.W.2d 769, 771-73 (Wis. Ct. App. 1996) (stating that whenever a trial court has doubt as to the defendant's competency to communicate with counsel in English, to understand the testimony of witnesses, or to be understood when speaking, it has sufficient notice of defendant's language difficulties to require a suspension of the trial to hold a hearing and to make a factual determination of the need for an interpreter).

translation is required.[170] The denial of a motion for an interpreter should be made outside the presence of the jury "because of the negative inference that may be drawn from the court's refusal."[171]

Defense counsel and the prosecutor should ensure that the trial court appoints a "defense interpreter" for the defendant, separate from the "witness interpreter" used by a court to translate the testimony of non-English-speaking witnesses.[172] In *People v. Romero*,[173] involving a prosecution for second degree murder, the Spanish-speaking defendant was held to have been denied due process of law under the federal and state constitutions when one interpreter was used both to assist the defendant and to interpret the testimony of eight Spanish-speaking witnesses, even with the accord of defense counsel.[174] Using only one interpreter may deny a defendant "a spontaneous understanding of the testimony and the proceedings."[175] However, where the Spanish-speaking defendant's interpreter was borrowed to interpret the testimony of Spanish-speaking witnesses, no error was found since the defendant did not need an interpreter to understand the testimony of those witnesses.[176]

The role of the "witness" interpreter at trial is to perform continuous word-for-word interpretation of counsel's questions and the responses of witnesses at the trial, with no editing by the interpreter. Nor should the interpreter engage in any private colloquies with the witness. The interpreter's sole role is to translate, not to advise the witness or the defendant.[177]

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170. *See* Commonwealth v. Garcia, 399 N.E.2d 460, 469-70 (Mass. 1980).

171. Commonwealth v. Pana, 364 A.2d 895, 899 (Pa. 1979).

172. *See* People v. Mata Aguilar, 677 P.2d 1198, 1201 (Cal. 1984) (detailing three distinct but interrelated roles of "defense," "witness," and "proceeding" interpreters).

173. 200 Cal. Rptr. 404 (Cal. Ct. App. 1984).

174. *See id.* at 406.

175. *Id.*; *see also* People v. Nieblas, 207 Cal. Rptr. 695, 696-97 (Cal. Ct. App. 1984) (borrowing of defense interpreter for testimony of three prosecution witnesses causes reversal of murder conviction for denial of defendant's constitutional rights); *In re* Dung T., 206 Cal. Rptr. 772, 776-78 (Cal. Ct. App. 1984) (right of defendant to own interpreter guaranteed by the California Constitution).

176. *See* Falciola v. State, No. 04-95-00366-CR, 1996 Tex. App. LEXIS 3158, at *2-3 (Tex. Ct. App. July 24, 1996); *see also* People v. Avila, 797 P.2d 804, 806 (Colo. Ct. App. 1990); State v. Kounelis, 609 A.2d 1310, 1314 (N.J. Super. Ct. App. Div. 1992) (court stated that it may be permissible to have only one interpreter if the witness interpreter is available to translate testimony of English-speaking witnesses for the defendant); State v. Vue, Nos. 95-0782-CR-NM, 95-0783-CR-NM, 1995 Wis. App. LEXIS 1180, at *3 (Wis. Ct. App. Sept. 21, 1995).

177. These and other practical guidelines on the use of interpreters at trial were provided by the Supreme Judicial Court of Massachusetts in *Commonwealth v. Festa*,

Failure to provide a personal interpreter for each defendant during the reading of jury instructions may, in certain circumstances, require reversal if the defendant can demonstrate that he tried, unsuccessfully, to communicate with counsel at that juncture.[178] But the failure to provide an interpreter during closing arguments and jury instructions has been held to constitute harmless error if there is no evidence that the basic fairness of the trial was compromised.[179] It has also been held to be prejudicial error for a trial court to have the stenographer read back testimony to the jury without waiting for the interpreter to be present so that the defendant could "effectively participate in the readback of the testimony."[180]

For a waiver of the right to an interpreter to be effective, the defendant must knowingly and voluntarily relinquish that right.[181] The California Supreme Court has held that a waiver must be personally made by the defendant with an "'affirmative showing,' on the record," through an open court colloquy with the defendant.[182] Failure to request an interpreter does not constitute a waiver, and any waiver may be withdrawn by the defendant at any stage of the criminal proceeding.[183]

Appellate courts have developed varied standards for review of the denial of an interpreter by a trial court. In Massachusetts, the Supreme Judicial Court has stated that the judge's exercise of his discretion in providing interpreter services at trial will only be disturbed on appeal if "the record reveals blatant insensitivity to a language problem" resulting in a fundamentally unfair trial.[184] "The test for both confrontation and effective assistance cases in this context is the same: was the defendant hampered by a language problem in any meaningful way in presenting his defense?"[185] "[T]he crucial factor is the level of fluency of a given defendant."[186] Other courts have applied a less stringent standard of review than

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341 N.E.2d 276, 283-84 (Mass. 1976); *see also* United States v. Torres, 793 F.2d 436, 442-43 (1st Cir. 1986).

178. *See* People v. Chavez, 283 Cal. Rptr. 71, 75-76 (Cal. Ct. App. 1991).

179. *See* Luu v. People, 841 P.2d 271, 275 (Colo. 1992).

180. People v. Pizzali, 552 N.Y.S.2d 961, 963 (N.Y. App. Div. 1990).

181. *See* State v. Natividad, 526 P.2d 730, 733 (Ariz. 1974); *In re* Dung T., 206 Cal. Rptr. 772, 778-79 (Cal. Ct. App. 1984); *Kounelis*, 609 A.2d at 1314.

182. People v. Mata Aguilar, 677 P.2d 1198, 1204 (Cal. 1984); *see also In re Dung T.*, 206 Cal. Rptr. at 778.

183. *See* MASS. GEN. LAWS ch. 221C, § 3 (1994).

184. Commonwealth v. Garcia, 399 N.E.2d 460, 470 (Mass. 1980).

185. *Id.* at 470 n.7.

186. *Id.* at 470.

the Massachusetts "blatant insensitivity" test.[187]

The trial court also has wide discretion to determine whether a witness shall be examined with the aid of an interpreter.[188] However, in *Commonwealth v. Pana*,[189] a conviction was reversed because the judge, without justification, had denied the defendant's request to testify in Spanish. A court-appointed interpreter had been present at trial and had assisted the defendant, who spoke some English, with particular words and phrases.[190] While testifying, the defendant's language difficulties became so acute that the assistant district attorney joined in the request.[191] The appellate court held that even though the decision to use an interpreter rests in the sound discretion of the trial judge, the defendant in this case was effectively denied his right to testify, resulting in prejudicial error.[192] The court observed that "a witness may be unable to understand or respond to questions, particularly on cross-examination, due to the tenseness and unfamiliarity of the circumstances, even though he has some familiarity with English."[193]

In *United States v. Mayans*,[194] the Ninth Circuit reversed a drug conviction and remanded the case for a new trial after the trial court ordered the withdrawal of the defendant's interpreter, and after urging the defendant to testify in English in the name of efficiency. The reversal was based on the grounds that the defendant's statutory right to an interpreter and his constitutional right to testify on his own behalf had been denied.[195] The Ninth Circuit chastised the district court for requiring the defendant to, in effect, submit to a test of his English while testifying on the stand before the jury.[196]

The qualifications of an interpreter fall within the area of the

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187. *See, e.g.*, Gonzalez v. United States, 33 F.3d 1047, 1051 (9th Cir. 1994) (totality of the circumstances test for effective assistance of counsel claims); United States v. Cirrincione, 780 F.2d 620, 634 (7th Cir. 1985) (four-prong due process test); United States v. Tapia, 631 F.2d 1207, 1210 (5th Cir. 1980) ("fundamental fairness" test); Vasquez v. State, 819 S.W.2d 932, 938 (Tex. Ct. App. 1991) ("would results of proceedings have been different" test for effective assistance of counsel claims).

188. *See* United States v. Tejada, 886 F.2d 483, 488-89 (1st Cir. 1989).

189. 364 A.2d 895 (Pa. 1976).

190. *See id.* at 896.

191. *See id.* at 897.

192. *See id.* at 898-99.

193. *Id.* at 899.

194. 17 F.3d 1174 (9th Cir. 1994).

195. *See id.* at 1180-81.

196. *See id.* at 1181.

judge's discretion.[197] However, a criminal defendant's Sixth Amendment right to be confronted by the witnesses against him may be violated when a trial court appoints an ineffective and incompetent interpreter. In *People v. Starling*,[198] which involved an appeal of a robbery conviction, the prosecution complained that it had difficulty understanding the translated testimony of a witness. Despite frequent admonitions from the judge, the interpreter engaged in unrecorded discussions with the complaining witness. It was held that the trial court abused its discretion in the selection and retention of the unqualified interpreter.[199]

When either the defense or prosecution questions the qualifications or competency of the interpreter, contests the interpreter's ability to communicate with the defendant or witness, or challenges whether the interpreter is unbiased, counsel should request a hearing prior to trial to examine such competence or bias, which may include a voir dire of the interpreter.[200] If misinterpretations are claimed during trial, objections should be made outside the hearing of the jury.[201]

During the trial, the prosecution or defense may challenge inaccurate or incomplete interpretations to cure them. This can be accomplished by cross-examination, by introducing independent evidence of incorrect interpretation, or by cross-examining the interpreter himself as to what the witness had said.[202] Objections to trial interpretation errors must be made in a timely fashion or they are generally waived.[203] In one case, *United States v. Urena*,[204] a defendant's general objections to the competency of an interpreter were held sufficient to preserve the issue on appeal.[205] However,

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197. *See* Commonwealth v. Salim, 503 N.E.2d 1267, 1274 (Mass. 1987).

198. 315 N.E.2d 163 (Ill. App. Ct. 1974).

199. *See id.* at 168.

200. *See* State v. Van Pham, 675 P.2d 848, 857-58 (Kan. 1984); *see also* People v. Estrada, 221 Cal. Rptr. 922, 925 (Cal. Ct. App. 1986).

201. *See Van Pham*, 675 P.2d at 858.

202. *See* State v. Mitjans, 408 N.W.2d 824, 831-32 (Minn. 1987); State v. Her, 510 N.W.2d 218, 222-23 (Minn. Ct. App. 1994); Garcia v. State, 887 S.W.2d 862, 875 (Tex. Crim. App. 1994) (en banc), *cert. denied*, 115 S. Ct. 1368 (1995); *see also* People v. Johnson, 120 Cal. Rptr. 372, 373-74 (Cal. Ct. App. 1975) (holding that it is prejudicial error for the trial court to refuse the defendant a meaningful opportunity to impeach the translation of the interpreter).

203. *See* Ramirez v. Price, 1994 U.S. App. LEXIS 35701, at *10 (10th Cir. Dec. 19, 1994), *cert. denied*, 115 S. Ct. 1435 (1995); Valladares v. United States, 871 F.2d 1564, 1566 (11th Cir. 1989); State v. Vue, Nos. 95-0782-CR-NM, 95-0783-CR-NM, 1995 Wis. App. LEXIS 1180, at *3-4 (Wis. Ct. App. Sept. 21, 1995).

204. 27 F.3d 1487 (10th Cir. 1994).

205. *See id.* at 1492.

the Spanish-speaking defendant's conviction for drug-related charges was affirmed due to insufficient evidence of interpreter incompetence.[206] The court noted that if the defendant's objections were focused on misinterpretation of a "particular, key portion of testimony," rather than on a broad claim of interpreter incompetence, the result may have been different.[207] In another case, the Utah Court of Appeals denied a defendant's appeal of the appointment of a Cantonese interpreter on the ground that the interpreter had no experience in court interpretation, and was incompetent as well as biased.[208] The court held that the defendant failed to particularize his objections or show actual prejudice.[209]

In *People v. Cunningham*,[210] the defendant's conviction for first degree criminal sexual conduct was reversed on the ground that the interpreter for the complainant interfered with the defendant's constitutional right to confront the witnesses against him. Instead of providing "'to the witness the precise form and tenor of each question propounded, and no more or less,'" and instead of interpreting "'the precise expressions of the witness,'" the interpreter "had a conversation with the complainant" for the purposes of clarification that was not translated for the jury.[211] Whereas violation of the right to adequate cross-examination is generally subject to harmless-error analysis, the Michigan Court of Appeals found it impossible to apply this standard in the absence of a tape recording of the cross-examination at issue.[212]

In *People v. Torres*,[213] the court ruled that it was improper to admit a translated transcript of a tape recorded conversation of an alleged drug transaction because the defendant was not afforded an opportunity to challenge the qualifications of the original interpreter and "the accuracy of the transcript" through cross-examination of that interpreter.[214] However, the court held that this was not reversible error since the defendant could have either called his own expert interpreter or challenged the accuracy of the transcript by questioning the bilingual investigating police officer who was

206. *See id.* at 1492-93.
207. *Id.* at 1491 n.3.
208. *See* State v. Fung, 907 P.2d 1192 (Utah Ct. App. 1995).
209. *See id.* at 1194.
210. 546 N.W.2d 715 (Mich. Ct. App. 1996).
211. *Id.* at 716 (quoting Rajnowski v. Detroit, B.C. & A.R. Co., 41 N.W. 849, 850 (Mich. 1889)).
212. *See id.* at 717.
213. 210 Cal. Rptr. 375 (Cal. Ct. App. 1985).
214. *Id.* at 376-77.

present during the questioning.[215]

D. *Trial Defenses Based on Culture*

As discussed above, defense counsel have at times successfully raised the issue of cultural differences to lead various courts to suppress defendants' statements made to law enforcement officials. However, defendants have found it difficult to assert successfully that cultural differences justify or excuse criminal conduct. In one case, a rape defendant, an Iranian who had lived in the United States only two years, contended that his limited and infrequent use of English and his lack of familiarity with American social mores prevented him from perceiving that the mentally retarded victim lacked mental capacity to consent.[216] The appeals court was not persuaded, noting that the defendant had testified at trial without an interpreter and that his testimony indicated an intelligent understanding of the proceeding.[217] In another case, a Hmong was convicted of raping a recent Hmong immigrant to whom he was providing job counseling.[218] The defendant asserted unsuccessfully that rape was not a concept recognized within Hmong culture.[219]

A cultural defense was also rejected in *Ha v. State*,[220] where the trial court had refused to grant a self-defense instruction for a Vietnamese defendant on a second-degree murder charge. The defendant argued that he reasonably believed that he was facing future harm from the victim and, because of his Vietnamese cultural background, believed that he could not receive help from the police.[221] The appellate court agreed that understanding Vietnamese culture was relevant in evaluating the victim's motivation or readiness to kill the defendant, and was a proper matter to be considered.[222] But the court found that the defendant failed to produce

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215. *See id.* at 377; *see also* United States v. Fuentes-Montijo, 68 F.3d 352, 354-56 (9th Cir. 1995) (holding that when a defendant did not dispute the accuracy of the translated transcript of a tape recording, the district court did not abuse its discretion in using the transcript at trial); United States v. Figueroa, 976 F.2d 1446, 1457-58 (1st Cir. 1992) (arguing that a defendant's right to confrontation in connection with cross-examination of a translator is not violated by merely deferring the cross-examination for good cause); United States v. Perez, No. 94-0192, 1996 U.S. Dist. LEXIS 43, at *2, 11-13 (E.D. Pa. Jan. 2, 1996).

216. *See* People v. Farrokhi, 414 N.E.2d 921, 923-24 (Ill. App. Ct. 1980).

217. *See id.* at 925.

218. *See* State v. Her, 510 N.W.2d 218, 219 (Minn. Ct. App. 1994).

219. *See id.* at 221-22.

220. 892 P.2d 184 (Alaska Ct. App. 1995).

221. *See id.* at 195.

222. *See id.*

evidence that he reasonably believed that he was subject to an *imminent* threat of harm, as was legally required for a valid self-defense claim.[223]

E. *The Prosecutor's Use of the Defendant's Culture to Prove Guilt*

Defendants have also challenged the prosecution's use of cultural background or stereotypes to prove guilt. In *Varughese v. State*,[224] an Indian defendant, convicted of murdering his wife by setting her on fire, attempted unsuccessfully to rebut the State's argument that, in India, wife burning is a common way to dispose of an unwanted spouse.[225] The defendant argued instead that his wife had followed Indian customs by immolating herself.[226] The defendant also argued that his nationality and alien status were used to create hostility against him.[227] The court ruled, however, that the defendant waived any objection by failing to timely object.[228]

Cultural background has been successfully used by prosecutors to counteract a defendant's evidence or by explaining a victim's response or conduct at the time of the crime. When one defendant evoked the mores of a foreign land in order to excuse or justify his unlawful conduct, the prosecution then countered with contrary evidence from the same culture. In *State v. Her*,[229] the prosecutor presented evidence that a Hmong woman would not seduce a Hmong man, but only in response to the defendant's testimony that "'there is no such thing as rape'" in Hmong culture.[230] In *State v. Lee*,[231] the defendant unsuccessfully argued on appeal that the prosecution had engaged in misconduct by presenting rebuttal expert and lay witness evidence that the victim's failure to flee and her delay in reporting the offense were due to Hmong cultural restraints.[232] The testimony served to counteract the defendant's testimony concerning Hmong attitudes about rape.[233]

Cultural issues may be inappropriately raised by prosecutors at

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223. *See id.*
224. 892 S.W.2d 186 (Tex. Ct. App. 1994).
225. *See id.* at 193.
226. *See id.*
227. *See id.* at 192.
228. *See id.* at 194.
229. 510 N.W.2d 218 (Minn. Ct. App. 1994).
230. *Id.* at 221.
231. 494 N.W.2d 475 (Minn. 1992).
232. *See id.* at 480.
233. *See id.*

trial. For example, a prosecutor's statements at examination and at closing about a Moroccan defendant's cultural background, concerning the negative attitudes of residents of Morocco towards women, were held to be improper.[234] The court, however, concluded that those statements did not prejudicially affect the rights of the defendant.[235]

V. Post-Trial Stage of Criminal Proceedings

A. *Sentencing*

Although the defendant has a right to have his or her hired interpreter at the sentencing hearing, a court is not required to appoint one, even if an interpreter was present during the trial, as long as the defendant has sufficient command of English.[236] However, one state appellate court has held that the failure to provide simultaneous interpretation by an interpreter for the entire sentencing proceeding, a critical stage of the criminal trial, constituted a denial of due process.[237] The appellate court vacated the plea agreement for second degree murder.[238]

Similarly, in *Monte v. State*,[239] the Spanish-speaking defendant successfully appealed a seven year prison term for second degree murder, based on the trial court's failure to appoint an interpreter for his sentencing hearing. The court found reversible error, vacated the sentence, and remanded for resentencing, even though defense counsel failed to object to the lack of an interpreter.[240] The court held that the denial was a fundamental violation of the defendant's right to be present at sentencing.[241] The court stated that "[o]ur system of justice has evolved too far for a defendant's acknowledged language problem to cause him to be placed in a position before the court which is not equal to that of an English-speaking defendant in terms of communicative opportunities."[242] Although the trial court had not appointed an interpreter for sen-

234. *See* State v. Boulabeiz, 634 N.E.2d 700, 702 (Ohio Ct. App. 1994).

235. *See id.*

236. *See* Commonwealth v. Rosadilla-Gonzalez, 480 N.E.2d 1051, 1058 (Mass. App. Ct. 1985).

237. *See* State v. Hansen, 705 P.2d 466, 472 (Ariz. Ct. App. 1985). Note that in this case there was evidence that interpretation was so inadequate during other stages of the trial that it violated due process. *See id.*

238. *See id.*

239. 443 So. 2d 339 (Fla. Dist. Ct. App. 1983).

240. *See id.* at 342.

241. *See id.*

242. *Id.*

tencing, it did so for the plea hearing.[243] However, because of questions as to the qualifications of the interpreter at the plea hearing, as well as apparent problems with the interpretation provided, the appellate court also stated that the defendant would not be precluded from seeking post-conviction relief to challenge the validity of his plea.[244]

B. *Cultural Issues in Sentencing*

Defense counsel should ensure that the court, in sentencing, consider how the defendant's cultural heritage or background may suggest circumstances in favor of mitigation. Moreover, defense counsel should alert the court to cultural background differences that might explain surprising, unusual, or incomprehensible behavior or demeanor on the part of the defendant. For example, in *People v. Superior Court (Soon Ja Du)*,[245] the appellate court held that the trial court did not abuse its discretion in granting probation in a voluntary manslaughter case where the trial court had found that the defendant's "'failure to verbalize her remorse to the Probation Department [was] much more likely a result of cultural and language barriers rather than an indication of a lack of true remorse.'"[246] Along similar lines, a federal district court granted habeas corpus after it found that the defendant's counsel had failed to present evidence from an anthropologist and sociologist that the defendant's "apparent lack of emotion at trial did not necessarily indicate disinterest or coldness, but was consistent with cultural expectations of Chinese males."[247]

On the other hand, two United States courts of appeals have held that cultural differences were not grounds to depart downward from the sentencing guidelines. In *United States v. Yu*,[248] a Korean tax lawyer sentenced to prison for attempting to bribe an IRS agent unsuccessfully argued that the district court erred in failing to consider his cultural background which had led him to think it would be insulting not to offer a bribe.[249] The Eighth Circuit also affirmed

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243. *See id.* at 340.

244. *See id.* at 341 n.3.

245. 7 Cal. Rptr. 2d 177 (Cal. Dist. Ct. App. 1992).

246. *Id.* at 181.

247. Kwan Fai Mak v. Blodgett, 754 F. Supp. 1490, 1499 (W.D. Wash. 1991), *aff'd per curiam and remanded*, 970 F.2d 614 (9th Cir. 1992).

248. 954 F.2d 951 (3d Cir. 1992).

249. *See id.* at 953, 954-55.

the sentence in *United States v. Natal-Rivera*,[250] where the defendant was sentenced for conspiring with her male companion to distribute cocaine. She argued for reversal on the ground that the district court should have considered as a mitigating factor that Puerto Rican women were socialized from childhood to follow their future husband's every command.[251] The court held that the trial court did not err in failing to take this into account.[252] Similarly, a Vietnamese defendant failed to persuade an appellate court in Texas that he was unfairly sentenced to death by a jury who had "'no understanding of the cultural concepts and mores of the Oriental people, and with little or no understanding as to their thought processes, which must be different than ours.'"[253]

In *Flores v. State*,[254] the defendant was convicted of driving while intoxicated and sentenced to one year in prison.[255] The trial court, having found that the county in Texas where the trial took place had no rehabilitation program for Spanish-speaking persons convicted of alcohol related offenses, and that the state program offered in Spanish was worthless, denied probation.[256] Flores petitioned for discretionary appellate review, arguing that the trial court's consideration of linguistic competence as a factor in assessing punishment was a denial of due process and equal protection of the laws under the United States and Texas Constitutions.[257] The Texas court applied only a rational basis test to this denial, since probation is not a fundamental right and since language ability, unlike race or national origin, is not a suspect classification.[258] The court concluded that incarceration of this defendant was an appropriate punishment in the absence of any meaningful alternative.[259] The court declined to examine the disproportionate effect that such a denial would have on Hispanics convicted of driving while intoxicated.[260] Following United States Supreme Court precedent, the Texas court refused to substitute disparate impact analysis for that

250. 879 F.2d 391 (8th Cir. 1989).
251. *See id.* at 393.
252. *See id.*
253. Vuong v. State, 830 S.W.2d 929, 940 (Tex. Crim. App. 1992) (en banc) (quoting Appellant's Brief at 29-30).
254. 904 S.W.2d 129 (Tex. Crim. App. 1995) (en banc), *cert. denied*, 116 S. Ct. 716 (1996).
255. *See id.*
256. *See id.* at 130.
257. *See id.*
258. *See id.* at 130-31.
259. *See id.* at 131.
260. *See id.*

of discriminatory intent, or to extend disparate impact analysis into the realm of criminal law.[261]

CONCLUSION

Our criminal justice system serves large numbers of individuals whose primary language is not English or who come from vastly different cultures. Courts are faced with the difficult challenge of effectively administering to the legal needs of those participants with language or cultural barriers. This challenge can only be successfully met with the active participation and commitment of prosecutors, defense counsel, and the courts.

Courts have a constitutional mandate to ensure that our legal system provides equal access to justice, regardless of race, national origin, language, or culture. Defense counsel and prosecutors have the legal and ethical responsibility to raise issues of effective communication and to reduce prejudice against defendants, complainants, and witnesses who do not speak or understand English, or who are from a different country and culture.

Relatively few of the complex legal and factual issues that arise due to language or cultural differences have been thoroughly examined by the courts, resulting in a lack of clear guidance as to the exact contours of the rights implicated. Case law in criminal proceedings will further develop only if prosecutors and defense counsel more often raise, and courts more often address, these issues at all stages of criminal proceedings. Only then will the clear standards necessary to ensure constitutional and statutory guarantees be established for all participants in the criminal justice system.

261. *See id.*