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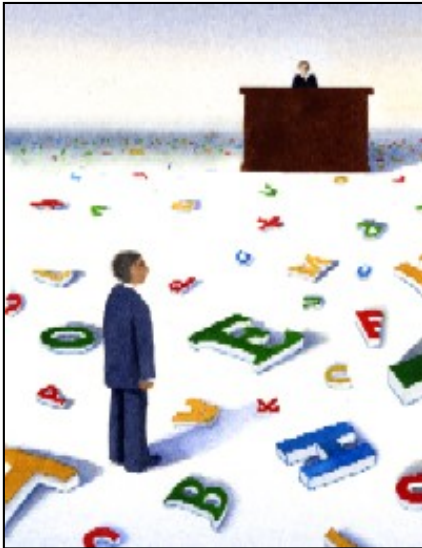
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Court Interpreting: Linguistic Presence v. Linguistic Absence by Elena M. de Jongh

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Court interpreting involves a linguistic and cultural performance whose objective is to overcome the language barriers and cultural misunderstandings that could cause non-English-speaking defendants to be linguistically absent from their own legal proceedings. High-level proficiencies in the source and target languages and cultures, including knowledge of geographic variation, an understanding of the legal process and related terminology, the ability to manipulate the various discourse styles used in the courtroom, along with interpreting skills and adherence to standards of ethics and professional conduct, are essential in protecting a non-English speaker's right to due process.

Demographic changes in the United States, case law recognizing the right of non-English speakers to accurately interpreted court proceedings, and state and federal legislation governing interpreting services in legal proceedings have resulted in a growing need for qualified, competent, certified court interpreters. Through the use of authentic examples taken from court transcripts, this article aims to demonstrate how a non-English-speaking defendant's linguistic presence in his or her own case is inextricably linked to the degree of accuracy of the interpretation. Although the focus is on the Spanish-speaking population in the U.S., the concepts discussed are applicable to court interpreting in other languages.

Linguistic Presence

A number of courts have ruled that a defendant's physical presence in the courtroom is not enough to constitute legal presence; for a defendant in criminal matters to be "meaningfully present," everything that is being said in the case must be communicated in a language he or she can understand. This concept, known as "linguistic presence," requires the services of a qualified foreign-language interpreter

for non-English speakers and a sign language interpreter for the hearing-impaired.¹ In *State v. Natividad*, 526 P.2d 730 (1974), the Arizona Supreme Court, en banc, held:

The inability of a defendant to understand the proceedings would be [not only] fundamentally unfair but particularly inappropriate in a state where a significant minority of the population is burdened with the handicap of being unable to effectively communicate in our national language. A defendant's inability to spontaneously understand testimony being given would undoubtedly limit his [or her] attorney's effectiveness, especially on cross-examination. It would be as though a defendant were forced to observe the proceedings from a soundproof booth or seated out of hearing at the rear of the courtroom, being able to observe but not comprehend the criminal processes whereby the state had put his [or her] freedom in jeopardy. Such a trial comes close to being an invective against an insensible object, possibly infringing upon the accused's basic right to be present in the courtroom at every stage of his [or her] trial. (*Lewis v. United States*, 146 U.S. 370 (1892); *Negron v. New York*, 434 F.2d 386 (2d Cir. 1970)).

A Growing Need

U.S. Census data and statistics on interpreter use in the U.S. district courts document the growth in foreign language speakers and in the need for foreign language court interpreters in the United States. Research on recent court interpreter decisions from state and federal courts indicates that non-English speakers are appearing in courts across the country with increasing frequency and that many courts are

struggling to cope with a shortage of qualified interpreters.² In "Language Use and English-Speaking Ability: 2000," U.S. Census data indicate that the number of people aged five and over who spoke a language other than English at home grew by 38 percent in the 1980s and by 47 percent in the 1990s. In 2000, 18 percent of the total population aged five and over, or 47 million people, reported that they spoke a language other than English at home. Approximately 2,000 unique languages were identified within the borders of the United States. The population of individuals who spoke a language other than English was 29 percent in the West; 20 percent in the Northeast; 15 percent in the South; and nine percent in the Midwest. Generally, the highest concentrations of non-English speakers were in states that border Mexico, the Pacific Ocean, and the Atlantic Ocean.³

The number of non-English language speakers at least doubled in six states from 1990 to 2000. Spanish speakers grew by about 60 percent and Spanish continued to be the non-English language most frequently spoken at home in the U.S., followed by Chinese (2 million people), French (1.6 million), and German (1.4 million).

Of the 20 non-English languages most frequently spoken at home, the largest proportional increase was for Russian speakers, who nearly tripled from 242,000 to 706,000. The second largest increase was for French Creole speakers (the language group that includes Haitian Creoles), whose numbers more than doubled from 188,000 to 453,000.⁴

Spanish was spoken more than any other language group in all regions of the country, according to 2000 U.S. Census figures. And although the number of Spanish speakers grew in all regions, more than three-fourths of that growth was in the West and South, which combined had about three times the number of Spanish speakers (21 million) as the Northeast and the Midwest combined (7.1 million). California had the largest percentage of non-English speakers (39 percent), followed by New Mexico (37 percent), Texas (31 percent), New York (28 percent), Hawaii (27 percent), Arizona, and New Jersey (each about 26 percent). The largest percentage increase between 1990 and 2000 in the population who spoke a language other than English at home occurred in Nevada (193 percent), which also had the highest rate of population increase during the decade. The increase in Florida was 65.6 percent. Georgia's non-English-speaking residents increased by 164 percent, followed by North Carolina (151 percent), Utah (110 percent), Arkansas (104 percent), and Oregon (103 percent).⁵

In Florida, 23.1 percent of the population in 2006 was reported to speak a language other than English at home.⁶ Hispanics accounted for almost half (1.4 million) of the national population growth of 2.9 million between July 1, 2005, and July 1, 2006. California had the largest Hispanic population of any state as of July 1, 2006 (13.1 million), followed by Texas (8.4 million) and Florida (3.6 million). Texas had the largest numerical increase between 2005 and 2006 (305,000), with California (283,000) and Florida (161,000) following.⁷

Figure 1

**Interpreter Use in U.S. District Courts
Calendar Years 2000-2005**

Year	Number of Events	Total
	Spanish	(All Languages)
2000	179,271	190,127
2001	171,331	181,303
2002	163,344	174,405
2003	176,704	189,044
2004	212,223	223,996
2005	214,355	227,461

Source: Administrative Office of the U.S. Courts, Annual Report of the Director (2000-2005).

U.S. District Courts

Statistics from the Administrative Office of the United States Courts for the years 2000-2005 document an increase in the number of cases requiring interpreters in the federal courts. In 2005, for instance, district courts reported that interpreters were required in 227,461 events, compared to 223,966 events reported in 2004. Moreover, the number of languages requiring interpretation rose from 106 in 2004 to 111 in

2005. Spanish (214,355 events) remains the language most often interpreted in the courts, accounting for 94 percent of all reported events, followed by Mandarin (1,792 events), Arabic (1250 events), Vietnamese (863 events), Korean (796 events), Cantonese (745 events), Russian (610 events), French (417 events), and Foochow (409 events).

Courts along the Southwest border are in "crisis mode," contending with criminal caseloads that have skyrocketed since the late 1990s.⁸ In 2005, "more than one-third of all federal felonies prosecuted in the U.S. came from five of the 94 judicial districts — the southwest border courts of the District of New Mexico, the Southern and Western Districts of Texas, the District of Arizona, and the Southern District of California."⁹ In New Mexico's federal district courts, criminal felony cases have climbed 287 percent since 1997. The average felony caseload (felony case per authorized judgeship) nationwide is 87. In the District of New Mexico, which ranks first, the average is 405. The Southern District of Texas ranks third, with an average of 326. That district's Laredo division carries 2,800 felony cases — an average of 1,400 per judge.¹⁰

Legal Precedents

In U.S. district courts, the right to sign language and foreign language interpretation is recognized by case law as protected especially by the Fifth, Sixth, and 14th amendments to the U.S. Constitution. The Fifth Amendment, which guarantees fundamental fairness and equal protection under the law, states, in pertinent part: "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ." The Sixth Amendment, the major federal source of the right to an interpreter, states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense." The 14th Amendment extends the application of these rights to all states. Federal as well as state jurisdictions have affirmed the right to an interpreter in criminal proceedings. Some states — such as California — guarantee the right to an interpreter in their constitutions, although there is no explicit provision providing for this in the U.S. Constitution.¹¹

There is a considerable amount of case law relating to interpreter use in courts across the country. The first federal court ruling stating that a Spanish-speaking defendant in a criminal case was entitled to the services of an interpreter and that failure to provide an interpreter rendered the trial constitutionally infirm is *U.S. ex rel. Negron v. State of New York*, 434 F.2d 386 (2d Cir. 1970). This landmark case, often cited as a basis for providing court interpreters, involved the murder trial of a 23-year-old Spanish-speaking migrant worker who was not provided an interpreter, even though he spoke no English and an interpreter was necessary to translate the testimony of two Spanish-speaking witnesses for the court. Not only was the defendant unable to communicate with his court-appointed attorney, who spoke no Spanish, the trial proceedings were incomprehensible to the defendant because the English testimony of witnesses was not interpreted for him, although his own testimony had to be given through an interpreter. The court found that the lack of adequate interpretation was a violation of the due process clause, a decision affirmed by the Second Circuit Court of Appeals. In a related case, *United States v. Torres*, 793 F.2d 436 (1986), the court held that a defendant had the right to an interpreter in order to understand the charges against him, to confront his accusers, and to understand and be understood "without discretion to limit translation to those statements deemed appropriate by the court or government." Another significant case is *U.S. ex rel. Navarrow v. Johnson*, 34 F. Supp. 679, 682 (D.Pa. 1973), in which the court found that the absence of an interpreter violates the right of confrontation.

Federal Legislation

The Court Interpreters Act of 1978 [amended in 1988 (28 U.S.C. 1827-1828)], the federal statute governing the use of interpreters in U.S. district courts, marks a watershed moment in the history of court interpreting in the U.S. because it mandated the development of a national certification examination on the federal level to test for linguistic and interpreting skills, provided for the use of certified interpreters in judicial proceedings instituted by the United States, and required the use of certified interpreters when reasonably available.¹² When a certified interpreter is not available, the law allows for the use of "otherwise qualified" or "language skilled" interpreters, defined as individuals who meet "the educational, training, job-related performance and experience criteria established by the [d]irector of the Administrative Office of the United States Courts, after consultation with the National Court Interpreters Special Task Force, for non-certified court interpreters."¹³

Certification

Certification is the principal indicator that a person has passed an examination mandated by legislation to assess interpreter competency for court proceedings, such as the federal court interpreter examination administered by the Administrative Office of the U.S. Courts. Unfortunately, the term "certified" is often used imprecisely to refer to individuals who have completed a certificate program or passed a qualifying examination. Moreover, it should be noted that, although different states "have several different kinds of interpreter testing, not all tests are recognized by law as certification tests."¹⁴ The establishment of a consortium by the National Center for the State Courts (NCSC) is a significant improvement toward professionalizing and setting uniform requirements in court interpreting services at the state level. In

addition to administering court interpreting examinations, the NCSC provides court interpreter orientation and training.¹⁵

At the federal level, the Administrative Office of the United States Courts has developed certification examinations for three languages: Haitian Creole, Navajo, and Spanish. The federal examination consists of a written test followed by an oral examination. As of this writing — since the inception of the certification program in 1980 — 21 Haitian Creole and nine Navajo language interpreters have received certification from the administrative office. Out of a nationwide pool of 21,002 candidates, 1,302 individuals have been certified for Spanish/English proceedings. To date, the passing rate for the written exam is 21 percent, and the overall certification rate is eight percent.¹⁶ Several judicial districts have interpreters on staff; those who do not may use the Administrative Office's Telephone Interpreting Program (TIP)¹⁷ or hire interpreters on a contract basis.

The Interpreting Process

The interpretation process involves the comprehension and analysis of a spoken or signed message and the rendering of that message in another language, taking into account the cultural and social context. The task of interpreting is extremely complex. Interpreters perform two functions simultaneously in the field of language and communication that otherwise are always carried out separately: speech (the expression of our ideas) and understanding (our comprehension of the ideas of the other speaker). Interpretation is a unique activity because these two processes are performed by the same person, often simultaneously. In place of the usual communication that occurs between speaker and listener — two individuals who reverse their respective roles in the course of communicating with one another — the communication takes place through the interpreter. Thus, an interpreter "is at the same time both speaker and listener, although in reverse order: listening and then expressing the same verbal message, but doing so through a different linguistic system."¹⁸

Court interpretation may be performed by different modes: consecutive, simultaneous, and sight translation, all of which may be used in a single hearing or trial. In the simultaneous mode, the interpreter conveys the target language message at the same time as the source language speaker. In the consecutive mode, the interpreter waits until the source language speaker pauses, then renders the original meaning in the target language. Sight translation, which is the oral rendition into a target language of material written in a source language, is a hybrid form used when providing defendants with an "oral translation" of written documents such as plea agreements and presentence investigation reports. Tape transcripts, the written transcriptions and translations of spoken language, frequently introduced as evidence in trials, also constitute a hybrid form.

Although the terms "translator" and "interpreter" tend to be used interchangeably in case law and by the general public, they refer to two very different activities requiring different skills. "Translation" refers to the written rendition of textual information in one language by the equivalent textual material in another language. Translators have time to reflect and craft their work, whereas "interpreters" must instantaneously produce a target language equivalent. Research on conference interpreters reveals:

During a regular 30-minute turn, working from an original speaker whose speaking speed is between 100 and 130 words per minute, considered more or less comfortable... an interpreter processes and delivers final copy of an average of 3,000 to 3,900 words (equivalent to 12 to 15 1/2 type-written double-spaced pages). With fast speakers, speaking at a rate of 135 to 180 words per minute, the interpreter's output can increase to 4,050-5,400 words, or 16-21 1/2 pages per 30 minute turn. By way of comparison, the output of translators working as permanents in an international organization or in a company translation service varies between [three] and 10 pages a day.¹⁹

For a defendant to be linguistically present, the interpretation must be impartial, complete, and accurate. In the legal setting, the interpretation should reflect the tone, intonation, register, and educational level of every source language speaker, because it is the interpreter's words in the target language — and not the original source language utterances — that become the official court record. The following exchanges illustrate "a failure of communication" when slang and regional varieties of Spanish are not taken into account in the interpretation:

Prosecutor: What was your involvement?

Witness: *Bueno, brother, yo era marimbero pero ahora soy tumbador porque es más fácil.* (Cuban slang for: I was a marijuana dealer but now I do rip-offs.)

Interpreter: Well, brother, I was a marimba player but now I play the conga drums because it's easier.²⁰

Another example is from the examination of a witness who had entered the U.S. by crossing the Mexican border with a smuggler, a *coyote*:

Attorney: How did you cross the river?

Witness: *A caballito* ("piggyback").

Interpreter: On a little horse.

Attorney: (Who, until now, had not heard anything about a little horse in this case): And how was that little horse?

Witness: *Era chaparrito y de bigote*.

Interpreter: He was short and had a moustache.²¹

Common sources of misunderstanding in interpreted testimony include false cognates and tag questions. "False or partly false cognates" may be defined as words that appear similar or identical because they are derived from a common form but whose meanings in certain contexts are often completely different. The words "crime" in English and "*crimen*" in Spanish are examples of false cognates with important implications in the context of criminal law. The words sound the same but mean different things. In Spanish, *crimen* refers to more "serious criminal transgressions, usually penalized by the death sentence or long prison terms."²² *Crimen* means "*delito muy grave, consistente en matar o herir gravemente a alguien*" [very serious crime, consisting of killing or seriously injuring another],²³ whereas in English "crime" refers to felonies and misdemeanors.²⁴ Thus, "crime" in English is better translated as "*delito*," meaning any violation of the law — from misdemeanor to murder. The word "criminal" in English should not be interpreted as "*criminal*" in Spanish, which means "murderer."²⁵ Other potential pitfalls for interpreters include tag questions or "interrogative fragments" added to a statement to elicit agreement or disagreement from the addressee. Tag questions in English require a negative answer to deny an accusation (e.g., "You took the money, didn't you?" "No, I didn't"), whereas in many other languages, including Spanish, tag questions can be answered either negatively or affirmatively with relatively no alteration in the meaning.²⁶

Recent Case Law

Although the Court Interpreters Act of 1978 accomplished a great deal in the protection of due process rights for linguistic minorities, gross miscarriages of justice have nonetheless persisted. The case of *State of Oregon v. Ventura Morales*, Nos. 86-630, 1988 Ore. App. LEXIS 1627 (Or. Ct. App. Aug. 30, 1988), for example, involves a Mexican Native American who spoke only Mixtec, an indigenous language, and was assigned a Spanish interpreter for his trial. Although the interpreter — unable to interpret faithfully the proceedings into Mixtec and the testimony of Mixtec-speaking witnesses into English — repeatedly complained on the record regarding linguistic limitations, no action was taken by the court. The defendant served four years in prison before it was discovered that he had not understood the courtroom proceedings.²⁷

In *State v. Santiago Calderon*, 13 P.3d 871, 876 (Kan. 2000), the defendant, Domingo Santiago Calderon, appealed his murder conviction and claimed that the trial court erred in ordering that the closing argument not be translated. On appeal, the Supreme Court of Kansas held that the "right to be present at one's own criminal trial is a fundamental right. . . . A defendant's right to be present includes a right to have trial proceedings translated into a language that he or she understands so that he or she can participate effectively in his or her own defense." The Supreme Court of Kansas also held that the trial court's failure to provide a translator constituted plain error because this violated the appellant's fundamental right to be "present" at trial. Santiago Calderon's conviction was reversed, and the case was remanded for a new trial.

Several rulings since 2000 have recognized not only that defendants with limited or non-existent knowledge of English possess a fundamental right to have court proceedings interpreted, they have also emphasized that quality — the accuracy — of the interpretation is essential to protect those rights. In *U.S. v. Gonzalez*, 339 F.3d 725 (2003), a decision from the Eighth Circuit, the court ruled on the importance of using federally certified interpreters in district courts. The decision acknowledges that accurate court interpreting is fundamental to the rights of a non-English-speaking defendant in the federal court system. The U.S. Court of Appeals for the Eighth Circuit ruled:

adherence to the requirements of the [Court Interpreters] Act is not optional. . . . When district courts . . . decline to follow the unambiguous language of the Court Interpreters Act, the rights of non-native English speaking criminal defendants may be impermissibly jeopardized. *U.S. v. Gonzalez*, 339 F.3d 725 (8th Cir. 2003). Although the appointment of an interpreter lies within the sound discretion of the trial judge (*U.S. v. Tapia*, 631 F.2d 1207, 1210 (5th Cir. 1980)), once the district judge decides to appoint an interpreter, however, it is obligated to follow the mandates of the Court Interpreters Act. (*U.S. v. Gonzalez*, 339 F.3d 725 (8th Cir. 2003).

The court further stated:

it is important in the administration of justice that the provisions of the Court Interpreters Act be followed. The legislature recognized a need for this Act, to ensure that justice is provided to non-native English speaking defendants. The Act obligates

district courts to make every effort to use certified interpreters, and we caution district courts that this obligation should not be ignored. (*U.S. v. Gonzalez*, 339 F.3d 725 (8th Cir. 2003)).

While not binding in all circuits, this decision provides some additional information for consideration by the courts.

U.S. v. Bailon-Santana, 429 F.3d 1258 (2005), a 2005 decision from the Ninth Circuit, involves the case of a non-English-speaking defendant who was convicted at trial and sentenced to 30 years in prison. *Bailon-Santana* communicated with the court with a court-certified interpreter during the proceedings, but before trial, signed a jury waiver form that was printed only in English and had been translated for him by his counsel. The court considered whether the attorney's representation that he translated the document for his client obviated the need for an in-court waiver colloquy. The court in *Bailon-Santana* ruled that the jury waiver was invalid because the attorney who translated the form was not certified as an interpreter, and reversed the conviction, stating: "Many people claim 'fluency' in a foreign language, but '[t]here are few persons in the United States who can interpret with the degree of precision and accuracy required at the [f]ederal court level.'"²⁸ Because the record reflected only the defense lawyer's self-assessment that he had the requisite translating ability, the court further stated: "We cannot be sure that his Spanish-speaking ability is as good as he believes it to be. . . ." ²⁹

Lost in Interpretation

Such instances of miscarriages of justice occasionally come to the attention of the mass media, but it is safe to assume that many more cases go unnoticed. As reported in the *Washington Post*, Fernando Antonio Cruz, an inmate who was unable to speak English, had been left in the Prince William County jail until February 15, 2006, although his case had been dismissed on December 12, 2005. Cruz spent two extra months in jail "through human error complicated by language and cultural differences. . . . As the number of Hispanics has swelled to more than 16 percent of Prince William's 348,588 residents, Cruz's case shows how one immigrant can find himself lost in the judicial system."³⁰

In May 2007, a federal judge in El Paso, Texas, dismissed the indictment on immigration fraud against Cuban militant Luis Posada Carriles, criticizing the government's actions in the case and the "inherently unreliable" Spanish language interpretation of Posada's naturalization interview. The judge, with the aid of a court-certified interpreter, found numerous instances of deficiencies in the performance by the uncertified interpreter provided for the interview. For example, words were incorrectly interpreted or not interpreted at all, the interpreter omitted or added his own words to certain questions and answers, he summarized, paraphrased, and added his own version of statements. The court, thus, determined that the Spanish language interpreter the government provided for Posada during his naturalization interview was incompetent: "In light of the fact that the indictment in this case is based upon statements made during the naturalization interview, this [c]ourt finds that the interpretation is so inaccurate as to render it unreliable as evidence of [d]efendant's actual statements."³¹

Excerpts from transcripts of courtroom proceedings in a 2006 Florida case demonstrate a defendant's linguistic absence and the resulting miscarriage of justice when the interpretation is inaccurate. The case of Juan Ramon Alfonzo (Case No. 2004-34473) exposed the Seventh Judicial Circuit's use of an unqualified, uncertified interpreter and prompted recent statewide changes regarding standards for hiring interpreters in Florida's courts. At the time of the Alfonzo case, circuits set their own hiring practices and, in the Seventh Judicial Circuit interpreters were not required to pass a test before being hired.³² Alfonzo, the defendant, thought he had pled no contest to stealing a toolbox, a misdemeanor, and would receive probation. Instead, he was sentenced to 15 years in prison for stealing a dump truck, valued at \$125,000, which is a felony.³³ A review of relevant court transcripts showed that the interpreter assigned to the case did not provide an accurate interpretation of "dump truck" or "toolbox," which were key words in Alfonzo's case (see figure two).

Figure 2

ORIGINAL UTTERANCE	INTERPRETATION	TRANSLATION OF INTERPRETED UTTERANCE
MR. KWILECKI: Tool box	[no interpretation]	
MR. MCGLASHAN: -- I just needed to talk to the victim because —	INTERPRETER: ...tengo que hablar con la víctima.	I have to talk to the victim.
THE COURT: To the dump truck?	[no interpretation]	
MR. KWILECKI: I don't think it was a — I — they just took it for — it looks like a joy ride kind of thing.	INTERPRETER: [unintelligible] se lo llevaron como para un viaje de disfrute.	...they took it like for a pleasure trip.
THE COURT: In a dump truck?	[no interpretation]	
MR. KWILECKI: In a dump truck.	[no interpretation]	

After an expert witness determined that the court interpreter in the Alfonzo case provided an incomprehensible interpretation and was not fluent in Spanish, a local circuit judge threw out the sentence and plea. It is worth noting that the interpreter in question had interpreted more than 5,000 times during a period of approximately nine years in that county. As pointed out by María Cecilia Marty, the expert witness, had the State of Florida passed a law earlier requiring interpreter certification, this interpreter "would have had to perfect her trade in order to pass the test or would never have interpreted in court."³⁴ Figure three shows excerpts from the October 15, 2004, change of plea hearing in the Alfonzo case taken from the official tape transcript and recordings reviewed and prepared by the expert witness who evaluated and transcribed the interpreter's rendition of the proceeding.³⁵ In figure three, omissions are indicated in brackets and mistakes in the interpreted utterances are underlined.

Figure 3

ORIGINAL UTTERANCE	INTERPRETED UTTERANCE	TRANSLATION OF INTERPRETED UTTERANCE
THE COURT: State of Florida versus Juan Ramón Alfonso, 04-34473.	INTERPRETER: Okay, la fiscalia contra Juan Ramón Alfonso, 04-34-473.	Okay, <u>The State Attorney's Office</u> versus Juan Ramón Alfonso, 04-34-473.
MR. KWILECKI: Judge, pursuant to negotiations, Mr. McGlashan would be offering for – in return for a plea of no contest, and a withhold of adjudication, hopefully —	INTERPRETER: Su Señoría, según los negocios hechos con su ... de que el señor, la Fiscalía está dando de no, no adjudicarlo culpable	Your Honor, according to <u>the businesses</u> made with your ... of the, the sir, the State Attorney's Office if <u>giving of</u> no, not to <u>adjudicate you guilty</u>
MR. MCGLASHAN: That's difficult to hear, Your Honor. This is a co-defendant to the dump truck ring, where this dump truck was – this dump truck was retrieved and recovered. The victims are here; Mr. and Mrs. Linsley. And in this case, I guess, there's some damage and restitution is owed. And as we had a previous discussion at the arraignment of this case, they feel strongly about it, although there's no direct link between — I have no direct evidence connecting the two thefts. But they would like to address the court.	Sí, Su Señoría, <u>de que</u> eso es un, <u>un pensa de un camioneta peque — de que</u> lo recogieron y las víctimas están presente y ... [] Sr. y [] Sra. <u>Stansley</u> [sic] y el caso de que hay daños y de que y, tiene que pagar. Y de que como hemos hablado antes...ellos <u>se sienten muy fuerte de eso, de que se sienta de que</u> han... <u>un conexión</u> aunque no hay evidencia, eh, de los, ah, robos, pero si ellos quieren hablar <u>a la par de...</u>	Yes Your Honor of the that is a, a 'pensa' [sic] of a pick-up [wrong gender] <u>ama[ll]</u> — of that they picked it up and the victims are <u>present</u> [singular conjugation; phonological interference] and ... Mr. and Mrs. Stansley [sic] and the case <u>of that</u> there are damages and of the and, you have to pay. And <u>of the</u> as we have talked about before...they <u>feel</u> [sic] <u>very strong</u> [singular instead of plural] of that, of the he feels of that they have ... <u>a connection</u> [masculine – wrong gender] even though there is no evidence, um, of the, ah, robberies, but if they want to speak along with...

Legislative initiatives dating to the 1980s requiring certification for Florida's state court interpreters had met with resistance.³⁶ Finally, on June 26, 2006, the Florida Legislature authorized the Supreme Court of Florida to "establish minimum standards and procedures for qualifications, certification, professional conduct, discipline, and training of court interpreters." After many years of hard work and persistence, the Florida Court Interpreter Certification was implemented on May 6, 2008.³⁷

Since 2000, there has been a significant increase in the number of states that have enacted legislation to set standards for court interpreters and joined the Consortium of the National Center for the State Courts. Likewise, publications in law review journals, such as the *Harvard Latino Law Review* regarding the impact of court interpreters in the judicial system, reflect a growing awareness of fundamental fairness issues and equal access to justice for linguistic minorities in the legal community.

At the federal district court level, new programs have been established to facilitate the use of certified and otherwise qualified interpreters. The Administrative Office of the United States Courts, for instance, maintains a national court interpreter database to assist federal courts in locating interpreters in a number of languages. At the end of fiscal year 2005, the database contained the names of 880 active certified interpreters and 1,869 "otherwise qualified" interpreters in 103 languages. Additionally, the federal judiciary's Telephone Interpreting Program (TIP) provides remote interpretation in short proceedings where certified or otherwise qualified interpreters are not locally available. In fiscal year 2005, TIP services were used in 3,600 events in 40 languages.³⁸

Much still remains to be done to address the shortage of qualified interpreters as the U.S. experiences a significant growth in linguistic pluralism. According to The Federal Court Management Report of July 24, 2006, 72 percent of proceedings interpreted by Spanish language contract interpreters in 2005 were handled by certified interpreters, and many federal courts used certified interpreters at much lower rates. Thus, if court interpreting is to overcome language barriers and cultural misunderstandings, courts must ensure that qualified interpreters are used. For a defendant to be truly present, a linguistically and culturally true and accurate interpretation of statements spoken or read in court must be rendered from the source to the target language and vice versa. In the context of the due process rights of linguistic minorities, an accurate, impartial, and complete interpretation preserves equivalence and allows non-English-speaking defendants to be linguistically present, and thereby meaningfully participate, in our criminal justice system.

¹ Roseanne Dueñas González, Holly Mikkelson & Victoria E. Vásquez, *Fundamentals of Court Interpretation: Theory, Policy, and Practice*. 49-50, 155 (Carolina Academic Press 1991). The authors point out that *Arizona v. Natividad* is the first decision to perceive the issue as one of linguistic presence.

² Lynn Davis *et al.*, *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, 7 *Harvard Latino L. Rev.* 1 (Spring 2004). The authors reviewed approximately 30 decisions from 1998 to 2003.

³ U.S. Census Bureau, *Language Use and English-Speaking Ability: 2000* at 2-7, U.S. Department of Commerce, Economic and Statistics Administration, Census 2000 Brief, *available at* factfinder.census.gov.

⁴ *Id.* at 3.

⁵ *Id.* at 2-7 and Figure 4 at 6, *available at* factfinder.census.gov.

⁶ U.S. Census Bureau, State and County QuickFacts, quickfacts.census.gov/qfd/states/12000.html.

⁷ *Minority Population Tops 100 Million*, U.S. Census Bureau News, May 17, 2007, www.census.gov/Press-Release/www/releases/archives/population/010048.html.

⁸ *Immigration Crisis Tests Federal Courts on Southwest Border*, 38 *The Third Branch* (June 2006), *available at* www.uscourts.gov/ttb/06-06/border/index.html.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Calif. Const. art. 1, §14 states: "A person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings."

¹² The court may pay travel and subsistence costs when necessary to assure that certified interpreters are available. Administrative Office of the U.S. Courts, Interim Court Interpreter Regulations.

¹³ 28 U.S.C. §12(1)(k). The relevant statutory language states: "(a) The [d]irector of the Administrative Office of the United States Courts shall establish a program to facilitate the use of certified and otherwise qualified interpreters in judicial proceedings instituted by the United States. . . . (b)(1) The [d]irector . . . shall prescribe, determine, and certify the qualifications of persons who may serve as certified interpreters for the hearing impaired . . . and persons who speak only or primarily a language other than the English language, in judicial proceedings instituted by the United States. . . . (c)(2) The clerk of the court, or other court employee designated by the chief judge, shall be responsible for securing the services of certified interpreters and otherwise qualified interpreters required for proceedings initiated by the United States, except that the United States attorney is responsible for securing the services of such interpreters for governmental witnesses. . . . (d)(1) The presiding judicial officer, with the assistance of the [d]irector of the Administrative Office of the United States Courts, shall utilize the services of the most available certified interpreters . . . (§1827. Interpreters in courts of the United States, Public Law 95-539 §2(a), Oct. 28, 1978 Stat. 2040, and amended Pub. L. 100-702, Title VII, §§702-710, Nov. 19, 1988, 102 Stat. 4654-4657)."

¹⁴ U.S. District Court Southern District of New York, Frequently Asked Questions About Interpreting, www.nysd.uscourts.gov/interp/faqs.htm.

¹⁵ The National Association of Judiciary Interpreters and Translators (NAJIT) also offers an examination for interpreters and translators working in the legal setting.

¹⁶ Administrative Office of the United States Courts, Federal Court Interpreter Certification Examination: Spanish/English, 1980-2005. The author is grateful to Dr. Carolyn J. Kinney, Federal Court Interpreting Program, District Court Administration Division, for providing the statistical history of the FCIC examination (February 1, 2007). This data is taken from statistics provided by the AOUSC and excludes

the results of the most recent testing cycle.

- 17 Administrative Office of the U.S. Courts, Office of Public Affairs, *Federal Court Manager Report, AO Makes It Easier to Locate Certified Interpreters* (July 24, 2006).
- 18 Elena M. de Jongh, *An Introduction to Court Interpreting Theory and Practice* 35-49 (1992).
- 19 Barbara Moser-Mercer *et al.*, *Prolonged Turns in Interpreting: Effects on Quality, Physiological and Psychological Stress (Pilot Study)*, 3 *Interpreting* 47-64 (1998).
- 20 Interview with Alberto de la Cerra, U.S. certified court interpreter (May 15, 2008).
- 21 Interview with Guillermo Suquet, U.S. certified court Interpreter (May 21, 2008).
- 22 Guillermo Cabanellas de las Cuevas & Eleanor C. Hoague, *Butterworths Spanish/English Legal Dictionary* 165 (1991).
- 23 María Moliner, *Diccionario del uso del español* 803 (1991).
- 24 *Black's Law Dictionary* 370-372 (6th ed.1990).
- 25 See Marcial Prado, *Spanish False Cognates* (1993). The translator must always determine the context.
- 26 Colleen B. Brennan, *Linguistics and the Law* (Sept. 2001), available at www.csa.com/discoveryguides/linglaw/overview.php.
- 27 Interview with Erlinda Gonzalez-Berry (2006). Ventura Morales learned English and works at a law center in Oregon, committed to helping protect the rights of linguistic minorities.
- 28 H.R. Rep. No. 100-889 at 58 (1988), reprinted in USCCAN 5982, 6012...." (*U.S. v. Bailon Santana*, 429 F.3d 1258 (9th Cir. 2005).
- 29 *Id.*
- 30 Theresa Vargas, *Prisoner Lost in Translation*, *The Washington Post*, August 4, 2006, available at www.msnbc.msn.com/id/14175549/page/2/print1/displaymode/1098/.
- 31 *U.S. v. Luis Posada Carriles*, Western District of Texas, Case No. EP-07-CR-00087-KC, p. 24/ Order of Dismissal, available at www.txwd.uscourts.gov/opinions/cases/posadacarriles/default.asp. See also Juan A. Lozano, *Judge Throws Out Cuban Militant's Indictment*, *Dallas Morning News*, May 11, 2007, available at www.dallasnews.com.
- 32 Previous efforts by several interpreters, including the author, with the support of legislators such as Carrie Meek, Ileana Ros-Lehtinen, and Bruce Hoffman, involved the co-authorship and introduction of legislation requiring certification and uniform standards for state court interpreters in Florida. In 1992, for instance, such legislation passed with the unanimous vote of the legislature, but was vetoed by then-Governor Lawton Chiles.
- 33 The case received a great deal of media attention. See Patricio G. Balona & Jim Saunders, *Botched Case Shows Need for Translator Standards, Advocates Say*, *Daytona Beach News- Journal*, January 18, 2006; Patricio G. Balona, *Inmate Happy to See New Court Interpreter Law*, *Federal Court Reporters Association*, FCR Online 7-9 (July/August/September 2006).
- 34 Maria Cecilia Marty, *The Alfonzo Case: The Rationale for State Certification in Florida*, 15 *Proteus* 1, 4-6 (Winter 2007).
- 35 E-mail from M.C. Marty, excerpts are from transcripts, January 2006 (on file with the author).

³⁶ *Id.*, Patricio Balona at 2.

³⁷ E-mail from Joelle Haspil, U.S. certified court interpreter, May 6, 2008. According to the 2005 *Annual Report from the Director of the Administrative Office of the U.S. Courts*, Spanish was used for 91 percent of the telephone interpreting events. See also *AO Makes It Easier to Locate Certified Interpreters*, Administrative Office of the U.S. Courts, Federal Court Management Report (July 24, 2006).

Dr. Elena M. de Jongh is a two-time Fulbright Fellow and author of three books and numerous articles on Spanish and Cuban literature and court interpreting. She received the Ph.D. in Spanish language and literature from Tulane University. A federally certified court interpreter since 1985, she has interpreted in thousands of proceedings in the United States district courts. Her book, *An Introduction to Court Interpreting: Theory and Practice* (University Press of America, 1992) is widely used in workshops and university courses.

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