Errors in Interpretation: Why Plain Error Is Not Plain

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Introduction

> A farm worker from Mexico applied for worker's compensation benefits for a back injury. At his hearing, a Salvadorean [sic] interpreter was used. The interpreter interpreted "cintura" as "waist" instead of "lower back" as the Mexican-dialect worker used it. Upon questioning by the judge, the worker denied having any injury other than to his back. He lost the hearing because the judge found his statements to be inconsistent and evasive.[1]

While this incident may not appear to be a gross miscarriage of justice, the injured worker was denied benefits that he may have rightfully deserved simply because one word was not interpreted accurately. Mistakes in interpretation may bear more serious consequences in the context of a criminal trial.[2]

Imagine that you speak only English and you are accused and charged with committing a crime in a foreign country where English is not spoken. The court appoints an attorney for your defense

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1. WASHINGTON (STATE) OFFICE OF THE ADMINISTRATOR FOR THE COURTS, COURT INTERPRETER TASK FORCE INITIAL REPORT & RECOMMENDATIONS 21 (October 20, 1986) [hereinafter REPORT & RECOMMENDATIONS]. The Task Force included this account, as well as others, to "demonstrate the difficulties faced by Non-English speaking or hearing-impaired persons (and the courts) in actual court proceedings." *Id.* at 21. The Task Force noted that it did not vouch for the accuracy of the reports. Rather, it included the accounts to "exemplify the type of incident commonly facing the courts." *Id.* at 22.

2. For example, in a case in Washington state, "a Laotian man charged with attempted murder was given the Miranda warning that he could remain silent and was entitled to an attorney . . .[b]ut an interpreter translated it as being the right to remain at peace." Barbara A. Serrano, *Courts Shy on Interpreters to Help Immigrants, Jurors*, SEATTLE TIMES, November 30, 1990, at C1. The man further misunderstood and thought that an attorney was "someone who takes you to jail." *Id.*

who does not speak English and also appoints an interpreter[3] to aid you in communicating with your attorney. This same interpreter will interpret your testimony for the benefit of the court and the jury and will also interpret the testimony of any other English-speaking witnesses.

During the trial, the interpreter makes errors which you do not catch because you do not speak the language of the foreign country. Your attorney does not object to the interpretation errors because she does not speak English and is unaware that errors were made. The jury returns a verdict of guilty. After the trial, you try to appeal your conviction on several grounds, including that the interpretation errors were prejudicial to your case. The appellate court refuses to reverse your conviction or grant a new trial based on inaccurate interpretation because your attorney did not object to the interpretation errors at trial. Further, the appellate court finds that the misinterpretations do not qualify as "plain error"[4] because there is no indication from the trial transcript that the interpretation was faulty. The judges at the appellate level do not speak English, and the transcript of the case that they review is written entirely in their language, not in English. Even if extrinsic evidence of the interpretation is allowed on appeal, you may not have access to bilingual transcripts of the trial or you may not have the resources to have the transcript examined for error by a third party.

This is the experience of many non-English speaking criminal defendants in the United States even though federal[5] and state[6] court systems generally provide for the appointment of an interpreter for the non-English speaking defendant and non-English speaking witnesses. Bilingual or English-speaking defendants whose trials include foreign language interpretation suffer this experience as well. The provisions providing for appointment of an

3. Interpreters translate spoken communication from one language to another. Translators, on the other hand, translate written communication from one language to another language. *Translation Service*, Bar Ass'n of San Francisco Newsletter, October 21, 1991, 4. *See also* Graham, J. Steele, *Court Interpreters in Canadian Criminal Law*, 34 CRIM. L. Q., No. 2, 218, 219 (1992). The definitions in Black's Dictionary vary somewhat from those above. Translation is defined as "[t]he reproduction in one language of a book, document, or speech in another language." BLACK'S LAW DICTIONARY 1499 (6th ed. 1990). Interpreter is defined as "[a] person sworn at a trial to interpret the evidence of a foreigner or a deaf person to the court." *Id.* at 818. Many cases and articles use the terms interpreter and translator interchangeably. This article attempts to follow the definitions given by the Bar Ass'n of San Francisco Newsletter even though the articles and cases cited may use the terms synonymously.

4. *See infra* text accompanying note 123.

5. *See generally*, Federal Court Interpreters Act, 28 U.S.C. § 1827 (1978).

6. *See* SUSAN BERK-SELIGSON, THE BILINGUAL COURTROOM 219 app. 1 at 219-22 (1990) (detailing state legislation regarding right to court interpreters).

interpreter aid the court, jury, and defendant in understanding the proceedings; however, the defendant and defense counsel may still be prejudiced in assessing the accuracy of the interpretation that the jury hears and thus be unable to object to inaccurate interpretation or make a case on appeal. Overwhelmingly, appellate courts affirm defendants' convictions despite prejudicial interpretation errors at trial.[7]

This article examines appellate cases in which non-English speaking criminal defendants and bilingual criminal defendants raised the issue of inaccurate interpretation and concludes that the present procedure for appellate review is inadequate. On appeal, courts must give careful review to interpretation issues because they present problems not typically encountered when reviewing other types of issues at the appellate level. Part I describes factors which contribute to errors in interpretation at the trial court level. This section also recognizes that, while there are ways to reduce error, some misinterpretation is inevitable, underscoring the importance of appellate review. Part II describes the problems of applying the existing standards of appellate review to interpretation errors and concludes that the requirement of timely objection at trial should be waived and that there must be an exception to the plain error rule. Part III reviews some proposed methods to reduce interpretation error including the use of separate interpreters for the court and the criminal defendant throughout the trial, the use of team interpreters, the establishment of foreign language courts, the cultivation of more bilingual attorneys, and mandatory taping of all bilingual or multi-lingual court proceedings and review of these tapes for errors. Part III also argues that the prosecution should have the burden of proving the accuracy of the interpretation as an element of the case against the defendant at trial.

I. Errors in Interpretation

This article focuses on inaccurate interpretation and the inherent problems of appellate review of such error. Court-appointed interpreters may misinterpret the testimony of a criminal defendant or other witnesses who do not speak English. Several types of

7. A review of all the cases in which interpreter inaccuracy or error was used as a ground for appealing a prior ruling uncovers one overwhelmingly predominant pattern: appellate judges generally uphold the rulings of lower courts, rejecting appellant claims that their trial had been unfairly conducted. The major reason why appellate judges can and do rule in this way is that usually the appellant cannot provide concrete evidence of poor quality interpreter performance.
BERK-SELIGSON, *supra* note 6, at 200. *See infra* notes 39-58, 60-88 and accompanying text.

errors are common. Questions posed to non-English speaking defendants or witnesses and their answers can be erroneously interpreted. The interpreter may simply make inaccurate word choices or may summarize the question to the witness. The interpreter may elaborate on or downplay the question by embellishing the question or by not translating portions of the question.[8] For example, interpreters may choose not to interpret profanity; they may leave out words and phrases that they do not understand and may tell the witness to be brief.[9] The witness' testimony will not be a direct answer to the question posed by the examining attorney; rather it will be an answer to the question posed by the interpreter. The interpreter may make these same types of errors when interpreting the answers to questions. Interpreters may also impose their own biases. For example, they may want to offer comfort to witnesses or victims, or they may side with one party.[10] These types of problems generally occur because interpreters are not adequately trained[11] or certified.[12]

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8. Ruth Hammond, *Lost in Translation*, TWIN CITIES READER, Mar. 11-18, 1992, at 8.

9. *Id.* at 8-9. Ruth Hammond interviewed some interpreters who admitted that they did not like to repeat profanity and that they instructed witnesses to keep their answers short. *Id.* Additionally, Shoua Cha, a St. Paul, Minnesota police officer (also interviewed by Hammond) stated that while observing many Hmong interpreters, Cha noticed that some interpreters translate what they understand and leave out what they do not understand. *Id.* *See generally*, BERK-SELIGSON, *supra* note 6, at Ch. 7 (discussing the lengthening of interpreted testimony). Berk-Seligson's research shows that, in most cases, the mean length of an English interpretation of Spanish testimony is longer than the mean length of the Spanish answers. "Given that the English interpretations would be expected to be significantly shorter, this finding is striking." *Id.* at 124.

10. Carlos A. Astiz, *But They Don't Speak the Language*, JUDGES' J. 32, 34. Astiz argues that siding with one party, or taking on an "adaptation role" is not appropriate. When interpreters take on an "adaptation role" in which they familiarize themselves with a witness' background to help with the translation, attempt to explain to witnesses, to a defendant or to the defendant's non-English speaking relatives what is going on in the courtroom, there is likely a conflict with giving an accurate interpretation. *Id.* Emphasis should be on "accuracy, precision, and comprehensiveness in terms of what is being said and the mode in which it is being said." *Id.* Astiz suggests that interpreters and others in the criminal justice system encourage this adaptation role because it discourages those who need interpreters from complaining about the quality of the interpretation. *Id.* at 35. Although this role may discourage complaints, it does so "at the expense of accuracy, precision, and equality of treatment." *Id.*

11. In a study titled "Non-English Speaking Individuals and the Criminal Justice System: A Violation of Due Process of Law?", Carlos A. Astiz found that very few interpreters in the criminal justice system were familiar with the interpreting techniques used by professional interpreters. Astiz, *supra* note 10, at 32, 34. In the interviews conducted for the study, few individuals were interested in obtaining interpreting credentials or in upgrading their interpretation skills. The individuals who did want credentials or upgrading of skills "wanted nothing more than a 'quick fix,' a nearly instantaneous acquisition of skills accompanied by the awarding of

The lack of certification and training[13] are important factors in interpretation inaccuracy. The federal court system, under the Federal Court Interpreters Act (Act),[14] presently certifies three languages: Spanish, Haitian Creole and Navajo.[15] The Act provides that the federal government will provide the court interpreter's services at its expense.[16] The federal certification process is very demanding; only four percent of those who take the certification tests eventually pass.[17] This indicates that those interpreters who do get certified are more capable than non-certified interpreters.

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valid credentials." *Id.* at 56. Astiz notes that there are many resources available to help interpreters in the criminal justice system, including government and world organizations that employ interpreters in their daily operations and many materials that focus on interpretation issues. Criminal justice system administrators and interpreters ignore the available resources and this suggests that, among other things, the administrators are not really convinced that they have to bridge the language barrier. *Id.* The ideal court interpreter . . .

> will have an education beyond the second year of college *in two or more languages*; he or she will be familiar with legal, medical and other professional and technical terminology, and will also be able to handle everyday expression widely employed within the immediate jurisdiction of the criminal justice system he serves. But those of us who have been engaged in recruitment know that ideal types seldom appear.

Id. at 35 (emphasis in original).

12. *See infra* note 15 and accompanying text.

13. *See generally* BERK-SELIGSON, *supra* note 6, at 40-42 (discussing interpreter training programs). Minnesota is mentioned as one of the states that was considering a state certification program. *Id.* at 40 (*quoting* M. Farmer, *Outcome of Case May Depend on Court Interpreters Language Skills*, CHRISTIAN SCI. MONITOR, June 27, 1983, at 14). At this writing, approximately 10 years later, there is still no statewide certification program for interpreters in Minnesota.

14. 28 U.S.C. § 1827 (1978). The purpose of the Federal Court Interpreters Act "is to give non-English speaking and hearing/speech-impaired defendants and witnesses an equal chance to understand and participate in criminal and civil trials in federal courts." Carlos A. Astiz, *A Comment on Judicial Interpretation of the Federal Court Interpreters Act*, 14 JUST. SYS. J. 103 (1990). The Act was passed in 1978 and provides, in part, that the presiding judicial officer shall use the services of a certified interpreter in criminal or civil actions initiated by the United States in district court if the officer determines that a party or a witness speaks only, or primarily, a language other than English. 28 U.S.C. § 1827 (1978).

This article focuses solely on the appellate review of cases where foreign language interpreters were used and the criminal defendants claim that there were material misinterpretations at trial. While trials using sign language interpreters are likely subject to the same kinds of biases, this subject is beyond the scope of this article.

15. Hammond, *supra* note 8, at 10. The federal certification process includes passing the Federal Court Interpreters Examination. BERK-SELIGSON, *supra* note 6, at 36. This test is administered by the Administrative Office of the Courts (AOC) and includes both a written and an oral examination. *Id.* at 36-37. By February 1986, only four percent of those persons taking the test had passed it in its entirety. *Id.* Most "passers" had taken portions of the exam repeatedly before passing the entire exam. *Id.* at 37. *See generally id.* at 36-40 (discussing the training and certification of federal court interpreters).

16. 28 U.S.C. § 1827(c) (1978), 28 U.S.C. § 1827(g)(3) (1978).

17. *See supra* note 15.

However, certification is not the norm, and federal courts do not have to use certified interpreters. Rather, in federal court, when a certified interpreter is not available, judges and courts are free to appoint "otherwise competent interpreters."[18] Thus, in a federal court, if a language is not certified or if certified interpreters are not available, judges have discretion to choose the interpreter.[19] For example, in Minnesota's U.S. district courts during 1990, interpreters were used in sixty-seven proceedings, and none of the interpreters were certified.[20]

State procedures for appointing interpreters may vary. In Minnesota, for example, the state procedures are similar to the federal procedures in that a qualified interpreter will be made available to assist persons or witnesses handicapped in communication.[21] In contrast to the federal court system, which

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18. 28 U.S.C. § 1827(b)(2) (1978).

19. Therefore, in the federal courts, for all languages other than Spanish, Navajo and Haitian Creole, the court has discretion to appoint an "otherwise qualified" interpreter. *See supra* note 18. Considering the diversity of languages spoken in the United States, this is a large loophole through which many interpreters who may not be qualified slip. Hammond, *supra* note 8, at 10. As an example of the diversity of languages spoken in courtrooms, in 1985, Los Angeles courtrooms utilized the services of an interpreter for 80 languages, more than any other county court system in the nation at that time. Paul Feldman, *Society Increasingly Multilingual; L.A. Courtrooms: Judge, Jury — and Interpreter*, L.A. TIMES, May 5, 1985, at Part 1, page 1. Although this statistic is only applicable to the court system in Los Angeles County, it shows the extensive use of interpreters that some courts face. *See also generally* BERK-SELIGSON, *supra* note 6, at 5 (analyzing the number of times various languages were interpreted in United States Federal District Courts in 1986).

20. Hammond, *supra* note 8, at 10.

21. MINN. STAT. § 611.32 (1991). This section provides:

> Subdivision 1. Proceedings and preliminary proceedings involving possible criminal sanctions or confinement.
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> In any proceeding in which a person handicapped in communication may be subjected to confinement, criminal sanction, or forfeiture of the person's property, and in any proceeding preliminary to that proceeding, including coroner's inquest, grand jury proceedings, and proceedings relating to mental health commitments, the presiding judicial officer shall appoint a qualified interpreter to assist the person handicapped in communication and any witness handicapped in communication throughout the proceedings.
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> Subd. 2. Proceedings at time of apprehension or arrest.
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> Following the apprehension or arrest of a person handicapped in communication for an alleged violation of a criminal law, the arresting officer, sheriff or other law enforcement official shall immediately make necessary contacts to obtain a qualified interpreter and shall obtain an interpreter at the earliest possible time at the place of detention. A law enforcement officer shall, with the assistance of the interpreter, explain to the person handicapped in communication, all charges filed against the person, and all procedures relating to the person's detainment and release. If the property of a person is seized under section 609.531, subdivision 4, the seizing officer, sheriff, or other law enforcement official shall, upon request, make available to the person at the earliest possi-

has at least a limited certification program,[22] Minnesota currently has no statewide provisions for certification of interpreters.[23] Other states, such as California, have certification programs for interpreters who work in state courts.[24] Most states, however, simply have statutes or other regulations providing for interpreters when needed, without requiring certification.[25] At least two states, New Mexico and California, provide for the right to interpreters in their state constitutions.[26] In spite of legislation that seeks to provide interpreters, problems remain even when interpreters are used. Assessing the quality of the interpretation provided is a difficult problem.[27]

It is almost impossible for a trial judge to tell whether an interpretation is accurate unless the judge is bilingual and can monitor the interpreter's performance. Repeated complaints by witnesses, attorneys, and the parties to a case would inform the

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> ble time a qualified interpreter to assist the person in understanding the possible consequences of the seizure and the person's right to judicial review. If the seizure is governed by section 609.5314, subdivision 2, a request for an interpreter must be made within 15 days after service of the notice of seizure and forfeiture. For a person who requests an interpreter under this section because of a seizure of property under section 609.5314, the 60 days for filing a demand for a judicial determination of a forfeiture begins when the interpreter is provided. The interpreter shall also assist the person with all other communications, including communications relating to needed medical attention. Prior to interrogating or taking the statement of the person handicapped in communication, the arresting officer, sheriff, or other law enforcement official shall make available to the person a qualified interpreter to assist the person throughout the interrogation or taking of a statement.

Id.

22. *See supra* notes 14-17 and accompanying text.

23. See *supra* note 13. A Report of the Supreme Court Racial Bias Task Force (a task force of the Minnesota Supreme Court) was issued during May, 1993. MINN. SUP. CT. TASK FORCE ON RACIAL BIAS, FINAL REP., 74 May 1993. The Minnesota Conference of Chief Judges implemented the maintenance of a list of all interpreters used in the state court system in April of 1992. Telephone interview with Janet Marshall, Racial Bias Task Force (Mar. 4, 1993). *See also, Final Report, supra* at 72. The report makes several recommendations including establishing and funding a State Board for Interpretive Services which would "propose standards and procedures for the training, professional conduct, certification, qualification testing and adequate compensation of certified instructors. *Final Report, supra* at 77. The report also recommends defining "qualified interpreter" as someone certified by the state, designating higher education institutions as centers for training of interpretors, requiring continuing education of personnel involved in court interpreting and translating, and the adoption of a canon of ethics for interpretors. *Id.* at 77-78. The report does not address the appellate review of cases in which interpretation errors are alleged.

24. BERK-SELIGSON, *supra* note 6, at 41; *see* CAL. GOV'T CODE §§ 68561 - 68566 (1993).

25. BERK-SELIGSON, *supra* note 6, at 219-22.

26. CAL. CONST. art.1, § 14 (providing an interpreter for persons charged with felonies who do not understand English); N.M. CONST. art. 2, § 14.

27. Astiz, *supra* note 10, at 33.

court of a problem with an interpreter. However, these courtroom actors may not know whether the interpretation is accurate and thus detection of interpretation errors is unlikely to even occur.[28] Further, it may be against the interests of some of these actors to point out errors in interpretation when they notice them.[29] Many courts require that an interpreter take an oath[30] to interpret accurately, but an incompetent interpreter who takes an oath will not be magically transformed into a good interpreter.[31]

Bias and conflicts of interest may also contribute to errors in the interpretation process. Some states have ethical codes which set forth guidelines to help determine if an interpreter is biased or interested. As an example, the Court Interpreter Manual for Ramsey County, Minnesota, states

> In all instances, the interpreter should disclose to the Judicial Administrator's Office or to the judge, if in a trial, any actual conflict of interest or the appearance of any conflict of interest. Any condition which impinges on the objectivity of the interpreter or affects his/her professional independence constitutes a conflict of interest. A conflict may exist whenever any of the following occurs:
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> 1. The interpreter is acquainted with any party to the action.
> 2. The interpreter has, in any way, an interest in the outcome of the case.
> 3. The interpreter is perceived as not being neutral. In addition, the court should be informed whenever the interpreter and any witness are previously acquainted.[32]

Necessity may dictate that someone must serve as an interpreter regardless of a conflict of interest. This will be the case if a language is rare and only a few people can understand it well enough to act as an interpreter. These types of problems, where

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28. *But see infra* note 97.

29. *See id.*

30. For example, the Minnesota statute provides that:

> Every qualified interpreter appointed pursuant to the provisions of 611.30 to 611.34, before entering upon duties as such, shall take an oath, to make to the best of the interpreter's skill and judgment a true interpretation to the handicapped person being examined of all the proceedings, in a language which said person understands, and to repeat the statements, in the English language, of said person to the court or other officials before whom the proceeding is taking place.

MINN. STAT. § 611.33 subd. 2 (1991).

31. BERK-SELIGSON, *supra* note 6, at 204.

32. SECOND JUDICIAL DISTRICT, RAMSEY COUNTY, MINNESOTA, COURT INTERPRETER MANUAL 11 (3rd Revision, March 1992). *See also* BERK-SELIGSON, *supra* note 6, at 227 (suggested interpreter's written oath).

qualified interpreters may have an interest in the outcome of the case, are more likely to occur in smaller communities.[33]

Errors in interpretation are likely to occur and even if most interpreters were certified, errors would not be completely eliminated. As the Minnesota Supreme Court recently stated, translation is more an art than a science, and "there is no such thing as a perfect translation."[34] Absent major institutional changes in the way that foreign language interpretation is handled in state and federal courts, errors will persist. It is important, therefore, that criminal defendants have an opportunity for review of interpretation errors on appeal.

II. Appellate Review of Interpretation Errors

> In cases where only the interpreter knows both the source and target language, there are frightening prospects for undetected miscarriage of justice. I do not believe it is too much to say that where there is an interpreter there is a ground of appeal.[35]

Several Minnesota cases[36] illustrate the difficulties with the present requirements for preserving an error for appeal. A timely

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33. Ruth Hammond, *Lost in Translation Part 2*, TWIN CITIES READER, Mar. 18-24, 1992, at 11. For example, in State v. Lee, *infra* notes 71-89 and accompanying text, the prosecution's backup interpreter had an apparent conflict of interest; he was related to one of the defendant Lee's accusers. *Id.* at 9. This problem is not confined to the United States. A survey by the Nuffield Foundation found cases where interested parties such as friends and relatives of defendants and courtroom ushers were used as interpreters due to lack of qualified interpreters. Gavin Cordon, *Lack of Interpreters 'Threat to Justice'*, PRESS ASSOCIATION, Feb. 3, 1993, at Home News. The study found that interpreters acted as advocates for defendants and stated their own opinions as to the guilt or innocence of the defendant. *Id.*

34. State v. Lee, No. C9-91-560, 1992 Minn. LEXIS 372, at 19 (Minn. Dec. 31, 1992) (quoting State v. Mitjans, 408 N.W.2d 824, 832 (Minn. 1987)). "Even the best interpretation is not 'perfect', in that the interpreter can never convey the evidence with a sense and nuance identical to the original speech." Steele, *supra* note 3, at 242.

35. Steele, *supra* note 3, at 242.

36. Minnesota cases were chosen because of the author's access to information regarding cases decided under the statutes. It is difficult to obtain any information on how extensive the misinterpretations were in any particular case. Several articles in a local newspaper have examined trial transcripts and have tried to identify the level of inaccuracy in two recent cases. *See generally* Hammond, *supra* note 8, at 8; Hammond, *supra* note 33, at 8; Ruth Hammond, *Call It Rape*, TWIN CITIES READER, Mar. 27-Apr. 2, 1992, at 8 [hereinafter Hammond, *Call It Rape*]; Ruth Hammond, *Jail Wait*, TWIN CITIES READER, Nov. 4-11, 1992, at 8 [hereinafter *Jail Wait*]; Ruth Hammond, *Clan Secrets*, TWIN CITIES READER, Jan. 13-19, 1993, at 4 [hereinafter *Clan Secrets*].

Ruth Hammond has "written extensively on the Hmong culture for the Twin Cities Reader and the Washington Post." Hammond, *Call It Rape*, *supra*, at 11. She has studied the Hmong language since 1984 and has interpreted portions of two cases in Ramsey County, Minnesota. Hammond, *supra* note 33, at 8. A native speaker who is unrelated to the parties checked these translations. *Id.* Several Hmong speakers rechecked some essential phrases. *Id.* Over the past two years,

objection[37] to the error is required; in the alternative, the error, if not objected to at trial, must be "plain error."[38] These cases reveal how difficult it is to get a conviction overturned or get a new trial because of inaccurate interpretation.

The Minnesota Supreme Court considered the issue of inaccurate interpretation at trial in *State v. Mitjans*.[39] The defendant, Mitjans, was a Cuban immigrant who came to the United States in 1980 and spoke only Spanish.[40] He was involved in a dispute with two men at a bar, Chapman and Froiland.[41] Mitjans went to the bar with some friends and later left by himself and went home.[42] While at home, he injected himself with cocaine, got a revolver, and returned to the bar.[43] The defendant accused a bar patron of making a comment about one of his companions and this led to a skirmish during which Chapman was shot.[44] The jury acquitted Mitjans of intentional murder but found him guilty of assault and felony murder.[45] The Minnesota Court of Appeals held that one of the defendant's statements to a police officer who spoke Spanish, but had not taken an oath to be an interpreter, should not have been admitted.[46] Thus, the appellate court overturned the conviction because it found the error prejudicial at least when considered in connection with other errors at trial.[47] The case was then appealed to the Minnesota Supreme Court.

On appeal, Mitjans alleged other trial errors including inaccuracy in the court-appointed interpreter's interpretation of defendant's trial testimony.[48] Mitjans alleged that the translation as to why he initially fired the gun was inaccurate. Borges, the court-appointed interpreter,[49] stated that "after Froiland called him

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Hammond has investigated one Minnesota case, State v. Her, and a Ramsey County judge used parts of her retranslation of some testimony at Her's trial in ruling on Her's request for a new trial. Hammond, *Clan Secrets*, *supra*, at 7. *See infra* note 120 (New Chue Her's request for a new trial was denied).

Information regarding specific interpretation errors is difficult to obtain without translation of trial transcripts. The author has relied on Ms. Hammond's retranslations and estimates of error noted in the *Twin Cities Reader* articles for this article.

37. *See supra* notes 98-102 and accompanying text.

38. *See supra* note 123 and accompanying text.

39. *Mitjans II*, 408 N.W.2d 824 (Minn. 1987).

40. *Id.* at 824.

41. *Id.* at 826.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 827.

46. *Id.*

47. *Id.*

48. *Id.* at 831.

49. Mitjans' counsel had requested that the court appoint Daniela Savino to interpret the testimony since she was familiar with the type of Spanish that Mitjans

names and put his hands in defendant's face, defendant stepped back and pulled the gun in order to 'coerce' Froiland and stop the problems."[50] Mitjans alleged that the word "causionarlo" should have been translated as "to caution" and not "coerce."[51] "According to Borges' interpretation, [Mitjans] also testified that after Froiland walked toward the gameroom . . . Chapman 'grabbed' defendant by the neck, there was a struggle and the gun accidentally discharged."[52] Daniela Savino, an interpreter for the defense, testified that "Borges should have interpreted [the] defendant as saying that Chapman 'squeezed' defendant's neck."[53] Finally, "[a]ccording to Borges' interpretation, defendant testified that after the first shot was fired, Chapman fell, then got up and tried to 'tackle' defendant."[54] Savino testified that what the defendant meant was that "Chapman 'came at him like a charging bull'."[55]

The Minnesota Supreme Court reinstated the conviction.[56] The court was not persuaded that any of the errors in interpretation affected the outcome of the trial.[57] The court was satisfied that

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spoke (low education Cuban). State v. Mitjans (*Mitjans I*), 394 N.W.2d 221, 226 (Minn. App. 1986). The court denied this request and appointed Luis Borges to interpret at trial. *Id.* Savino was also sworn in as an interpreter and interpreted the trial for the benefit of Mitjans. *Id.* Borges learned Spanish in Puerto Rico and had much experience interpreting in the Hennepin County District Courts. *Id.*

50. *Mitjans II*, 408 N.W.2d at 831.

51. *Id.* at 831-32.

52. *Id.* at 832.

53. *Id.* at 832. There was no trial transcript available at the time of the appeal to the Minnesota Court of Appeals. *Mitjans I*, 394 N.W.2d at 226. The trial had been audiotaped and Savino reviewed the tape for purposes of the appeal. *Id.*

54. *Mitjans II*, 408 N.W.2d at 832.

55. *Id.* Other alleged errors included that the interpreter "omitted appellant's testimony that as he stood still, Chapman came and grabbed his neck, squeezing it." *Mitjans I*, 394 N.W.2d at 226. Savino also testified that the interpreter "omitted a portion of appellant's testimony." *Id.* "Testimony that appellant was scared Chapman 'will come back toward me and take the gun away from,' should have read, 'will come back toward me and take the gun away from me and using it on me.'" *Id.* Further, an affidavit was produced that stated that Borges did not translate literally. Rather, he paraphrased the testimony to more accurately portray what he thought the defendant meant. *Id.* at 227. The State claimed that the "bull-charging idea" was conveyed by gestures and that some omitted testimony was later given on redirect examination. *Id.*

56. *Mitjans II*, 408 N.W.2d at 835.

57. "We are not persuaded that Borges' use of the word "coerce" rather than caution had any conceivable effect on the outcome of the prosecution." *Id.* at 832. As to the alleged interpretation error of "grabbed" versus "squeezed", the court stated that "the essence of the defendant's testimony was adequately conveyed to the jury." *Id.* Finally, the alleged misinterpretation of the word "embestir" was translated as "tackle" by the interpreter, however, Mitjans felt the correct interpretation was that Chapman "came at him like a charging bull." *Id.* Again, the court did not believe the alleged error affected the outcome of the case, especially because the defendant demonstrated what Chapman did to him. *Id.* *See supra* note 55 (discussing other errors alleged on appeal).

the interpretation of Mitjans' testimony was basically adequate and accurate.[58] While these errors may not seem particularly egregious, word choices affect the jury's perception greatly and may have made the difference between conviction or acquittal in this case.[59]

A more recent case demonstrates a greater level of inaccurate interpretation. In *State v. Her*,[60] Her, a Hmong man, was convicted of criminal sexual conduct in the first degree.[61] New Chue Her was an employment counselor who was accused of luring one of his clients to a hotel under the guise of a job search and then raping her.[62] In *Her*, the interpreter changed nearly one-third of the question and answer exchanges between the attorneys and Hmong witnesses.[63] Therefore, the jury was substantially misinformed of the

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58. *Id.* The Minnesota Supreme Court was satisfied with the adequacy and accuracy even though the Court of Appeals had found that the interpretation problems were significant and noted that the trial court had admonished the interpreter for "paraphrasing and giving obviously incomplete translations." *Mitjans I*, 394 N.W.2d at 227.

59. "One little word can cause . . . a lot of trouble. You can win or lose a case with a sentence." Hammond, *supra* note 8, at 10 (quoting Mike Garza). Mike Garza is a community outreach worker and investigator in St. Paul, Minnesota, for the St. Paul West Side Office of the Neighborhood Justice Center. *Id.* at 9. *See supra* note 1 and accompanying text.

60. No. C0-91-608, 1992 Minn. App. LEXIS 25 (Minn. Ct. App. 1992).

61. *Id.* at * 1.

62. *Id.*

63. Hammond, *supra* note 33, at 8. At trial, a vague Hmong phrase that literally translated means "he did like that" was interpreted as "he raped me." *Id.* at 10. The Hmong word "mos" was also sometimes interpreted as rape. *Id.* Some Hmong speakers would agree that "mos" refers to rape while others indicate that the word could be used to describe either a serious struggle or consensual foreplay. *Id.* The principal interpreter in the Her case stated that, in his opinion, "mos" does not mean "rape." *Id.*

More important than questions as to the accuracy of the interpretation of individual words are other alleged errors. The interpreter allegedly altered the victim's husband's testimony to reconcile it with the victim's earlier testimony regarding why the victim did not call the police until two days after the rape. Further, the victim testified in Hmong that "[i]t was that they used a knife and used a gun to point at me." *Id.* She had not mentioned a knife or a gun before trial. *Id.* She did not claim to have seen a gun only that she thought Her might have had one because "he had put his hand in his pocket." *Id.* The jury never heard this change in testimony because it was interpreted as, "I was in dangerous due to the force and I have to do." *Id.* A second interpreter in the case omitted more than 60% of one prosecution witness' testimony. *Id.* at 11. In fact, a tape recording of the trial reveals that the interpreter and witness were arguing. *Id.* The witness insisted that the interpreter interpret what he was saying while the interpreter scolded the witness for repeating himself and for not directly answering the questions. *Id.*

> It's difficult to determine whether a truer interpretation of the testimony would have resulted in a different verdict. New information would have been revealed, but it's impossible to guess what new lines of questioning the opposing attorneys would have pursued. The jury foreman in the New Chue Her case, Greg Guenther of St. Paul, agreed to look at the *Reader* retranslation of the trial. After errors were pointed

contents of the testimony.[64] New Chue Her, who speaks English, did not urge his attorney to object because he did not want the jury to think negatively of him.[65] Because of this, the public defender representing him did not feel that there was a basis for raising the misinterpretation issue on appeal.[66] Later, Her wrote a supplemental brief explaining the language difficulties at trial. However, the brief was not mentioned in the opinion.[67]

The interpreters in the *Her* case had, at most, fifteen hours of training.[68] Further, some Hmong witnesses never took an oath to tell the truth.[69]

> Her's defense attorney . . . says he thinks the jury convicted Her because it could think of no other explanation for the woman's bruises[.] . . . In refusing to overturn Her's conviction on January 14, the Minnesota Court of Appeals cited this as corroborating evidence of guilt. "Specifically, the bruises on the victim's arms, legs, and back were consistent with her claim that appellant threw her against a wooden bed spring frame[.]" . . . But the justices didn't know that the interpreter had omitted a second version of how she injured herself, which the woman offered during cross-examination. At that time, she said she struck *herself* by writhing on the floor after New Chue Her had already gotten onto the bed.[70]

State v. Lee[71] is another case in which the inaccuracy of the interpretation was great.[72] Lee was convicted of three counts of

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> out to him, Guenther said he couldn't be sure the jury would have arrived at the guilty verdict, if it had a more accurate translation of testimony.

Id. The following indicates other problematic interpretation:

> Defense attorney Mohs says, "The fact that most of the government witnesses spoke Hmong made it virtually impossible to carry on effective cross-examination of those witnesses." Mohs remembers hearing chuckling in the courtroom as he repeatedly tried to elicit responses to specific questions from the witnesses. "I just gave up because it wasn't going to happen," he says.

Id. These examples are given to highlight the extensiveness of interpretation errors in one case. They are not given to suggest agreement or disagreement with the conviction. The author was limited to cases where retranslation had been performed. *See supra* note 36.

64. Hammond, *supra* note 33, at 8.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 9.

69. *Id.*

70. *Id.* at 10-11 (emphasis in original). Other errors included the interpreter adding testimony for purposes of consistency and answering an attorney's queries for the witness without ever posing the question to the witness. *Id.* at 9.

71. *Lee I*, 480 N.W.2d 668 (Minn. Ct. App. 1992).

72. Telephone interview with Ruth Hammond, journalist and teacher of English as a Second Language (Oct. 7, 1992). *See supra* note 36.

criminal sexual conduct in the third degree.[73] The *Twin Cities Reader*, a Minneapolis-St. Paul weekly newspaper, reviewed eight hours of tapes from Lee's trial.[74] The reviewers found several hundred interpreting errors, many of which were potentially significant.[75] The uncertified interpreters exaggerated and omitted some testimony.[76] The reviewers found that one-third to one-half of the witnesses' responses were omitted.[77] They also found that incorrect words were used and questions were misstated.[78]

Interpretation errors in *Lee* included that the interpreter "had a tendency to redramatize rather than faithfully represent the words of the witnesses."[79] For example, the Hmong word for "maybe" was changed to "in fact," and the word "said" to "threatened" or "retorted."[80] The appellate court did not even reach the issue of "interpreter qualifications." Rather, it reversed on other grounds including an incorrect application of the spousal communications rule[81] and abuse of discretion by the trial court for allowing into evidence prejudicial testimony concerning a wholly unrelated similar criminal prosecution.[82]

Like *Her*, *Lee* was appealed to the Minnesota Supreme Court, which reinstated Lee's convictions.[83] The court based its decision on issues other than interpretation but made a brief mention of the alleged interpretation errors.[84] In a section titled "[o]ther issues raised by defendant do not merit detailed discussion," the court briefly discussed the interpretation issue:[85]

> Defendant claims he was prejudiced by inaccurate translations at the trial. It appears from the record, however, that the trial

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73. *Lee I*, 480 N.W.2d at 669.
74. Hammond, *Jail Wait*, *supra* note 36, at 8-9.
75. *Id.* at 9.
76. *Id.*
77. *Id.*
78. *Id.*
79. Hammond, *Clan Secrets*, *supra* note 36, at 4, 5.
80. *Id.*
81. *Lee I*, 480 N.W.2d at 673.
82. *Id.* at 672-37.
83. State v. Lee (*Lee II*), No. C9-91-560, 1992 Minn. LEXIS 372, at * 1 (Minn. Dec. 31, 1992). The Minnesota Supreme Court reinstated King Buachee Lee's rape convictions on December 31, 1992. *Id.* *See also*, Paul Gustafson, *Maplewood Man Missing After Court Restores His Rape Convictions*, STAR TRIBUNE, Jan. 8, 1993, at 2Bw. Lee has failed to turn himself in to authorities to serve the remaining 16 years and eight months of his prison sentence. *Id.* The Minnesota Court of Appeals had overturned Lee's convictions in February, 1992, partially because the judge allowed trial testimony "based on improper racial and cultural stereotyping." *Id.* If he does not turn himself in, Lee may not appeal the reinstatement of his conviction to the United States Supreme Court. *Id.*
84. *Lee II*, 1992 Minn. LEXIS 372, at * 2.
85. *Id.* at * 19.

> court was cognizant of the risks of inaccurate translations and took reasonable steps to insure that the translations were fair and accurate. . . . Translation is an art more than a science, and there is no such thing as a perfect translation . . . . Indeed, in every case there will be room for disagreement among expert translators over some aspects of the translation. Defense counsel, with the assistance of the defendant's own interpreter, is always free to object contemporaneously if counsel believes that the court-appointed interpreter has significantly misinterpreted or omitted parts of . . . testimony.[86]

The court further stated that Lee had apparently worked as an interpreter himself.[87] Because of this, the court reasoned that he had every opportunity to bring any misinterpretations to the trial court's attention as they arose.[88] The problem with this reasoning is that during trial, Lee complained to his attorney about the interpreter's errors so often that the judge reprimanded Lee, through his attorney, because the judge felt that Lee was trying to undermine the jury's confidence in the English interpretation of the testimony.[89] The court's treatment of the interpretation issue is indicative of the lack of attention courts generally give to interpretation errors and illustrates the problems unique to defendants in these situations.

Mitjans, Her, and *Lee* are cases where interpreters inaccurately interpreted testimony and where the level of inaccuracy has been investigated.[90] Usually, determination of error is not possible (without translation of the transcript) because the trial transcript is completely in English. Cases are recorded as if they were conducted in one language, English, instead of two.[91] The foreign language is not entered into the record. Therefore, it can not be verified or discounted on appeal unless there is a tape of the proceeding.[92] Thus, only in rare cases will an error be apparent from the trial transcript.[93]

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86. *Id.* (quoting State v. Mitjans, 408 N.W.2d 824, 832 (Minn. 1987)).

87. *Lee II*, 1992 MINN. LEXIS 372, at * 19.

88. *Id.* at * 19-20.

89. Hammond, *Clan Secrets*, *supra* note 36, at 5.

90. *Her* and *Lee* were publicized cases. There are conflicting views as to the justice served in the convictions of these two men. See Ruth Hammond, *Hmong Men's Rape Conviction Sends Unintended Message*, ST. PAUL PIONEER PRESS, March 12, 1991, at 11A. *See also Hmong, Community Slighted by Rape Prosecutions' Critic*, ST. PAUL PIONEER PRESS, April 19, 1991, at 17A. This article focuses only on the interpretation issues in the cases although other errors were alleged on appeal.

91. BERK-SELIGSON, *supra* note 6, at 200.

92. *Id.*

93. *See infra* note 97. More characteristically, cases involving interpretation errors are overturned on appeal if there are other issues on which the conviction can be reversed as well. BERK-SELIGSON, supra note 6, at 204-05. When the *Mitjans* case

A. Timely Objections, Prejudicial Error and Harmless Error

Generally, appellate courts will accept two kinds of evidence of error in interpreting: presence in the record of English answers by the interpreter that are unresponsive or confusing and objections to the interpreter's interpretation made by the attorney or the defendant during the testimony.[94] If the appellate court can look at the trial transcript and determine that there were errors in interpretation, the court may reverse or grant a new trial.[95] Alternatively, if the defendant's attorney has made objections to certain interpretations at trial, these may be reviewed to determine whether the errors were prejudicial to the defendant's case.[96] However, it is rare that a conviction is overturned on an interpretation question alone.[97]

Counsel must make a timely and specific objection to preserve an error for appeal; this includes obtaining a ruling from the court and ensuring that the objection and ruling appear in the record.[98]

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was overturned at the Minnesota Court of appeals, there were several other grounds for appeal.

94. BERK-SELIGSON, *supra* note 6, at 200.

95. *See infra* note 97.

96. *Id.*

97. Berk-Seligson, *supra* note 6, at 203. One unusual case is People v. Starling, in which a conviction was overturned based solely on poor interpreting. 315 N.E.2d 163 (Ill. App. 1974). Starling was found guilty of simple robbery. *Id.* at 164. Bolanis, the witness who claimed to have been robbed by Starling, spoke only Spanish. *Id.* The court appointed an interpreter to which both the prosecution and the defense agreed. *Id.* While the State was examining Bolanis, the defense objected to a conversation that was being held between Bolanis and the interpreter. The objection was sustained. *Id.* at 166-67. The defense made other similar objections, and the court admonished the interpreter about the conversations between herself and the witness. *Id.* at 167. "At one point, even the State's attorney commented about the difficulty of understanding what the witness was saying as related by the interpreter, and observed that the witness should testify in narrative." *Id.* The Appellate Court of Illinois found that the record contained clear indications that the interpretation was flawed:

> Defense counsel complained repeatedly of the interpreter's ineffectiveness, as did counsel for the State on at least one occasion. The trial judge was aware of the problems attendant on the matter before him and attempted to act accordingly. He admonished the interpreter regarding conversations with the witness; he attempted to clarify testimony of Bolanis (as did both counsel).

Id. at 167-68. The accuracy of the testimony was solely up to the interpreter since the trial judge and the attorneys did not speak Spanish. *Id.* at 168. Thus, the appellate court found that the trial court abused its discretion by choosing the interpreter which denied the defendant's Sixth Amendment right to be confronted by the witnesses against him. *Id.* The case was remanded for a new trial. *Id.*

98. ROGER C. PARK, TRIAL OBJECTIONS HANDBOOK § 12.01 (1991). *See generally id.* at Ch. 1. In State v. Anderson, 261 N.W.2d 747 (Minn. 1978), the defendant was found guilty of aggravated robbery and kidnapping. *Id.* at 748. He challenged the jury verdict on two grounds, one of which was the propriety of the prosecutor's clos-

Counsel must make the objection as early as possible after the error is apparent and in some instances, if the objection is sustained, counsel must make an offer of proof.[99] If counsel fails to make a timely objection, the objection is waived.[100] If the objection is waived, the admission of evidence cannot be used as grounds for appeal unless its admission was plain error affecting substantial rights.[101] The rationale behind these rules is to allow the trial court the chance to correct the error and prevent a wasted trial.[102]

> Generally, objections should be made only when the question is objectionable *and* the answer will be harmful to the objecting party's case. The attorney who makes too many objections may be seen as an obstructionist who is trying to conceal information. Moreover, overruled objections are harmful to the case. The jury may give the admitted evidence more weight than it

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ing arguments. *Id.* at 748. The Minnesota Supreme Court held that the defendant had waived any right to challenge the verdict on this issue since his attorney did not object to the closing argument at trial. *Id.*

The Minnesota Rules of Evidence also provide:

> RULE 103. RULINGS ON EVIDENCE
>
> (a) *Effect of erroneous ruling.* Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and
>
> (1) *Objection.* In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
>
> (b) *Record of Offer and Ruling.* The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. Upon request of any party, the court shall place its ruling on the record. The court may direct the making of an offer in question and answer form.
>
> (c) *Hearing of Jury.* In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.
>
> (d) *Error.* Nothing in this rule precludes taking notice of errors in fundamental law or of plain errors affecting substantial rights although they were not brought to the attention of the court.

MINN. R. EVID. 103 (West 1980 & Supp. 1993).

99. PARK, *supra* note 98, at §§ 1.03, 1.09.

100. *Id.*

101. *Id.* at § 1.06 n.37. Another possibility is a continuing objection. An attorney might make this type of objection if he or she expects to have to make repeated objections on the same topic which might antagonize the court and the jurors. *Id.* at § 1.08. Continuing objections present certain dangers. For example, "[i]f the grounds for objecting to a later question differ from the ground originally stated, error will not be preserved." Id. at § 1.08 n.55. Further, it may be burdensome to decide where a continuing objection ends. *Id.* at § 1.08. If there is a difference of opinion as to the ending point of a continuing objection, an attorney may think that error was preserved for appeal but the court may disagree. *Id.*

102. *Id.* at § 1.06.

> would otherwise receive, because attention has been drawn to the evidence.[103]

While the underlying policy behind timely objections is clear, it is often impossible to object to inaccurate interpretations. There are several reasons for this. First, the defendant may speak little or no English and may not know that the interpretation is inaccurate.[104] This makes it impossible for the defendant to inform his or her attorney that the interpretation is inaccurate so that an objection can be made. Second, unless the attorney is bilingual, the attorney will probably not know of inaccuracies in the interpretation and will not object. However, even if the attorney is bilingual, she should not have to act as both attorney and interpreter.[105] Additionally, even if the defendant does speak English, as both Her and Lee did, there are other barriers to objecting in a timely manner. New Chue Her did not object to the errors in interpretation at his trial because he did not want the jury to think negatively of him;[106]

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103. *Id.* at § 1.14.

104. *See e.g.*, U.S. v. Negron, 434 F.2d 386 (2nd Cir. 1970). In *Negron*, a federal appellate court found that the defendant, a native of Puerto Rico who had emigrated to the U.S., had the right to a competent translator to assist him during trial. *Id.* at 387. He was involved in a brawl that ended in the fatal stabbing of his housemate. *Id.* Negron was unable to communicate with his English speaking attorney without an interpreter. *Id.* at 388. At trial, an interpreter interpreted his testimony for the benefit of the court, prosecution and jury. *Id.* Twice during the four-day trial, the interpreter summarized the testimony of the witnesses who testified in English. The interpreter was not always present in the courtroom, however, and she did not interpret the English testimony for Negron during the trial. *Id.* Twelve of the prosecution's fourteen witnesses testified in English and except for the times when the interpreter summarized testimony for Negron, none of this testimony was understandable to him. *Id.* The court found that Negron's trial "lacked the basic and fundamental fairness that is required by the due process clause of the Fourteenth Amendment." *Id.* at 389. An indigent defendant who does not speak English has the right to have his trial proceedings translated so that there can be effective participation in his own defense. *Id.*

105. *See generally*, Bill Piatt, *Attorney as Interpreter: A Return to Babble*, 20 N.M. L. REV. 1 (1990). Bilingual attorneys should not serve as interpreters for their clients in the courtroom even though courts have upheld these types of arrangements. *Id.* at 8-9. Attorneys who act as interpreters for their clients are dividing their interests and are unable to perform well either the job of interpreting or of zealous advocacy. *Id.* at 10.

> [T]he ethical burden of zealous advocacy imposed upon trial counsel and the right of the client to effective representation should preclude an attorney from serving as an interpreter should the matter proceed to trial. It would be physically impossible for counsel to cross-examine witnesses, listen attentively to testimony and objections of opposing counsel, hear rulings and remarks of the judge, and still simultaneously render an accurate and complete translation of the proceeding to the client."

Id. at 13. *See also* Williamson B. Chang & Manual U. Araujo, *Interpreters for the Defense: Due Process for the Non-English Speaking Defendant*, 63 CAL. L. REV. 801, 822-23 (1975).

106. *See supra* text accompanying note 65.

King Buachee Lee did complain to his attorney about the interpretation, but the judge reprimanded him for trying to shake the jury's faith in the interpretation.[107]

Because it is difficult for an attorney or a non-English speaking defendant to object in a timely manner, often the defendant's only recourse is to appeal and try to convince the appellate court that there was plain error in the translation or prove that the answers in the record are unresponsive or confusing, thus justifying reversal on grounds of sufficiency of the evidence.[108] Defendants must bring up the interpretation issue in conjunction with other issues on appeal, as Mitjans did,[109] with the hope that the appellate court will consider the interpretation errors.

Even if a court waives the requirement of timely objection, the appellate court may review interpretation errors not objected to at trial but decide that they were "harmless" and thus refuse to overturn the conviction or grant a new trial.[110] Various rules of evidence, criminal procedure, and civil procedure provide that if errors do not affect substantial rights of a party, the court should disregard such error.[111] But, the definition of what is a substantial right or prejudicial error is vague.[112] "The Supreme Court has held that substantial rights are affected if the error 'substantially swayed' the jury's verdict or 'materially affected the deliberations of the jury.'"[113]

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107. *See supra* text accompanying note 89.

108. *See supra* note 97 for discussion of People v. Starling, 315 N.E.2d 163 (Ill. App. 1974). In *Mitjans II* and *Lee II*, the Minnesota Supreme Court addressed the issue of interpretation even though the defense does not appear to have objected to interpretation errors at trial. *Mitjans II*, 408 N.W.2d at 831-832; *Lee II*, 1992 Minn. LEXIS 372 at * 19-20. However, in both cases, the court dismissed the errors finding that they were not prejudicial. *Mitjans II*, 408 N.W.2d at 832; *Lee II*, 1992 Minn. LEXIS 372 at * 19-20. It appears that unless the record contains complaints about the interpreter by either side or reprimands of the interpreter by the judge, errors in interpretation will be given only cursory review on appeal. In fact, in *Lee II*, the court suggests that objections to the errors should have been made at trial. *Id.* at * 19.

109. *See supra* text accompanying note 48.

110. See *supra* notes 56-58 and accompanying text. On the other hand, an appellate court may reverse a conviction or holding if the ruling on an objection was serious and prejudiced a party. PARK, *supra* note 98, at § 12.02.

111. PARK, *supra* note 98, at § 12.02, nn.12-14. *See* FED. R. EVID. 103(a), FED. R. CIV. P. 61, and FED. R. CRIM. P. 52(a). The Minnesota Rules of Criminal Procedure provide:

> Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

MINN. R. CRIM. P. 31.01.

112. PARK, *supra* note 98, at § 12.02.

113. *Id.* at § 12.02, nn.21-22. In recent cases, however, when the U.S. Supreme Court has considered whether an error is harmless, it has placed great emphasis on

The purpose behind the harmless error doctrine is to avoid filling appellate courts' dockets with appeals on technicalities.[114] The harmless error doctrine serves a legitimate purpose.[115] However, in *Mitjans*[116] and *Lee*,[117] the Minnesota Supreme Court held that the interpretation errors were not prejudicial enough to reverse the convictions or to grant new trials.[118] In *Her*,[119] New Chue Her recently requested a new trial based on inaccuracy of interpretation, however, the request was denied.[120] The interpretation errors in these cases were substantial and might have prejudiced the jury. When applied to issues of interpretation, the harmless error doctrine seems to foreclose serious review of interpretation errors. Courts can easily say that there were mistakes but that they did not prejudice the defendant. It is questionable whether a court can or should make such a holding from a transcript completely in English.[121]

B. The Necessity of an Exception to the Plain Error Rule

Plain error is a stricter standard than that applied to errors for which there was a timely objection. If a timely objection was made at trial, the error is generally preserved for appeal.[122] If the error was not objected to at trial, then it must be "plain error." The plain error doctrine will only be used to reverse an error that was not objected to at trial in a few circumstances: if the error affected "substantial rights," if the error was "particularly egregious," if there was a miscarriage of justice, or if the error resulted in an unfair trial.[123] Thus, defendants raising interpretation issues may

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evidence of overwhelming guilt, finding that an error is harmless if there is strong evidence of guilt of the party. *Id.* at § 12.02, n.34.

114. *Id.* at § 12.02. Another purpose is to avoid appeals when "no real injustice was done." *Id.*

115. *Id.* at § 12.02, n.34.

116. *Mitjans II*, 408 N.W.2d 824 (Minn. 1987).

117. *Lee II*, No. C9-91-560, 1992 Minn. LEXIS 372 (Minn. Dec. 31, 1992).

118. *See supra* note 108 for discussion of *Mitjans II* and *Lee II*.

119. No. C0-91-608, 1992 Minn. App. LEXIS 25 (Minn. Ct. App. 1992).

120. The judge ruling on the request for a new trial stated that the translation errors actually benefitted New Chue Her instead of depriving him of a fair trial. Paul Gustafson, *Translation Errors Didn't Hurt Hmong Defendant, Judge Rules*, STAR TRIBUNE (Minneapolis), Mar. 5, 1993, at 2Be. The judge stated that the errors tended to make the testimony less detailed and less graphic. Therefore, they were more detrimental to the prosecution than they were to Her. *New Rape Trial Denied*, ST. PAUL PIONEER PRESS, Mar. 5, 1993, at 4C.

121. In *Mitjans*, the appellate court based its reversal on several grounds. In regard to the interpretation errors, however, the judges had no trial transcript. Instead, there was testimony of the defendant's interpreter and an audiotape of the trial. *See supra* note 53.

122. *See supra* notes 98-102 and accompanying text.

123. PARK, *supra* note 98, at § 12.03.

have to satisfy a higher standard on appellate review than for other types of error. Because it is unrealistic to assume that defendants or attorneys can make timely objections to interpretation errors, appellate courts should waive the mandate of timely objections for interpretation errors, or in the alternative, apply a less stringent standard of review than that applied under the "plain error" doctrine.

In some courts, obtaining reversal for plain error requires that the error be obvious in the trial record.[124] This is an even more burdensome hurdle for a defendant to overcome when an interpretation error is involved. Rarely will an interpretation error be obvious. The trial transcript is in English, thus, errors in interpretation will not be manifest unless a party has repeatedly complained about the inaccuracy of the interpretation or the judge has counseled the interpreter during the trial regarding the interpretation.[125]

Appellate courts generally follow the procedural requirements for timely objections to promote judicial economy, to encourage lower courts to correct errors in a timely manner, and to avoid unfairness to a prevailing civil party.[126] However, courts have recognized that the rights of the parties should be more important than technicalities and so have created the plain error doctrine to preserve important rights.[127] Reversal based on plain error is relatively rare.[128] The doctrine allows for judicial discretion and is only used in certain circumstances.[129]

An exception to the plain error rule would allow defendants to have interpretation errors scrutinized under a less strict standard of review. Further, if the court requires that the error be obvious, the defendant would be allowed to present evidence on appeal regarding the accuracy of foreign language interpretation. Evidence of errors would be allowed on appeal even though the trial transcript does not show that interpretation errors were made. Presently, some appellate courts will hear evidence regarding accuracy

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124. *Id.* at § 12.03 n.64. The Minnesota Rules provide:

> Plain errors or defects affecting substantial rights may be considered by the court upon motions for new trial, post-trial motions, and on appeal although they were not brought to the attention of the trial court.

MINN. R. CRIM. P. 31.02.

125. *See supra* note 97. Minnesota courts do not appear to require that the error be obvious. Appellate courts have allowed new evidence on the issue of interpretation errors on appeal. *See supra* notes 36, 108.

126. *See Park, supra* note 98, at § 12.03, n.49.

127. *Id.* at § 12.03. Plain error is most often found in criminal cases when a defendant alleges on appeal that some form of liberty has been taken away. *Id.*

128. *Id.* at § 12.03, n.66.

129. *See supra* text accompanying note 123.

of interpretation, however, the right to present such evidence should be guaranteed and not predicated on a finding of plain error.

Considering the constraints that timely objection and the plain error doctrine place on defendants and counsel, it is questionable whether non-English speaking defendants or defendants whose trials include non-English speaking witnesses have the same access to the appellate process as do English speaking defendants. Often the interpretation is crucial to the jury's understanding of the defendant's case; and if it is difficult for a defendant to appeal a case based on the issue of interpretation, then these defendants are at a distinct disadvantage.[130] The procedural rules particularly disadvantage defendants who raise interpretation errors as an issue on appeal. If judges look to the transcript to ascertain if there is error, interpretation errors will evade almost all such review. Even if the court allows evidence of the alleged interpretation inaccuracies to be brought in on appeal, the heightened standard of review for plain error is detrimental.

An argument can be made that an exception to the plain error rule will "open the flood gates" to appeals based on interpretation issues. However, until the quality of interpretation is vastly improved, it is necessary that defendants whose trials include foreign language interpretation have some method to effectively appeal their convictions when the accuracy of interpretation is an issue. Perhaps "opening the flood gates" will force the courts to examine their procedures and provide more efficient methods of monitoring the quality of interpretation. Some suggestions for improving the quality of interpretation are discussed below.[131]

III. Reducing Interpretation Error and Improving Appellate Review

The focus of this article is the unfairness of the appellate review process for defendants whose trials include foreign language interpretation. However, the issue of quality of interpretation is important as well. In addition to mandating certification for more languages, certification in more states and pleas for more training, various authors have made suggestions for improving the quality of interpretation. Some suggestions include giving the defendant the right to a separate interpreter in all cases where testimony is inter-

130. In State v. New Chue Her, No. C0-91-608, 1992 Minn. App. LEXIS 25 (Minn. Ct. App. 1992), the defendant translated the trial transcript himself in order to write a pro se brief on appeal on the issue of interpretation. *Supra* note 67 and accompanying text. Her's request for a new trial was recently denied although Her's attorney plans to appeal the decision. Gustafson, *supra* note 120, at 2Be.

131. *Infra* part III.

preted[132] and using team interpreters.[133] Further suggestions include establishing foreign language courts and utilizing bilingual attorneys.

Defendants have a limited constitutional right to an interpreter to aid the defendant during the trial in addition to an interpreter for any non-English speaking witness' testimony. In *U.S. v. Negron*,[134] the Second Circuit held that non-English speaking criminal defendants have a constitutional right to a separate interpreter in some circumstances.[135] Since the time *Negron* was decided, Congress passed the Federal Court Interpreters Act,[136] which provides that the presiding judicial officer shall use the services of a certified interpreter in criminal or civil actions initiated by the United States in district court if the officer determines that a party or a witness speaks only, or primarily, a language other than English.[137]

Many states have statutory provisions providing for the use of interpreters in the courtroom and in other legal proceedings.[138] The Minnesota statutes, for example, provide in part:

> It is hereby declared to be the policy of this state that the constitutional rights of persons handicapped in communication cannot be fully protected unless qualified interpreters are available to assist them in legal proceedings. It is the intent . . . to provide a procedure for the appointment of interpreters to avoid injustice and to assist persons handicapped in communication in their own defense.[139]

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132. Chang & Araujo, *supra* note 105, at 821-23.

133. Hammond, *supra* note 8, at 10-11.

134. 434 F.2d 386 (2nd. Cir. 1970).

135. *See supra* note 104 for discussion of *Negron*. *See generally*, Piatt, *supra* note 105 (general discussion of the right to an interpreter and implementation of the right to an interpreter).

136. 28 U.S.C. § 1827 (1978).

137. *Id.* If a certified interpreter is not available, then an "otherwise qualified interpreter" may be used. *Id.* The Federal Court Interpreters Act "makes it very difficult for a federal judge or magistrate to ignore a request for a certified interpreter." Astiz, *supra* note 14, at 103. "A specific denial can only come after a hearing and is subject to appeal." *Id.* The purpose of the Act "is to give non-English speaking and hearing/speech-impaired defendants and witnesses an equal chance to understand and participate in criminal and civil trials in federal courts." *Id.* The Act also gives witnesses who do not speak English the ability to participate in trials. *Id.* Most importantly, the Act requires that the federal government provide the court interpreter's services at its expense. *Id.*

On its face, the statute appears to be a giant step toward providing equal justice for non-English speaking defendants in federal court. In reality, courts have ignored the statutory provisions. *See id.* at 105.

138. BERK-SELIGSON, *supra* note 6, at 219 app. 1 219-22.

139. MINN. STAT. § 611.30 (1991). The Minnesota statutes also provide a definition of "handicapped person."

> For the purposes of sections 611.30 to 611.34, "a person handicapped in communication" means a person who: (a) because of a hearing, speech

This statute is somewhat limited by judicial construction.

In *Franklin v. State*,[140] the Minnesota Court of Appeals considered whether a defendant was handicapped in communication.[141] To determine this, the court asked whether the failure to appoint an interpreter hampered the accused in presenting his defense.[142] The court held that the defendant was not hampered in the presentation of his defense because examination of the transcript indicated that he understood the questions he was asked by the judge and further, he had prior experience with the court system.[143] Thus, the court found that he generally understood court proceedings and that he was not handicapped in communication.[144]

Applying the same test, the Minnesota Court of Appeals held in *State v. Perez*[145] that Minn. Stat. § 611.30[146] does not require simultaneous translation.[147] Rather, it requires that qualified interpreters be available, if necessary, to assist persons handicapped in English.[148] Further, in *Mitjans*,[149] the Minnesota Supreme Court rejected the contention that the legislature could create con-

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> or other communication disorder, or (b) because of difficulty in speaking or comprehending the English language, cannot fully understand the proceedings or any charges made against the person, or the seizure of the person's property, or is incapable of presenting or assisting in the presentation of a defense.

MINN. STAT. § 611.31 (1991).

Other statutory sections provide procedures to determine in what proceedings an interpreter should be appointed, define who is a "qualified interpreter," outline what is expected of an interpreter, and finally, provide a provision for payment of fees. *See* MINN. STAT. § 611.32 (1991). Similar to the Federal Court Interpreters Act, the Minnesota statutes seem to provide adequate protection for non-English speaking defendants. However, in practice there is little protection against misinterpretation at the trial level. In fact, since Minnesota has no statewide certification process for interpreters, the protection provided against incompetent interpreters and misinterpretations is probably less effective than at the federal level. The Administrative Office of the U.S. Courts constructs and administers rigorous exams for persons to become certified language interpreters in the federal courts. The first exam (for Spanish) was given in 1980. BERK-SELIGSON, *supra* note 6, at 36-7 (citation omitted).

140. No. C3-91-2241, 1992 Minn. App. LEXIS 553 (Minn. Ct. App. 1992).

141. *Id.* at * 2-3.

142. *Id.* at * 3.

143. *Id.*

144. *Id.*

145. 404 N.W.2d 834 (Minn. Ct. App. 1986).

146. *See supra* note 139 and accompanying text.

147. *Perez*, 404 N.W.2d at 838.

148. *Id.* Perez alleged that he was prejudiced because he could not understand the testimony of the state's six expert witnesses. *Id.* He did not argue that he was unable to assist in his defense because he spoke some English. *Id.* Apparently, there was an interpretor provided by the court, but it is unclear whether Perez made use of the interpreter. *Id.* Further, Perez did not ask for an interpreter and did not indicate that he could not speak English well. *Id.* at 839.

149. *Mitjans II*, 408 N.W.2d 824 (Minn. 1987).

stitutional rights by statute.[150] The Minnesota Supreme Court held that the Minnesota "interpreter" statutes did not create a new constitutional right and that failure to comply with the statutes would not violate such a right.[151] Thus, even though the language of the Minnesota statute appears to be flexible enough to mandate the appointment of an interpreter for the defendant throughout the trial, the courts have not given it such a broad reading. In contrast to Minnesota law, California has read its constitutional provision providing for interpreters as mandating the appointment of an interpreter for a defendant at all times during the proceedings.[152]

Providing an interpreter for the defendant at all times, as the California Constitution provides,[153] is protection against prejudicial interpretation errors. If an interpreter is provided for the defendant, this interpreter can check the accuracy of the court-appointed interpreter, inform the attorney when to object to the interpretation, and also keep the defendant informed of the content of the proceedings.[154] Additionally, an interpreter can only interpret

150. *Id.* at 830.

151. *Id.*

152. The California Constitution provides that "a person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings." CAL. CONST. art. I § 14. California courts have interpreted this constitutional provision to require that a non-English speaking defendant has an interpreter at all times during the proceedings.

In People v. Mata Aguilar, 677 P.2d 1198 (Cal. 1984), the Supreme Court of California held that a defendant should have exclusive access to an interpreter throughout the court proceedings. *Id.* at 1199. At one point during Mata Aguilar's trial, the interpreter "became unavailable to the defendant during the testimony of two Spanish speaking prosecution witnesses." *Id.* The defendant was convicted and appealed the decision claiming that the trial court's interference with his right to an interpreter at all times during his trial was a deprivation of a constitutional right. *Id.* The California Supreme Court held that "California's Constitution does not provide a half measure of protection. Rather, it requires that when an interpreter is appointed for a criminal defendant, that interpreter must be provided to aid the accused during the whole course of the proceedings." *Id.* at 1201. Thus, the court held that "borrowing" the defendant's interpreter was a denial of a constitutional right.

New Mexico also provides for interpreters in its constitution. *Supra* note 26 and accompanying text. Although it is not entirely clear that constitutional provisions ensure better interpreters or better access to interpreters, the Fifth District Appellate Court of Illinois has held that constitutional provisions, like the provision in the California Constitution requiring interpreters, provide more of a commitment to giving non-English speaking defendants greater access to interpreters than the Illinois state statutes provide. *See* People v. Tomas, 484 N.E.2d 341 (Ill. App. Ct. 1985). In *Tomas*, the Illinois district court held that an Illinois statute did not provide that a defendant was entitled to an interpreter by his or her side for the duration of the trial. *Id.*

153. *See supra* note 152.

154. Chang & Araujo, *supra* note 105, at 822. *See also* Steele, *supra* note 3, at 243-44 (suggesting that courts should impose objective qualifications which potential interpreters must meet and suggesting that these qualifications should be assessed before the start of the trial).

what he or she understands, and if there is an additional party acting as "quality control," it is likely that bias and errors will be less frequent and less serious.[155] With a second interpreter checking accuracy, interpretation errors can be minimized. "[I]t is nearly impossible for one interpreter to translate the testimony of a witness while simultaneously translating and listening to the discussion between defendant and counsel."[156]

Another suggestion similar to providing an interpreter for the defendant at all times is to have interpreters working in teams of two. Using a team interpretation approach instead of single interpreters has been shown to be effective in increasing the accuracy of interpreters for American Sign Language.[157] Under this approach, two interpreters work together, taking turns interpreting and checking the accuracy of each other's interpretation.[158]

Courts that conduct proceedings solely in a foreign language might be warranted in some areas where certain foreign languages are widely spoken.[159] There may be an equal protection problem in

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155. Chang & Araujo, *supra* note 105, at 822.

156. *Id.* at 821.

157. Two certified American Sign Language interpreters who aid in civil and criminal cases in the metro area of Minneapolis, Minnesota, translate as a team. Hammond, *supra* note 8, at 11. "To avoid misinterpretation, they work as a team, alternating every 20 to 30 minutes, with one always observing the other's work to catch any errors and offer corrections or clarifications." *Id.* With another person checking the translation at all times, there is less likelihood of errors. Further, it seems likely that such a situation would ultimately reduce the amount of cases getting appealed on the issue of interpretation errors.

158. *Id.*

159. Census figures for 1990 indicate that out of 230,445,777 persons over the age of five, 31,844,979 indicated that they spoke a language other than English, and of those 31 million, 13,982,502 indicated that they did not speak English very well. U.S. BUREAU OF THE CENSUS, 1990 CPH-L-80, SELECTED SOCIAL CHARACTERISTICS: 1990 (CORRECTED) TABLE 1 (1990). (Note that the data is based on a sample and is subject to sampling variability). Further, of the 17,345,064 persons who stated that they spoke Spanish, 8,309,995 stated that they did not speak English very well. *Id.* Of 4,471,621 persons who said they spoke an Asian or Pacific Island language, 2,420,355 persons said they did not speak English very well. *Id.* Statistics were not available to determine where those persons who indicated that they did not speak English very well lived. However, New Mexico, California, Texas, Hawaii and New York reported the highest percentages of persons five years and older who spoke a language other than English at home. U.S. BUREAU OF THE CENSUS, 1990 CPH-L-88, STATES RANKED BY SELECTED SOCIAL, ECONOMIC, AND HOUSING CHARACTERISTICS: 1990. (Note that the data is based on a sample and is subject to sampling variability). While there is probably not a perfect correlation between speaking English at home and the ability to speak English well, the statistics do give an indication of areas of the country where there may be more of a need for court interpreters. *See supra* note 19.

It should be noted, however, that a federal statute provides that even in Puerto Rico, where the predominant language is Spanish, all pleadings and proceedings are to be conducted in the English language. 48 U.S.C. § 864 (1948). *See also* U.S. v. Valentine, 288 F. Supp. 957 (D.C. Puerto Rico, 1968).

such a situation, however.[160] Because only three languages are certified under the Federal Court Interpreters Act,[161] it has been suggested that "[t]he . . . situation raises the issue of equal protection of the laws for non-English speaking defendants whose language is not [a certified language], an issue which . . . has not been explored in litigation."[162] Defendants speaking an uncertified language are likely disadvantaged at trial due to the lower level of proficiency of uncertified interpreters. Thus, equal protection might be violated if an uncertified interpreter is appointed by the court. An equal protection challenge could also be made to a court system catering to the main non-English languages spoken in the United States, such as Spanish. Furthermore, such a system would not work for all types of cases. For routine court proceedings such as misdemeanors, however, such courts might save both time and money.

At least one group has tried to convince the Canadian courts that a defendant does have a right to a trial in a language that he or she can understand without an interpreter. The Canadian Freedom of Choice Movement has concluded "that it is prejudicial to the defendant to have the proceedings interpreted for him, since interpreting can never be perfectly accurate."[163] Its position is that the trial should be conducted in a language that the person can understand.[164] The Canadian Supreme Court has ruled, however, that a defendant does not have the right to proceedings conducted in the language of his or her choice even though Canada is a bilingual country.[165]

Finally, bilingual attorneys are another way of addressing the problem of policing interpretation.[166] If a non-English speaking de-

160. Astiz, *supra* note 14, at 105.

161. See *supra* note 15 and accompanying text.

162. Astiz, *supra* note 14, at 105.

163. BERK-SELIGSON, *supra* note 6, at 215.

164. *Id.*

165. *Id.* *See* R. v. Mercure, 39 C.C.C. (3d) 385 (S.C.C. 1988).

166. In a similar vein, bilingual jurors might also be able to "police" interpretation. A thorough analysis of this topic is beyond the scope of this article. A recent Supreme Court case, U.S. v. Hernandez, 111 S. Ct. 1859 (1991), held that striking bilingual jurors did not violate the Fourteenth Amendment's guarantee of equal protection. *Id.* at 1862. In *Hernandez*, the prosecution struck four Latino jurors. *Id.* at 1864. The appeal only challenged the striking of two of the four jurors. The Supreme Court held that where there is a race neutral reason for the peremptory strikes, the Constitution is not violated. *Id.* at 1873. The Court found that the prosecution's concern regarding the effect the bilingual jurors might have on the rest of the jury was race neutral. *Id.* at 1867.

The dissent, consisting of Justices Blackmun, Stevens and Marshall, argued that the prosecutor's explanation for peremptory strikes was insufficient. *Id.* at 1877 (Blackmun, J., dissenting). The dissent asserted that the prosecutor's reason-

fendant is represented by a monolingual attorney, she may be at a disadvantage even before trial because she is unable to communicate well with her attorney. Bilingual attorneys, however, may be better able to represent their non-English speaking clients more efficiently because they would be able to communicate better from the outset of their relationship. Nonetheless, even if the attorney is bilingual, an interpreter may still be preferable to interpret for the defendant for the same reasons that it is preferable for the defendant to have her own interpreter at trial.[167] Further, bilingual attorneys should not serve as interpreters in the courtroom.[168] "[Z]ealous advocacy requires that counsel insist on having two interpreters in the courtroom. One would translate witness testimony and proceedings for the record. The other would facilitate communication between counsel and client, and advise counsel of any translation errors made by the . . . 'court' interpreter."[169]

While the process of interpretation has been studied and there is a consensus that the quality of interpretation needs to be improved,[170] it is clear that interpretation will never be perfect. An interpretation will never be completely accurate.[171] However, courts should not be able to use this fact as an excuse to ignore errors in interpretation on appeal. Instead, courts should be particularly aware of the problems created by interpretation and strive to rectify them. Creating an exception to the "plain error" doctrine

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ing would result in a disproportionate number of strikes of Spanish-speaking jurors, that the prosecutor's concerns could have been accommodated by less drastic alternatives, and that if the prosecutor's concern was valid and had been supported by the record, then it would have been a challenge for cause. *Id.* The dissent suggested that the trial court could have accommodated the bilingual jurors by instructing the jury that the official translation was the sole evidence. *Id.* The trial court could also have employed an interpreter who would be the only person to hear the witness' words and interpret the testimony into English. *Id.* at 1877 n.2.

Further, the dissent suggested that the jurors could bring to the attention of the judge any disagreements they had with the interpretation. Therefore, any disputes could be resolved by the courts. *Id.* at 1877. In dicta, the plurality stated that Spanish-speaking jurors could be permitted to advise the judge in a discreet way of any concerns with the interpretation during the course of the trial. *Id.* at 1868. *But see* U.S. v. Perez, 658 F.2d 654 (9th Cir. 1981) (bilingual juror who questioned the court interpreter's interpretation of a word was later dismissed from service as a juror).

167. *See supra* text accompanying notes 153-156.

168. *See generally*, Piatt, *supra* note 105, at 1 (discussing the drawbacks and inequalities to the defendant of having his/her attorney serve as interpreter during trial).

169. *Id.* at 7.

170. *See* REPORT & RECOMMENDATIONS, *supra* note 1; ARTHUR YOUNG & CO., A REPORT TO THE JUDICIAL COUNCIL ON THE LANGUAGE NEEDS OF NON-ENGLISH SPEAKING PERSONS IN RELATION TO THE STATE'S JUSTICE SYSTEM (January 1976-January, 1977 (Phase I - Phase III)); Astiz, *supra* note 10; BERK-SELIGSON, *supra* note 6, at 214-218.

171. *See supra* text accompanying note 86.

and waiving the requirement of timely objection for interpretation errors as discussed in Part II would allow greater access to the appellate process.[172] Taping all court proceedings and mandating the translation of these tapes as a review for harmful error would also help.[173] Additionally, requiring the prosecution to bear the burden of proving the accuracy of the interpretation would enable appellate courts to more accurately and fairly judge whether interpretation was prejudicial to a criminal defendant.

Various authors have suggested that court proceedings involving interpreters should be tape-recorded.[174] "Providing access to testimony uttered in its source language is the only legitimate vehicle for ascertaining the fit between foreign language testimony and its English interpretation."[175] Attorneys who do not speak the language of the person they represent are unable to assess the quality of the interpretation without access to bilingual transcripts of the proceedings.[176] The appeals process is inadequate for non-English speaking persons if they do not have access to bilingual recordings and bilingual transcripts.[177] If such bilingual records are not provided, it is almost impossible to ascertain whether there is a basis for appeal.[178] "Providing lawyers with such bilingual transcripts is one test of the seriousness of the commitment of the American legal system to due process for the non-English speaking."[179] Tapes of bilingual court proceedings should be routinely reviewed for errors, not simply reviewed when a case is appealed.[180]

The outcome of a case often depends on the accuracy of the interpretation of a foreign language. Furthermore, the burden of proving inaccurate interpretation usually falls on the defendant who may not have access to the resources needed to provide evidence that the interpretation was prejudicially inaccurate. Clearly, some level of inaccuracy must be held to be harmless. Otherwise, it

172. *Supra* notes 122-131 and accompanying text.

173. Steele, *supra* note 3, at 244-46. *See also infra* notes 174-72.

174. Steele, *supra* note 3, at 242-43. Steele suggests several reforms including using two interpreters, taping the proceedings, and routinely reviewing the tapes to ensure accuracy of the interpretation. *Id.* at 242-46. Steele notes that when interpretation occurs in a courtroom there is a great possibility of undetected errors and miscarriages of justice. *Supra* text accompanying note 35. *See also* BERK-SELIGSON, *supra* note 6, at 217 (suggesting that all court proceedings must be taped as it is the only accurate way to assess whether the questions and answers have been interpreted with high fidelity).

175. BERK-SELIGSON, *supra* note 6, at 217.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.*

180. Steele, *supra* note 3, at 244.

would be impossible to convict a non-English speaking defendant. However, in some cases, the level of inaccurate interpretation is great enough to overturn conviction or grant new trials.

In a criminal trial, the state must prove "beyond a reasonable doubt" that the defendant committed the crime in question. As a part of this burden of proof, the prosecution must be required to show that the interpretation at trial is substantially accurate. Accurate interpretation is crucial to a fair trial and is an issue upon which an appeal may be based, thus, the accuracy should be proven by the prosecution. Requiring the prosecution to bear the burden of proving accurate interpretation would reduce unnecessary appeals and put the prosecution and courts on notice that accurate interpretation is essential to a fair trial.

Conclusion

> Now the whole earth had one language and few words . . . And the Lord said, 'Behold, they are one people, and they have all one language; and this is only the beginning of what they will do; and nothing that they propose to do will now be impossible for them. Come, let us go down, and there confuse their language, that they may not understand one another's speech.'[181]

Accurate interpretation is critical to a fair trial for defendants whose trials include interpretation of a foreign language. Thus far, state and federal statutes and constitutional provisions have not guaranteed a high quality of interpretation. Many court interpreters are not certified and have little or no training. Judges and attorneys are often unable to assess the competency of an interpreter unless they themselves are bilingual. All of these factors contribute to errors in interpretation. These factors are further exaggerated when the language is less "common." Because of this, errors in interpretation are common and will continue to be a problem absent major institutional changes.

Because errors will be a continuing problem, the appellate process must be made more fair to defendants who raise the accuracy of interpretation as an issue on appeal. Presently, appellate courts do not take the interpretation issue seriously which results in a higher than usual standard of review for interpretation errors. This is an injustice to the defendant. The requirements of timely objection and plain error must be waived, for it is virtually impossible for an attorney who is not bilingual to object to interpretation errors at trial. Further, plain error is a more difficult standard under which to obtain a reversal. This is especially true if the court

181. *Genesis* 11:1 (Revised Standard Version).

requires the error to be obvious. In order to provide fair trials for defendants whose trials include foreign language interpretation, the review for plain error should be less stringent in such cases.

Harmful interpretation errors are made, and yet in many cases it is rare to get a criminal conviction overturned or a new trial ordered based solely on inaccurate interpretation. While preventing errors in interpretation is very important, until the quality of interpretation is ensured, avenues for appeal are necessary. An exception to the plain error rule and a waiver of the necessity of timely objection to interpretation errors are necessary. These procedural changes are needed to ensure that non-English speaking criminal defendants receive fair trials.