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Lost in Interpretation: The Problem of Plea Bargains and Court Interpretation for Non-English-Speaking Defendants

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LOST IN INTERPRETATION: THE PROBLEM OF PLEA BARGAINS AND COURT INTERPRETATION FOR NON-ENGLISH-SPEAKING DEFENDANTS

INTRODUCTION

On March 26, 1991, Mr. Irving Chin pled guilty to charges arising from an alleged illegal gambling operation.[1] Yet, Chin pled guilty without realizing that he would be "regarded as a criminal."[2] His co-defendant, Mr. Chi Chak Leung, similarly pled guilty to related charges despite consistently asserting that his only role in the gambling operation was cashing chips.[3] Since neither Chin nor Leung spoke English and their court interpreters failed to convey the serious consequences of a guilty plea, both men unwittingly waived away fundamental constitutional rights in a language they did not understand.[4] Consequently, Chin and Leung filed a motion to withdraw their guilty pleas due to cultural and language barriers.[5] Upon evaluating both men's motions to withdraw their pleas, a United States district court found that the two defendants faced "linguistic and cultural difficulties" during the plea bargaining process.[6] When the court evaluated Leung's responses during the plea colloquy, it determined that Leung "lack[ed] . . . an adequate understanding . . . of the nature of the charges he was pleading to."[7] In fact, Leung informed the court that he would not have agreed to the plea bargain "even with a gun to his head" if he had understood the consequences of the guilty plea.[8] The court noted that Chin did not even understand particular words involved in the plea bargain.[9] As a result, the *Leung* court allowed both Leung and Chin to withdraw their guilty pleas.[10]

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1. United States v. Leung, 783 F. Supp. 357, 358 (N.D. Ill. 1991).
2. *Id*. at 359.
3. *Id.* at 358.
4. *Id.*
5. *Id.*
6. *Id*. at 360.
7. *Id*. The *Leung* court found that Leung actually had denied the guilt component of the plea agreement and did not understand the details of his plea. *Id.* at 361.
8. *Id.* at 358.
9. *Id.* In its decision, the *Leung* court also considered an affidavit from Chin's former counsel who attested to Chin's "lack of understanding of the nature and consequences of his plea." *Id.* at 361.
10. *Id.*

In another case, *Perez-Lastor v. Immigration and Naturalization Service*,[11] Mr. Perez-Lastor, a Guatemalan citizen and a Quiche Indian, was denied asylum by the Bureau of Immigration Affairs (BIA).[12] Although a Quiche interpreter was provided during the immigration proceedings, Perez-Lastor indicated multiple times on the record that "he could barely understand" the BIA judge's questions.[13] Perez-Lastor appealed the BIA decision to deny asylum by arguing that inadequate translation prejudicially affected his asylum hearing.[14] In evaluating Perez-Lastor's appeal, the reviewing court found that Perez-Lastor's answers to the BIA judge had been unresponsive and that the record indicated numerous occasions where Perez-Lastor "expressed difficulty understanding the translation."[15] The *Perez-Lastor* court noted that "[w]hile repeat questioning produced a superficially responsive answer on some occasions, it is by no means clear that Perez-Lastor actually understood what was asked of him."[16] Also, the *Perez-Lastor* court found its review further complicated by the fact that the court did not know what Perez-Lastor's "actual testimony" was during the proceedings since "[n]o record of it was preserved."[17] Instead, the court could only evaluate Perez-Lastor's statements from a record revealing "the garble produced by the translator."[18] In deciding to reverse the BIA's ruling, the *Perez-Lastor* court based its decision on the finding that a "better translation would have made a difference in the outcome of [Perez-Lastor's deportation] hearing."[19]

Both *Leung* and *Perez-Lastor* illustrate how non-English-speaking defendants are entirely dependent on the work of court interpreters in American courtrooms. As seen in *Leung*, court interpreters play a particularly crucial role in the plea bargain context when a non-English-

11. 208 F.3d 773 (9th Cir. 2000).

12. *Id.* at 775.

13. *Id.* at 776 (quotation marks omitted). In response to Perez-Lastor's complaints regarding the interpretation, the BIA judge asked that the Quiche interpreter and Perez-Lastor determine off the record whether they spoke the same dialect of Quiche. *Id.* At this point, the Quiche interpreter informed the BIA judge that Perez-Lastor could understand the interpretation if the interpreter spoke more slowly. *Id.* After accepting the Quiche interpreter's statement, the BIA judge did not check on Perez-Lastor's comprehension of the court proceedings again. *Id.*

14. *Id.* at 780.

15. *Id.* at 779.

16. *Id.* (italics omitted).

17. *Id.* at 782.

18. *Id.* The reviewing court reversed the BIA judge's ruling and remanded Perez-Lastor's case for a new asylum hearing. *Id.* at 783.

19. *Id.* at 780. According to the reviewing court, the BIA judge "disbelieved Perez-Lastor's testimony because he could not communicate effectively at the hearing." *Id.* at 781.

speaking defendant is asked to waive substantial constitutional rights.[20] Guilty pleas are now the standard method for resolving criminal controversies.[21] At the very heart of the plea bargain is the defendant's voluntary choice to plead guilty to avoid the expense, inconvenience, and risk of a trial.[22] However, a defendant's lack of English comprehension undermines the public's confidence in the voluntary nature of a guilty plea.[23] Federal courts should be concerned about a possibility that innocent non-English-speaking defendants are pleading guilty simply because they are thrown into a tumult of judicial proceedings in a foreign language.[24] Yet, non-English-speaking defendants plead guilty on a daily basis without adequate safeguards ensuring the voluntariness of their choice.[25] These non-English-speaking defendants face consequences as dire as deportation or imprisonment when they (perhaps unwittingly) waive their constitutional rights away in a cursory plea bargain.[26] With the numbers of non-English-speaking individuals growing rapidly in the United States,[27]

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20. *Valencia v. United States* is another similar case that addresses the issue of flawed or inadequate court interpretation during the plea bargain process. 923 F.2d 917, 922 n.5 (1st Cir. 1991). In this case, the defendant communicated with the judge through an interpreter and did not appear to recognize the charge against him. *Id.* at 921 n.4. The First Circuit also noticed that the defendant had "little familiarity with the American legal system" and had difficulty comprehending the term "statelessness," an element of the charge against him. *Id.* at 921. Since the defendant did not understand the crucial elements of his charge and could not challenge the elements, the First Circuit remanded his case to the district court with directions to vacate the guilty plea. *Id.* at 922–23; *see also* Richard W. Cole & Laura Maslow-Armand, *The Role of Counsel and the Courts in Addressing Foreign Language and Cultural Barriers at Different Stages of a Criminal Proceeding*, 19 W. NEW ENG. L. REV. 193, 211–12 (1997) (discussing *Valencia* as an example of language acting as a "barrier [] to a defendant's knowing and intelligent participation in a plea bargain").

21. Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 AM. J. CRIM. L. 223, 229 (2006).

22. Brady v. United States, 397 U.S. 742, 747–48 (1970).

23. Public confidence in the plea bargain process will be undermined if there is a possibility that innocent individuals are pleading guilty. *See* F. Andrew Hessick III & Reshma M. Saujani, *Plea Bargaining and Convicting the Innocent: The Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 B.Y.U. J. PUB. L. 189, 197–99 (2002).

24. Fred C. Zacharias, *Justice in Plea Bargaining*, 39 WM. & MARY L. REV. 1121, 1151–55 (1998). *See also* Alice J. Baker, *A Model Statute to Provide Foreign-Language Interpreters in the Ohio Courts*, 30 U. TOL. L. REV. 593, 594 (1999).

25. *See* discussion *infra* Part III.B.

26. Sarah Keefe Molina, Comment, *Rejecting the Collateral Consequences Doctrine: Silence About Deportation* May *or* May Not *Violate* Strickland*'s Performance Prong*, 51 ST. LOUIS U. L.J. 267, 278 (2006). In the 2008 Presidential Campaign debates, the issue of linguistic discrimination in the courtroom was noted as an issue by the Presidential candidate, U.S. Senator Hillary Clinton. Senator Clinton commented: "I do not think that we should be in any way discriminating against people who do not speak English, who use facilities like hospitals or have to go to court to enforce their rights." Hillary Clinton, United States Senator, Presidential Debate at the University of Texas, Austin (Feb. 21, 2008), *available at* http://www.iht.com/articles/2008/02/22/america/21textdem debate.php.

27. *See* discussion *infra* note 60.

the risk that non-English-speaking defendants are being substantially deprived of their rights in a speedy plea bargain is remarkably high.

Due to the increasing numbers of diverse defendants in American courtrooms, this Note argues that new measures should be adopted by the federal courts to address the concern of court interpretation for non-English-speaking defendants in the plea bargain process.[28] Part I of this Note presents the framework of the plea bargaining process, which is a "process by which the prosecution and defense agree to a specific disposition of the criminal charges."[29] All plea bargains must meet a *Brady*[30] threshold which requires that a guilty plea be voluntary, knowing, and intelligent.[31] Nevertheless, federal courts have no true guarantees that a non-English-speaking defendant's plea agreement satisfies the *Brady* threshold because the court relies wholly on the work of a court interpreter.[32] Likewise, the non-English-speaking defendant is entirely dependent upon the court interpreter who is his or her primary link to the judicial proceedings.[33] This part lays the foundation for showing the importance of general compliance with the Court Interpreters Act when the non-English-speaking defendant waives constitutional rights through a plea bargain.

Part II explores how the growing diversity of the United States impacts the federal judicial system and how it makes the issue of court interpretation in plea bargaining an area of significant concern. Specifically, increased linguistic and cultural diversity may make the circumstances seen in *Leung* and *Perez-Lastor* increasingly frequent. This

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28. This Note exclusively discusses issues relating to court interpretation for plea bargains in the federal courts. At this time, state courts do not have uniform programs in place for court interpretation. However, several authors have proposed improved court interpreter programs on the individual state level. *See, e.g.*, Baker, *supra* note 24; John R. Bowles, Note, *Court Interpreters in Alabama State Courts: Present Perils, Practices, and Possibilities*, 31 AM. J. TRIAL ADVOC. 619 (2008); Heather Pantoga, *Injustice in Any Language: The Need for Improved Standards Governing Courtroom Interpretation in Wisconsin*, 82 MARQ. L. REV. 601 (1999); Katherine Kerns Vesely, Note, *¿Cómo Se Dice "Qualified"?: Statutory Considerations in Improving the Standards and Practices of Court Interpreters in Kentucky*, 44 BRANDEIS L.J. 463 (2006).

29. Jason R. Marshall, Note, *Two Standards of Competency Are Better Than One: Why Some Defendants Who Are Not Competent To Stand Trial Should Be Permitted To Plead Guilty*, 37 U. MICH. J.L. REFORM 1181, 1213 (2004). Plea bargaining is dictated by Rule 11 of the Federal Rules of Criminal Procedure. FED. R. CRIM. P. 11.

30. Brady v. United States, 397 U.S. 742, 748 (1970).

31. *Id.*

32. In *Perez-Lastor*, the court noted that the record of the proceedings represented only the work of the interpreter. The defendant's untranslated statements went unrecorded for later review. Perez-Lastor v. INS, 208 F.3d 773, 782 (9th Cir. 2000).

33. Michael B. Shulman, Note, *No Hablo Inglés: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 VAND. L. REV. 175, 177 (1993).

part discusses the shortage of court interpreters equipped to handle this increasing linguistic diversity and provides background about the role of federal court interpreters under the Court Interpreter's Act.

Part III details the harms resulting from inadequate court interpretation during the plea bargain process. The harms resulting from inadequate courtroom interpretation for non-English-speaking defendants in the plea bargain process are both individualized and institutional. Inadequate courtroom interpretation produces individualized harms for the non-English-speaking defendant because it implicates the individual's Fourteenth Amendment right to equal protection and Sixth Amendment right to effective assistance of counsel.[34] Similarly, inadequate court interpretation also harms the criminal justice system because it undermines public confidence in the fairness of the plea bargaining process.[35]

Despite the critical nature that court interpretation plays in many criminal federal judicial proceedings, few procedural safeguards exist for ensuring accurate court interpretation even in the plea bargain process where the defendant relinquishes multiple constitutional rights.[36] Part IV proposes multiple solutions that would provide necessary precautions for non-English-speaking defendants who plead guilty. The solutions for inadequate court interpretation in the plea bargain process range from adding personnel, to utilizing technological safeguards, to working with judge-based protections. Implementing these solutions will help to avoid the daunting circumstances that Leung and Chin faced when they bargained away their constitutional rights in both an unfamiliar language and judicial system.[37]

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34. *See* discussion *infra* Part III.A.

35. *See* discussion *infra* Part III.C.

36. For example, the court has total discretion in determining whether to appoint a court interpreter to aid the defendant in communicating with counsel and the court. FED. R. CRIM. P. 28. Rule 28 of the Federal Rules of Criminal Procedure specifically states: "The court may select, appoint, and set the reasonable compensation for an interpreter. The compensation must be paid from funds provided by law or by the government, as the court may direct." *Id.*

37. This Note primarily focuses upon improving the plea colloquy that takes place between the non-English-speaking defendant and the federal judge. Yet, the problem of language interpretation is not limited merely to the plea colloquy but also extends to all negotiations and discussions leading up to the plea colloquy. During this early stage, the non-English-speaking defendant may be in an impaired negotiating position because of the lack of accurate language interpretation during communications with defense counsel. Daniel J. Rearick, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 573 (2004). Although many of the remedies discussed in the Note address the plea colloquy, many of these proposals may also be implemented in the plea negotiation stage.

I. THE PLEA BARGAIN PROCESS

Plea bargaining is the typical way criminal cases are disposed of by the federal judiciary.[38] In 2006, United States courts reported that eighty-seven percent of criminal defendants pled guilty.[39] The effect of plea bargaining on the immigrant and non-English-speaking populations within the federal court system is staggering. In 2006, there were 18,055 defendants charged with immigration offenses, of which 17,328 pled guilty.[40]

A guilty plea constitutes a waiver of the constitutional rights against compulsory self-incrimination, right to a trial by jury, and the right to confront one's accusers.[41] The standards for all plea bargains are dictated by the Federal Rules of Criminal Procedure, Supreme Court jurisprudence, and the U.S. Constitution. Under Supreme Court jurisprudence, the *Brady* standard controls the validity of the plea bargain. It requires that a plea bargain is "voluntary . . . knowing, intelligent . . . [and] done with sufficient awareness of the relevant circumstances and likely consequences."[42]

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38. Langer, *supra* note 21, at 229. The U.S. Supreme Court has recognized the benefits of the plea bargaining process:

> (1) The criminal case is resolved expeditiously; (2) defendants avoid the unproductive and negative effects of incarceration that may occur when bail is denied or is set too high; (3) society is protected from defendants who may commit crimes while released on bail; (4) handing down prison sentences soon after a defendant is charged with a crime increases the probability that the criminal will be rehabilitated; and (5) the resources that are saved by avoiding trial reduce the drain on state and federal judges and courthouses.

Marshall, *supra* note 29, at 1213 (Santobello v. New York, 404 U.S. 257, 260–61 (1971)).

The Supreme Court also stated in *Brady* that "[i]t is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions in this country rest on pleas of guilty." Brady v. United States, 397 U.S. 742, 752 (1970). Furthermore, defendants face a number of risks in participating in a trial including: a prosecutorial, adversarial system, prosecutorial discretion in charging, inability to compel private or public prosecutions, and the "harshness of American criminal penalties." Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. Supp. 717, 718 (2006).

39. JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 2006 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 24 tbl.D-4 (2006) (showing criminal statistics for a 12 month period). According to the U.S. courts, this percentage represents 76,610 individual criminal defendants who were disposed of by way of a guilty plea. *Id.* The U.S. courts also report that, in the same period, there were 87,985 criminal defendants. *Id.*

40. *Id.* at 251.

41. Boykin v. Alabama, 395 U.S. 238, 243 (1968).

42. *Brady*, 397 U.S. at 748. In evaluating whether a plea bargain is "voluntary," the *Brady* court looked to all of the "relevant circumstances." *Id.* at 749. Moreover, the Court explained that "voluntariness in pleading guilty . . . would be presumed in the absence of coercion." Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2018 (2000). However, the *Brady* Court recognized that the prosecution will "encourage pleas of guilty at every important step in the criminal process" and this type of encouragement is not coercion. *Brady*, 397 U.S. at 750. In elaborating the standard of

The plea bargaining process generally follows a well-established path. After a defendant has been arraigned, the plea bargaining process can begin.[43] At this time, the defense counsel[44] and prosecutor will start discussing the terms of a potential plea agreement. However, the court is prohibited from participating in these discussions.[45] In a plea bargain, the defendant has the option of pleading guilty or pleading nolo contendere.[46] Defendants are motivated to plea bargain because they can potentially plead to a lesser or related offense in exchange for a prosecutor's promise to "not bring" or "move to dismiss" other charges.[47] In exchange, the

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"knowing," the *Brady* court requires the defendant to be "fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel." *Id.* at 755 (quoting Shelton v. United States, 242 F.2d 101, 115 (5th Cir. 1957)). However, the *Brady* standard of voluntariness is limited. For example, even if the prosecution fails to provide exculpatory evidence to the defendant prior to the guilty plea, the Supreme Court has considered the guilty plea to be voluntary. Ross, *supra* note 38, at 719–20. *See generally* Corinna Barrett Lain, *Accuracy Where It Matters:* Brady v. Maryland *in the Plea Bargaining Context*, 80 WASH. U. L.Q. 1, 3–22 (2002) (discussing different approaches to determining whether a plea bargain met the *Brady* standard).

43. A prosecutor can be motivated to pursue plea bargains because "he is able to handle more cases; conviction rates soar; and most importantly, more criminals . . . are more quickly removed from the streets." Hessick, *supra* note 23, at 191–92. A prosecutor's own career can be boosted with ensured convictions, higher conviction rates, and increased public confidence in the criminal justice system. *Id.* at 192; *see also* Ross, *supra* note 38, at 717 (explaining that plea bargains help prosecutors dispose of cases efficiently, maintain control over caseloads, and avoid the risk of acquittal).

Similarly, public defenders are motivated to participate in plea bargains based on the sheer volume of their caseloads. Hessick, *supra* note 23, at 209. As salaried employees of the government, a public defender's "income does not depend on the number of cases they quickly dispose of; rather, their job depends upon managing an overwhelming number of cases every year." *Id.* In addition, public defenders also "feel[] pressure from prosecutors, judges, and court clerks to move cases quickly to resolution." *Id.* at 210. By suggesting a client go to trial, a public defender also runs the risk that the trial's outcome will be more harsh than the punishment specified in an agreed-upon plea bargain. *Id.* at 211. In fact, both the prosecution and the defense counsel are "often encouraged to enter into plea negotiations for no other reason than that they have longstanding bargaining relationships." *Id.* at 219.

44. If the defendant is appearing pro se, the defendant will personally engage in the plea negotiations. FED. R. CRIM. P. 11.

45. While the court cannot participate in the plea bargains, the court can encourage the use of plea bargains. Hessick, *supra* note 23, at 210. For example, a judge can "threaten to punish defendants more harshly if a case goes to trial" or "make sure that the attorney [defense counsel] is forced to wait next time he needs something from the clerk or judge." *Id.* The court may be motivated to take such actions because a judge can protect his or her reputation by reducing the risk of reversible error. *Id.* at 226. Additionally, like prosecutors and public defenders, judges also favor plea bargains because it reduces their overall caseload in an efficient manner. *Id.* at 227.

46. FED. R. CRIM. P. 11(a)(1). The defendant may decide to plead nolo contendere (no contest plea), which the Supreme Court has understood as an "admission of guilt for the purposes of this case." Lott v. United States, 367 U.S. 421, 426 (1961) (quoting Hudson v. United States, 272 U.S. 451, 455 (1926)).

47. For a defendant, the decision to enter a guilty plea is "heavily influenced by the defendant's appraisal of the prosecution's case against him and by the apparent likelihood of securing leniency should a guilty plea be offered and accepted." *Brady*, 397 U.S. at 756. In advising the defendant, the defense counsel must "communicat[e] his assessment of the strength of the prosecution's case, the

prosecution may promise to "recommend" or "not . . . oppose the defendant's request" for a "particular sentence or sentencing range" or come to an agreement with the defense attorney for a "specific sentence or sentencing range."[48]

Once the prosecution and the defense have agreed upon a plea bargain, the plea bargain must be "disclose[d] . . . in open court."[49] However, the defendant can withdraw his guilty plea for any reason before the plea is accepted by the court.[50] At this juncture, the court is responsible for determining whether the guilty plea meets constitutional muster.[51] Once the defendant has been placed under oath, the court "must address the defendant personally in open court" to "inform the defendant of, and determine that the defendant understands" the function and effect of the plea agreement on the defendant's constitutional rights.[52] In this plea

applicable issues of law, and the possible legal alternatives." Hessick, *supra* note 23, at 218. In suggesting clients pursue a plea bargain, the defense counsel runs the risk of "fail[ing] to pursue information that they need to maximize their clients' position" or miscalculating the strength of the prosecution's case. Zacharias, *supra* note 24, at 1165.

48. FED. R. CRIM. P. 11(c)(1). In these plea bargain negotiations, the prosecutor has the balance of power in controlling the terms of the plea bargain. Christopher P. Siegle, Note, United States v. Mezzanatto*: Effectively Denying Yet Another Procedural Safeguard to "Innocent" Defendants*, 32 TULSA L.J. 119, 133–38 (1996). Instances of this unequal power balance include: the prosecutor's ability to "bluff" the defendant and the option of requiring a defendant to waive future protections against the use of his or her statements during the current plea negotiations. *Id.*

49. FED. R. CRIM. P. 11(c)(2).

50. FED. R. CRIM. P. 11(d)(1).

51. Hessick, *supra* note 23, at 224–25. The court can also reject a plea bargain "if it is contrary to 'the interest of the public in the effective administration of criminal justice.'" Abraham S. Goldstein, *Converging Criminal Justice Systems: Guilty Pleas and the Public Interest*, 49 SMU L. REV. 567, 571 (1996) (quoting AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO PLEAS OF GUILTY, §§ 1.8(a), 3.3(c) (1968). For a plea bargain to "violate the public interest," the plea bargain must be "(1) . . . unfair to the defendant; (2) . . . involve[] an abuse of prosecutorial discretion; or (3) . . . infringe[] seriously on the judge's sentencing domain without serving a countervailing prosecutorial purpose." *Id.* at 571–72. In this respect, the judge acts as the final review of the plea bargain's appropriateness. *Id.* at 571.

52. FED. R. CRIM. P. 11(b)(1). The *Judicial Benchbook* for federal district judges also provides a guideline for questions that a judge should ask a defendant during a plea colloquy. The following is an excerpt from the *Judicial Benchbook* for the taking of pleas:

> Ask the defendant:
>
> 1. Do you understand that you are now under oath and if you answer any of my questions falsely, your answers may later be used against you in another prosecution for perjury or making a false statement? [See Fed. R. Crim. P. 11(b)(1)(A) [formerly 11(c)(5).]]
>
> 2. What is your full name?
>
> 3. How old are you?
>
> 4. How far did you go in school?
>
> 5. Have you been treated recently for any mental illness or addiction to narcotic drugs of any kind? . . .

colloquy, the court must ensure that the defendant understands the "nature of each charge to which the defendant is pleading" and associated penalties.[53] The court is also required to find that the guilty plea is voluntary according to the *Brady* standards,[54] and that the plea has a factual basis.[55] After a defendant's plea has been accepted by the court, the defendant can only withdraw the plea if "the defendant can show a fair and just reason for requesting the withdrawal."[56] This plea colloquy between

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> 6. Are you currently under the influence of any drug, medication, or alcoholic beverage of any kind? . . .
>
> 7. Have you received a copy of the indictment (information) pending against you—that is, the written charges made against you in this case—and have you fully discussed those charges, and the case in general, with Mr./Ms. _____ as your counsel?
>
> 8. Are you fully satisfied with the counsel, representation, and advice given to you in this case by your attorney, Mr./Ms. _____?
>
> E. *If there is a plea agreement of any kind,* ask the defendant:
>
> . . .
>
> 2. Does the plea agreement represent in its entirety any understanding you have with the government?
>
> 3. Do you understand the terms of the plea agreement?
>
> 4. Has anyone made any promise or assurance that is not in the plea agreement to persuade you to accept this agreement? Has anyone threatened you in any way to persuade you to accept this agreement? . . .
>
> M. Ask the defendant:
>
> 1. Do you understand
>
> (a) that you have a right to plead not guilty to any offense charged against you and to persist in that plea;
>
> (b) that you would then have the right to a trial by jury;
>
> (c) that at trial you would be presumed to be innocent and the government would have to prove your guilt beyond a reasonable doubt;
>
> (d) that you would have the right to the assistance of counsel for your defense—appointed by the court if necessary—at trial and every other stage of the proceeding, the right to see and hear all the witnesses and have them cross-examined in your defense, the right on your own part to decline to testify unless you voluntarily elected to do so in your own defense, and the right to compel the attendance of witnesses to testify in your defense?
>
> Do you understand that should you decide not to testify or put on any evidence, these facts cannot be used against you?

FED. JUDICIAL CTR., BENCHBOOK FOR U.S. DISTRICT COURT JUDGES 73–78 (5th ed. 2007) [hereinafter BENCHBOOK] (footnotes omitted).

53. FED. R. CRIM. P. 11(b)(1).

54. The plea bargain must "not result from force, threats, or promises." FED. R. CRIM. P. 11(b)(2); *see also* Brady v. United States, 397 U.S. 742, 753 (1970).

55. FED. R. CRIM. P. 11(b)(3).

56. FED. R. CRIM. P. 11(d). The Supreme Court prohibits a defendant from withdrawing his or her guilty plea merely because he or she "misapprehended the quality of the State's case or the likely penalties attached to alternative courses of action." *Brady*, 397 U.S. at 757. In addition, a criminal defendant cannot attack a guilty plea "even if the defendant was not advised of every potential constitutional claim or defense." Blank, *supra* note 42, at 2025. The Supreme Court further clarified in *McMann v. Richardson* that when a defendant is weighing the decision whether or not to plead guilty

the court and the defendant is the final check before the defendant relinquishes multiple constitutional rights and faces consequences as serious as deportation or imprisonment.[57] In practice, this entire plea bargain process occurs in a compressed period of time.[58]

II. CHANGING DEMOGRAPHICS OF THE UNITED STATES AND THE ROLE OF THE COURT INTERPRETER

A. Growing Diversity within the United States and the American Judicial System

Increasing numbers of non-English-speaking defendants are caught in the whirlwind of the plea bargain process. Since the passage of the Court Interpreters Act[59] in 1978, the population of the United States continues to diversify.[60] This greater diversity has largely stemmed from the rising numbers of immigrants entering the United States.[61] Coupled with the growth of the immigrant population are increased language barrier concerns. For example, in Census 2000, 24.1 million individuals in the United States indicated a difficulty with speaking and understanding the English language.[62] Of this number, more than 11.9 million indicated that they were "linguistically isolated."[63] In addition, more than two thousand

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that this decision "must necessarily rest upon counsel's answers, uncertain as they may be." McMann v. Richardson, 397 U.S. 759, 770 (1970). Thus, a defendant, in deciding to plead guilty, must accept the risk that the defense counsel is "mistaken either as to the facts or as to what a court's judgment might be on given facts." *Id*. Moreover, as long as the "decision to plead is 'based on reasonably competent advice' of counsel," then the plea meets the *Brady* voluntariness threshold. Blank, *supra* note 42, at 2020 (quoting *McMann*, 397 U.S. at 770).

57. Goldstein, *supra* note 51, at 571.

58. Godinez v. Moran, 509 U.S. 389, 398–99 (1993).

59. 28 U.S.C. § 1827 (2000).

60. The Act was passed by Congress in 1978. Mollie M. Pawlosky, Case Note, *When Justice is Lost in the "Translation":* Gonzalez v. United States, *An "Interpretation" of the Court Interpreters Act of 1978*, 45 DEPAUL L. REV. 435, 444–45 (1996). In 1980, the foreign-born population was approximately fourteen million individuals. U.S. Census Bureau, Table 14: Foreign-Born Population by Historical Section and Subsection of the United States: 1850 to 1990, http://www.census.gov/population/www/documentation/twps0029/tab14.html (last visited Jan. 21, 2008). By Census 2000, the foreign-born population had more than doubled and even these numbers are now almost ten years out of date. NOLAN MALONE ET AL., U.S. CENSUS BUREAU, U.S. DEPARTMENT OF COMMERCE, THE FOREIGN BORN POPULATION: 2000, at 2 (2003).

61. Between the 1990 U.S. Census and the 2000 U.S. Census, the foreign-born population grew by fifty-seven percent, which is an increase from 19,800,000 to 31,100,000 individuals. Of this population, fifty-two percent were born in Latin America and twenty-six percent were born in Asia. MALONE ET AL., *supra* note 60, at 2.

62. Lynn W. Davis et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, 7 HARV. LATINO L. REV. 1, 4 (2004).

63. HYON B. SHIN & ROSALIND BRUNO, U.S. CENSUS BUREAU, U.S. DEPARTMENT OF

unique languages were identified by Census 2000 within the United States.[64]

This growing tide of diversity has spilled into federal judicial proceedings. Between 2002 and 2006, the federal courts recorded a thirty percent increase in immigration filings.[65] In 2006, seventy-two percent of all immigration cases constituted "improper reentry by an alien," which involves defendants unlikely to have fluency in English.[66] These Census 2000 statistics and immigration filing percentages indicate the mounting need for the United States courts to provide adequate court interpretation services for non-English-speaking individuals who enter the American criminal justice system.[67]

The shortage of both certified and "otherwise qualified" interpreters is striking in light of the increased number of criminal defendants who require the use of a court interpreter.[68] In 2006 alone, the United States

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COMMERCE, LANGUAGE USE AND ENGLISH-SPEAKING ABILITY 10 (2003). The term linguistic isolation is defined by Census 2000 as:

> A linguistically isolated household is one in which no person age 14 or over speaks English at least "Very well." That is, no person aged 14 or over speaks only English at home, or speaks another language at home and speaks English "Very well."
>
> A linguistically isolated person is any person living in a linguistically isolated household. All the members of a linguistically isolated household are tabulated as linguistically isolated, including members under 14 years old who may speak only English.

Id. Census 2000 recognized the impact of linguistic isolation and noted that:

> In the United States, the ability to speak English plays a large role in how well people can perform daily activities. How well a person speaks English may indicate how well he or she communicates with public officials, medical personnel, and other service providers. It could also affect other activities outside the home, such as grocery shopping or banking.

Id. at 9–10.

Census 2000 also conducted a geographic breakdown of the language demographics in the United States and found that fourteen percent of people over five years of age in the Western region of the United States did not speak English "Very well." *Id.* at 5 tbl.2. Other regions that showed large percentages of individuals who did not speak English "Very well" include: nine percent of people in the Northeast and seven percent in the South. *Id.*

64. Davis et al., *supra* note 62, at 4.

65. DUFF, *supra* note 39, at 27.

66. *Id.* at 25.

67. *See also* Erik Camayd-Freixas, *Interpreting after the Largest ICE Raid in US History: A Personal Account* (June 13, 2008), *available at* http://graphics8.nytimes.com/images/2008/07/14/opinion/14ed-camayd.pdf (describing a federal court interpreter's experience as an interpreter in one of the largest immigration raids in the United States, which involved the plea bargains of hundreds of non-English-speaking defendants); Julia Preston, *An Interpreter Speaking up for Migrants*, N.Y. TIMES, July 11, 2008, at A1 (highlighting the concern that non-English-speaking defendants are not being afforded the same constitutional protections in the plea bargain process by recounting Professor Camayd-Freixas's experience as a federally certified interpreter).

68. Even with the passage of the Court Interpreters Act and other pushes by the government to increase numbers of court interpreters, "the demand for court interpreters remains much greater than the current supply of officially certified interpreters." Davis et al., *supra* note 62, at 14–15. At the very least, this shortage has forced many courts to use "skilled non-certified interpreters on a regular basis."

district courts reported the use of court interpreters in 210,336 events.[69] This need for court interpreters has expanded beyond the district court level to federal appellate courts, which now have caseloads necessitating greater use of court interpreters.[70]

B. How Existing Institutions Address this Growing Diversity of Defendants

Congress initially enacted the Court Interpreters Act to ensure the ability of the defendant to communicate with counsel and the court, as well as to make certain that the non-English-speaking defendant could understand questions directed at him or her during the judicial proceedings.[71] The Act calls for the Director of the Administrative Office of the United States Courts to establish the federal certification program for interpreters, prescribe the qualifications necessary for certification, determine who meets the certification standards, and certify those individuals who meet the rigors of the certification program.[72] Compliance with the Act by the federal judiciary is compulsory.[73]

Id. at 15. However, at the very worst, this shortage has led to "the widespread use of unqualified and incompetent individuals as interpreters." Beth Gottesman Lindie, *Inadequate Interpreting Services in Courts and the Rules of Admissibility of Testimony on Extrajudicial Interpretations*, 48 U. MIAMI L. REV. 399, 410 (1993). The *Mosquera* court also described the problem:

> The interpretation problem is far more pervasive than court records indicate. In many instances when interpreters are not available, conversations between counsel and client or defendant and government or court personnel take place in halting English, or in the case of a few attorneys who are fluent in a foreign language, in the foreign language. Sometimes relatives or friends of defendants or privately retained interpreters are relied upon outside the courtroom.

United States v. Mosquera, 816 F. Supp. 168, 171 (E.D.N.Y. 1993).

69. JAMES C. DUFF, ADMINISTRATIVE OFFICE OF THE UNITED STATES, 2006 ANNUAL REPORT OF THE DIRECTOR: ACTIVITIES OF THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS 27 (2006).

70. Davis et al., *supra* note 62, at 5.

71. Pawlosky, *supra* note 60, at 445. The "original impetus" for passage of the Court Interpreters Act was the decision in *United States ex rel. Negron v. New York*, 434 F.2d 386 (2d Cir. 1970). In this decision, the Second Circuit "held that the Sixth Amendment . . . requires that non-English[-]speaking defendants be informed of their right to simultaneous interpretation of proceedings at [federal] government expense." H.R. REP. NO. 95–1687, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4652, 4653. Furthermore, testimony before the House Committee on the Judiciary's Subcommittee on Civil and Constitutional Rights demonstrated that "several federal convictions have been reversed on due process grounds where no interpreter had been appointed and where the defendant's knowledge of English was either minimal or nonexistent." *Id*. at 25.

72. Court Interpreters Act, 28 U.S.C. § 1827(a)-(b) (2000). In addition to establishing the certification program, the Director of the Administrative Office of the United States Courts also maintains the master list of federally certified interpreters. § 1827(b)(3).

73. United States v. Gonzales, 339 F.3d 725, 728 (8th Cir. 2003).

During judicial proceedings, the Act places on the court an affirmative duty to determine whether a defendant understands the courtroom proceedings.[74] Once the court finds that the defendant is in need of a court interpreter, the clerk of the court is responsible for securing the services of a certified interpreter.[75] Federal appellate courts give great deference to the United States district courts' exercise of this discretion in selecting a competent court interpreter.[76]

Under the Act, there are two categories of court interpreters: federally certified interpreters and "otherwise qualified" interpreters.[77] At this time, the federal certification program of courtroom interpreters established under the Act is available in a limited number of languages.[78] The goals of the federal certification program are to find interpreters with a strong vocabulary, interpreting skill, and understanding of the court's style and tone.[79] As such, the federal certification program includes an oral and written exam in English and the tested language.[80]

The second category of interpreters are those who are "otherwise qualified." If a federally certified interpreter is not reasonably available either in the language needed or at the time of the judicial proceedings, the

74. Pawlosky, *supra* note 60, at 445.

75. 28 U.S.C. § 1827(c)(2). Individuals, other than witnesses, may waive their right to an interpreter. § 1827(f)(1). According to the Act, the court interpreter secured by the clerk of the court must provide for a simultaneous translation of the courtroom proceedings to the defendant. § 1827(k).

76. *See* United States v. Paz, 981 F.2d 199, 200 (5th Cir. 1992) (explaining that "a district court is given wide discretion in matters regarding the selection of a court interpreter . . . [and] [s]uch decisions will not be overturned unless the district court abused its discretion"); *Gonzales*, 339 F.3d at 727 ("It is well settled that '[t]he appointment of an interpreter lies within the sound discretion of the trial judge.'") (quoting United States v. Coronel-Quintana, 752 F.2d 1284, 1291 (8th Cir. 1985)). If a defendant chooses to waive a court interpreter, courts are required by the Court Interpreters Act to make "certain findings on the record" to show that declining to provide a court interpreter was not "fundamentally unfair." United States v. Tapia, 631 F.2d 1207, 1209–10 (5th Cir. 1980); 28 U.S.C. § 1827(f)(1).

77. § 1827(a).

78. Shulman, *supra* note 33, at 180.

79. Lindie, *supra* note 68, at 409. According to the National Association of Judiciary Interpreters & Translators, a court interpreter "should be expected to provide competent simultaneous and consecutive interpreting and sight translation of documents." NAT'L ASS'N OF JUDICIARY INTERPRETERS & TRANSLATORS, EIGHT POSITION PAPERS 13 (2006).

80. Kelly Kaiser, *A Lawyer's Guide: How to Avoid Pitfalls When Dealing With Alien Clients*, 86 KY. L.J. 1183, 1200 (1998). The Federal Court Interpreter Certification Examination consists of both a written and oral portion. The written portion of the exam "tests the candidate's reading comprehension, language usage, proficiency at sentence completion and knowledge of antonyms and synonyms." Pawlosky, *supra* note 60, at 468–69. A candidate can pass the exam with an eighty percent score. Kaiser, *supra*, at 1200. After the written portion has been completed, the candidate is tested orally. The oral portion of the exam is "conducted in a simulated courtroom and tests the candidate's use of formal language, slang, and colloquialisms." Pawlosky, *supra* note 60, at 469. Each candidate is reviewed by a "panel consisting of an active court interpreter, a specialist in the . . . language, and an international conference interpreter." *Id.* at 470.

district court may select an "otherwise qualified interpreter."[81] Certification of "otherwise qualified" interpreters is accomplished through professional associations or through private companies contracting out the services of courtroom interpreters.[82] In the period from 2005–06, the National Court Interpreter Database recorded an increase of six hundred new "otherwise qualified interpreters," but this number of additional interpreters is insufficient in light of the federal caseload requiring interpretation.[83] This present shortage of certified and qualified court interpreters harms non-English-speaking defendants who choose to plead guilty because these defendants may have unskilled court interpreters performing interpretation during plea negotiations.

C. The Present Shortage of Court Interpreters

Despite these growing numbers of cases requiring court interpretation, United States courts reported the availability of only 960 federally certified interpreters in 2006.[84] Unfortunately, the number of individuals passing the federal certification exam annually is also correspondingly low.[85] For example, in 2006, only eighty-one individuals passed the Spanish interpreters certification exam.[86] This scant number is partly due

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81. *Paz*, 981 F.2d at 200.

82. NAT'L ASS'N OF JUDICIARY INTERPRETERS & TRANSLATORS, *supra* note 79, at 16–17. However, use of "otherwise qualified interpreters" has raised concerns. In *Gonzales*, the Eighth Circuit commented that the trial court's use of non-certified interpreters was "troubling." United States v. Gonzales, 339 F.3d 725, 728 (8th Cir. 2003). The Eighth Circuit also observed that the circuit even used uncertified interpreters in about sixty percent of Spanish-English interpretations. *Id.*

83. DUFF, *supra* note 69, at 28. Moreover, the shortage does not only affect certified interpreters, but also "otherwise qualified" interpreters. Part of the problem arises from the fact that there are "few institutions of higher education that extensively train and certify interpreters and that agencies providing interpreting services lack quality control mechanisms." Lindie, *supra* note 68, at 410.

84. DUFF, *supra* note 69, at 27.

85. Pawlosky, *supra* note 60, at 470 (explaining that the "small number of candidates that actually pass the examination" may be a result of the federal government's failure to provide training programs and the level of difficulty of the exam).

86. DUFF, *supra* note 69, at 27. Census 2000 documented more than 28.1 million Spanish speakers in the United States. SHIN & BRUNO, *supra* note 63, at 2. Of that number, approximately 13.8 million reported that they spoke English "less than very well." *Id*. According to Census 2000, the number of Spanish speakers grew by sixty percent from the decade between 1990 and 2000. *Id*. at 3.

The federal certification program is extremely rigorous due to the challenging nature of accurately interpreting idioms, slang, tone, and dialect. *See* Lindie, *supra* note 68, at 416–18 (describing the obstacles that interpreters face in providing an accurate translation, including words with multiple meanings and variations in dialect); Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. REV. 999, 1036–37 (2007) (explaining the difficulty in checking accuracy of interpretation and the need to adjust for nonlinguistic clues in understanding the meaning of words). Even at a moderate rate of speech, the National Association of Judiciary Interpreters and Translators notes that accurate and consistent interpretation is "relatively difficult" because "memory,

to the fact that federal certification is available only for three languages: Spanish, Navajo, and Haitian-Creole.[87] Meanwhile, 111 languages required interpretation in the federal court system in just 2006.[88] As a result, non-English-speaking defendants who require interpretation of a language other than those three languages rely on the National Court Interpreter Database to refer "otherwise qualified" interpreters for their judicial proceedings.[89] Despite the need, there were only 2,475 otherwise qualified interpreters for 168 languages in 2006, according to the National Court Interpreter Database.[90]

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speed, mental flexibility, patience, and many cognitive skills come into play." NAT'L ASS'N OF JUDICIARY INTERPRETERS & TRANSLATORS, *supra* note 79, at 16.

The shortage of court interpreters even plagues major metropolitan areas like New York City, where the *Mosquera* court once noted that there were only a "handful of reliable Chinese interpreters." United States v. Mosquera, 816 F. Supp. 168, 176 (E.D.N.Y. 1993). Overall, "courts are faced with a severe shortage of qualified interpreters to handle this increasing multilingual caseload." *Id.* at 171. Additionally, the shortage of court interpreters is further compounded by the fact that interpreters do not interpret at the same level, which can lead to problems of inconsistent interpretation. *See* Ahmad, *supra* note 86, at 1008.

87. Shulman, *supra* note 33, at 180.

88. DUFF, *supra* note 69, at 27. The languages with the highest frequency of interpretation include: Spanish, Mandarin, Vietnamese, Arabic, Korean, Cantonese, Russian, Portuguese, Haitian Creole, and Punjabi. *Id*. Census 2000 documented dramatic increases in the numbers of Chinese, Vietnamese, and Russian speakers in the decade from 1990 to 2000. SHIN & BRUNO, *supra* note 63, at 3. According to the Census, Chinese speakers "jumped from the fifth to the second most widely spoken non-English language, as the number of Chinese speakers rose from 1.2 million to 2.0 million people." *Id*. Moreover, Vietnamese speakers doubled in number and Russian speakers nearly tripled in number during the decade. *Id*.

89. The Director of the Administrative Office of the United States Courts "shall provide guidelines to the courts for the selection of otherwise qualified interpreters, in order to ensure that the highest standards of accuracy are maintained in all judicial proceedings subject to the provisions" of the Court Interpreters Act. 28 U.S.C. § 1827(b)(2) (2000). The federal courts divide "otherwise qualified" interpreters into two categories of "professionally qualified" and "language skilled." U.S. Courts, Three Categories of Interpreters, http://www.uscourts.gov/interpretprog/categories.html (last visited Jan. 21, 2008). To be considered as "professionally qualified," the interpreter must satisfy a number of rigorous standards including prior existing employment as an interpreter for the State Department, United Nations, or other similarly related agency. *Id*. For an individual to be considered as "language skilled," the interpreter must show to the court the ability to interpret court proceedings. *Id*.

90. DUFF, *supra* note 69, at 27–28. If certified or otherwise qualified interpreters are not available, the courts can provide for a Telephone Interpreting Program (TIP). *Id.* at 28. The TIP is made available to the Courts where court interpreters are not cost-effective for use. United States v. Gonzales, 339 F.3d 725, 728–29 (8th Cir. 2003). In fiscal year 2006, the TIP was used "in 3,770 events in 47 languages, with Spanish used for 91 percent of events." DUFF, *supra* note 69, at 27.

III. THE IMPACT OF COURT INTERPRETATION UPON THE PLEA BARGAIN PROCESS

The impact of inadequate court interpretation permeates the entire judicial system, but its impact on plea bargains is particularly severe. The Constitution guarantees non-English-speaking defendants equal standing as fluent English speakers in the American judicial system.[91] Yet, the present judicial system provides few meaningful safeguards to ensure the quality and accuracy of the interpretation received by a non-English-speaking defendants in the judicial process.[92] As a result, inadequate court interpretation not only violates the non-English-speaking defendant's constitutional rights but also undermines confidence in the practice of plea bargaining.[93]

A. Non-English-Speaking Defendants Are Afforded Constitutional Protections

Due to the increased use of plea bargaining and the rising numbers of non-English-speaking defendants, federal courts face the growing possibility that plea bargains may not be meeting constitutionally required standards of voluntariness due to inadequate court interpretation. Specifically, a non-English-speaking defendant's rights under the Equal Protection Clause of the Fourteenth Amendment and the Effective Assistance of Counsel Clause of the Sixth Amendment are the rights most likely to be violated when inadequate court interpretation occurs. Although courts have discretion in determining whether or not to provide an interpreter under Federal Rule of Criminal Procedure 28(b),[94] the rule does not require that defendants be informed of their right to a court-appointed interpreter, even if the defendant does not have the ability to pay for these services.[95] Nonetheless, the presence of a court interpreter is essential where the non-English-speaking defendant intends to plea bargain—a precarious position if the court does not adequately convey the meaning and significance of the guilty plea.

Since the Equal Protection Clause of the Fourteenth Amendment guarantees the equal protection of United States laws to any person within

91. *See* discussion *infra* Part III.A.
92. *See* discussion *infra* Part III.B.
93. *See* discussion *infra* Part III.C.
94. FED. R. CRIM. P. 28(b).
95. Virginia E. Hench, *What Kind of Hearing? Some Thoughts on Due Process for the Non-English-Speaking Criminal Defendant*, 24 T. MARSHALL L. REV. 251, 258 (1999).

U.S. jurisdiction,[96] non-English-speaking defendants should not be harmed in the judicial system because they cannot fully comprehend the significance and consequences of the judicial proceedings.[97] If the Equal Protection Clause is read according to its plain language, a defendant's immigration status or language ability should not be a detriment to the defendant during court proceedings while within the jurisdiction of the United States.[98] Moreover, the Equal Protection Clause extends to all guilty pleas,[99] including the guilty pleas of non-English-speaking defendants.[100] As such, courts must guarantee that the non-English-speaking defendant is on equal footing as any other citizen, naturalized citizen, or English-speaking defendant during the plea bargain process.[101] Thus, to protect a non-English-speaking defendant's equal protection rights, courts are required to assure that the court interpretation sufficiently conveys the meaning of the plea bargain according to the standards set by *Brady*.[102]

Inadequate court interpretation of a guilty plea can also impact a non-English-speaking defendant's Sixth Amendment right to the effective assistance of counsel. Under the Sixth Amendment, the accused has the right "to have the Assistance of Counsel for his defense."[103] If a non-English-speaking defendant and the defense counsel are unable to communicate due to language barriers, the defendant's Sixth Amendment right to effective assistance of counsel is violated.[104] Furthermore, a

96. U.S. CONST. amend. XIV, § 1.

97. *See* discussion *infra* Part III.C.

98. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

99. Brian R. Shipley & Kimberlee A. Cleaveland, *Guilty Pleas*, 87 GEO. L.J. 1433, 1433 (1999); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) (stating that a prosecutor is prohibited from offering a plea bargain "deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification" (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)).

100. *See* Kaiser, *supra* note 80, at 1189–90 (discussing the impact of guilty pleas on non-English-speaking defendants and the Sixth Amendment right to effective counsel); Molina, *supra* note 26, at 269–70 (mentioning the immigration consequences of guilty pleas on immigrant defendants); Cole & Maslow-Armand, *supra* note 20, at 211–13 (examining the impact of court interpretation on plea bargains for non-English-speaking defendants in both the state and federal context).

101. *See* Graham v. Richardson, 403 U.S. 365, 371 (1971) (holding that the "term 'person' in this context encompasses lawfully admitted resident aliens as well as citizens of the United States and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside"); *see also* Cristina M. Rodríguez, *The Significance of the Local in Immigrant Regulation*, 106 MICH. L. REV. 567, 622 n.240 (2008) (explaining that the Equal Protection Clause guards against states discriminating against aliens but states can impose some restrictions regarding alien access to state benefits).

102. *See* discussion *supra* Part I.

103. U.S. CONST. amend. VI.

104. To assist defense counsel in effective representation, a defendant has the right to "participate

defendant's Sixth Amendment right is infringed upon if the defense counsel fails to object to the inadequacy of interpretation at trial. To determine whether defense counsel was ineffective during the plea bargain process, the courts have applied the *Strickland* standard.[105] Under the *Strickland* standard, the court will evaluate whether the counsel's advice to the defendant was "objectively unreasonable" and "that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial."[106] Application of the *Strickland* standard is detrimental to the non-English-speaking defendant because "it creates a strong presumption that counsel's conduct is within the range of competent and reasonable professional assistance."[107] Therefore, the *Strickland* standard makes it difficult for a defendant to show that the ineffectiveness of counsel is a reversible error.

B. Insufficient Checks Exist to Determine the Accuracy of Court Interpretation

Inadequate guidelines for federal judges, scarcity of interpreters for most languages, and a lack of precautionary checks in courtrooms create serious problems in verifying the accuracy of court interpretation. The most guidance a federal district judge receives regarding taking pleas from non-English-speaking defendants is a brief passage from the *Judicial Benchbook*:

> Taking pleas from defendants who do not speak English raises problems beyond the obvious language barrier. Judges should be mindful not only of the need to avoid using legalisms and other

in his own defense." Kaiser, *supra* note 80, at 1203. However, this participation "is impossible when a language barrier exists between the attorney and client and there is no one available to bridge the interpretation gap." *Id.* Under these circumstances, the language barrier prevents the defense attorney and defendant from forming the best defense possible, which violates the Sixth Amendment. *See* United States *ex rel.* Negron v. New York, 434 F.2d 386, 390–91 (2d Cir. 1970) (finding that the defendant's Sixth Amendment right to effective counsel was violated when the Spanish-speaking defendant could not communicate with defense counsel and did not participate in his own defense); *cf.* Gallo-Vasquez v. United States, 402 F.3d 793, 799 (7th Cir. 2005) (holding that there was no Sixth Amendment violation when defendant could understand some English, could translate some phrases on his own, and did not raise the language barrier issue to the court).

105. Molina, *supra* note 26, at 273–74.

106. *Id.* at 274; *see* Strickland v. Washington, 466 U.S. 668, 691, 694 (1984) ("An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. . . . The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

107. Kaiser, *supra* note 80, at 1190.

> terms that interpreters may have difficulty translating, but also of the need to explain such concepts as the right not to testify and the right to question witnesses, which may not be familiar to persons from different cultures.[108]

This lone passage is the only reference available for federal district judges regarding the acceptance of guilty pleas from non-English-speaking defendants.[109] The *Judicial Benchbook* does not provide any examples of possible lines of questioning for a non-English-speaking defendant during the plea colloquy.[110]

In addition, courts frequently cannot rely on the availability of federally certified court interpreters during the plea bargain process because federal certification is limited to only three languages.[111] While federal certification requires an extensive written and oral examination and a simulated court proceeding, the certification process for "otherwise qualified" court interpreters can be conducted entirely by professional associations and private companies.[112] Unfortunately, the certification processes by these professional associations are not uniform, partly due to the lack of incentive to limit the number of qualified interpreters available for contracting by private companies.[113] As such, court interpreters for frequently interpreted languages, such as Mandarin and Arabic, may have not undergone the same rigorous testing as federally certified court interpreters.[114]

Within the courtroom, few checks exist to ensure that the court interpretation is meeting the level of accuracy and fluency required by the Court Interpreters Act and the United States Constitution.[115] Since the court reporter records only what the interpreter says, there is no true record of what is stated by the non-English-speaking defendant during the

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108. *See* BENCHBOOK, *supra* note 52, at 71–72.

109. *See id.* at 71–85.

110. *Id.* In contrast, the *Judicial Benchbook* provides extensive guidance for federal district judges addressing "special trial problems" like the disruptive defendant or a recalcitrant witness. *Id*. at 157–69.

111. Shulman, *supra* note 33, at 180.

112. *See also id.* at 182–83. *See generally* Commission on Gender & Commission on Race & Ethnicity, *Report of the Third Circuit Task Force on Equal Treatment in the Courts*, 42 VILL. L. REV. 1355, 1723–24 (1997).

113. *Id*.; Davis et al., *supra* note 62, at 14–15.

114. *See* Shulman, *supra* note 33, at 180 (explaining that federal certification is only available for Spanish, Navajo, and Haitian-Creole); DUFF, *supra* note 69, at 27 (noting that among the most frequently interpreted languages are Mandarin, Arabic and Portuguese).

115. *See* Shulman, *supra* note 33, at 186.

courtroom proceedings.[116] Due to the lack of a true record, appeals premised upon inadequate court interpretation are complicated and difficult for non-English-speaking defendants.[117]

C. The Harms Resulting from Inadequate Court Interpretation in Plea Bargains

1. Harm to the Individual's Constitutional Rights

The risk of a violation of a non-English-speaking defendant's constitutional rights is especially high due to the large number of criminal cases with non-English-speaking defendants, the prevalence of plea bargaining, and the lack of checks for courtroom interpretation.[118] At minimum, the defendant's waiver by plea bargain must be "voluntary . . . knowing, [and] intelligent," but this standard only applies to the direct consequences of the plea bargain and not to collateral consequences.[119] In

116. *Id.* at 185–86. This gap between the court interpreter's work and the speaker's true intent is primarily due to differences in dialect or language, bias of the court interpreter, and inaccurate translation. Randall T. Shepard, *Access to Justice for People Who Do Not Speak English*, 40 IND. L. REV. 643, 644–48 (2007).

117. *Id.*; *see also* Kaiser, *supra* note 80, at 1200. Witnesses can also encounter problems of court interpretation. In *United States v. Way Quoe Long*, 301 F.3d 1095 (9th Cir. 2002), the Ninth Circuit noted that other than the Lao-speaking witness and court interpreter, no one in the district court nor any of the lawyers was familiar with either Hmong or Lao. *Id.* at 1105. The defendant contested the accuracy of the interpreter's work when the defendant attempted to cross-examine a witness who spoke only Lao. The court stated "[t]here is no way to know what really happened between the witness and the interpreter, nor determine the adequacy of the translation." *Id.*

118. In part, "[c]ulture and language can also present barriers to a defendant's knowing and intelligent participation in a plea bargain. Understanding of the elements of the charge and the rights waived are critical factors." Cole & Maslow-Armand, *supra* note 20, at 211.

119. Brady v. United States, 397 U.S. 742, 748 (1970). Immigrant defendants are only required to be informed by their counsel of the "direct consequences" of a guilty plea and need not be informed of any "collateral consequences." Molina, *supra* note 26, at 272. The definition of direct consequences are those that have "a definite, immediate, and largely automatic effect on the range of the defendant's punishment." *Id.* In contrast, "collateral consequences" are those that "remain beyond the control and responsibility of the district court in which [the] conviction was entered," which may include deportation and civil commitment. *Id.*

Most federal circuits have treated deportation resulting from a guilty plea as a collateral consequence rather than a direct consequence. *See id.* However, the number of individuals deported from the United States is extensive—approximately 90,000 criminal aliens are deported a year. *Id.* at 269. Of that number, over 80,000 of these defendants are deported based on guilty pleas. *Id.*

If an immigrant defendant has unknowingly pled guilty to a deportable offense, "two lines of attack" are available against these guilty pleas. *Id.* at 268. "Some attempt to withdraw their guilty pleas by asserting that due process required the trial court to question and inform them about the immigration consequences of the pleas. Others challenge their convictions by alleging ineffective assistance of counsel in violation of the Sixth Amendment of the U.S. Constitution." *Id.* (footnotes omitted); *see generally* Kaiser, *supra* note 80, at 1190–94 (providing a further discussion regarding the debate over deportation as a direct or collateral consequence of a plea bargain).

fact, courts have vacated pleas where the defense counsel does not fully inform the non-English-speaking defendant about the content of the plea bargain and the rights waived.[120] Plea bargains also present another unique challenge; in order to reach an agreed-upon plea bargain, both the defendant and the defense counsel participate in out-of-court discussions to solidify the terms of the plea bargain. Yet the federal Court Interpreters Act places no requirements on interpretation for out-of-court discussions, even when these discussions may be essential to courtroom proceedings in determining the outcome of the case.[121]

Furthermore, non-English-speaking defendants face tough hurdles in establishing that inadequate court interpretation occurred at trial. When courts have reviewed appeals based on the Act, the courts have stated that the Act does not "create . . . or expand existing constitutional safeguards."[122] Presently, if the non-English-speaking defendant does not object to inadequate court interpretation, the appellate court reviews the appeal under the plain error standard of review.[123] Under the plain error standard, the court will evaluate whether there was error, which was plain, that affected the defendant's substantial rights.[124] In proving plain error, the defendant has the burden of submitting "sufficient evidence to demonstrate that the district court's decision . . . affected his substantial rights."[125] Nevertheless, courts generally do not find inadequate or potentially inadequate interpretation to rise to the level of plain error.[126] Although the Court Interpreters Act requires that an appointed court interpreter provide simultaneous translation, an appellate court still has the discretion to determine whether the lack of simultaneous translation resulted in an unfair trial.[127] Similarly, if an interpreter summarizes

120. Cole & Maslow-Armand, *supra* note 20, at 213.

121. Rearick, *supra* note 37, at 573 ("Though the Court Interpreters Act of 1978 says nothing about facilitating out-of-court communication between attorney and client, the lawyer would clearly not be very effective if she did not have a means of communicating at length with her client in preparation for trial."); *see also* United States v. Medina, No. 82-224/318, 1988 U.S. Dist. LEXIS 5067, at *4–6 (D. N.J. May 24, 1988) (declining to provide a court interpreter to the non-English-speaking defendant during plea negotiations because it is not explicitly required by the Court Interpreters Act); *see also infra* note 37.

122. United States v. Joshi, 896 F.2d 1303, 1309 (11th Cir. 1990).

123. Pawlosky, *supra* note 60, at 488; *see infra* note 129.

124. United States v. Gonzales, 339 F.3d 725, 729 (8th Cir. 2003).

125. *Id*.

126. Davis et al., *supra* note 62, at 16; *see, e.g.*, *Gonzales*, 339 F.3d at 725 (applying the plain error standard and declining to reverse the conviction based on a violation of the Court Interpreters Act); United States v. Camejo, 333 F.3d 669, 672 (6th Cir. 2003) (applying the plain error standard because the defendant failed to object at trial, and affirming the defendant's conviction).

127. United States v. Huang, 960 F.2d 1128, 1135–36 (2d Cir. 1992) (noting that summaries, rather than literal translation, "do not automatically require reversal" if the deviation did not result in

courtroom proceedings for the non-English-speaking defendant, the appellate court is not compelled to find that this constitutes plain error.[128] In these types of scenarios, the non-English-speaking defendant is disadvantaged because the reviewing court evaluates the appeal under the deferential plain error standard of review.[129]

2. Harms to the Criminal Justice System

Inadequate court interpretation also harms the criminal justice system by undermining confidence in the system's fairness. In challenging plea bargains based on inadequate court interpretation, non-English-speaking defendants must overcome the almost impossible plain error standard of review.[130] For example, the U.S. Supreme Court applied the plain error standard in *United States v. Dominguez Benitez*.[131] In this case, Mr. Dominguez Benitez pled guilty to conspiring to possess more than 500 grams of methamphetamine.[132] However, prior to submitting the plea agreement, Dominguez Benitez sent multiple letters to the district court "express[ing] discomfort with the plea agreement his counsel was encouraging him to sign."[133] In response to his letters, the district court stated "that it could not help him in plea negotiations" and that the circumstance presented "no reason to change counsel."[134] In its opinion,

any "substantive inaccuracy").

128. *Id.* at 1135. However, summary interpreting of courtroom proceedings has been considered inadequate to ensure due process. NAT'L ASS'N OF JUDICIARY INTERPRETERS & TRANSLATORS, *supra* note 79, at 31.

129. The plain error standard is a difficult standard for a petitioner to appeal under because "[p]lain error will be noted only where an error is evident from the record, prejudicially affects a substantial right of a litigant, and is of such a nature that to leave it uncorrected would cause a miscarriage of justice or result in damages to the integrity, reputation, and fairness of the judicial process." Davis et al., *supra* note 62, at 16; *see, e.g.*, United States v. Paz, 981 F.2d 199, 201 (5th Cir. 1992) (explaining that the plain error standard of review requires error that "when examined in the context of the entire case, is so obvious and substantial that failure to notice and correct it would affect the fairness, integrity, or public reputation of judicial proceedings" and the court applies this standard of review if a petitioner has failed to object to inadequate court interpretation); *Gonzales*, 339 F.3d at 728 (articulating the application of the plain error standard when a defendant has failed to object regarding court interpretation and noting that the court retains "discretionary authority to consider plain errors"); *Camejo*, 333 F.3d at 672 (applying the plain error standard if the defendant made no objection about court interpretation, explaining that "[p]lain error is defined as an egregious error, one that directly leads to a miscarriage of justice") (quoting United States v. Frazier, 936 F.2d 262, 266 (6th Cir. 1991)).

130. *See* United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004).

131. *Id.*

132. *Id.* at 77.

133. *Id*.

134. *Id.* at 77. The Supreme Court noted that it was unclear who helped Dominguez-Benitez write the letters in English to the District Court indicating his reluctance to accepting the terms of the plea

the Supreme Court noted that Dominguez Benitez "speaks and writes Spanish, not English" and that a certified translator was present during his proceedings.[135] Despite the trial court's failure to inform Dominguez Benitez that he could not withdraw his guilty plea, the Supreme Court upheld the plea.[136] According to the Supreme Court, Dominguez Benitez could not show that "but for" the trial court's error that he would not have pled guilty.[137] Under this plain error standard, the possibility of successfully attacking a plea bargain—despite serious court interpretation flaws—is extremely slim.[138] The presence of inadequate court interpretation in federal courts highlights how the criminal justice system fails to broadly protect non-English-speaking defendants. Therefore, inadequate court interpretation not only damages the non-English-speaking defendant's individual constitutional rights but also undercuts the perception that plea bargains can be fair for defendants.[139]

IV. PROPOSALS TO IMPROVE COURT INTERPRETATION AND THE PLEA BARGAIN PROCESS

To address the issues of potentially inadequate court interpretation, a number of precautions should be instituted to protect the non-English-speaking defendant in the plea bargain process. Federal courts can implement personnel, technological, or judge-based remedies which include increasing checks in the courtroom during the plea colloquy, modifying the standard of review for interpreter-required cases, increasing the role of the judge in ensuring adequate court interpretation, and adopting the safeguards provided for mentally ill individuals in the plea bargaining process.

A. Personnel-Based Remedies

To guard against inadequate court interpretation during plea bargains, the federal government should increase the number of personnel devoted to court interpretation. First, federal courts can expand the number of

agreement. *Id.* at 77 n.1.

135. *Id*. at 77 n.1.

136. *Id*. at 84–86.

137. *Id.*

138. *See supra* note 129.

139. *See generally* John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?* 126 U. PA. L. REV. 88 (1977); John G. Douglass, *Fatal Attraction: The Uneasy Courtship of* Brady *and Plea Bargaining*, 50 EMORY L.J. 437 (2001).

federally certified court interpreters. Since federally certified interpreters must meet rigorous governmental standards, the level of accuracy in interpretation is far more reliable than "otherwise-qualified" court interpreters.[140] Second, the federal government should consider expansion of federal certification to include languages other than Spanish, Navajo, and Haitian-Creole. Although increased costs in administering this expanded certification program would be unavoidable, the risk to an individual's substantial rights justifies the cost.[141]

Another solution to help ferret out inadequate court interpretation during the plea bargain process is to assign additional court interpreters to such cases. In circumstances where a non-English-speaking defendant plans to plead guilty, the court can provide dual interpreters. This option would call for a second interpreter to be present in the courtroom to act as a check on the first interpreter's work during the plea colloquy.[142]

However, these suggested reforms are likely to fall short due to the cost of providing an additional interpreter and the currently small numbers of federally certified and "otherwise qualified" interpreters.[143] Additionally, a second interpreter checking the work of the court-appointed interpreter could pose logistical problems. For example, courts would have to determine when it is appropriate for a second interpreter to raise concerns regarding interpretation during the plea colloquy. If a concern is raised by a second interpreter, the court would also have to decide which interpreter has the most accurate understanding of a statement by defendant or witness. Another shortcoming of additional interpreters is that these methods fail to capture the defense attorney's recommendations and statements to the non-English-speaking defendant during the plea colloquy. As such, these two methods might not sufficiently safeguard the non-English-speaking defendant's Sixth Amendment right to effective assistance of counsel.

Another proposal to detect inadequate court interpretation is the appointment of a separate defense interpreter. During the plea colloquy, the defense interpreter would provide translation specifically for discussions between the defense counsel and the non-English-speaking defendant while the court-appointed interpreter translates between the judge and the non-English-speaking defendant.[144] The benefit of a separate

140. Shulman, *supra* note 33, at 180–81.
141. *See id.* at 192.
142. *Id*. at 193.
143. DUFF, *supra* note 69, at 27.
144. William B.C. Chang & Manual U. Araujo, *Interpreters for the Defense: Due Process for the*

defense interpreter is that this interpreter would prioritize the interests of the defendant and not merely the interests of the court.[145] A separate defense interpreter could also interpret out-of-court discussions between defense counsel and a non-English-speaking defendant during plea bargain negotiations, closing this loophole in the Court Interpreters Act.[146] Yet, the cost and availability of defense interpreters pose significant obstacles to implementing this option.[147]

Additional interpreters during the plea colloquy and plea negotiations could have prevented Chin's and Leung's unwitting guilty pleas by immediately detecting inadequate courtroom interpretation.[148] In addition, a separate defense interpreter for Chin and Leung would have opened the lines of communication between the two defendants and their counsel during any out-of-court discussions about the plea bargain.[149] Adopting any of these added checks in court would better protect the individual constitutional rights of non-English-speaking defendants and promote the integrity of the plea bargain process.

B. Technology-Based Remedies

If increasing the number of court interpreters is not feasible, at a minimum courts should implement new, efficient technological precautions during the plea colloquy between the judge and the non-English speaking defendant. One low-cost and easily implemented technological advancement is allowing for the practice of video monitoring. Unlike a traditional court reporter's transcript, a video record of the event will include the original utterances of the non-English-speaking defendant.[150] Footage of this exchange between the judge and the non-English-speaking defendant can later be reviewed by other court interpreters if there are concerns about the validity of the plea bargain

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Non-English-Speaking Defendant, 63 CAL. L. REV. 801, 821–22 (1975).

145. *Id.*

146. *See* Lindie, *supra* note 68, at 420 (providing further information regarding interpretation of out-of-court witness statements and admissibility); *see also supra* note 121.

147. *See* Chang & Araujo, *supra* note 144, at 821–22.

148. Shulman, *supra* note 33, at 193.

149. *See* Lindie, *supra* note 68, at 420; *see also supra* note 121.

150. "The court must keep a verbatim record of the plea proceedings, including the court's advice to the defendant, the voluntariness inquiry, the factual accuracy inquiry, and the details of the plea agreement." Shipley & Cleaveland, *supra* note 99, at 1459; *see also* Perez-Lastor v. INS, 208 F.3d 773, 778 (9th Cir. 2000) ("It is extremely difficult to pinpoint direct evidence of translation errors without a bilingual transcript of the hearing."); *cf.* Boykin v. Alabama, 395 U.S. 238, 244 (1968) (stating that when a judge engages in a plea acceptance discussion with the defendant, "he leaves a record adequate for any review that may be later sought").

under *Brady*.[151] Since the defendant's original statements and demeanor are captured on film, the reviewing court interpreters can more accurately interpret the defendant's intent from the footage.[152] Currently, most federal district courts have access to comparable technology to provide video monitoring, or at least, audio monitoring.[153] The cost and inconvenience of requiring video monitoring for all plea bargains with non-English-speaking defendants is negligible because of increasing court access to technology.[154] Therefore, at the very least, courts should require audio or video monitoring of the exchanges that take place between the judge and a non-English-speaking defendant during the plea colloquy, when the defendant requires the use of an interpreter.[155]

Use of either audio or video monitoring in court would have aided the *Leung* court's decision to withdraw Chin's and Leung's plea bargains.[156] If

151. Fredric I. Lederer, *The Effect of Courtroom Technologies on and in Appellate Proceedings and Courtrooms*, 2 J. APP. PRAC. & PROCESS 251, 256 (2000) (discussing how audio or audio/video footage is typically stored on computer hard disks and then "back[ed] up [on] CD media, high-density tape, or cassette," which can be accessed for later review).

152. Kaiser, *supra* note 80, at 1206 (describing the advantages of videotaping or audiotaping proceedings where interpreters are required); *see also* Robert C. Owen & Melissa Mather, *Thawing Out the "Cold Record": Some Thoughts on How Videotaped Records May Affect Traditional Standards of Deference on Direct and Collateral Review*, 2 J. APP. PRAC. & PROCESS 411, 418 (2000) (providing examples of how videotaping technology captures aspects of a trial that are not revealed on a cold record); Fredric I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's—and Tomorrow's—High-Technology Courtrooms*, 50 S.C. L. REV. 799, 809 (1999) (explaining that a video record "inherently supplies information to an appellate court that is not available though a traditional transcript alone"); Lederer, *supra* note 151, at 253 (noting that on a cold record "witness gestures and demeanor often are inadequately set forth in text").

153. *See* Lederer, *supra* note 151, at 256 ("Ironically, a large number of court transcripts begin life as audio or audio/video recordings."); *see also* Owen & Mather, *supra* note 152, at 412 (describing the "advent of reliable and cheap videotaping technology" which allows "trial court proceedings [to be taped] with increasing frequency"); Elizabeth C. Wiggins, *What We Know and What We Need to Know About the Effects of Courtroom Technology*, 12 WM. & MARY BILL RTS. J. 731, 733 (2004) (explaining that in a survey conducted by the Federal Judicial Center to which ninety federal districts responded, sixty-six percent of the district courts had access to digital audio recording and seventy-four percent had access to real-time transcript viewer annotation systems).

154. Fredric I. Lederer, *Technology-Augmented Courtrooms: Progress Amid a Few Complications, or the Problematic Interrelationship Between Court and Counsel*, 60 N.Y.U. ANN. SURV. AM. L. 675, 75–76 (2005).

155. Video monitoring has been suggested as a comprehensive solution and not merely limited to the problems posed by plea bargaining. Shulman, *supra* note 33, at 194. Some modifications of this solution include random video monitoring when resources are not available for comprehensive video-monitoring. Under this program, courts would randomly select courtroom proceedings with non-English-speaking defendants or witnesses to be taped. Kaiser, *supra* note 80, at 1206. These tapes would then be reviewed by other court interpreters for accuracy and sufficiency of interpretation. *Id.*; *see also* Lederer, *supra* note 151, at 256 (explaining that audio or audio/video recording can be accomplished by using a "single fixed camera image," a "multi-frame picture that includes four or more separate camera images," or a "voice-activated camera").

156. United States v. Leung, 783 F. Supp. 357, 359–61 (N.D. Ill. 1991).

either technological precaution had been in place during Chin and Leung's plea colloquy, the reviewing court would have had a more complete record in determining whether inadequate court interpretation had occurred.[157] These technological advancements protect a non-English-speaking defendant's ability to collaterally attack a plea bargain and also broadly hold court interpreters accountable for the adequacy of their interpretation in the criminal justice system.

C. Judge-Based Remedies

In addition to personnel- and technology-based remedies, courts can also implement judge-based remedies to address the issue of inadequate court interpretation during plea bargains. These judge-based remedies include modification of the existing plain error standard of review, greater engagement of the judge during the plea colloquy process with the non-English-speaking defendant, and implementation of the same procedures used in reviewing the plea bargains of mentally ill individuals. Unlike personnel- and technology-based remedies, judge-based remedies may be the most efficient for federal courts to adopt since the cost of implementation is low.

1. Modifying the Standard of Review in Accord with Perez-Lastor

If a non-English-speaking defendant challenges the adequacy of court interpretation on appeal, courts presently apply the plain error standard of review when no objection was made at trial.[158] Under this standard, the defendant must show that the "error was egregious, that it affected substantial rights, represented a miscarriage of justice, or resulted in an unfair trial."[159] When reviewing courts apply the plain error standard of review, the appeals based on inadequate court interpretation are almost never granted because the defendant cannot overcome this deferential standard.[160] Instead, courts should consider applying a "better translation" test in reviewing claims based on inadequate interpretation because it is fairer to non-English-speaking defendants.

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157. *Id.* at 358–59.

158. Davis et al., *supra* note 62, at 7,

159. *Id.*; *see, e.g.*, Pawlosky, *supra* note 60, at 459 n.192 (further discussing both the abuse of discretion and plain error standards of review and their impact on the non-English-speaking defendant appealing based on inadequate court interpretation).

160. Davis et al., *supra* note 62, at 7.

In the Ninth Circuit Court of Appeals, the court adopted a competent translation test that the court outlined in *Perez-Lastor*.[161] The *Perez-Lastor* court is distinctive because it carefully examined evidence of the non-English-speaking defendant's lack of comprehension of the judicial proceedings. In one instance, the *Perez-Lastor* court stated that if there is "direct evidence of incorrectly translated words[,] . . . [this is] persuasive evidence of an incompetent translation."[162] The *Perez-Lastor* court also analyzed the responses of the non-English-speaking defendant and found that the unresponsive answers provided circumstantial evidence that interpretation problems existed.[163] In addition, the *Perez-Lastor* court considered that a "translation may also be so inadequate throughout in its failure to translate words with precision and to communicate the nuances of questions and answers . . . [that it is] impossible . . . to reconstruct the dialogue and pinpoint the errors in translation."[164] Lastly, the *Perez-Lastor* court also accepted as evidence the expressions of the non-English-speaking defendant, which indicated his difficulty in understanding the statements and questions directed at him.[165]

After examining this language barrier evidence, the *Perez-Lastor* court adopted the "better translation" test. According to this test the court finds reversible error if "a better translation would have made a difference in the outcome of the hearing."[166] The *Perez-Lastor* court recognized that "[t]his standard is onerous, but not insurmountable."[167] Since non-English-speaking defendants are already facing an uphill challenge within the American justice system, the "better translation" test provides a fairer test for the defendant to meet in remedying any inadequate court interpretation. Moreover, the *Perez-Lastor* court also recognized that the evidence produced by the defendant can be shown in multiple forms.

For collateral attacks on plea bargains based on inadequate court interpretation, courts could even treat the "better translation" test as a part of the *Strickland* ineffective assistance of counsel test.[168] If the "better translation" test falls under the umbrella of the *Strickland* test, the defense counsel would bear the burden of investigating a non-English-speaking

161. Perez-Lastor v. INS, 208 F.3d 773, 780 (9th Cir. 2000).
162. *Id*. at 778.
163. *Id*. at 778–79.
164. *Id.* at 780 n.8.
165. *Id.* at 778.
166. *Id.* at 780.
167. *Id.*
168. *See* discussion *supra* Part III.A.

defendant's language ability and the competence of the court interpreter.[169] In fact, the Supreme Court has held that defense counsel does have a responsibility to further investigate under the Sixth Amendment right to effective assistance of counsel.[170] For example, the Supreme Court has expanded ineffective assistance of counsel to include a counsel's failure to investigate a defendant's life history to find mitigating factors in sentencing.[171] This scenario closely parallels a defense counsel's failure to investigate a defendant's language ability and the competence of the court interpreter. While the *Leung* court clearly found that a "better translation" would have benefited both Chin and Leung,[172] the inclusion of the "better translation" test within the *Strickland* test would have given the defense counsels the responsibility of investigating the language abilities of the defendants and the competence of the court interpreter.[173] If both defense counsels had adequately investigated the work of Chin and Leung's court interpreter, the counsels would have realized that neither defendant understood the basis and impact of a guilty plea.[174] Thus, the "better translation" test calls for a court to look more broadly to find interpreter error and makes it more realistic for a non-English-speaking defendant to demonstrate reversible error based on inadequate court interpretation in a plea bargain.[175]

2. Increasing the Involvement of the Court in the Plea Colloquy

Courts may also reduce the risk of inadequate court interpretation for plea bargains by increasing the judge's involvement in the plea colloquy. A simple practice that federal courts can adopt is to provoke a narrative response from the non-English-speaking defendant during the plea colloquy to make certain that the guilty plea is "knowing and

169. *See generally* Strickland v. Washington, 466 U.S. 668, 691 (1984).

170. Wiggins v. Smith, 539 U.S. 510, 521–22 (2003).

171. *Id*. at 522. In *Wiggins*, the defendant's claim of ineffective assistance of counsel was based on defense counsel's decision to "limit the scope of . . . investigation into potential mitigating evidence." *Id.* at 521. In this case, the Court applied the *Strickland* standard to see if the counsel's actions were reasonable in light of the circumstances. *Id.* at 521–22. Additionally, the Court noted that "in any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Id*. In its decision, the Court held that the petitioner's counsel did not provide effective assistance of counsel in violation of the Sixth Amendment because the failure to investigate was not reasonable and prejudiced the defendant in violation of the Sixth Amendment. *Id.* at 534–38.

172. United States v. Leung, 783 F. Supp. 357, 360–61 (N.D. Ill. 1991).

173. *See discussion supra* Part IV.B.1.

174. *Id.*; *Leung*, 783 F. Supp. at 358–59.

175. *See* discussion *supra* Part IV.B.

voluntary."[176] A narrative response from the non-English-speaking defendant, even with the aid of an interpreter, would give a federal judge a clearer assurance of a plea bargain's validity than the existing perfunctory yes or no questions part of the typical plea colloquy.[177] By asking the non-English-speaking defendant questions that trigger a narrative response, the federal judge has more of an opportunity to evaluate whether the defendant is aware of the constitutional rights being waived and the direct consequences of a guilty plea.[178] Although narrative questioning may slow down the efficiency of a plea colloquy, courts have adopted narrative questioning when defendants waive substantial rights in conflict of interest and pro se hearings.[179] In conflict of interest hearings, judges elicit narrative responses from defendants to ensure that defendants understand the complex issue of attorney-client conflicts of interest.[180] Like conflict of interest hearings, courts will ask the defendant about familiarity with the law and even test the defendant's choice to forgo counsel with relevant hypotheticals during pro se hearings.[181] The *Judicial Benchbook* should

176. *Leung*, 783 F. Supp. at 358–60.

177. As stated in *United States v. Leung*:

> The extent of the dialogue required between the court and the defendant to establish an intelligent and voluntary plea varies from case to case, but in all cases it must be a meaningful dialogue. Simple yes or no answers, or answers which merely mimic the indictment will not suffice. The court should question the defendant in a way that provokes a narrative response.

Leung, 783 F. Supp. at 360 (citing United States v. Fountain, 777 F.2d 351, 356 (7th Cir. 1985)). In contrast, the Ninth Circuit found that due process was protected where the record indicated the "painstaking efforts of the immigration judge to provide a full and fair hearing" and the judge's "sensitivity to the potential for linguistic and other confusion." United States v. Nicholas-Armenta, 763 F.2d 1089, 1091 (9th Cir. 1985). The Ninth Circuit evaluated the record at trial and established that:

> The transcript of the hearing shows that (1) Nicholas-Armenta was the thirty-third respondent; (2) it was conducted through an interpreter; and (3) the entire hearing lasted only an hour and twenty-five minutes, including time for translation. Despite these disadvantages, however, the transcript reflects the judge's careful and, where necessary, particularized, inquiries of each of the 33 persons before him, and his sensitivity to the potential for linguistic and other confusion on the part of those facing deportation.

Id.; *cf.* BENCHBOOK, *supra* note 52, at 72–80.

178. *See supra* note 118.

179. *See supra* note 177.

180. *See, e.g.*, United States v. Osborne, 402 F.3d 626, 631 (6th Cir. 2005) (stating that "the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, [and] that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict"); United States v. Placente, 81 F.3d 555, 560 n.2 (5th Cir. 1996) (explaining that "the court should seek to elicit a narrative response from each defendant . . . that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict"); United States v. Gilliam, 975 F.2d 1050, 1053 (4th Cir. 1992) (requiring the court to "seek to elicit a narrative response from each defendant . . . that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict").

181. *See* BENCHBOOK, *supra* note 52, at 6.

call for federal judges to participate in this narrative questioning whenever a court interpreter is appointed under Federal Rule of Criminal Procedure 28 and the non-English-speaking defendant is preparing to plead guilty. This procedure would help detect any problems with the adequacy of the court interpretation and make sure that the non-English-speaking defendant's plea meets the *Brady* standard.[182]

Federal judges can also require defense counsel to utilize a modified plea bargain "checklist" during out-of-court discussions when the defense counsel explains the content and effect of a plea agreement to the defendant.[183] This checklist requires that defendants initial each component of the checklist that specifies a term of the plea bargain.[184] During this checklist process, the defense counsel asks the defendant through an interpreter to summarize the content and effect of each component of the plea to demonstrate that the *Brady* standards are met.[185] Afterwards, the initialed checklist is submitted to the court before the court accepts the defendant's guilty plea.[186] The effectiveness of such a checklist operates upon the good faith of the defense counsel in fulfilling its requirements.[187] Although the checklist may add additional work to an already burdened defense counsel, the benefit of protecting a non-English defendant's Sixth Amendment right outweighs this concern.[188] The checklist is a low-cost solution that protects the integrity of the plea bargain process by making certain that defendants are meeting the *Brady* standard during guilty pleas.[189]

Increasing the court's involvement during the plea colloquy or requiring a checklist could have prevented the initial unknowing guilty pleas by Chin and Leung.[190] If the trial court had triggered narrative responses from both Chin and Leung, the court would have realized that neither Chin nor Leung understood the meaning and impact of a guilty plea.[191] Instead of the standard, "Do you understand the terms of your plea

182. *See supra* notes 177 and 180.

183. Interview with Emily Hughes, Associate Professor of Law, Washington University School of Law, in St. Louis, Mo. (Feb. 15, 2008) (transcript on file with author) (discussing a procedure implemented by Iowa Senior State Judge Vern Robinson for plea bargains).

184. *Id.* The checklist is printed in the non-English-speaking defendant's native language. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *See* discussion *supra* Part III.A.

189. *See* discussion *supra* Part IV.B.2.

190. United States v. Leung, 783 F. Supp. 357, 361 (N.D. Ill. 1991).

191. *Id.*; *see also* discussion *supra* Part IV.C.

agreement?,"[192] the *Leung* court could have asked both defendants, "Can you explain to me the terms of your plea agreement?" and, "What is the basis of your plea agreement?"[193] Had the trial court asked either Chin or Leung these questions, the court would have quickly realized that the defendants did not understand the basis and impact of the guilty plea.[194] Likewise, if both Chin's and Leung's counsels had faithfully completed a plea bargain "checklist," the defendants would have had full understanding of the plea before the plea colloquy.[195] Increasing the court's involvement during the plea colloquy would simultaneously diminish the possibility of inadequate court interpretation during the plea bargain process and decrease collateral attacks on plea bargains based on inadequate court interpretation.

3. Adopting the Dusky *Standard or Bonnie Approach for Mentally Ill Individuals in the Non-English-Speaking Defendants Context*

Federal courts can also adopt a modified version of the precautions currently in place for mentally ill individuals who plan to plead guilty. The same concern of voluntariness is raised when both mentally ill individuals and non-English-speaking individuals plead guilty because of questions of comprehension.[196] Presently, the Supreme Court applies the *Dusky* test for mentally ill defendants and prohibits these defendants from proceeding to trial if they lack "the capacity to understand the nature and object of the proceedings against [them], to consult with counsel, and to assist in preparing [their] defense."[197] Moreover, the trial judges have the responsibility to monitor the defendant's behavior through trial and use "their judgment to decide if an evaluation for competency is warranted."[198] "All jurisdictions in the United States" follow a two-pronged *Dusky* competency test: "A judge must evaluate: (1) the defendant's capacity to understand the charges and nature of the criminal proceedings; and (2) the defendant's ability to assist counsel in defending against the charges."[199]

192. *See supra* note 79.
193. *See supra* notes 171–72.
194. *Leung*, 783 F. Supp. at 358–59.
195. *Id*. at 361; *see* discussion *supra* Part IV.C.
196. *See* Godinez v. Moran, 509 U.S. 389, 399–401 (1993); *see also* discussion *supra* Part III.C.
197. Marshall, *supra* note 29, at 1187 (alteration in original); *see* Dusky v. United States, 362 U.S. 402, 402 (1960).
198. Marshall, *supra* note 29, at 1188.
199. *Id.* However, the Supreme Court decided in *Godinez v. Moran* that the level of competence required to plead guilty or waive counsel is not any greater than the competency level required for defendants to stand trial. *Godinez*, 509 U.S. at 400–01. According to the Court, the *Dusky* standard

Additionally, the federal *Judicial Benchbook* provides sample questions that the court should ask the defendant of questionable mental competency to satisfy the *Dusky* standard.[200]

In determining whether a guilty plea is voluntary, courts presently do not explicitly consider the ability of a non-English-speaking defendant to assist counsel.[201] This second prong should be adopted because the contents of guilty pleas are heavily reliant on facts.[202] In order for the defense counsel to effectively serve the interests of the defendant, the defendant needs to be able to communicate these facts to the defense counsel.[203]

Another suggestion has been proposed by Professor Richard J. Bonnie in assessing the competence of criminal defendants. Professor Bonnie's approach could also be applied to the setting of non-English-speaking defendants within the plea bargain process. According to Professor Bonnie, the court should evaluate the defendant's competence to assist counsel and his or her decisional competence.[204] The defendant's ability to communicate with his or her counsel "can profoundly influence the outcome of . . . plea bargains . . . [because] facts and descriptions of the

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"satisfies due process when the defendant is seeking to waive any constitutional right." Marshall, *supra* note 29, at 1188.

200. *See* BENCHBOOK, *supra* note 52, at 57–65 (providing examples of questions that federal district judges should ask of defendants who may be mentally ill and explaining the responsibility of federal district judges in determining the competency to plead guilty).

201. *See* discussion *supra* Part III.A.

202. Marshall, *supra* note 29, at 1197–98.

203. *Id.*; *see supra* note 104.

204. Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond* Dusky *and* Drope, 47 U. MIAMI L. REV. 539, 554–61 (1993). Professor Bonnie's approach "competence to assist counsel" breaks down to the defendant possessing the ability to:

> 1. Understand[] the nature and purpose of criminal prosecution and punishment and the nature of the adversary process, especially the role of defense counsel.
>
> 2. Capacity to understand the criminal charge(s).
>
> 3. Appreciation of one's own situation as a defendant in a criminal prosecution.
>
> 4. Capacity to recognize and relate pertinent information to counsel concerning the facts of the case.

Id. at 562. In addressing the second step of "decisional competence," Professor Bonnie looks at

> [a]bility to express a stable preference[,] . . . [a]bility to understand nature and consequences of decision[,] . . . [a]bility to express plausible (i.e., not grossly irrational) reasons for the decision[,] . . . [a]bility to understand reasons for alternative courses of action (risks and benefits)[,] . . . [a]bility to appreciate significance of this information in one's own case[, and] . . . [a]bility to use logical processes to compare and weigh risks and benefits of alternative courses of action.

Id. at 576; *see also* Marshall, *supra* note 29, at 1187; Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer's Fiduciary Duty to Clients with Mental Disability*, 68 FORDHAM L. REV. 1581, 1595 (2000) (further describing Professor Bonnie's approach to competence to effectively assist counsel, and decisional competence).

alleged crime . . . help [defendants'] attorneys assess the strength of the prosecution's case and can give them leverage in plea negotiations."[205] Professor Bonnie's "decisional competence" test is more comprehensive than the *Dusky* standard because it requires the defendant to explain the decision to plead guilty.[206] Application of Professor Bonnie's two-step test would be helpful in assessing a non-English-speaking defendant's awareness of the content and effect of the plea bargain because it provides a detailed guideline for judges in assessing the voluntariness of a defendant's decision. While this proposal may have the same benefits as narrative questioning, this line of questioning targets only a few areas for follow-up by the court.[207] Since Professor Bonnie's test requires that defendants know the full consequences of a guilty plea, this test could resolve the problem of defendant's lacking information regarding collateral consequences of a plea bargain.[208] This test would also help ensure that the non-English-speaking defendant is both communicating effectively with his or her counsel during plea negotiations and aware that pleading guilty has serious consequences.

Either a modified *Dusky* standard or the Bonnie proposal would have helped catch the inadequate court interpretation during Chin's and Leung's plea bargains. Although the *Leung* court allowed Chin and Leung to withdraw their plea bargains, the *Leung* court would have found that neither defendant was able to properly assist his counsel under the second prong of *Dusky* and allowed for a collateral attack on this ground.[209] Likewise, if Professor Bonnie's "decisional competence" test were in place, the court would have triggered narrative responses during the plea colloquy and found that neither Chin nor Leung understood the impacts of a guilty plea.[210] Adoption of the *Dusky* standard or the Bonnie proposal would systematically reduce the risk of inadequate court interpretation and create greater confidence in the fairness of the plea bargain process.

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205. Marshall, *supra* note 29, at 1197.

206. Bonnie, *supra* note 204, at 576.

207. *Id.*; *see* discussion *supra* Part IV.B.

208. *See* discussion *supra* Part IV.D and note 116.

209. United States v. Leung, 783 F. Supp. 357, 358–61 (N.D. Ill. 1991). In one example, Leung did not fully explain his role in the gambling business to the defense counsel and later told the court that he "just worked there" and "cash[ed] chips." *Id.* at 358.

210. *Id.* at 360–61.

D. Weighing the Effectiveness of the Different Remedies

A few of these proposed solutions can be easily implemented with immediate results. First, video monitoring is a low-cost and efficient method of detecting and remedying inadequate court interpretation.[211] Video monitoring will not encourage frivolous collateral attacks on plea bargains based on inadequate interpretation. With video monitoring, the reviewing interpreter must carefully examine the video footage to determine if the collateral attack of the plea bargain is indeed a valid concern.[212] Furthermore, courts should err in favor of reducing invalid plea bargains even at the cost of possibly encouraging more collateral attacks on plea bargains.[213] Second, courts could easily employ narrative questioning and a defendant checklist, which would prevent unknowing pleas.[214] Requiring the court to ask a few more questions during the plea colloquy is a light burden if balanced against the possible violation of a non-English-speaking defendant's substantial rights.[215] This option would concededly add more time to each plea colloquy but would not cost the court any expenses to exercise. In contrast, adding more interpreters would cost more than video monitoring and narrative questioning by the court.[216] Adopting the "better translation" test would also be an unwieldy solution. While the "better translation" test would allow for courts to more effectively detect inadequate court interpretation, changing the standard of review lacks immediate preventative effects and its benefits overlap the video monitoring proposal.[217] Setting into place any one of these solutions would decrease the possibility that inadequate court interpretation would harm a non-English-speaking defendant's constitutional rights during a plea bargain.

CONCLUSION

Chin and Leung pled guilty without understanding the charges against them, knowing the basis of the charges, or comprehending the significance of the guilty plea. But no one stopped them from pleading guilty—neither their counsel nor the judge. Only after their guilty pleas were entered, did

211. *See* discussion *supra* Part IV.B.
212. *See* discussion *supra* Part IV.B.
213. *See* discussion *supra* Part III.C.2.
214. *See* discussion *supra* Part IV.C.
215. *See* discussion *supra* Part III.A.
216. *See* discussion *supra* Part III.A–B.
217. *See* discussion *supra* Part III.A–C.

Chin realize that he would be "regarded as a criminal" and Leung understand that he had entered into a deal that he would not have accepted even if there had been a "gun to his head."[218]

Although federal courts continue to resolve more cases involving non-English-speaking defendants through plea bargains, almost no checks exist to guarantee that these court interpreters are adequately conveying the defendant's words to the court or the court's message to the defendant during the plea bargain. While guilty pleas are required to be voluntary, knowing, and intelligent, a court cannot be absolutely assured under the present circumstances that this standard is met if the defendant does not speak the language of the court and is entirely dependent upon the court interpreter. Without precautions to ensure adequate interpretation, the very validity of these plea bargains is questioned. The risk is unacceptably high that inadequate court interpretation could cause non-English-speaking defendants to unknowingly or involuntarily waive constitutional rights in a plea agreement. Federal courts should take steps toward reducing this risk by adopting safeguards; otherwise, involuntary pleas, like those of Chin and Leung, will continue to occur.

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218. United States v. Leung, 783 F. Supp. 357, 358–59 (N.D. Ill. 1991).

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