

IN THE SUPERIOR COURT OF PENNSYLVANIA

Docket Number 2204 EDA 2024

Commonwealth of Pennsylvania,

Appellant,

v.

David Pacheco,

Appellee.

Commonwealth Appeal from the August 15, 2024 Order of the Court of Common Pleas, Montgomery County (Hon. Garrett D. Page), Docket Number CP-46-CR-2243-2016 Granting Post-Conviction Relief On a First Petition, Following a Hearing

**BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF JUDICIARY INTERPRETERS AND TRANSLATORS ("NAJIT")
IN SUPPORT OF APPELLEE DAVID PACHECO**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The mission of the National Association of Judiciary Interpreters and Translators (“NAJIT”) is to promote continuing excellence and ensure professional recognition for judiciary interpreters and translators by advocating, upholding, and safeguarding the highest professional standards. Professional interpreting is required to ensure due process, equal protection and equal access to the administration of justice for non-English-speaking or limited English proficient (“LEP”) individuals.

This appeal directly concerns the constitutional rights of an LEP defendant whose trial counsel decided to deprive defendant of an interpreter throughout the criminal proceedings against him without informing his client of his right to an interpreter or consulting with his client about that decision. The PCRA court found that the LEP defendant’s trial counsel was constitutionally ineffective owing to this decision. *Amicus Curiae* NAJIT submits this brief in support of Appellee David Pacheco and to uphold the PCRA Court’s determination.

No one besides the *amicus curiae*, its members, and its counsel paid in whole or part for the preparation of the brief. No one besides the *amicus curiae*, its members, and its counsel authored in whole or in part the brief.

SUMMARY OF ARGUMENT

Criminal defendants with limited English proficiency (“LEP”) have a constitutional right to an interpreter at trial. This constitutional right derives from the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution because none of these rights can be ensured if a defendant is unable to understand and fully participate in the proceedings that will determine their guilt or innocence. It is a right long recognized by the Pennsylvania Supreme Court, the Pennsylvania Legislature, the United States Congress, and by courts across the country.

The Commonwealth seeks to reverse the PCRA Court finding that David Pacheco’s constitutional rights were violated when he was not provided an interpreter at his criminal trial. The sole basis of the Commonwealth’s argument is that, as a matter of law, an attorney can deny a criminal defendant an interpreter needed to ensure his comprehension of the proceedings, confront witnesses, consult with his attorney, and meaningfully be present at his own trial as a matter of “trial strategy.” This is wrong. As the PCRA Court properly recognized, “trial counsel’s strategy cannot trump Petitioner’s constitutional rights.” Op. at 8.

The PCRA Court is correct. Mr. Pacheco had a constitutional right to an interpreter “to confront witnesses against him, ... to

consult with his attorney, ... to be present at his own trial [, and] ... to testify in his own behalf” that cannot be abridged by counsel’s “strategy.” *Com. v. Pana*, 364 A.2d 895, 898 (Pa. 1976).

Amicus Curiae NAJIT, compelled by its mission to ensure professional recognition for judiciary interpreters and translators, respectfully urges this Court to affirm the PCRA Court to uphold both Mr. Pacheco’s rights and the well-established principle that, for criminal defendants with limited English proficiency, professional interpreting is required to ensure due process, equal protection and equal access to the administration of justice.

ARGUMENT

I. The Constitutional Right to an Interpreter for a Criminal Defendant with Limited English Proficiency Is Well-Established

This appeal seeks to undermine a critical constitutional right to an interpreter for Limited English Proficiency (“LEP”) criminal defendants, guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution. The PCRA Court recognized this right and granted relief to Mr. Pacheco, finding that trial counsel was constitutionally ineffective when he chose not to obtain an interpreter for Mr. Pacheco at any point during Mr. Pacheco’s criminal proceedings.

As the Pennsylvania Supreme Court has explained, “[a] defendant’s ability to use an interpreter encompasses numerous fundamental rights.” *Com. v. Pana*, 364 A.2d 895, 898 (Pa. 1976). The Court further suggested those rights included the rights “to confront witnesses against him, ... to consult with his attorney, ... to be present at his own trial [, and] ... to testify in his own behalf.” *Id.*

To secure this constitutional right, the Pennsylvania General Assembly passed the Pennsylvania Interpreter Act, Act 172 of 2006, providing a program to certify and fund court interpreters

as well as ensure they are appointed for anyone who has a limited ability to speak or understand English. 42 Pa.C.S. §§ 4411, 4412, 4417. The statute's preamble states:

It is hereby declared to be the policy of this Commonwealth to secure the rights, constitutional and otherwise, of persons who because of a non-English speaking cultural background ... are unable to understand or communicate adequately in the English language when they appear in court or are involved in judicial proceedings.

42 Pa.C.S. § 4401. When signing the bill into law, Governor Rendell remarked that "A fair and just legal system requires that all who testify must be able to clearly understand the questions posed to them, and the judge and jury must be able to understand their answers. We must assure that those who speak limited English are not shut out of our legal system and receive due process under the law." Pennsylvania Governor's Message, (Nov. 30, 2006).¹

¹ This statute notably requires the trial court to appoint an interpreter *sua sponte* "if the presiding judicial officer determines that a principal party in interest or witness has a limited ability to speak or understand English." 42 Pa.C.S. § 4412. The Language Access Plan for the Unified Judicial System of Pennsylvania, which implements the statute, also provides as its first principle of language access that "Courts are responsible for early identification of the need for language services" *Id.* at 5. The trial court made no such determination, despite substantial testimony that suggested Mr. Pacheco's limited English ability, including responding to a question in his direct examination about

And in its report preceding the passage of that statute, the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System reported that:

When people are unable to comprehend or participate fully in court proceedings in which they are parties, fundamental notions of justice and fairness are called into question. ...The right to an interpreter in criminal matters is based upon the Fifth, Sixth and Fourteenth Amendments to the U.S. Constitution. If the state fails to provide an interpreter when one is needed, the situation jeopardizes the broad Fifth Amendment right not to be deprived of life or liberty without due process of law; the more specific Sixth Amendment rights of a criminal defendant to counsel, to a speedy trial, to be informed of the charges against him, and to confront adverse witnesses; and the Fourteenth Amendment rights to due process and equal protection of the law.

[Final Report of the Pennsylvania Supreme Court Committee on Racial and Gender Bias in the Justice System](#), at 21 (March 2003).

State and federal courts across the country have found that an individual whose rights are to be determined at a trial or hearing has a constitutional right to an interpreter when he or

whether he could “speak pretty good English, right?” and answering, “No, not really, but I can try to speak. If you speak to me slow, I understand.” R. 004a. As the Third Circuit held in a case about a non-citizen’s constitutional right to an interpreter in removal proceedings, “not making a threshold inquiry into whether an interpreter is needed, in turn, renders the right to an interpreter meaningless.” *B.C. v. Att’y Gen. United States*, 12 F.4th 306, 316 (3d Cir. 2021).

she does not possess sufficient English skills to fully comprehend the proceedings. Every federal court of appeals to address the question has recognized the constitutional nature of the right of a criminal defendant to the assistance of an interpreter.² The Third

² See *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973) (recognizing that a criminal defendant has a constitutional right to an interpreter that “rests most fundamentally... on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.”); *U. S. ex rel. Negron v. New York*, 434 F.2d 386, 389 (2d Cir. 1970) (holding that where a criminal defendant who did not speak or understand English was not provided with an interpreter at trial, his trial “lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment,” among other constitutional guarantees); *United States v. Garcia*, 956 F.2d 41, 45 (4th Cir. 1992) (emphasizing that “[c]ourts, prosecutors, and defense attorneys alike must be especially vigilant in assuring that a language barrier does not unfairly prejudice a criminal defendant”); *United States v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980) (per curiam) (recognizing that the use of courtroom interpreters involves “the defendant’s constitutional rights to due process and confrontation”); *United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985) (holding that a criminal defendant’s right to due process is violated when “the nature of the proceeding is not explained to him in a manner designed to insure his full comprehension”); *Luna v. Black*, 772 F.2d 448, 451 (8th Cir. 1985) (per curiam) (concluding that defendant who raised a due process claim based on failure to appoint interpreter “correctly asserts that an indigent defendant who has obvious difficulty with the language has a right to a court-appointed interpreter”); *United States v. Mayans*, 17 F.3d 1174, 1180–81 (9th Cir. 1994) (holding that defendant’s Fifth Amendment right to testify on his own behalf was violated when the court prevented him from

Circuit Court of Appeals addressed the question of the impact of a failure to provide an interpreter in the context of a removal proceedings and held that “[f]ailing to provide an interpreter when needed makes meaningless a noncitizen’s right to due process. And not making a threshold inquiry into whether an interpreter is needed, in turn, renders the right to an interpreter meaningless.” *B.C. v. Att’y Gen. United States*, 12 F.4th 306, 316 (3d Cir. 2021). Likewise, the highest courts of numerous states have recognized that criminal defendants have a constitutional right to an interpreter.³

testifying with an interpreter); *Cervantes v. Cox*, 350 F.2d 855, 855 (10th Cir. 1965) (concluding that “we have no doubt” that the Sixth Amendment right to counsel may be denied where the defendant is unable to communicate with counsel); *United States v. Edouard*, 485 F.3d 1324, 1338 (11th Cir. 2007) (recognizing that the denial of an interpreter implicates “the defendant’s rights to due process, confrontation of witnesses, effective assistance of counsel, and to be present at his trial”).

³ See, e.g., *State v. Natividad*, 526 P.2d 730, 733 (Ariz. 1974); *People v. Romero*, 187 P.3d 56 (Cal. 2008); *State v. Heredia*, 754 A.2d 114, 122 (Conn. 2000); *Suarez v. State*, 481 So. 2d 1201, 1203–04 (Fla. 1985); *Ling v. State*, 702 S.E.2d 881, 882–83 (Ga. 2010); *State v. Faafiti*, 513 P.2d 697, 699 (Haw. 1973); *People v. Shok*, 145 N.E.2d 86, 88 (Ill. 1957); *Ponce v. State*, 9 N.E.3d 1265, 1272 (Ind. 2014); *State v. Calderon*, 13 P.3d 871, 879 (Kan. 2000); *Commonwealth v. Abukar*, 497 S.W.3d 231, 238 (Ky. 2016); *State v. Lopes*, 805 So. 2d 124 (La. 2001); *Commonwealth v. Lee*, 134 N.E.3d 523, 532 (Mass. 2019); *State v. Bol*, 882 N.W.2d 674, 680 (Neb. 2016); *Ton v. State*, 878 P.2d 986 (Nev. 1994); *People v. Robles*, 655 N.E.2d

Similar to the Pennsylvania General Assembly, the United States Congress passed the Court Interpreters Act of 1978 (codified at 28 U.S.C. §§ 1827-28 (2010)), to secure the constitutional right to an interpreter in federal court where limited English ability inhibits a party's understanding of the proceedings, communication with the court or counsel, or a witness's comprehension of questions or presentation of testimony. As detailed in the final report of the Senate Committee on the Judiciary, Congress was motivated by its concern that the lack of an interpreter could undermine rights protected by the Fifth and Sixth Amendments, and queried "how these guarantees can be assured if a party does not understand the language used in the courtroom unless he has the right to an interpreter." S. REP. No. 95-569, at 3 (1977). Likewise, the House Judiciary Committee report explained that the "original impetus" behind the bill was the Second Circuit's decision in *Negron*, 434 F.2d 386, which held that the absence of an interpreter during criminal proceedings violated both due process and the Sixth Amendment. H.R. REP. No. 95-1687 at 2 (1978). *See also, e.g.*, H.R. REP. No. 95-1687

172, 173 (N.Y. 1995); *In re Application of Murga*, 631 P.2d 735, 736-37 (Okla. 1981); *State v. Torres*, 524 A.2d 1120, 1126 (R.I. 1987); *State v. Selalla*, 744 N.W.2d 802, 808 (S.D. 2008); *Garcia v. State*, 149 S.W.3d 135, 142-43, 145 (Tex. Crim. App. 2004); *State v. Gonzales-Morales*, 979 P.2d 826, 828, 832 (Wash. 1999).

at 3 (describing remarks of Rep. Richmond, arguing that if Congress denied limited English proficient Americans the ability “to understand and participate in their own defense, then we have failed to carry out a fundamental premise of fairness and due process for all”); 124 CONG. REC. H11910, 11912 (daily ed. Oct. 10, 1978) (statement of Rep. Edwards describing the refusal to provide interpreters for persons with language or hearing barriers as “a serious denial of due process of the law”).

II. Trial Counsel’s “Strategy” Cannot Trump a Criminal Defendants’ Constitutional Right to an Interpreter

Despite the critical and essential function that competent court interpreters play in protecting the rights of LEP criminal defendants before, during, and after trial, the Commonwealth argues in its appeal that trial counsel’s “strategy” to not use an interpreter for Mr. Pacheco’s testimony on the stand was “reasonable” and therefore Mr. Pacheco’s trial counsel was not constitutionally ineffective. The Commonwealth’s argument ignores the whole panoply of constitutional rights that were denied to Mr. Pacheco, an LEP defendant, by trial counsel’s “strategy” to not use an interpreter *throughout the entirety of the proceedings*, independent of Mr. Pacheco’s testimony. Trial counsel’s “strategy”: (1) denied Mr. Pacheco’s due process rights to understand the proceedings in a manner designed to ensure

his full comprehension; (2) denied Mr. Pacheco's right to be present so that he could participate effectively in his own defense; (3) denied Mr. Pacheco's right to confront witnesses against him; and (4) denied Mr. Pacheco's right to provide meaningful input to counsel both before and during his trial. As the PCRA Court correctly recognized, "trial counsel's strategy cannot trump Petitioner's constitutional rights." Op. at 8.⁴

A. A Court Interpreter Is Essential to Protecting a Defendant's Right to Due Process

A criminal defendant's right to the assistance of an interpreter derives in process and the right to a fair hearing. See *Pana*, 364 A.2d at 898 ("A defendant's ability to use an interpreter encompasses numerous fundamental rights."). When a defendant who neither speaks nor understands English is denied an interpreter to help him comprehend the proceedings against him, his trial "lack[s] the basic and fundamental fairness required

⁴ As noted above, the trial court also had an obligation, under the law, 42 Pa.C.S. § 4412(a), to appoint an interpreter once it became apparent that Mr. Pacheco had limited English proficiency. See *supra* note 1. This obligation and ensuing deprivation of rights by the trial court is independent of the import of any "strategy" by trial counsel. See *B.C.*, 12 F.4th at 316 ("And not making a threshold inquiry into whether an interpreter is needed, in turn, renders the right to an interpreter meaningless.").

by the due process clause of the Fourteenth Amendment.” *Negron*, 434 F.2d at 389; *see also B.C.*, 12 F.4th at 316 (“Failing to provide an interpreter when needed makes meaningless a noncitizen’s right to due process.”). “The right to an interpreter rests most fundamentally, however, on the notion that no defendant should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment.” *Carrion*, 488 F.2d at 14. “[T]he right to an interpreter is not aimed solely at ensuring the integrity of the outcome; it is also fundamentally a right which safeguards the fairness of the process. The right to an interpreter is the right of a criminal defendant to be treated at trial as a comprehending individual rather than as an insensate object.” *State v. Neave*, 344 N.W.2d 181, 187–88 (Wis. 1984); *see also Ko v. United States*, 722 A.2d 830, 834 (D.C. 1998) (en banc) (explaining that the right to an interpreter “goes to the essence of a defendant’s right to a fair trial” under the due process clause).

B. A Court Interpreter Is Essential to Protecting a Defendant’s Right to Be Present at Trial

An LEP defendant’s “failure to understand the proceedings may deny him ... his right to be present at his own trial.” *Pana*, 364 A.2d at 898. “Considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of

justice forbid that the state should prosecute a defendant who is not present at his own trial." *Negron*, 434 F.2d at 389. "When the accused cannot understand the proceedings, then the trial, to him, is no more than 'a babble of voices,' and he cannot fairly be said to be present at his own trial." *Ko v. United States*, 722 A.2d 830, 834 (D.C. 1998) (en banc) (quoting *Negron*, 434 F.2d at 388, citing Gonzalez, Vasquez, & Mikkelson, *Fundamentals of Court Interpretation* § 3, at 59 (1991)).

"To be 'present' requires that a defendant be more than just physically present. It assumes that a defendant will be informed about the proceedings so he or she can assist in the defense." *State v. Calderon*, 13 P.3d 871, 875 (Kan. 2000). Indeed, in many if not most cases, it is the defendant who has the most intimate knowledge of the facts relevant to their defense, and who will be best suited to assess and rebut the prosecution's theories and the testimony of the witnesses against them. Thus, the defendant's active participation in the defense is critical. As numerous courts have recognized, however, a defendant who does not fully comprehend the English language proceedings against them is not able to participate effectively in their own defense. *See, e.g., Natividad*, 526 P.2d at 733 ("[A]n indigent defendant who is unable to speak and understand the English language should be afforded the right to have the trial

proceedings translated into his native language in order to participate effectively in his own defense.”); *Lopes*, 805 So. 2d 124 (describing as “nearly self-evident” the “proposition that a defendant who cannot speak or understand English would have a right to have his criminal trial translated to permit him to effectively participate in his own defense”); *Cirrincione*, 780 F.2d at 634 (holding that a criminal defendant’s right to due process is violated when “what is told [to] him is incomprehensible” or “the nature of the proceeding is not explained to him in a manner designed to part, as the Supreme Court recognized in *Marino*, from elementary notions of due process to ensure his full comprehension”).

C. A Court Interpreter Is Essential to Protecting a Defendant’s Right to Confront Witnesses Against Them

The assistance of an interpreter is particularly necessary to protect the defendant’s Sixth Amendment right to confront and cross-examine witnesses. *See Pana*, 364 A.2d at 898 (finding that an LEP defendant’s “failure to understand the proceedings may deny him his right to confront witnesses against him”); *Commonwealth v. Diaz*, 183 A.3d 417, 423 (Pa. Super. Ct. 2018), *aff’d*, 226 A.3d 995 (Pa. 2020) (“The ability of a defendant to

understand the proceedings against him was fundamental to the right to confront witnesses and be present at his own trial.”)

A defendant’s inability to spontaneously understand testimony being given would undoubtedly limit his attorney’s effectiveness, especially on cross-examination. “Clearly, the right to confront witnesses would be meaningless if the accused could not understand their testimony, and the effectiveness of cross-examination would be severely hampered.” *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973); *see also, e.g., Garcia*, 149 S.W.3d at 142- 43, 145 (Tex. Crim. App. 2004) (holding that defendant’s right to confrontation was denied where interpreter was not sworn in and did not translate witness testimony for the defendant); *Flores v. United States*, 698 A.2d 474, 479–80 (D.C. 1997) (holding that a strict time limit on cross-examination of non-English- speaking prosecution witness violated defendant’s Sixth Amendment right to confront witnesses because it did not adequately take into account time needed for interpretation); *People v. Shok*, 145 N.E.2d 86, 88 (Ill. 1957) (remanding for retrial where non-English speaking prosecuting witness had language difficulties on the stand, reasoning that “there was a deprivation of the basic right of cross-examination to the prejudice of the defendant”).

D. A Court Interpreter Is Essential to Protecting a Defendant's Right to Counsel

"A criminal defendant's right to counsel guaranteed by the Sixth Amendment includes his right to consult with his attorney about the substance of trial during his trial (other than in the midst of his testimony)." *Commonwealth v. Diaz*, 226 A.3d 995, 1010 (Pa. 2020). An LEP defendant's "failure to understand the proceedings may deny him ... his right to consult with his attorney" *Pana*, 364 A.2d at 898. In *Diaz*, the Pennsylvania Supreme Court held this constitutional right *per se* infringed where an interpreter was not provided throughout trial to facilitate ongoing translation between the defendant and his trial counsel: "Because Diaz could not understand what was being said, he could not have communicated with his attorney about the substance of the proceedings. Such communications encompass discussions about witness testimony, lines of inquiry to pursue and tactical decisions, all of which are constitutionally protected." 226 A.3d at 1011.

Numerous other courts have likewise recognized that both the effectiveness of an attorney's representation and the constitutional right to representation by counsel are negated when the defendant is made to sit through an incomprehensible trial. *See, e.g., Torres*, 524 A.2d at 1126 (recognizing that a

defendant's language barrier could "threaten the effectiveness of counsel"). An attorney in that situation operates without any input or participation from his client as to the matters discussed at trial and the testimony of adverse witnesses. In such circumstances, the criminal defendant's "incapacity to respond to specific testimony would inevitably hamper the capacity of his counsel to conduct effective cross-examination." *Negron*, 434 F.2d at 389–90; *see also Natividad*, 526 P.2d at 733. The attorney would also be unable to consult with his client on key strategic questions that arise during the course of the trial, or on any questions at all. *See, e.g., Chao v. State*, 604 A.2d 1351, 1362 (Del. 1992). ("A criminal defendant who is unable to understand the English language is effectively denied the right to consult with an attorney."). An attorney who attempts to mount a defense without seeking meaningful input from an otherwise competent defendant during trial simply cannot provide constitutionally effective representation.

CONCLUSION

For the reasons set forth above, *Amicus Curiae* NAJIT, compelled by its mission to promote continuing excellence and ensure professional recognition for judiciary interpreters and translators and their critical work ensuring due process, equal protection and equal access to the administration of justice for

non-English or limited English proficient (“LEP”) individuals, respectfully urges the Court to affirm the PCRA court’s determination that Appellee David Pacheco’s constitutional rights were violated when he was denied a competent court interpreter at his criminal trial.

Respectfully,

Dated: February 12, 2025

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CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 127

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ David Nagdeman
David Nagdeman, Esq.

CERTIFICATE OF COMPLIANCE WITH PA.R.A.P. 531(b)(3)

I certify that this filing complies with the word count limit of 7,000 words for amicus briefs submitted during merits briefing as provided at Pa.R.A.P. 531(b)(3). The total number of words contained in this brief—excluding the table of contents, table of citations, proof of service, signature block, and certifications—is 3,892 words.

/s/ David Nagdeman
David Nagdeman, Esq.

CERTIFICATE OF SERVICE

I certify that on this date I served the foregoing Amicus Curiae Brief in Support of Appellee David Pacheco on all parties via this Court's electronic filing system.

Dated: February 12, 2025

/s/ David Nagdeman
David Nagdeman

IN THE SUPERIOR COURT OF PENNSYLVANIA

Commonwealth of Pennsylvania	:	2204 EDA 2024
Appellant	:	
v.	:	
David Pacheco	:	

PROOF OF SERVICE

I hereby certify that this 12th day of February, 2025, I have served the attached document(s) to the persons on the date(s) and in the manner(s) stated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service

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IN THE SUPERIOR COURT OF PENNSYLVANIA

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