

IN THE SUPREME COURT OF GEORGIA

CASE NO. S10-C0460

ANNIE LING

Appellant,

v.

STATE OF GEORGIA,

Appellee.

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF  
GEORGIA, LEGAL AID SOCIETY – EMPLOYMENT LAW CENTER,  
AND AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF  
APPELLANT ANNIE LING

Jennifer Chang Newell  
(Cal. SBN 233033)  
David Wakukawa  
(Cal. SBN 262546)  
(volunteer attorney)  
American Civil Liberties Union  
Foundation  
Immigrants' Rights Project  
39 Drumm Street  
San Francisco, CA 94111  
Telephone: 415.343.0770  
Facsimile: 415.395.0950  
jnewell@aclu.org

Chara Fisher Jackson  
(Georgia SBN 386101)  
Azadeh Shahshahani  
(Georgia SBN 509008)  
American Civil Liberties Union  
Foundation of Georgia  
1900 The Exchange, SE, Suite 425  
Atlanta, Georgia 30339  
Telephone: 770.303.8111  
Facsimile: 770.303.0060  
cfjackson@acluga.org

Araceli Martínez-Olguín  
(Cal. SBN 235651)  
The LEGAL AID SOCIETY –  
EMPLOYMENT LAW CENTER  
600 Harrison Street, Suite 120  
San Francisco, California 94107  
Telephone: 415.864.8848  
Facsimile: 415.864.8199  
amartinez-olguin@las-elc.org

## Table of Contents

<b>INTRODUCTION .....</b>	<b>1</b>
<b>INTEREST OF AMICI .....</b>	<b>2</b>
<b>ARGUMENT .....</b>	<b>4</b>
<b>I. A CRIMINAL DEFENDANT WHO SPEAKS AND UNDERSTANDS LIMITED ENGLISH HAS A FEDERAL CONSTITUTIONAL RIGHT TO AN INTERPRETER AT TRIAL.....</b>	<b>4</b>
<b>A. As this Court Has Recognized, Interpreters Are Necessary to Ensure Due Process and Equal Access to Justice in Criminal Proceedings .....</b>	<b>4</b>
<b>B. The Widespread Consensus of State and Federal Authority is that the Constitution Requires that LEP Defendants be Provided with an Interpreter. ....</b>	<b>6</b>
<b>1. Due Process Requires that LEP Defendants Be Provided An Interpreter.....</b>	<b>10</b>
<b>2. The Rights Guaranteed By the Sixth Amendment Require that LEP Defendants be Provided an Interpreter.....</b>	<b>12</b>
<b>a. The Right to Be Present. ....</b>	<b>13</b>
<b>b. The Right to Confront Witnesses.....</b>	<b>15</b>
<b>c. The Right to Effective Assistance of Counsel.....</b>	<b>16</b>
<b>C. The U.S. Congress Has Likewise Recognized the Constitutional Right to an Interpreter. ....</b>	<b>17</b>
<b>II. CONSISTENT WITH CONSTITUTIONAL REQUISITES, FEDERAL CIVIL RIGHTS LAW INDEPENDENTLY REQUIRES THAT STATE COURTS RECEIVING FEDERAL FUNDS PROVIDE INTERPRETERS FOR LEP LITIGANTS.....</b>	<b>19</b>
<b>CONCLUSION .....</b>	<b>22</b>

## Table of Authorities

### FEDERAL CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V .....	4, 10
U.S. Const. Amend. VI .....	4, 10, 13
U.S. Const. Amend. XIV .....	4, 10

### FEDERAL CASES

<i>Bartels v. State of Iowa</i> , 262 U.S. 404 (1923) .....	7
<i>Cervantes v. Cox</i> , 350 F.2d 855 (10th Cir. 1965) .....	8
<i>Farrington v. Tokushige</i> , 273 U.S. 284 (1927) .....	7
<i>Gonzales v. Zurbrick</i> , 45 F.2d 934 (6th Cir. 1930) .....	8, 12
<i>Lau v. Nichols</i> , 414 U.S. 563 (1974) .....	21
<i>Luna v. Black</i> , 772 F.2d 448 (8th Cir. 1985) .....	8
<i>Marincas v. Lewis</i> , 92 F.3d 195 (3d Cir. 1996) .....	8
<i>Marino v. Ragen</i> , 332 U.S. 561 (1947) .....	6, 7, 10
<i>Meyer v. Nebraska</i> , 262 U.S. 390 (1923) .....	7
<i>Nazarova v. INS</i> , 171 F.3d 478 (7th Cir. 1999) .....	12
<i>Perez-Lastor v. INS</i> , 208 F.3d 773 (9th Cir. 2000) .....	4, 12
<i>U. S. ex rel. Negron v. State of N. Y.</i> , 434 F.2d 386 (2d Cir. 1970) .....	<i>passim</i>
<i>U.S. v. Cirrincione</i> , 780 F.2d 620 (7th Cir. 1985) .....	8, 11
<i>U.S. v. Edouard</i> , 485 F.3d 1324 (11th Cir. 2007) .....	<i>passim</i>

<i>U.S. v. Martinez</i> , 616 F.2d 185 (5th Cir. 1980).....	7, 12, 15
<i>United States v. Carrion</i> , 488 F.2d 12 (1st Cir. 1973).....	7
<i>United States v. Garcia</i> , 956 F.2d 41 (4th Cir. 1992).....	7
<i>United States v. Mayans</i> , 17 F.3d 1174 (9th Cir. 1994).....	8

## **STATE CASES**

<i>In re Application of Murga</i> , 631 P.2d 735 (Okla. 1981).....	9, 14, 16, 17
<i>Arrieta v. State</i> , 878 N.E.2d 1238 (Ind. 2008).....	9, 11, 14, 16
<i>People v. Redgebol</i> , 184 P.3d 86 (Colo. 2006).....	17
<i>Chao v. State</i> , 604 A.2d 1351 (Del. 1992), .....	8, 16, 17
<i>Commonwealth v. Pana</i> , 364 A.2d 895 (Pa. 1976).....	9, 14, 16, 17
<i>Flores v. United States</i> , 698 A.2d 474 (D.C. 1997).....	10, 15
<i>Garcia v. State</i> , 149 S.W.3d 135 (Tex. Crim. App. 2004).....	10, 15
<i>Ko v. United States</i> , 722 A.2d 830 (D.C. 1998).....	11
<i>People v. Ramos</i> , 26 N.Y.2d 272 (N.Y. 1970).....	4, 14
<i>People v. Robles</i> , 655 N.E.2d 172 (N.Y. 1995).....	9
<i>People v. Romero</i> , 44 Cal. 4th 386, 79 Cal. Rptr. 3d 334 (Cal. 2008).....	<i>passim</i>
<i>People v. Shok</i> , 145 N.E.2d 86 (Ill. 1957).....	9, 15
<i>Ramos v. Terry</i> , 622 S.E.2d 339 (Ga. 2005).....	5
<i>State v. Calderon</i> , 13 P.3d 871 (Kan. 2000).....	9, 13, 14
<i>State v. Douangmala</i> , 646 N.W.2d 1 (Wis. 2002).....	10, 12

<i>State v. Faafiti</i> , 513 P.2d 697 (Haw. 1973).....	9, 12
<i>State v. Farrah</i> , 735 N.W.2d 336 (Minn. 2007).....	10
<i>State v. Gonzales-Morales</i> , 979 P.2d 826 (Wash. 1999).....	10, 14, 16
<i>State v. Heredia</i> , 754 A.2d 114 (Conn. 2000).....	8, 14, 17
<i>State v. Karumai</i> , 126 P.2d 1047 (Utah 1942).....	10, 14
<i>State v. Lopes</i> , 805 So. 2d 124 (La. 2001).....	9, 14
<i>State v. Natividad</i> , 526 P.2d 730 (Ariz. 1974).....	4, 8, 11, 15
<i>State v. Ortiz</i> , 766 N.W.2d 244 (Iowa 2009).....	10
<i>State v. Selalla</i> , 744 N.W.2d 802 (S.D. 2008).....	9, 12, 16, 17
<i>State v. Torres</i> , 524 A.2d 1120 (R.I. 1987).....	9, 16
<i>Suarez v. State</i> , 481 So. 2d 1201 (Fla. 1986).....	9, 11, 16
<i>Ton v. State</i> , 110 Nev. 970 (Nev. 1994).....	9, 10

#### **FEDERAL STATUTES AND REGULATIONS**

Court Interpreters Act of 1978, 28 U.S.C. §§ 1827-28 (2010).....	17
Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, <i>et seq.</i> .....	2, 19, 21
28 C.F.R. § 42.101, <i>et seq.</i> .....	19
Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,461 (June 18, 2002).....	21

#### **CONGRESSIONAL RECORDS**

124 Cong. Rec. H11910, 11912 (daily ed. Oct. 10, 1978).....	18
---	----

H.R. Rep. No. 95-1687 (1978).....	18
S. Rep. No. 95-569 (1977).....	18

#### **OTHER AUTHORITIES**

Ga. S. Ct., Use of Interpreters for Non-English Speaking Persons (2008).....	5, 6
Loretta King, Prepared Remarks for Federal Interagency Working Group on Limited English Proficiency (April 20, 2009).....	21
Letter from DOJ Civil Rights Division to Indiana Supreme Court Administration (February 4, 2009).....	20

## INTRODUCTION

Amici curiae American Civil Liberties Union of Georgia, Legal Aid Society - Employment Law Center, and American Civil Liberties Union respectfully submit this brief to address the second set of questions set out by the Court in its March 29, 2010 order granting *certiorari* in this case:

[W]hether the lack of a translator at trial for a non-English speaking defendant deprives the defendant of her constitutional right to be present at the trial; and

[W]hether a non-English-speaking defendant is deprived of the right to effective assistance of counsel where counsel fails to secure an interpreter for trial.

The State's filing in this case does not and could not contest that criminal defendants with limited English proficiency ("LEP") have a constitutional right to interpretation at trial. The widespread consensus of state and federal courts that have addressed these questions is that LEP criminal defendants have a right under the U.S. Constitution to an interpreter at trial. This constitutional right is grounded in the Constitution's guarantees to the accused of the Fifth and Fourteenth Amendment right to due process and a fair hearing, and the Sixth Amendment rights to confront the witnesses against her and be present at one's own trial, and to the effective assistance of counsel.

In addition to the constitutional guarantee, the State, as a recipient of federal dollars which help fund its state court systems, is required by Title VI of

the Civil Rights Act of 1964 and its implementing regulations to provide competent interpretation services to all LEP individuals who come into contact with its court system. As such, there is no question Title VI provides an independent mandate that an interpreter be made available to an LEP criminal defendant, such as the defendant in this case, during hearings and trials.

### **INTEREST OF AMICI**

The American Civil Liberties Union Foundation of Georgia is a state affiliate of the ACLU with over 5,000 members. The ACLU of Georgia's mission is to advance the cause of civil liberties in Georgia, with emphasis on rights of free speech, free assembly, freedom of religion, due process of law and to take all legitimate action in the furtherance of such purposes without political partisanship. Through its National Security/Immigrants' Rights project, the ACLU of Georgia strives to bring Georgia and its localities into compliance with international human rights and constitutional standards regarding the treatment of refugee and immigrant communities, including limited English proficient persons.

The Legal Aid Society-Employment Law Center ("LAS-ELC") is a nonprofit legal services organization, founded in 1919, that litigates cases nationwide on behalf of low-wage workers. Through its National Origin,



Immigration, and Language Rights Program, LAS-ELC works to protect the rights of individuals who face discrimination because they belong to a particular ethnic community, because they or their ancestors immigrated to the United States, or because of their linguistic or cultural characteristics. If the decisions of the lower courts in this case are permitted to stand, LAS-ELC's ability to represent low-wage workers who are not proficient in English, including such workers in the State of Georgia, will be adversely impacted.

The American Civil Liberties Union is a nationwide, nonprofit nonpartisan organization of almost 500,000 members dedicated to protecting the fundamental rights guaranteed by the Constitution and laws of the United States. Since its founding, the ACLU has sought to ensure that the protections of the Constitution and the Bill of Rights apply equally to all persons, including immigrants. Through its national Immigrants' Rights Project, the ACLU engages in litigation and advocacy to ensure that immigrants receive the full protection of federal civil rights and labor laws.

## ARGUMENT

### **I. A Criminal Defendant Who Speaks and Understands Limited English Has a Federal Constitutional Right to an Interpreter at Trial.**

The constitutional right to an interpreter in criminal cases has been described by courts from jurisdictions across the U.S. as “axiomatic,”<sup>1</sup> “unquestionable,”<sup>2</sup> “long-settled,”<sup>3</sup> and “nearly self-evident.”<sup>4</sup> Indeed, this Court itself has previously recognized that access to an interpreter is critical to protecting the constitutional rights of LEP criminal defendants or other litigants. Every federal court of appeals to consider the question has recognized that the right to an interpreter implicates rights under the Fifth, Fourteenth and Sixth Amendments to the U.S. Constitution. Numerous state supreme courts have likewise concluded. Adding to this overwhelming consensus of authority, the U.S. Congress has likewise recognized that constitutional concerns necessitate the appointment of interpreters for LEP litigants.

#### **A. As this Court Has Recognized, Interpreters Are Necessary to Ensure Due Process and Equal Access to Justice in Criminal Proceedings**

Although the Court has never squarely addressed whether criminal defendants have a constitutional right to an interpreter, it has recently recognized

---

<sup>1</sup> *State v. Natividad*, 526 P.2d 730, 733 (Ariz. 1974).

<sup>2</sup> *People v. Robles*, 655 N.E.2d 172, 173 (N.Y. 1995).

<sup>3</sup> *Perez-Lastor v. INS*, 208 F.3d 773, 778 (9th Cir. 2000).

<sup>4</sup> *U. S. ex rel. Negron v. State of N. Y.*, 434 F.2d 386, 389 (2d Cir. 1970).

that, in cases involving LEP individuals, the use of interpreters is essential to ensure that the ends of justice are served. *See Ramos v. Terry*, 622 S.E.2d 339 (Ga. 2005) (“The use of qualified interpreters is necessary to preserve meaningful access to the legal system for persons who speak and understand only languages other than English.”).

Further, by taking commendable action to adopt rules and appoint the Georgia Commission on Interpreters, this Court has acknowledged the fundamental importance of interpreters in providing equal access to justice for LEP litigants and safeguarding constitutional rights. *See Use of Interpreters for Non-English Speaking Persons* (2008). The Court explained that it established this commission, along with the uniform rules on court interpreters, specifically “to assure that persons of limited English proficiency be provided due process, equal access and meaningful participation in all court proceedings and court support services; *that the constitutional rights of criminal defendants to assistance of language interpreters be safeguarded*; and, that the efficiency, quality and uniformity of court proceedings as assisted by interpreters be encouraged and preserved.” *Id.*, Appendix C, Code of Professional Responsibilities for Interpreters, Preamble (2008) (emphasis added); *see also id.*, Commentary on Standard VI (“Parties to litigation have a constitutional right to test the testimony

of non-English speaking witnesses, just as they test the testimony of an English speaking witness.”).

This Court’s previous recognition that the assistance of an interpreter implicates constitutional rights is fully consistent with the widespread consensus amongst state and federal courts – including nearly every federal circuit court and numerous state supreme courts – that the right of LEP litigants to a court-appointed interpreter is mandated under the U.S. Constitution.

**B. The Widespread Consensus of State and Federal Authority is that the Constitution Requires that LEP Defendants be Provided with an Interpreter.**

As early as 1948, the U.S. Supreme Court held that a state criminal defendant “was denied the due process of law which the Fourteenth Amendment requires” when he was appointed neither a neutral interpreter nor an attorney to represent him at trial. *Marino v. Ragen*, 332 U.S. 561, 562 (1948). As the Supreme Court recounted, the defendant in *Marino* was a recent immigrant who “had been in this country only two years. He did not understand the English language and it is doubtful that he understood American trial court procedure. The arresting officer served as an interpreter for petitioner at the original trial.” *Id.* Under these circumstances, the Court concluded, the state had violated the defendant’s due process rights. Notably, before so holding, the Supreme Court did not view it necessary to inquire

whether the defendant was prejudiced by the interpretation provided by the arresting officer. *Id.*<sup>5</sup>

Since then, the clear weight of state and federal authority has been that an individual whose rights are to be determined at a trial or hearing has a constitutional right to an interpreter when he or she does not possess sufficient English skills to fully comprehend the proceedings. Every federal court of appeals to address the question, including the Eleventh Circuit, has recognized the constitutional nature of the right of a criminal defendant to the assistance of an interpreter.<sup>6</sup> Likewise, the highest courts of numerous states have recognized that

---

<sup>5</sup> The U.S. Supreme Court has also made clear in other contexts that the Constitution protects the right of individuals to communicate in a foreign language. See *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. State of Iowa*, 262 U.S. 404 (1923); *Farrington v. Tokushige*, 273 U.S. 284, 409 (1927). "The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue." *Meyer*, 262 U.S. at 401.

<sup>6</sup> 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. State of N. Y.*, 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 prejudice a criminal defendant," and citing *Marino v. Ragen*, 332 U.S. 561 (1947), for the proposition that "due process [was] violated where, among other errors, arresting officer served as defendant's interpreter"); *U.S. v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980) (per curiam) (recognizing that the use of courtroom interpreters involves "the

criminal defendants have a constitutional right to an interpreter.<sup>7</sup> These courts have based this conclusion on several constitutional sources, including the due

---

defendant's constitutional rights to due process and confrontation"); *U.S. v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985) (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 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 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); *U.S. 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"). Cf. *Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996) (holding that, to be consistent with due process, the federal immigration statute should be construed to require interpreters when administrative officers interview asylum applicants who do not speak English); *Gonzales v. Zurbrick*, 45 F.2d 934, 937 (6th Cir. 1930) (explaining that the right to an interpreter "affects a constitutional right").

<sup>7</sup> See, e.g., *State v. Natividad*, 526 P.2d 730, 733 (Ariz. 1974) (holding that the denial of an interpreter would deprive a criminal defendant of a meaningful opportunity to participate in his own defense, be fundamentally unfair, and limit the effectiveness of counsel); *People v. Romero*, 79 Cal. Rptr. 3d 334, 355 (Cal. 2008) ("The right to an interpreter has its underpinnings in a number of state and federal constitutional rights. These include a defendant's rights to due process, to confrontation, to effective assistance of counsel, and to be present at trial."); *State v. Heredia*, 754 A.2d 114, 122 (Conn. 2000) ("There is no question . . . that with respect to a defendant who has only a limited understanding of English, his 'right to confrontation, his right to counsel and his right to be present at trial may be violated if he is not provided with a separate interpreter[.]'"); *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, to

---

confront his or her accusers, and/or to waive constitutional rights knowingly, intelligently, and voluntarily.”), *overruled on other grounds* by *Williams v. State*, 818 A.2d 906 (Del. 2002); *Suarez v. State*, 481 So. 2d 1201, 1203-04 (Fla. 1986) (concluding that the due process and confrontation clauses require that a criminal defendant be provided a translator at trial); *State v. Faafiti*, 513 P.2d 697, 699 (Haw. 1973) (concluding that trying an LEP defendant without an interpreter would violate due process); *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”); *Arrieta v. State*, 878 N.E.2d 1238, 1242-43 (Ind. 2008) (recognizing that interpreters are “necessary to implement fundamental notions of due process such as the right to be present at trial, the right to confront one’s accusers, and the right to counsel”) (citation omitted); *State v. Calderon*, 13 P.3d 871, 879 (Kan. 2000) (reversing conviction because the failure to provide defendant an interpreter during closing arguments violated the Sixth Amendment right to confrontation, even though no prejudice was shown); *State v. Lopes*, 805 So. 2d 124 (La. 2001) (citing cases recognizing “the right [to an interpreter] deriving from the United States Constitution”); *Ton v. State*, 110 Nev. 970, 971-72 (Nev. 1994) (“A criminal defendant has a due process right to an interpreter at all crucial stages of the criminal process . . . if that defendant in fact does not understand the English language.”); *People v. Robles*, 655 N.E.2d 172, 173 (N.Y. 1995) (“No one quarrels with . . . the unquestionable right of any defendant . . . to the assistance of an interpreter at any stage of a criminal proceeding”); *In re Application of Murga*, 631 P.2d 735, 736-37 (Okla. 1981) (“When a defendant cannot speak or understand English, . . . several of [the defendant’s] rights cannot be preserved without the assistance of an interpreter. Among these rights are the right to counsel, the right to confront adverse witnesses, the right to cross-examine those witnesses, and the right to be present and participate at one’s own trial. Without an interpreter any prosecution of these defendants would be constitutionally infirm.”); *Commonwealth v. Pana*, 364 A.2d 895, 898-99 (Pa. 1976) (“A defendant’s ability to use an interpreter encompasses numerous fundamental rights. The failure to understand the proceedings may deny him his right to confront witnesses against him, his right to consult with his attorney, or his right to be present at his own trial. The use of an interpreter may also be necessary to protect appellant’s right to testify in his own behalf.”); *State v. Torres*, 524 A.2d 1120, 1126 (R.I. 1987) (recognizing that a defendant’s language barrier could “threaten the effectiveness of counsel, the right to confront witnesses, or [his] ability to testify free of error”); *State v. Selalla*, 744 N.W.2d 802, 808 (S.D. 2008) (“Clearly, a criminal defendant’s

process clause of the Fifth and Fourteenth Amendments and the several rights guaranteed to criminal defendants in the Sixth Amendment.

**1. Due Process Requires that LEP Defendants Be Provided An Interpreter.**

A criminal defendant's right to the assistance of an interpreter derives in part, as the Supreme Court recognized in *Marino*, from elementary notions of due

---

ability, or lack thereof, to understand the English language . . . implicates the constitutional rights of due process, confrontation of witnesses, and effective assistance of counsel.”); *Garcia v. State*, 149 S.W.3d 135, 142-43, 145 (Tex. Crim. App. 2004) (holding that defendant's right to confrontation was violated where unsworn interpreter failed to translate witness testimony); *State v. Gonzales-Morales*, 979 P.2d 826, 828, 832 (Wash. 1999) (“[T]he right of a defendant in a criminal case to have an interpreter is based upon the Sixth Amendment constitutional right to confront witnesses and ‘the right inherent in a fair trial to be present at one’s own trial.’”) (internal citation omitted); *Flores v. United States*, 698 A.2d 474, 479-80 (D.C. 1997) (holding that defendant's right to confront witnesses was violated because time limit on cross examination did not adequately take into account time necessary for interpretation). *Cf. People v. Redgebol*, 184 P.3d 86, 95 (Colo. 2006) (holding that defendant did not knowingly waive his Miranda rights given the translator's “incorrect and insufficient interpretation, the frequent miscommunication between the parties, and [defendant's] cultural<sup>†</sup> background and limited intellectual functioning.”); *State v. Ortiz*, 766 N.W.2d 244, 253 (Iowa 2009) (holding that the state did not meet its *Miranda* burden where state failed to prove that defendant spoke and understood English, law enforcement gave him written translations that failed to convey the essence of one's *Miranda* rights, and he still had to ask orally what his rights were after reading the Spanish-language waiver); *State v. Farrah*, 735 N.W.2d 336, 342-43 (Minn. 2007) (holding that the state did not meet its burden of showing knowing and voluntary *Miranda* waiver given suspect's English difficulties, and lack of oral or written advisory in his native tongue); *State v. Karumai*, 126 P.2d 1047, 1050 (Utah 1942); *State v. Douangmala*, 646 N.W.2d 1, 9-10 (Wis. 2002) (“This court has stated that fairness requires that those who speak and understand only languages other than English and who become defendants in Wisconsin's criminal courts should have the assistance of interpreters when needed.”).



process and the right to a fair hearing. 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 by the due process clause of the Fourteenth Amendment.” *U.S. ex rel. Negron v. State of N. Y.*, 434 F.2d 386, 389 (2d Cir. 1970). *See also, e.g., State v. Natividad*, 526 P.2d 730, 733 (Ariz. 1974) (holding that denial of an interpreter to a criminal defendant would be fundamentally unfair). Or, as the Nevada Supreme Court has explained, “a criminal defendant who cannot understand the proceedings going on around him . . . has not received due process of law. He or she might as well have been tried in his or her absence.” *Ton v. State*, 110 Nev. 970, 971-72 (Nev. 1994). *Accord, e.g., Arrieta v. State*, 878 N.E.2d 1238, 1242-43 (Ind. 2008) (recognizing that interpreters are ““necessary to implement fundamental notions of due process””) (citation omitted); *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); *Suarez v. State*, 481 So.2d 1201, 1203-04 (Fla. 1986) (concluding that the due process clause, inter alia, requires that a criminal defendant be provided a translator at trial); *U.S. v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985) (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

insure his full comprehension”); *State v. Faafiti*, 513 P.2d 697, 699 (Haw. 1973) (recognizing that “where a defendant cannot understand and speak English, the judge is required to appoint an interpreter to aid a defendant. Otherwise, a trial held in his presence would be meaningless to him and would violate our concept of due process”) (internal citations omitted). *See also, e.g., U.S. v. Edouard*, 485 F.3d 1324, 1338 (11th Cir. 2007) (recognizing that the denial of an interpreter implicates “the defendant’s right[] to due process”); *People v. Romero*, 44 Cal. 4th 386, 410, 79 Cal. Rptr. 3d 334, 355 (Cal. 2008) (same); *State v. Selalla*, 744 N.W.2d 802, 808 (S.D. 2008) (same); *U.S. v. Martinez*, 616 F.2d 185, 188 (5th Cir. 1980) (per curiam) (same).<sup>8</sup>

## **2. The Rights Guaranteed By the Sixth Amendment Require that LEP Defendants be Provided an Interpreter.**

Equally important, the right to the assistance of an interpreter also derives from the several rights guaranteed to the accused under the Sixth Amendment to the U.S. Constitution, including:

---

<sup>8</sup> *Cf. State v. Douangmala*, 646 N.W.2d 1, 9-10 (Wis. 2002) (“This court has stated that fairness requires that those who speak and understand only languages other than English and who become defendants in Wisconsin’s criminal courts should have the assistance of interpreters when needed.”); *Perez-LASTOR v. INS*, 208 F.3d 773, 778 (9th Cir. 2000) (“It is long-settled that a competent translation is fundamental to a full and fair hearing.”); *Nazarova v. INS*, 171 F.3d 478, 484 (7th Cir. 1999) (“absent an interpreter, a non-English speaker’s ability to participate in the hearing and her due process right to a meaningful opportunity to be heard are essentially meaningless”); *Gonzales v. Zurbrick*, 45 F.2d 934, 937 (6th Cir. 1930) (“The function of an interpreter is an important one. It affects a constitutional right. The right to a hearing is a vain thing if the alien is not understood[.]”).

the right to a speedy and public trial[,] . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI. The closely related Sixth Amendment rights to confront and cross-examine witnesses, to be present at one's own trial and to assist in one's own defense, and to effective assistance of counsel, all require that the state provide an LEP defendant an interpreter.

**a. The Right to Be Present.**

The Kansas Supreme Court emphasized that “[t]o 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 her defense, and who will be best suited to assess and rebut the prosecution's theories and the testimony of the witnesses against her. 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 her is not able to participate effectively in her own defense. For example, in *Natividad*, the Supreme Court of Arizona held that “an 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[.]” 526 P.2d 730 at 733. *See also, e.g., Calderon*, 13 P.3d at 875 (same); *Negron*, 434 F.2d at 389 (same); *State v. Lopes*, 805 So.2d 124 (La. 2001) (describing as “nearly self-evident” the “proposition that a defendant who cannot speak or understand English would have a right to have his own criminal trial translated to permit him to effectively participate in his own defense”); *People v. Ramos*, 26 N.Y.2d 272, 274 (N.Y. 1970) (“To be sure, a defendant who cannot understand English is entitled to have the trial testimony interpreted to him in a language which he understands in order that he may meaningfully assist in his own defense.”); *State v. Karumai*, 126 P.2d 1047, 1050 (Utah 1942) (“In this type of case there is a serious possibility of grave injustice being done an accused by reason of his being unable to properly present his defense due to his inability to speak or understand the language in which the trial is conducted.”); *Edouard*, 485 F.3d at 1338; *Romero*, 79 Cal. Rptr. 3d at 355; *State v. Heredia*, 754 A.2d 114, 122 (Conn. 2000); *Arrieta*, 878 N.E.2d at 1242-43; *In re Application of Murga*, 631 P.2d 735, 736-37 (Okla. 1981); *Commonwealth v. Pana*, 364 A.2d 895, 898-99 (Pa. 1976); *State v. Gonzales-Morales*, 979 P.2d 826, 828, 832 (Wash. 1999).

**b. The Right to Confront Witnesses.**

The assistance of an interpreter is particularly necessary to protect the defendant's Sixth Amendment right to confront and cross-examine witnesses. As the Arizona Supreme Court emphasized,

A defendant's inability to spontaneously understand testimony being given would undoubtedly limit his attorney's effectiveness, especially on cross-examination. It would be as though a defendant were forced to observe the proceedings from a sound-proof bo[o]th ..., being able to observe but not comprehend the criminal processes whereby the state had put his freedom in jeopardy. Such a trial comes close to being an invective against an insensible object.

*Natividad*, 526 P.2d at 733. See also, e.g., *Garcia v. State*, 149 S.W.3d 135, 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"); *Martinez*, 616 F.2d at 188 (recognizing that the use of courtroom interpreters involves "the defendant's

constitutional right[[]to . . . confrontation"); *Edouard*, 485 F.3d at 1338; *Romero*, 79 Cal. Rptr. 3d at 355; *Heredia*, 754 A.2d at 122; *Chao v. State*, 604 A.2d 1351, 1362 (Del. 1992), *overruled on other grounds* by *Williams v. State*, 818 A.2d 906 (Del. 2002); *Suarez*, 481 So.2d at 1203-04 (Fla. 1986); *Arrieta*, 878 N.E.2d at 1242-43; *Murga*, 631 P.2d at 736-37; *Pana*, 364 A.2d at 898-99; *State v. Torres*, 524 A.2d 1120, 1126 (R.I. 1987); *Selalla*, 744 N.W.2d at 808; *Gonzales-Morales*, 979 P.2d at 828, 832.

**c. The Right to Effective Assistance of Counsel.**

Numerous 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<sup>1</sup> 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*, 604 A.2d at 1362 (“A criminal defendant who is unable to understand the English language is effectively denied the right to consult with an attorney”), *overruled on other grounds* by *Williams v. State*, 818 A.2d 906 (Del. 2002); *Commonwealth v. Pana*, 364 A.2d 895, 899 (Pa. 1976) (“A defendant’s ability to use an interpreter encompasses numerous fundamental rights,” including, *inter alia*, “his right to consult with his 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. *See also, e.g.*, *Edouard*, 485 F.3d at 1338; *Romero*, 79 Cal. Rptr. 3d at 355; *Heredia*, 754 A.2d at 122; *Arrieta*, 878 N.E.2d at 1242-43; *Murga*, 631 P.2d at 736-37; *Selalla*, 744 N.W.2d at 808.

### **C. The U.S. Congress Has Likewise Recognized the Constitutional Right to an Interpreter.**

Consistent with the widespread consensus of federal and state courts, and to secure these constitutional rights in federal court, the U.S. Congress passed the Court Interpreters Act of 1978 (codified at 28 U.S.C. §§ 1827-28 (2010)). The Act generally requires the appointment of a government-compensated interpreter in any criminal or civil judicial proceeding initiated by the U.S. in which limited English ability inhibits a party’s understanding of the proceedings, communication with the court or counsel, or a witness’ comprehension of questions or presentation of testimony. 28 U.S.C. § 1827(d)(1), (g). 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 (2d Cir. 1970), 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 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").

\* \* \*

In sum, courts across the country, like the U.S. Congress, have recognized that the provision of an interpreter is critical in protecting the various constitutional rights of LEP criminal defendants.



## **II. Consistent with Constitutional Requisites, Federal Civil Rights Law Independently Requires that State Courts Receiving Federal Funds Provide Interpreters for LEP Litigants.**

Providing criminal defendants who have limited English proficiency with competent interpretation services not only safeguards the defendants' constitutionally protected rights, but is mandated by Title VI of the Civil Rights Act of 1964 ("Title VI"), 42 U.S.C. §§ 2000d to 2000d-7, and its implementing regulations. *See, e.g.*, 28 C.F.R. § 42.101, *et seq.* As a recipient of funds from the U.S. Department of Justice,<sup>9</sup> Georgia has an affirmative obligation to take reasonable steps to provide meaningful access to its courts for LEP individuals. Thus, recognizing the constitutional significance of interpretation services for LEP persons who come in contact with the Georgia justice system will in no way additionally burden the State.

Title VI mandates that recipients of federal funds refrain from discrimination on the basis of race, color, or national origin in programs that receive federal financial assistance. *See* 42 U.S.C. § 2000d. When a recipient, such as a state court system, fails to provide an interpreter for an LEP person in criminal

---

<sup>9</sup> *See, e.g.*, <http://www.ojp.gov/BJA/grant/09SNAwards.pdf> (indicating that the Georgia Criminal Justice Coordinating Council was a recipient of a Project Safe Neighborhood Award); <http://www.ojp.usdoj.gov/BJA/funding/09DrugCourtsAwards.pdf> (listing several Georgia courts and municipalities that received funding as part of the Adult Drug Court Discretionary Grant Program); <http://www.ovw.usdoj.gov/stop-contactlist.htm> (providing contact information for individuals who administer STOP grant money from the Office on Violence Against Women).

proceedings, not only have a defendant's constitutional rights been violated, but the state court system has failed to comply with Title VI, and the recipient puts itself at risk of a federal investigation and potentially loss of its federal funding. In order to facilitate compliance by its recipients, the U.S. Department of Justice issued a Guidance clarifying that when interpretation is needed, it should be provided "at a time and place that avoids the effective denial of the service, benefit, or right at issue or the imposition of an undue burden on or the delay in important rights, benefits, or services to the LEP person." Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41,455, 41,461 (June 18, 2002).<sup>10</sup> Further, the Guidance indicates that state court systems must "at a minimum" make every effort to ensure competent<sup>11</sup> interpretation for LEP individuals during all hearings, trials, and motions which the LEP individuals must or may be present. *Id.* at 41,471. Also, when the recipient court appoints an attorney to represent an LEP defendant, in order to meet its Title VI obligations, the state court should either make sure that the appointed attorney

---

<sup>10</sup> Interpretation services should be provided at government expense if a party or a party's witness is LEP. See Letter from DOJ Civil Rights Division to Indiana Supreme Court Administration (February 4, 2009) (available at: [http://www.lep.gov/whats\\_new/IndianaCourtsLetterfromMAF2009.pdf](http://www.lep.gov/whats_new/IndianaCourtsLetterfromMAF2009.pdf)).

<sup>11</sup> "In a courtroom setting or administrative hearing setting, the use of informal interpreters, such as family members, friends and caretakers would not be appropriate." *Id.*


is proficient in the LEP person's language or that a competent interpreter is provided during consultations between the attorney and the LEP person. *Id.* In order to uphold the civil rights of its LEP residents, and remain in compliance with Title VI, the State of Georgia is already duty-bound to provide interpreters to criminal defendants.

Because this obligation to LEP residents is a longstanding requirement which flows from Title VI and the Title VI regulations, *see Lau v. Nichols*, 414 U.S. 563 (1974), the Department of Justice has indicated that non-compliance will not be rewarded with lenient enforcement. Loretta King, Prepared Remarks for Federal Interagency Working Group on Limited English Proficiency, at 8 (April 20, 2009) (available at: [http://www.justice.gov/crt/kingremarks4\\_20\\_09.pdf](http://www.justice.gov/crt/kingremarks4_20_09.pdf)). Instead, it is in the best interest of funding recipients to recommit themselves to fulfill their Title VI obligations, because the Department of Justice is “reinvigorating traditional Title VI enforcement.” *Id.* at 6. Thus, this court should not hesitate to find that interpretation services are necessary to protect the rights of criminal defendants who are LEP.

## CONCLUSION

For the reasons set forth above, amici respectfully urge the Court to hold that criminal defendants have a federal constitutional right to an interpreter at trial.

Respectfully submitted this 28<sup>th</sup> day of May, 2010,

  
Chara Fisher Jackson (Georgia SBN 386101)  
Azadeh Shahshahani (Georgia SBN 509008)  
American Civil Liberties Union Foundation  
of Georgia  
1900 The Exchange, SE, Suite 425  
Atlanta, Georgia 30339  
Telephone: 770.303.8111  
Facsimile: 770.303.0060  
cfjackson@acluga.org

Araceli Martínez-Olguín (Cal. SBN 235651)  
The LEGAL AID SOCIETY –  
EMPLOYMENT LAW CENTER  
600 Harrison Street, Suite 120  
San Francisco, California 94107  
Telephone: 415.864.8848  
Facsimile: 415.864.8199  
amartinez-olguin@las-elc.org

Jennifer Chang Newell (Cal. SBN 233033)  
David Wakukawa (Cal. SBN 262546)  
(volunteer attorney)  
American Civil Liberties Union Foundation  
Immigrants' Rights Project  
39 Drumm Street  
San Francisco, CA 94111  
Telephone: 415.343.0770  
Facsimile: 415.395.0950  
jnewell@aclu.org

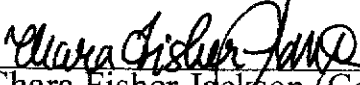
**CERTIFICATE OF SERVICE**

This is to certify that I have on this date served the parties' counsel in this case, with a true and correct copy of the within and foregoing Brief of Amici Curiae American Civil Liberties Union of Georgia, Legal Aid Society – Employment Law Center, and American Civil Liberties Union in Support of Appellant, by mailing a copy of the same through the U.S. Mail to them at their office at:

J. Scott Key, P.C.  
70 Macon Street  
P.O. Box 2696  
McDonough, GA 30253  
*Counsel for Appellant*

Robert W. Smith, Jr.  
Assistant District Attorney  
Fayette County Justice Center  
One Center Drive  
Fayetteville, Georgia 30214  
(770) 716-4250  
*Counsel for Appellee*

Dated: the 28<sup>th</sup> day of May, 2010.

  
Chara Fisher Jackson (Georgia SBN 386101)  
American Civil Liberties Union Foundation  
of Georgia  
1900 The Exchange, SE, Suite 425  
Atlanta, Georgia 30339  
Telephone: 770.303.8111  
Facsimile: 770.303.0060  
cfjackson@acluga.org