

No. 20-_____

IN THE

Supreme Court of the United States

NASSER MOHAMAD BAZZI,

Petitioner,

v.

THE STATE OF MICHIGAN,

Respondent.

On Petition for a Writ of Certiorari
to the Michigan Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WAS THE ARABIC-SPEAKING APPELLANT DENIED EFFECTIVE ASSISTANCE OF COUNSEL DURING CRITICAL STAGES OF THE PROCEEDINGS, FOR WHICH PREJUDICE IS PRESUMED, WHERE NO INTERPRETER WAS PRESENT DURING ANY ATTORNEY-CLIENT MEETINGS, NO INTERPRETER WAS PRESENT DURING THE INVESTIGATORY PERIOD, AND NO INTERPRETER WAS PRESENT FOR ANY COURT PROCEEDINGS, INCLUDING TRIAL?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Nasser Muhammad Bazzi, an inmate currently incarcerated in the Michigan Department of Corrections, by and through Attorney Rachel K. Wolfe, respectfully petitions this Court for a writ of certiorari to review the judgment of the Michigan Supreme Court.

LIST OF PARTIES AND RELATED CASES

All parties appear in the caption of the case. Petitioner is unaware of any related cases pending before this Court.

OPINIONS BELOW

The May 15, 2020 decision by the Michigan Supreme Court denying Mr. Bazzi's Application for Leave to Appeal is reported as *People v. Bazzi*, 943 N.W.2d 90 (Mich. 2020) (CAVANAGH, J., dissenting). (App. 1)

The Order of the Michigan Court of Appeals denying Mr. Bazzi's Application for Leave to Appeal is dated May 30, 2019. (App. 2).

The Opinion and Order of the Circuit Court for the County of Wayne, Michigan, denying Mr. Bazzi's Motion for Relief from Judgment, is dated October 24, 2018. (App. 3).

The Order Denying Mr. Bazzi's Application for Leave to Appeal (on direct review) is dated May 24, 2016. *People v. Bazzi*, 499 Mich 928; 878 NW2d 863 (2016).

The unpublished opinion and order of the Michigan Court of Appeals affirming Mr. Bazzi's convictions and sentencing on direct appeal is dated October 1, 2015. (App. 7.)

JURISDICTION

The Michigan Supreme Court denied discretionary review of Mr. Bazzi's appeal on May 15, 2020. *People v. Bazzi*, 943 N.W.2d 90 (Mich. 2020). On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the order denying discretionary review. Order List: 589 U.S. Mr. Bazzi invokes this Court's jurisdiction under 18 U.S.C. § 1257, having timely filed this petition for writ of certiorari within 150 days of the Michigan Supreme Court's judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be put twice in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they

reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Defendant, Mr. Nasser Mohamad Bazzi, was convicted by a jury of two counts of first-degree criminal sexual conduct (CSC I), two counts of second-degree criminal sexual conduct (CSC II), and two counts of fourth-degree criminal sexual conduct (CSC IV), on December 5, 2013. He was sentenced to concurrent terms of 135 months to 22 years' imprisonment for each CSC I conviction, 10 to 15 years' imprisonment for each CSC II conviction, and one to two years' imprisonment for each CSC IV conviction.

At the time of his trial, Mr. Bazzi suffered from severe language and education deficiencies and was profoundly limited in his ability to understand the English language. In affidavits obtained during postconviction investigation, Mr. Bazzi's trial attorneys specifically acknowledge that they were unable to meaningfully communicate with Mr. Bazzi, who spoke fluently only in Arabic, during any pretrial investigations. (Hall Affidavit, App. 4; Makled Affidavit, App. 5.)

Mr. Bazzi was charged after his nephew, Ahmad Hamid, reported to the police on January 4, 2013 that Mr. Bazzi had been accused by his niece, Zeinab Fawaz, of inappropriate conduct. Mr. Bazzi, who was represented by counsel, did not speak at his arraignment other than to simply respond "yes" when the district court judge asked him if he understood that his attorney had just waived the 14-day preliminary examination rule. His attorney, on his behalf, entered a plea of not guilty. Mr. Bazzi retained attorneys Cyril Hall and Amir Makled before the August 2, 2013

preliminary examination. The trial court did not address Mr. Bazzi at the preliminary examination and Mr. Bazzi had no occasion to speak.

In an affidavit, filed with his motion for relief from judgment, Mr. Bazzi reveals a fact that would have been apparent to the lower-court judges but is not apparent from the transcripts: “[D]uring *all* questioning by the trial court I indicated my assent *at the direction of counsel*, but did not fully understand the nature of the proceedings.” (N. Bazzi Affidavit, App. 6, emphasis added.)

Trial was set to begin on November 19, 2013. However, proceedings were adjourned in order to allow both parties time to investigate an audio recording Zeinab made in November, 2011. The recording preserved a conversation between Zeinab and her mother, Afrah Hamid, which was entirely in Arabic and would become a crucial piece of evidence at Mr. Bazzi’s trial. Resulting confusion over the tape’s contents illustrates the language barriers hindering Mr. Bazzi’s participation at trial.

On the day trial was set to begin, defense counsel had not been able to listen to the recording’s contents and neither party had procured a neutral translation. The trial court suggested that defense counsel could listen to the tape that day, but *both defense attorneys explained that they were not fluent in Arabic*. The court then suggested that they listen to the tape with Mr. Bazzi, who could speak Arabic. Defense counsel insisted, however, that they have an opportunity to listen to the tape with Afrah. Tellingly, trial counsel explained to the judge that they needed an interpreter to communicate fully with Afrah, even though Mr. Bazzi was on bond and, if able, would have been available to translate.

The following day, the transcript had not been prepared, and both parties were adamant about the need for a proper translation. Attorney Makled indicated that although he had “very limited skills in terms of the Arabic language,” he could not translate the tape, and the prosecutor could not confirm the contents of the tape even with an understanding of “some” Arabic. The prosecutor indicated that she could have the translation by that evening, and the court stated that it would allow the admission of the tape at trial on the following day. On November 21, 2013, a neutral translation of the audio tape had not yet been obtained.

The parties met again on the morning of November 22, 2013 to discuss a plea agreement. The court questioned Mr. Bazzi about his understanding of the offer. Mr. Bazzi responded as prompted by his counsel, with simple, affirmative answers. It was counsel who informed the court that Mr. Bazzi rejected the offer. When the court questioned Mr. Bazzi about the decision, Mr. Bazzi gave only simple answers.

Zeinab was 21 years old at the time of trial. Her testimony formed the basis for all of Mr. Bazzi’s convictions, and no other family members saw or heard any inappropriate contact between Zeinab and Mr. Bazzi, who was Zeinab’s maternal uncle. Zeinab testified to six acts of molestation that she claimed occurred when she was between the ages of 11 and 15 years old. There was no physical evidence of abuse, and no propensity evidence was introduced.

Given that Zeinab’s credibility was the central issue at Mr. Bazzi’s trial, the examination of witnesses focused on either confirming or rebutting her account. Every material aspect of Zeinab’s testimony was directly contradicted by witnesses for the defense. Several of Zeinab’s siblings refuted Zeinab’s allegations against Mr. Bazzi, testifying that Zeinab was lying and that

crucial details surrounding her description of molestation could not have been true. Zeinab's mother, Afrah Hamid, was questioned extensively about the contents of the audio recording, which the court allowed to be played before the jury without an accurate translation. Afrah explained, with the help of an interpreter, that during the conversation, Zeinab had never said that she had been molested.

Mr. Bazzi was convicted as charged. When asked, at sentencing, whether he had anything that he would like to say, Mr. Bazzi responded with a simple "no."

Despite an inability to understand most of the testimony presented at trial, Mr. Bazzi was not provided an interpreter during any critical stage of the lower court proceedings. He did not request one, because he did not know that he was entitled to one. Despite their awareness of Mr. Bazzi's limitations, his trial attorneys failed to request an interpreter or otherwise ensure that their client understood the nature of the proceedings, including the rulings and instructions of the trial court, the questions of the attorneys to the witnesses, and the testimony itself.

PROCEDURAL POSTURE

The denial of an interpreter, and the attendant deprivation of numerous constitutional rights, was an issue that should have been raised before the trial court or on direct appeal. Due to the ineffectiveness of counsel, it was not. Appellate counsel met with Mr. Bazzi on only one occasion before filing a claim of appeal. With the assistance of trial counsel, (App. 4, ¶ 9), appellate counsel raised nine claims of error, mirroring objections raised during trial. *People v Bazzi*, Docket No. 320065, 2015 WL 5749385 (Mich. App. 2015) (App. 7). The appeal was

accompanied by a motion for a new trial and for a *Ginther*¹ hearing for the purpose of raising a claim of ineffective assistance of counsel.

No claim of error regarding Mr. Bazzi's inability to understand and fully participate in the proceedings or his attorney's failure to ensure adequacy of communication was raised on direct appeal. On October 1, 2015, the Michigan Court of Appeals issued an unpublished opinion affirming Mr. Bazzi's convictions and sentence. (App. 7.) The Michigan Supreme Court denied leave to appeal. *People v Bazzi*, 499 Mich 928; 878 NW2d 863 (2016).

Mr. Bazzi filed a motion for relief from judgment pursuant to Michigan's postconviction statutes on April 25, 2018, seeking a new trial and arguing that (1) the denial of an interpreter was constitutional, structural error entitling him to a new trial, (2) his trial counsel was constitutionally ineffective for failing to inform Mr. Bazzi of his statutory right to an interpreter and ensure that Mr. Bazzi was able to fully understand and participate in the proceedings, and (3) his appellate counsel was constitutionally ineffective for failing to raise these meritorious claims on direct appeal. Mr. Bazzi's motion was supported with affidavits of Mr. Bazzi (App. 6), his brother Haidar Bazzi (H. Bazzi Affidavit, App. 8), and both trial attorneys (App. 4; App. 5), all of whom attested that Mr. Bazzi had a very low understanding of the English language. Specifically, Mr. Bazzi's affidavit states:

5. I had very few communications with my trial attorneys.

* * *

7. My brother, Haidar Bazzi, was their main contact throughout the proceedings . . .

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

8. I did not understand much of the dialogue during the hearings or during trial

9. In rejecting the prosecutor's plea offer and during all questioning by the trial court I indicated my assent at the direction of counsel, but did not fully understand the nature of the court proceedings.

10. My attorneys told me not to accept the plea agreement because the case against me was "bullshit." They did not explain the consequences of accepting the plea agreement or the consequences of being convicted after trial.

11. Had I understood the plea agreement and the risk of going to trial, it is very likely that I would have accepted the plea agreement. I cannot say that I would have accepted with absolute certainty because I did not understand the terms when offered and I [still] do not know what they were.

12. Neither Mr. Hall nor Mr. Makled informed me that I had the right to a court-appointed interpreter

14. I told Attorney Makled that I was having trouble understanding the testimony and what was happening in the courtroom Makled told me not to worry about it

16. Attorney Cornelius Pitts represented me on direct appeal

17. I did not understand who Attorney Pitts was or what he was doing in relation to my case.

18. I had trouble communicating with Attorney Pitts but Attorney Pitts did not inquire about my need for an interpreter.

Haidar's affidavit confirms the statements in Mr. Bazzi's affidavit, including that Mr. Bazzi's English comprehension "was very low," that Mr. Bazzi relied on Haidar to summarize the proceedings after they occurred, and that Mr. Bazzi "complained of [the] translation presented at the trial, especially during testimony regarding the audio recording . . . but only after [Haidar] told him what [he] believed was translated in English to the judge and jury." (App. 8, ¶¶ 1, 4, 6.) Haidar swears, "I asked Nassar Bazzi's attorneys for an independent translator during trial

preparation and at trial” because “Nassar Bazzi needed to know exactly what was going on, as [Mr. Bazzi] could not assist in his own defense without this knowledge,” and Haider’s own “English language ability is moderate at best.” (App. 8, ¶ 5.) Haidar further swears that “Nassar Bazzi wanted to testify at his trial and Mr. Hall told him ‘he absolutely could not.’ Defendant Bazzi and I took this to mean he did not have a right to take the stand in his own defense,” which Haidar later learned was untrue (App. 8, ¶ 7). Finally, Haidar attests that Mr. Bazzi “dropped out of school in or around the age of 10 while in Lebanon. I am certain that he did not attend any schooling whatsoever here in the United States.” (App. 8, ¶ 8.)

In their affidavits, trial attorneys Hall and Makled both attest to their “first-hand knowledge that Mr. Bazzi’s primary language is Arabic, and that during all relevant proceedings his English comprehension may have been compromised” (App. 4, ¶ 2), and “was very low,” (App. 5, ¶ 2). Both attorneys further attest that they did their “best to fully explain the plea offer to Mr. Bazzi” and his right to testify (App. 4, ¶ 7-8; App. 5, ¶ 7-8). They both continue, in the same words, “[h]owever, in retrospect, I am not prepared to say with certainty that he fully understood the consequences of going to trial” or of his right to testify (App. 4, ¶ 7-8; App. 5, ¶ 7-8). In his brief in response to Mr. Bazzi’s motion for relief from judgment, the prosecutor acknowledged that the affidavits of Hall and Makled were “admittedly disturbing.”

Despite this admission of complete deprivation of the right to an interpreter and, thus, ineffective assistance of counsel, the circuit court found no constitutional error. On October 24, 2018, the trial court issued an opinion and order denying Mr. Bazzi’s motion (App. 3).

Mr. Bazzi's subsequently filed applications for leave to appeal to the Michigan Court of Appeals and the Michigan Supreme Court were also denied. However, the denial by the Michigan Supreme Court was not unanimous. In her dissent, Justice Cavanagh wrote:

[D]efendant submitted four affidavits, the results of an English proficiency test, and the results of a polygraph examination. Two of the affidavits are from defendant's two trial attorneys; one of them avers that defendant's English comprehension "was very low," and the other says that defendant's English language comprehension "may have been compromised." Both state that they are not prepared to say with certainty that defendant fully understood the consequences of going to trial or his right to take the stand in his own defense. The polygraph examination results show that the examiner believed that defendant was being truthful when he responded "no" when asked whether he understood most of the trial because of language and whether his attorney thoroughly explained the prosecutor's plea offer.

This was *more than sufficient* to warrant a *Ginther* hearing on defendant's claim of ineffective assistance of counsel. I would remand to the trial court to hold such a hearing.

People v Bazzi, 943 NW2d 90 (2020) (CAVANAGH, J., dissenting) (emphasis added).

REASONS FOR GRANTING THE WRIT

This case presents the question whether complete deprivation of an interpreter to a limited English proficiency defendant, during all pretrial investigative stages and all in-court proceedings, supports a claim for deprivation of counsel and, as structural error, requires reversal. In conflict with this Court's precedents, the Michigan postconviction courts held that it does not.

A. The Issues Presented in this Case are of Great National Import

The Fourteenth Amendment guarantees equal protection and due process rights to all Americans, regardless of racial or ethnic identity. As this Court has made clear:

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. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

Meyer v. Nebraska, 262 U.S. 625, 627 (1923).

Although English is the most prevalent language in the United States, there is no officially preferred national language. According to the 2010 US Census, 25 million Americans speak English less than “Very Well,” and are classified as Limited English Proficient (LEP). This population represents 8% of all US residents, or about 1 in 13 people. Census data from 2013 reports that 60.3 million Americans speak a language other than English at home, or 20.7 percent of the population.² From 2000 to 2009, according to the Department of Homeland Security, 10,299,433 immigrants obtained legal permanent residency in the US. The number of new legal immigrants continues to increase each year, with the most recent data showing 1.1 million in 2018 alone.³ Criminal cases involving a non-English speaking defendant are common; the Bureau of Criminal Statistics estimated that 95,977 non-citizens were held in state custody in 2019.⁴

Projections from the Census Bureau show that these populations will continue to grow well into the foreseeable future.⁵ This increase in our country’s cultural and linguistic diversity will

² U.S. CENSUS BUREAU; AM. CMTY. SURVEY, 2015 *Am. Cmtys. Survey, Detailed Languages Spoken at Home and Ability to Speak English for the Population 5 Years and Over: 2009-2013*; using data.census.gov; <https://data.census.gov/cedsci/>; (5 October 2020)

³ OFFICE OF IMMIGRATION STATISTICS, U.S. DEP’T OF HOMELAND SEC., 2018 *Yearbook of Immigration Statistics* (2019).

⁴ BUREAU OF JUSTICE STATISTICS, U.S. DEP’T. OF JUSTICE, OJP BULL. NO. NCJ236096, *Prisoners in 2010* (2011).

⁵ JOHNSON, SANDRA, *A Changing Nation: Population Projections Under Alternative Migration Scenarios*, Current Population Reports, P25-1146, U.S. Census Bureau, Washington, DC, 2020.

result in even greater need for interpretation services in courts, not only for the accused, but for victims and witnesses alike. As Justice Sutherland explained:

[e]ven the intelligent and educated layman has small and sometimes no skill in the science of law . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.

Powell v. State of Alabama, 287 U.S. 45, 68-69 (1932).

Courts in the United States more frequently turn to interpreters. A 2001 survey by Indiana's Commission on Racial and Gender Fairness reported responses from 247 judges in that state alone. Of the respondents, 90.3 percent reported having used translators for non-English speakers in their courtrooms within the past five years, and 89.5 percent had used an interpreter in the previous six months. 54.7 percent said they had used interpreters between 1 and 10 times during this period. However, 4.9 percent reported that they had used interpreters more than 100 times.⁶

Federal and state interpreter rules diverge on qualifications for interpreters, how an interpreter is appointed, and even what constitutes need for an interpreter.⁷ Unequal application of constitutionally guaranteed rights can only serve to confuse an already vulnerable population, and clog the justice system with errors, or even more tragic, punish an innocent person based on their inability to understand their case. The constitutional issue of unfair treatment of LEP citizens

⁶ MYRA SELBY, ET AL., *Executive Report and Recommendations*, 2002, Indiana Supreme Court Commission on Race and Gender.

⁷ *Id.*

in the courts will not abate by itself. Indeed, similar violations may recur more frequently as long as these disparities goes unaddressed.

B. The Case Law is in Conflict Concerning the Constitutional Right to Interpreters in Criminal Cases across the Country, and this Court Can Clarify its Own Jurisprudence Regarding Interpreters

It is basic to fundamental fairness that an accused understands criminal proceedings, and the special needs and problems of those with impaired language or hearing skills have been recognized as necessary to give substance to other constitutional criminal rights. The right to confront one's accuser and the right to consult with counsel would be empty protections if the accused, because of physical impairment or a lack of comprehension of the language spoken, was unable to understand the testimony, proceedings, or his own lawyer. On review, it appears that the only Supreme Court case in which the question of the right to interpretation has arisen is *Perovich v. United States*, 205 U.S. 86, 91 (1907), in which this Court summarily dismissed the contention as without merit.⁸

Since this Court's early twentieth century dabbling in the area, the nation's lower courts have had to craft their own body of law on the matter. For example, in *Gonzalez v. Phillips*, 147 F. Supp. 2d 791 (E.D. Mich. 2001), the defendant was unable to speak and understand English sufficiently. The trial court did not appoint an interpreter for him. The defendant claimed that the failure to have an interpreter meant that he could not meaningfully participate in his defense,

⁸ “Other matters referred to in the assignment of errors require but slight notice. One is that the court erred in refusing to appoint an interpreter when the defendant was testifying. This is a matter largely resting in the discretion of the trial court, and it does not appear from the answer made by the witness that there was any abuse of such discretion.” *Id.* at 91. See also *Felts v. Murphy*, 201 U.S. 123 (1906) (in which the Court expressed concern over the fact that the defendant had not heard every word of the evidence presented at his trial because he almost totally deaf).

meaningfully be present at trial, protect his right of confrontation, protect his right to counsel, and protect his right to the effective assistance of counsel. On a petition for writ of habeas corpus, the court found that the trial court's failure to appoint a translator for the defendant required a remand for further evidentiary findings. *Id.* at 803.

Similarly, in the landmark case of *Negrón v. New York*, 434 F.2d 386 (2d Cir. 1970), the Second Circuit Court of Appeals held that the trial court's failure to *sua sponte* appoint an interpreter for an indigent twenty-three year old Puerto Rican immigrant charged with murder who neither spoke nor understood any English violated the petitioner's right of confrontation, right to consult with his lawyer with a reasonable degree of rational understanding, right to be meaningfully present at his own trial, and right to intelligently participate in his own defense. The court found that an inability to speak and understand English rendered the defendant as unable to participate intelligently in his own defense as any mental disorder, yet this language-based "disability" was readily "curable" through provision of an interpreter. *Id.* at 391; See also, e.g., *United States v. Mayan*, 17 F.3d 1174, 1180-1181 (9th Cir. 1994) (denial of interpreter violates constitutional rights); *United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985) (denial of due process if the accuracy and scope of translation is subject to grave doubt); *People v. Thomas*, 441 Mich. 879 (1992) (remanding for an evidentiary hearing where the hearing impaired defendant was not appointed an interpreter for the deaf); *People v. Sepulveda*, 412 Mich. 889 (1981) (reversing conviction where defendant spoke no English and had no interpreter, even though his attorney was bilingual); M.C.L. § 775.19a (statutory right to interpreter at trial).

Despite the aforementioned recognitions of the fundamental nature of the right to an interpreter, the rules have generally tended away from this Court's statements in *Perovich* and *Felts*, and lower courts have suggested that assistance by an interpreter is not a matter of right at all. A summary of some key cases from across the country gives a sense of the drift of the law over the past hundred years.⁹ This drift has been away from this Court's early statements regarding

⁹ First Circuit: *United States v. Carrion*, 488 F.2d 12, 14, (1st Cir. 1973), cert. denied, 416 U.S. 907 (1974) ("The necessity for an interpreter to translate from a defendant's native language into English when a defendant is on the stand, and from English into the defendant's native language when others are testifying, has been elevated to a right when the defendant is indigent and has obvious difficulty with the language.... 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.").

Second Circuit: *United States v. Desist*, 384 F.2d 889 (2d Cir. 1967), aff'd, 394 U.S. 244 (1969), reh'g denied, 395 U.S. 931 (1969), disapproved of on other grounds, *Griffith v. Kentucky*, 479 U.S. 314 (1987) (court appointed interpreter not needed where defendant's counsel included a French-speaking attorney).

Third Circuit: *Gonzales v. Virgin Islands*, 109 F.2d 215 (3d Cir. 1940) (dicta); *United States ex rel. Martin v. Brierley*, 464 F.2d 529 (3d Cir. 1972), cert. denied, 410 U.S. 943 (1973) (accused failed to prove an inability to hear).

Ninth Circuit: *Tapia-Corona v. United States*, 369 F.2d 366 (9th Cir. 1966) (foreign language; injury not shown); *Lopez-Vasquez v. United States*, 423 F.2d 1054 (9th Cir. 1970) (foreign language; injury not shown).

Eleventh Circuit: *United States v. Charles*, 722 F.3d 1319 (11th Cir. 2013) (confrontation right extended to language interpreter).

Ala: *Terry v. State*, 21 Ala. App. 100, 105 So. 386 (1925) (deaf mute; not a Sixth Amendment case).

Cal: *People v. Guillory*, 178 Cal. App. 2d 854 (2d Dist. 1960) ("It is a generally accepted rule that a trial judge should afford to a defendant who is handicapped by deafness, blindness or other affliction, such reasonable facilities for confronting and cross-examining the witnesses as the circumstances will permit. But he cannot restore sight to the blind, hearing to the deaf or speech to the mute. He need only give such aide [sic] to intelligent appreciation of the proceeding as a sound discretion may suggest."); *People v. Annett*, 251 Cal. App. 2d 858 (2d Dist. 1967), cert. denied, 390 U.S. 1029 (1968) ("Failure of a trial court to appoint an interpreter for a defendant who has requested one, or whose conduct has made it obvious to the court that he is unable because of linguistic difficulties knowingly to participate in waiving his rights, is 'fundamentally unfair' and requires reversal of a conviction.").

Colo: *People v. James*, 937 P.2d 781 (Colo. App. 1996); *People v. Luu*, 813 P.2d 826 (Ct. App. 1991), aff'd, 841 P.2d 271 (1992).

a right to an interpreter, and discrepancies among the lower courts have left the issue unsettled. One key factual distinction that has been repeatedly made is whether the defendant is able to communicate with the defense attorney because the defense attorney speaks the defendant's language, thus mitigating the harm of the lack of an interpreter and the harm to the right of counsel.¹⁰ This distinction, however, has no place where Supreme Court precedents suggest that denial of an interpreter is structural error, subject to reversal without the necessity of determining prejudice.

Ill: *People v. Pelegri*, 39 Ill. 2d 568 (1968) ("In a case where defense counsel spoke Spanish so fluently that he often corrected the expert interpreter, we do not believe that it is even arguable that the defendant who sat at his attorney's side was denied the right to confront the witnesses against him.").

Kan: *State v. Calderon*, 270 Kan. 241 (2000) (absence of translator during closing arguments denied accused right of confrontation).

Neb: *Markiewicz v. State*, 109 Neb. 514 (1922) ("We know of no affirmative duty devolving on the court to see that the defendant does have interpreted to him everything that is said and done, as it occurs, during the progress of the trial.").

NJ: *State v. Kounelis*, 258 N.J. Super. 420 (1992) (Greek-speaking accused entitled to interpreter).

Tex: *Adams v. State*, 749 S.W.2d 635 (Tex. App. Houston 1st Dist. 1988) (deaf accused); *Villarreal v. State*, 853 S.W.2d 170, 171 (Tex. App. Corpus Christi 1993) ("The right to confront witnesses includes the right to have trial proceedings translated to a language the accused can understand.").

Utah: *State v. Vasquez*, 101 Utah 444 (1942) (foreign language).

Wis: *State v. Neave*, 117 Wis. 2d 359 (1984) ("[W]henever the trial court has been put on notice that the accused has a language difficulty, the court must make a factual determination of whether the language disability is sufficient to prevent the defendant from communicating with his attorney or reasonably understanding the English testimony at the preliminary hearing or trial. If the court determines that an interpreter is necessary, it must make certain that the defendant is aware that he has a right to an interpreter and that an interpreter will be provided for him if he cannot afford one."), abrogated on other grounds by *State v. Koch*, 175 Wis. 2d 684 (1993).

¹⁰ This factual distinction does not apply in Mr. Bazzi's case. Although his trial attorneys spoke minimal Arabic, both admitted in sworn affidavits that they are not fluent in Arabic and were unable to communicate effectively with Mr. Bazzi in his native language.

Given the inconsistency with which lower courts recognize both a constitutional right to an interpreter and the structural nature of that right, it is time for this Court to draw some bright lines.

C. Although States Have Attempted to Craft Their Own Methods of Assuring Adequate Interpretation, the Current Systems, by Their Very Design, Suppress Opportunities for Raising These Issues

Public policy recognizes that no effective communication takes place between a LEP speaker and a legal representative. While this Court has not yet recognized a constitutional right to interpretation in criminal proceedings, Congress enacted the Court Interpreters Act (“CIA”), 28 U.S.C. § 1827, in 1978. The Act does not establish constitutional safeguards, but rather provides guidance for translators and interpreters *once appointed*. Under the Act, an “available” and “certified” interpreter must be utilized by a judge “if the presiding judicial officer determines on such officer’s own motion or on the motion of a party” that such party suffers from a hearing impairment or primarily speaks a language other than English. 28 U.S.C. § 1827(d)(1). Legislation similar to the CIA has been enacted in many states.

These state and federal statutes do not help to ensure that a criminal defendant is aware of his right to an interpreter, and do not require the appointment of any interpreter until the language barrier is brought to the attention of the judge. See, e.g., M.C.L. 775.19a (Michigan statute requiring a judicial officer to appoint an interpreter “when it appears to the judge that the person is incapable of adequately understanding the charge.”) This reliance on trial court perception places an unreasonable burden on our judicial officers. It is also dangerous to assume that these

statutes can protect a criminal defendant's constitutional rights where judges, who are almost never in a position to evaluate an accused's language comprehension, are left responsible.

Our current system's failure to provide an adequate mechanism for enforcement of language rights is illustrated in this case. At every stage of the proceedings, Mr. Bazzi employed his basic understanding of the English language to answer the court's questions at the explicit direction of counsel. The court never asked Mr. Bazzi if he was a native English speaker, or if he could understand the English language. The court, asking only necessary questions, generally in a "yes" or "no" format, would have no way of detecting Mr. Bazzi's language issue. Mr. Bazzi, unfamiliar with our criminal justice system, would have no way of knowing that his full understanding of the proceedings was crucial to his defense, that he could indicate his lack of understanding to the court, or that he had a right to an interpreter. Instead, Mr. Bazzi placed himself at the direction, and the mercy, of his trial counsel. Trial counsel, the only party to these proceedings with the power to both recognize the difficulties of communication (indeed, trial counsel themselves in this case were unable to communicate with Mr. Bazzi without the help of Mr. Bazzi's more English-proficient family members), and the knowledge to adequately inform Mr. Bazzi of his rights, failed to do either.

Mr. Bazzi faced significant hurdles in raising the issue after conviction. He could not communicate with his appellate attorney, and did not understand why his appellate attorney had even come to see him. He therefore was not informed of his options on direct appeal. Thereafter, on discretionary review, the trial court judge concluded that affidavits from trial counsel, results

of a polygraph examination, and English comprehension test results were insufficient to overcome the judge's perception of comprehension during his limited exposure to Mr. Bazzi.

In other words, the judicial officer in this case recognized that it was within his discretion to inquire about Mr. Bazzi's English comprehension, and within his sole discretion to appoint an interpreter. Because he had never deemed it necessary, the failure to do so was not constitutional error. If we leave the power to appoint, and the power to dismiss, solely with judges, violations of the right to an interpreter will persist.

An inability of LEP criminal defendants to bring a language issue to the court perpetuates violations of constitutional rights. Indeed, the trial attorney involved in this case had already been reprimanded for failing to ensure adequate communication with a LEP defendant when he was retained to represent Mr. Bazzi. See *Gonzalez v Phillips*, 195 F Supp 2d 893 (E.D. Mich. 2001) As the court noted in *Gonzalez*, "while the [in-court] exchanges may have been insufficient to alert the trial court that she should *sua sponte* appoint an interpreter, the exchanges do not absolve Attorney Hall of his duty to request an interpreter for his client." *Id.* at 900. "If a defendant does not understand those proceedings and the defendant's attorney is aware or should be aware of the defendant's inability to understand the proceedings, it is incumbent upon that attorney to act on his or her client's behalf by requesting an interpreter." *Id.* at 899.

The A.B.A. Standards for the Defense Function,¹¹ the Michigan statutes mandating interpretive services, and other state and Federal statutes make it clear that qualified interpreters

¹¹ See Standard 4-3.1(c) and (d), requiring that defense counsel "use language and means that the client is able to understand" and consider whether the client appears to suffer from a condition that "could adversely affect the representation."

are necessary to ensure that the rights of LEP individuals are protected. Mr. Bazzi submits that to ensure that an accused's right to an interpreter, and his concomitant rights to counsel and a fair trial, are protected, there are two options. First, this Court could require that lower courts engage in a more-extensive colloquy at arraignment, with the express objective of ferreting out language barriers for non-English proficiency defendants. This approach would complement attempts to ensure interpreter competency through the CIA and similar state legislation. These legislative acts do not recognize a constitutional right to an interpreter, but rather provide guidance for interpreters and translators once appointed.

Second, the obligation can be shifted to counsel, by holding that a failure to employ an interpreter and/or communicate to a LEP client that he has a right to an interpreter is *per se* unreasonable as a deprivation of the right to counsel guaranteed by the Sixth Amendment. Mr. Bazzi respectfully suggests that this Court choose this second option, by declaring (1) that the Sixth Amendment implicitly recognizes a constitutional right to an interpreter, (2) that failure of counsel to recognize a legitimate English deficiency and counsel accordingly is *per se* unreasonable, and that (3) the resultant error is structural in nature, and prejudice is therefore presumed.

D. Declaring that the Sixth Amendment to the Constitution Creates the Inherent Right to an Interpreter in the Context of a Claim for Ineffective Assistance of Counsel Ensures that an Aggrieved Defendant will have an Opportunity to Obtain Relief

This case presents this Court with an opportunity to consider the scope of the right to an interpreter, and the showing necessary to prove a deprivation of that right, as suggested above, in the context of an ineffective assistance of counsel claim.

“The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.” *Strickland v. Washington*, 466 U.S. 668, 691-92 (1984). In other words, the Sixth Amendment’s right to the effective assistance of counsel “is recognized not for its own sake but because of the effect it has on the ability of the accused to receive a fair trial.” *United States v. Cronic*, 466 U.S. 648, 658 (1984).

Furthermore, the right to counsel is the right to *effective* counsel. See *id.* at 686. The mere physical presence of an attorney does not fulfill the Sixth Amendment’s guarantee when the “advocate’s lips” are “effectively sealed” on crucial matters. See *Holloway v. Arkansas*, 435 U.S. 475, 488 (1978); *Strickland*, 466 U.S. at 667 (A defendant is entitled to assistance by an attorney “who plays the role necessary to ensure that the trial is fair.”). An attorney cannot play this role without ensuring the most basic necessity of representation—an effective means of communication.

The circuit court in this case erred in two important ways—each lending itself to meaningful consideration and clarification by this Court. The first is that it failed to recognize the importance of the right to an interpreter to all other fundamental rights, and created an unattainable standard of proof in these cases that simply cannot stand.

1. The circuit court adopted an impossible factual burden of proof for defendant to prove lack of understanding that must not be permitted to prevail.

The circuit court concluded that Mr. Bazzi had not presented evidence to suggest that he “suffered from any English language comprehension deficiencies,” (App. 3, p 8), or “actually

needed” an interpreter, (App. 3, p 6). However, as the dissenting Michigan Supreme Court Justice observed, Mr. Bazzi presented four affidavits—one of his own, attesting to his lack of comprehension, one from his brother, who witnessed first-hand the interactions between Mr. Bazzi and trial counsel and served as an unqualified translator during pretrial discussions and on evenings during trial, and his two trial attorneys, who were not prepared to state with certainty that Mr. Bazzi understood their communications. Mr. Bazzi also submitted the results of a polygraph examination, which indicated that truthful responses regarding his lack of understanding during plea negotiations and at trial, (App. 9), as well as the results of an English comprehension test performed during Mr. Bazzi’s incarceration, indicating that *after a full year and a half of post-conviction institutionalization*, Mr. Bazzi’s English reading and language abilities were equivalent to that of a first-grader, (App. 10).

As Justice Cavanagh noted, this was “more than enough evidence” to support an investigation into whether Mr. Bazzi’s due process rights had been violated. Indeed, Mr. Bazzi submits that if this offer of proof was insufficient to even warrant a hearing on the question of ineffective assistance of counsel, there is no amount of evidence, in Michigan or any other state adopting a similar burden, that would support an opportunity for relief after this deprivation of important constitutional rights.

- 2. The circuit court erred when it conflated the standard of review for ineffective assistance of counsel claims involving professional decisionmaking with the standard of review for structural errors, for which prejudice is presumed.**

The circuit court in this case also erred when it employed the traditional test for effective assistance of counsel, requiring a showing of prejudice before relief is warranted.

Two lines of authority govern Sixth Amendment assistance of counsel claims—distinguished substantially by the applicable standard of review. In the typical case, a defendant is denied his right to the assistance of counsel by the actually ineffective assistance of counsel. See *Strickland*, 466 U.S. at 692. To prevail, the defendant must show that counsel’s performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for the professional legal errors, the result of the proceeding would have changed. In these “bad lawyering” cases, the defendant is required to prove that trial counsel’s failure resulted in prejudice. *Strickland*’s two-prong standard focuses on an attorney’s professional judgment, his choice of legal tactics and strategies. A court reviews the attorney’s actual performance in the proceedings, including his use of the wide range of *reasonable* professional tactics and strategies available in defense of his client.

In a second line of cases, this Court has established that a defendant may also be denied his right to counsel where the assistance of counsel was actually or constructively denied—that is, when there has been no lawyering at all. See *id.*; *Cronic*, 466 U.S. at 659. However, these principles have not yet been made explicit.

In *Cronic*, this Court stated that prejudice need not be proven under circumstances which, although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct at trial. *Cronic*, 446 U.S. at 661-662. This

Court reaffirmed the same principle in *Lockhart v. Fretwell*, 506 U.S. 364, 378 (1993), when it reasoned that “[i]n some cases, the circumstances surrounding a defendant’s representation so strongly suggest abridgement of the right of effective assistance of counsel that prejudice is presumed.” A review of this Court’s precedents makes clear that a case of actual or constructive denial of counsel “*is legally presumed to result in prejudice.*” See *Strickland*, 466 U.S. at 692 (emphasis added).

As a part of the right to effective assistance of counsel, the Sixth Amendment guarantees a defendant the right to confer with counsel in the courtroom about the broad array of unfolding matters. *Geders v. United States*, 425 U.S. 80, 88 (1976); see also *Perry v. Leeke*, 488 U.S. 272, 284 (1989) (explaining that except when the defendant is testifying, the accused enjoys an absolute “right to unrestricted access to his lawyer for advice on a variety of trial-related matters.”).

This Court has implicitly held that even a partial deprivation of this guarantee is structural error subject to reversal without a showing of prejudice. In *Geders*, petitioner was a codefendant charged with conspiracy to import controlled substances. Geders elected to take the stand, and testified on direct examination until the end of the day. Out of concern that the defendant would try to alter his testimony for cross-examination, he instructed defense counsel not to discuss “anything” about the case with his client during an overnight recess. *Id.* at 82-83. Defendant was convicted and the Fifth Circuit affirmed, finding that even if the order deprived Geders of the assistance of counsel, reversal was not warranted absent a showing that the order caused actual prejudice. *United States v. Fink*, 502 F.2d 1, 8-9 (5th Cir. 1974).

This Court unanimously reversed. The Court ruled that the trial judge's order deprived the defendant of the "guiding hand of counsel" at a critical point in the proceeding. *Geders*, 425 U.S. at 89, quoting *Powell*, 287 U.S. at 69. It noted that an overnight recess is often a crucial time for both defendant and counsel:

Such recesses are often times of intensive work, with tactical decisions to be made and strategies reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day's events.

Geders, 425 U.S. at 88. Because of the overriding importance of the assistance of counsel to a criminal defendant, the Court found that the judge's order could not be upheld. *Id.* at 91. The conviction was reversed and the case remanded for further proceedings.

Pretrial investigations have at least as much, though arguably more, import as overnight recesses during trial. It is at this stage that a defendant and his counsel are developing a strategy, interviewing potential witnesses, examining evidence, and engaging in crucial discussions of a defendant's option to accept a plea agreement and to testify during trial. The reasoning of this Court in *Geders* therefore logically applies here. No showing of prejudice should be required in cases, like this one, where a defendant has been deprived of an opportunity to communicate with his counsel regarding critical strategic decisions.

Furthermore, as the United States Circuit Court for the District of Columbia has held, to require a showing of prejudice in such cases would compromise a defendant's right to other important rights:

We find that a *per se* rule best vindicates the right to the effective assistance of counsel. To require a showing of prejudice would not only burden one of the fundamental rights enjoyed by the accused, but also would create an unacceptable risk of infringing on the attorney-client privilege. The only way that a defendant could show prejudice would be to present evidence of what he and counsel discussed, what they were prevented from discussing, and how the order altered the preparation of his defense. Presumably the government would then be free to question defendant and counsel about the discussion that did take place, to see if defendant nevertheless received adequate assistance.

We cannot accept a rule whereby private discussions between counsel and client could be exposed in order to let the government show that the accused's sixth amendment rights were not violated. This court has stated:

As the common law has long recognized, the right to confer with counsel would be hollow if those consulting counsel could not speak freely about their legal problems.... Limitations on the attorney-client privilege have therefore been drawn narrowly, to remove the privilege only where the privileged relationship is abused. Having already been subjected to an improper judicial order, it would be anomalous if defendant was also forced to relinquish the right to have his discussions with his lawyer kept confidential.

A *per se* rule is also more consistent with *Geders*. While the majority opinion did not explicitly discuss the issue, the Court never inquired whether defendant *Geders* had been prejudiced by the judge's instructions. It necessarily rejected the holding of the Fifth Circuit, which had held that reversal was not justified unless there was a showing of "actual harm." Given that the question was squarely presented, it is unreasonable to assume that the Supreme Court *sub silentio* subjected the violation to a harmless error test. See *Geders*, 425 U.S. at 92 ("a defendant who claims that an order prohibiting communication with his lawyer impinges upon his Sixth Amendment right to counsel need not make a preliminary showing of prejudice") (MARSHALL, J., concurring).

We note that our reading of *Geders* is consistent with later Supreme Court understanding. In [Cronic], the Court cited *Geders* as an example of where it had "found constitutional error without any showing of prejudice...." Based on both the policy concerns and our reading of *Geders*, we conclude that [the defendant] is not required to show actual prejudice to his right to consult with counsel; it is enough to show that the district court restricted that right. See *Glasser v. United States*, 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942) ("The right to have

the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.”).

Mudd v. United States, 798 F.2d 1509, 1513 (D.C. Cir. 1986) (citations omitted).

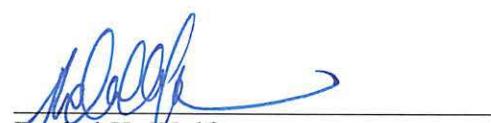
Mr. Bazzi proved that he is a non-English proficiency speaker, that his trial attorneys could not, and did not, communicate with him regarding his case, and that no interpreter assisted at any time during pretrial investigations or critical proceedings. The situation here is no different than if the court forbade Mr. Bazzi and his attorney from meeting, or if Mr. Bazzi’s attorney simply chose to sit silently or was absent.

It is impossible to know the extent of the prejudice Mr. Bazzi suffered as a result of the various interpreter errors affecting his trial. Even on this record, however, it is clear that language barriers and the potential for bias infected Mr. Bazzi’s trial to the point of constitutional infirmity. Mr. Bazzi should not be required to engage in attempting to prove how much, if any, he understood trial counsel, how much, if any, trial counsel understood him, and how much, if any, that which each of them believed he understood was, in fact, correctly understood. Mr. Bazzi respectfully asks this Court to adopt the reasoning of the D.C. Circuit Court and make explicit the constitutional guarantee implied by *Geders* and reaffirmed in *Cronic*.

CONCLUSION

For the foregoing reasons, Mr. Bazzi respectfully requests that this Honorable Court issue a writ of certiorari to review the judgment of the Michigan Supreme Court.

Dated this 9th day of October, 2020.



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