No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2020

ESAD LEMO,
Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent.

On Petition for Writ of Certiorari to the
Supreme Court of Pennsylvania.

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the Constitution violated where a defendant who speaks only Bosnian and has an IQ of 57 receives no interpretation during the suppression hearing testimony of the police officer who claimed that he confessed to an intentional murder?

PARTIES TO THE PROCEEDING

The petitioner is Esad Lemo. He is presently imprisoned by the Pennsylvania Department of Corrections at the State Correctional Institution at Rockview, located in Bellefonte, Pennsylvania. The named respondent is the Commonwealth of Pennsylvania.

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Petitioner, Esad Lemo, respectfully prays that a writ of certiorari issue to review the order of the Supreme Court of Pennsylvania.

OPINIONS BELOW

The opinion entered by the Superior Court of Pennsylvania affirming the judgment and sentence of the Court of Common Pleas of Allegheny County is attached as Appendix A. The Supreme Court of Pennsylvania denied allocatur without an opinion on December 22, 2020, with one justice noting her dissent. Its order is attached as Appendix B. The suppression hearing transcript, reflecting the trial court's rulings on the prosecutor's continued objection to the total lack of interpretation and Mr. Lemo's personal invocation of his right to full and simultaneous interpretation is attached as Appendix C.

JURISDICTION

The order of the state supreme court, denying the petition for allowance of appeal, was entered on December 22, 2020. Based on this Court's March 19, 2020, order extending the time to file petitions for writ of certiorari due to the COVID-19 pandemic, Mr. Lemo's petition for writ of certiorari is timely, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "No person shall be. . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right…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 defense." U.S. Const. amend. VI.

The Fourteenth Amendment to the United States Constitution provides: "No state shall…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 laws." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

A. Introduction

Petitioner Esad Lemo came to the United States from Bosnia in the late 1990s, when he was 38 years old. He has never spoken English and is unable to learn it. Even in Bosnian, Mr. Lemo is nearly illiterate. At 57, his full-scale IQ is lower than that of the petitioners in *Brumfield* (75), *Moore* (74), and even *Atkins* (59).[1]

At trial, Mr. Lemo's responsibility for killing his wife was never in dispute—only his state of mind was at issue. *See Atkins*, 536 U.S. at 318 ("[T]here is abundant evidence that [persons with intellectual disability] often act on impulse rather than pursuant to a premediated plan…").

Prior to trial, appointed counsel moved to suppress Mr. Lemo's responses to police interrogation shortly after his arrest where a neighborhood teenager did the best she could to interpret. Though Mr. Lemo's language and intellectual deficits were the clear bases for the suppression motion, the trial court failed to arrange for a courtroom interpreter to be present during the hearing. At that time, the court also was aware that Mr. Lemo had required a Bosnian interpreter (i) at the scene of his arrest, (ii) at the hospital, (iii) at the police station, (iv) at the county jail psychiatric evaluations, (v) at his first involuntary commitment hearing, (vi) at his preliminary hearing, (vii) at his second involuntary commitment hearing, (viii) at all times during

[1] *Brumfield v. Cain*, 576 U.S. 305 (2015); *Moore v. Texas*, 139 S. Ct. 666 (2019); *Atkins v. Virginia*, 536 U.S. 304 (2002).

his involuntary commitment to the state hospital, and (ix) at all four psychiatric evaluations the court ordered before the suppression hearing.

At the hearing, the record is clear that Mr. Lemo received absolutely no interpretation for the entire testimony and cross-examination of the most critical witness against him—the police officer who had interrogated him. The prosecutor objected to the total lack of interpretation, and trial counsel then administered a colloquy to Mr. Lemo, who asserted his right to full and contemporaneous interpretation. The court ordered that the hearing continue without any remedy.

This Court indulges "every reasonable presumption" against waiver of fundamental Constitutional rights and does not "presume acquiescence in the loss of fundamental rights." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (citations omitted). Far from silent, the record in this re-instated direct appeal shows that Mr. Lemo never acquiesced in the loss of his right to be present, to confront the primary witness against him, or to access and consult with his own counsel; instead, the record shows that Mr. Lemo personally affirmed that he was **not** waiving these rights.

Mr. Lemo has waited eleven years for Pennsylvania to provide him with a Constitutionally adequate direct appeal only to have its courts ignore his claims of federal Constitutional error. Mr. Lemo is precisely the petitioner this Court was designed to protect. His petition for certiorari should be granted.

B. Factual and Procedural History

Mr. Lemo was arrested in August 2006 for driving a car into his wife, Jasminka Lemo, killing her. First responders needed interpreters to evaluate Mr. Lemo's head

injury. At the hospital, a police officer questioned Mr. Lemo and had him sign a blood draw consent form, even though the officer knew he could not speak English. The police then plucked a random teenager from Mr. Lemo's refugee neighborhood to provide off-the-cuff interpretation at the police station. The officer knew that Mr. Lemo's "English was poor" and was "concern[ed] about misunderstandings as a result of any kind of language barriers…especially when...it came to actually speaking about details of the incidents [sic] as it transpired."

Mr. Lemo told the police in Bosnian that he could say his name, but he could not spell it. Though this statement flagged that he had disabilities beyond language, the police continued to interrogate him without a lawyer. The neighbor, who was "not a qualified translator," did "the best that [she] could" to interpret.[2] Mr. Lemo made incriminating statements during this interrogation, only part of which was recorded.[3]

The Municipal Court continued the preliminary hearing because it could not locate an interpreter. Almost immediately, the jail psychiatrist petitioned for involuntary commitment where Mr. Lemo was so mentally ill that he presented a danger to himself. The psychiatrist also informed the court that Mr. Lemo is "totally

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[2] The Commonwealth later called a professional interpreter witness who rated the teenager's performance only as "fairly adequate."

[3] When the officer asked whether he "intentionally" killed his wife, Mr. Lemo said, "yes." This "confession" was invoked by the trial court when it found him guilty of first-degree murder. *But see* Solomon M. Fulero & Caroline Everington*, Assessing the Capacity of Persons with Mental Retardation to Waive Miranda Rights: A Jurisprudent Therapy Perspective*, 28 Law & Psychol. Rev. 53 (2004) ("As it is well documented that individuals with mental retardation have a strong tendency for acquiescence and a strong desire to hide their disability, care should be taken by the evaluator to avoid the use of leading or suggestive questions.")

isolated at the jail because he can speak to no one about how he feels since he only speaks Bosnian." She stressed his suicidality and positive immediate family history for suicide. The court denied the petition.

The very next day, the preliminary hearing went forward. The transcript reflects that only select portions of the proceeding were interpreted for Mr. Lemo, with the trial court endorsing that "ministerial matters" did not need to be interpreted.

Soon thereafter, trial counsel contacted the psychiatrist because he "was having difficulty working with [Mr. Lemo] even though he was working through an interpreter." The psychiatrist again petitioned for his immediate involuntary commitment, finding he was severely depressed, "dysphoric" and already had "made one suicide attempt at the jail by tearing up his clothes to hang himself…" Mr. Lemo also had "culturally-based" and "unrealistic ideas about the court system," telling the psychiatrist that "after the trial he would like to take a trip to Bosnia to see his mother before she dies." This time, the court granted the petition.

Less than four months later, the state hospital reported that Mr. Lemo was now medicated and competent to stand trial but underscored that "the patient needs an interpreter to work effectively with the system on his own behalf."

Back at the jail, Mr. Lemo was evaluated four more times: by a defense psychiatrist, a defense psychologist and twice by the Commonwealth's psychiatrist. Each evaluator relied on an interpreter. The trial court provided the Commonwealth with all prior psychiatric records from the jail and state hospital, notwithstanding

that those evaluations were conducted for purposes of competency only, without any Fifth Amendment warnings, and were littered with testimonial statements about the victim, the crime and other hearsay.[4]

Trial counsel did not formally notice a diminished capacity defense until January 2009, after the psychiatric evaluations had occurred. Counsel also moved to suppress Mr. Lemo's responses during the police interrogation, asserting that, because of his cognitive and language deficits and the inadequate *Miranda* translation by the teenage neighbor, his waiver was not knowing and voluntary.

At the suppression hearing, the trial court failed to provide a courtroom interpreter. Although trial counsel brought an interpreter, the transcript reflects counsel's clear intention to use him as a fact witness to challenge the accuracy of the interrogation tape and confront the teenage neighbor who had interpreted the police interrogation. *See* Appendix C at 21; *see also* Appendix A at 11-12. ("Appellant's counsel arranged to have his own interpreter at the suppression hearing for purposes of aiding counsel in conferring with Appellant if the recording of Appellant's

[4] As a check on counsel's pursuit of any mental health defense, Pennsylvania Rule of Criminal Procedure 569 mandates a trial court to interface with the defendant in person, warn him of his rights and the purpose of the examination and to ensure his comprehension and agreement. The trial court entirely ignored this Rule both times it ordered Mr. Lemo to submit to the Commonwealth's examiner. Notwithstanding the Rule's clear purpose, the Superior Court failed to decide the merits of this claim because Mr. Lemo's counsel did not object at the non-existent hearings. *See* Appendix A at 9. Despite extensive discussion at oral argument, the opinion also ignored *Commonwealth v. Davido,* 868 A.2d 431 (Pa. 2005) (holding that "where the Rules of Criminal Procedure are clear that it is up to the trial court, and not counsel, to ensure that a colloquy is performed" an objection is not required).

statements to the police was played at the suppression hearing after being introduced into evidence.")

Though the Commonwealth also retained an interpreter who was in the courtroom, only the defense interpreter was sworn (along with Mr. Lemo himself) Appendix C at 3. The swearing in was at counsel's, rather than the court's, prompting.

The Commonwealth's first witness was the police officer who interrogated Mr. Lemo. On direct examination, Officer Palmer testified that Mr. Lemo:

- had only a "minor injury" on his head in the emergency room when Palmer engaged him in conversation
- told Palmer he could not speak English
- gave Palmer consent to draw his blood
- "understood his rights and did waive his rights"
- signed the waiver form personally and checked boxes "yes"
- "seemed to understand what I was saying"
- made statements about "how depressed he was, that he has just lost his job"
- was "agitated and angry" at the nurses
- rode with Palmer and another detective back to police headquarters
- was given a line-by-line reading of the *Miranda* form, both in English and Bosnian
- signed the *Miranda* form himself
- acknowledged that he understood his rights
- agreed to speak with the police detectives

- spoke of what happened "at Whitehall" [Mr. Lemo's neighborhood]
- "gave his story"
- agreed to place his statement on tape
- was not "reluctant to talk"
- did "not appear to be under the influence of any drugs or alcohol"
- appeared to understand what was being asked of him
- was given an explanation of his rights a second time, off tape
- did not "show any confusion about what [Palmer was] saying to him through the translator
- asked no questions indicating he was unsure of his rights
- answered Palmer's questions and cooperated the best he could.

On cross-examination, Officer Palmer admitted:

- that he did "a question and answer" with the interpreter and Mr. Lemo before they ever went on tape
- that he never told Mr. Lemo on the tape that he had a right to stop answering questions
- that he never explained to Mr. Lemo what a judge or lawyer was.

On redirect-examination, Officer Palmer testified:

- that Mr. Lemo never asked him "for the meaning of any words or further explanation"
- that Mr. Lemo did not make any objection during the drawing of his blood.

As soon as Palmer finished testifying, the prosecutor alerted the trial court that "the interpreter is not interpreting anything." The prosecutor continued: "[s]ince

[Mr. Lemo] is here, he would have a right to have everything translated to him. He has an interpreter."

Trial counsel explained: "[w]ell, the things that I was going to discuss with him or have my interpreter go through with him would be things concerning the exchange, which I believe would be coming up when we are doing the [interrogation] tape."[5]

The prosecutor did not back down: "**It is his trial**." Counsel replied: "To do it that way, then there would have to be a break so my translator can translate it because obviously he cannot translate simultaneous as to the way we're speaking." The trial court agreed that the prosecutor made "a good point" and specifically asked counsel whether Mr. Lemo was "waiving his right to have every statement translated?"

Trial counsel and the court then agreed to "put this on the record." Turning to Mr. Lemo, counsel explained through the interpreter that he had a "right to have every word spoken in this trial translated for you" and fully advised that Mr. Lemo's "understanding of all the words that are said during this trial are important for you to aid in your defense."

Trial counsel then asked Mr. Lemo, "Would you like us to interpret every word that is being said during this trial?" Mr. Lemo indicated "**yes**," and the trial court responded: "Okay. We'll do that."

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[5] It seems likely from this explanation that trial counsel swore his interpreter in along with his client because he perceived them both to be potential fact witnesses. There is no indication on the transcript that any official interpreter "oath" was administered pursuant to 42 Pa.C.S. § 4414.

Still, the prosecutor was not satisfied with the Court's prospective-only remedy and continued her objection: "What about what's been said so far?"

The Court: Call your next witness.

The prosecutor complied with the court's directive and called her next witness with no break in the proceedings.[6]

At the conclusion of the suppression hearing, the trial court found that "it is unquestionable that Mr. Lemo does fall within the purview of mental retardation." Nonetheless, it found his purported *Miranda* waiver to be valid and denied the motion to suppress statements. Before the hearing adjourned, and without any time to discuss the outcome of the suppression hearing with his client, trial counsel represented to the court that Mr. Lemo would be waiving his right to a jury trial, but confessed that counsel was having difficulty explaining the waiver to him.

On March 12, 2009, the bench trial began. Counsel informed the court that he expended "hours" trying to explain the jury waiver to Mr. Lemo: "As this Court is aware, we have demonstrated that he has been classified as mentally retarded… does not read English and his ability to read is very limited. I mean, I can ask him to initial that particular form, but it is not like he is reading it and initialing what he has read."

The court insisted that counsel have Mr. Lemo initial the English-language waiver form. After a short recess, counsel relayed that Mr. Lemo still did not

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[6] As the Superior Court noted, "[w]e can only assume Appellant's interpreter continued to interpret the testimony and hearing dialogue to Appellant for the remainder of the hearing as there is no indication in the notes of testimony that the interpreter was translating anything that was said." *See* Appendix A at n.12.

understand every word on the form. The court then conducted a colloquy with lengthy questions that required Mr. Lemo to give only "yes" or "no" answers. The next day, the bench trial ended. The trial court rejected Mr. Lemo's defense of diminished capacity, citing *inter alia*, his confession to the police, and found him guilty of first-degree murder.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari (i) where lower courts are in need of guidance to protect the Constitutional rights of defendants who do not speak English; (ii) where this case presents an ideal opportunity to confirm that a suppression hearing is a "critical stage" of the proceedings; (iii) where Mr. Lemo's language and cognitive deficits are severe and beyond dispute; and (iv) where Pennsylvania repeatedly has failed to protect Mr. Lemo's Constitutional and statutory rights, including multiple, total deprivations of his right to counsel.

I. Lower Courts Require Clarity on the Constitutional Responsibility to Ensure Interpretation in Criminal Cases.

A defendant's total inability to understand the language of the forum implicates due process and multiple Constitution guarantees, including the right to presence, to confrontation and the meaningful assistance of counsel.[7]

[7] One in every five American residents speaks a language other than English at home; the number of residents whose primary language is not English has been growing steadily for over two decades. Pennsylvania has 1.3 million residents—nearly the population of Philadelphia—who do not speak English at all. Another 500,000 residents do not speak it "very well." *See* The United States Census Bureau, *American Community Survey* (2019).

In *Snyder v. Com. of Mass.,* 291 U.S. 97, 107–08 (1934), *overruled in part by Malloy v. Hogan,* 378 U.S. 1 (1964), this Court held that "[s]o far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence." A defendant's meaningful presence is a precondition for him to effectuate his right "to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial itself." *Id.* at 106

As early as *Powell*, this Court has recognized that the right to the assistance of counsel includes the concomitant right to communicate with that counsel. *Powell v. State of Ala.*, 287 U.S. 45, 68-70 (1932) (citing two early 20th century deportation cases where foreign-born accused were entitled to consult with counsel); *see also Holloway v. Arkansas*, 435 U.S. 475, 489 (1978) (confirming that an attorney's physical presence in the courtroom does not alone satisfy the right to the assistance of counsel required by the Sixth Amendment).

Like the right to counsel, the denial the right of effective cross-examination is a "constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it." *Davis v. Alaska*, 415 U.S. 308, 318 (1974) (citations omitted). The "appropriate question [in determining whether the Confrontation Clause has been violated] is whether there has been any interference with the defendant's opportunity for effective cross-examination." *Kentucky v. Stincer*, 482 U.S. 730, 744, n.17 (1987). After all,

> [t]he Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to

> make his defense. It is **the accused**, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.

Faretta v. California, 422 U.S. 806, 819 (1975).

Applying these precedents, federal and state courts have found Constitutional violations where defendants who do not speak English are denied courtroom interpretation. What is less clear without this Court's guidance is who bears ultimate responsibility for these constitutional denials—whether the court or trial counsel—and the appropriate test and remedy whenever such a denial occurs. *See, e.g., United States v. Cirrincione*, 780 F.2d 620, 634 (7th Cir. 1985) (holding that a criminal defendant is denied due process when, *inter alia*, "what is told him is incomprehensible" or "the accuracy and scope of a translation at a hearing or trial is subject to grave doubt"); *Tejeda-Mata v. Immigr. & Naturalization Serv.*, 626 F.2d 721, 728 (9th Cir. 1980) (holding denial of simultaneous interpretation harmless) (Ferguson, J., dissenting) ("I am certain that the majority would never have allowed the immigration judge's decision to stand had [defendant] not been allowed to be present at the deportation hearing. Yet, refusal to allow simultaneous translation effectively denied [defendant] that very right."); *Garcia v. State,* 210 S.W.2d 574, 580 (Tex. Crim. App. 1948) (finding structural error in total absence of interpretation) ("The constitutional right of confrontation means something more than merely bringing the accused and the witness face to face; it embodies and carries with it the valuable right of cross-examination of the witness. Unless appellant was…afforded knowledge of the testimony of the witness, the right of cross-examination could not

be exercised by him."); *United States v. Anguloa*, 598 F.2d 1182, 1186 (9th Cir. 1979) (finding mistranslations and comments by interpreter and prosecutor's *ex parte* action with respect to interpreter to be harmless error); *United States v. Lim,* 794 F.2d 469, 470 (9th Cir. 1986) (first remanding for supplementation where three Korean-speaking defendants did not receive continuous courtroom interpretation then reviewing district court's factual conclusions regarding their comprehension); *but see Nguyen v. Booker*, 496 Fed. Appx. 502, 506 (6th Cir. 2012) (unpublished) (relying on this Court's decision in *Delaware v. Fensterer*, 474 U.S. 15 (1985), to find no "complete" Confrontation Clause violation where defendant lacked an interpreter but his counsel "albeit with difficulty" was able to challenge the witness and thus defendant had an "opportunity" for effective cross-examination.)

In *U.S. ex rel. Negron v. State of New York,* 434 F.2d 386 (2d Cir. 1970), the Second Circuit Court of Appeals affirmed the grant of habeas relief for a petitioner who spoke no English and who only had received "summaries" of already-completed testimony at his murder trial. The Court was clear that the violation spanned several Constitutional guarantees:

> [the denial] seems to us even more consequential than the right of confrontation. Considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial…[a]nd it is equally imperative that every criminal defendant- if the right to be present is to have meaning- possess 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding.'

Id. at 389 (citing *Dusky v. United States*, 362 U.S. 402 (1962)). The Court of Appeals was clear that these were not typical trial errors; rather the trial as a whole was

"constitutionally infirm" and required the trial court, "put on notice of defendant's severe language difficulty… to make unmistakably clear to him that he has a right to have a competent translator assist him." *Id.* at 391. The habeas court expressly declined to fault trial counsel for his failure to request an interpreter where "the federal right to a state provided translator is far from settled" and counsel "would have been on tenuous grounds for believing that the present claim would prevail." *Id.* at 390. Nor was the Court of Appeals "inclined to require that an indigent, poorly educated Puerto Rican thrown into a [murder] trial as his initiation to our trial system, come to that trial with a comprehension that the nature of our adversarial processes is such that he is in peril of forfeiting even the rudiments of a fair proceeding unless he insists upon them." *Id.*

The nuanced Constitutional roadmap provided by the court in *Negron* is exactly what is needed from this Court, especially in the case at bar. Mr. Lemo's language disabilities were compound and abundantly clear to all parties, including the trial court. Despite the court having a clear statutory duty to ensure adequate interpretation,[8] it failed to appoint a courtroom interpreter, interfered with defense counsel's strategy for his own interpreter at the suppression hearing, failed to

[8] Like the United States of America, Pennsylvania has no official language. Like the federal Court Interpreters Act, the responsibility for appointing, monitoring and, if appropriate, removing a courtroom interpreter in Pennsylvania belongs to the presiding judicial officer. *See* 42 Pa.C.S. § 4412 (Appointment), § 4413 (Removal), and §4414 (Oath); 28 U.S.C. § 1827(e)(1) ("If any interpreter is unable to communicate effectively…the presiding judicial officer shall dismiss such interpreter and obtain the services of another interpreter in accordance with this section.) Under either statute, none of these responsibilities belong to a defendant's lawyer.

monitor the interpreter even after it appropriated him, and failed to correct the total lack of interpretation by re-starting the hearing or taking other action.[9] The court's failures were so glaring that even the prosecutor objected, and Mr. Lemo asserted on the record that he was not waiving his rights. Still, the state appellate court faulted trial counsel, refused to enforce the mandatory language of the state statute and refused even to consider the myriad ways in which the federal Constitution was violated.

Pennsylvania's specious application of issue preservation to avoid deciding Mr. Lemo's claims of federal Constitutional error itself begs the federal question: if a total lack of interpretation both renders a defendant absent from the proceedings and deprives him of his Sixth Amendment right to counsel in a fundamental way… **who** is left to object? *See Penson v. Ohio*, 488 U.S. 75, 88 (1988) (a petitioner who is denied counsel altogether is "quite different from a case in which it is claimed that counsel's performance was ineffective."); *Commonwealth v. Diaz*, 226 A.3d 995, 1010 (Pa. 2020) (holding *Cronic* applies where defendant received no interpretation) ("The matter

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[9] The hearing transcript confirms that trial counsel continued to use the defense interpreter as his intended language consultant even after the objection/colloquy. *See* Appendix C at 37 (counsel conferencing with his interpreter in the middle of his cross-examination of the teenage neighbor); at 40 (counsel having his interpreter pronounce certain Bosnian words for the witness). It is unclear how the interpreter was able to perform these tasks while also interpreting the entire proceeding for Mr. Lemo. *See United States v. Hernandez*, 995 F.2d 307 (1st Cir. 1993) (endorsing that interpreter used as a fact or rebuttal witness should be distinct from the actual courtroom interpreter); *United States ex rel. Navarro v. Johnson*, 365 F. Supp. 676, 683 n.3 (E.D. Pa. 1973) (a "defendant's constitutional rights may require the presence of *two* interpreters" especially where interpretation of testimony makes a defendant unable to also talk to his lawyer, which will "inevitably hamper the capacity of his counsel to conduct effective cross-examination.") (citation omitted).

before us does not involve an allegation that trial counsel failed to test the prosecution's case. It is a question of whether the defendant's right to counsel was denied because of his inability to understand critical portions of his criminal trial, rendering him unable to have communications with counsel during those proceedings as protected by the Sixth Amendment."); *Commonwealth v. Pana*, 364 A.2d 895, 898 (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.")

Unless and until this Court issues guidance, petitioners like Mr. Lemo are left without a clear federal remedy if a state court fails to rectify a statutory violation or—as the lower courts did here—alchemizes structural constitutional violations into a claims of ineffective assistance of counsel that will face a higher burden and less forgiving standard of review in post-conviction. *See, e.g., Stevens v. Page,* 420 F.2d 933 (10th Cir. 1969) (denying habeas relief and holding prejudice to be lacking where deaf mute petitioner was forced to hand-write all of his communications with counsel in the middle of trial); *Urquhart v. Lockhart*, 726 F.2d 1316, 1318 (8th Cir. 1984) (denying habeas relief and finding interpreter claim procedurally defaulted where defendant did not first object).

This Court should grant certiorari to settle this federal issue.

II. This Case Presents a Clean Opportunity for this Court to Settle that a Suppression Hearing is a Critical Stage.

This Court has recognized the time between arraignment and trial as "perhaps the most critical period of the proceedings." *Powell v. State of Ala.*, 287 U.S. 45, 57 (1932). Suppression hearings, in particular, "often are as important as the trial itself." *Waller v. Georgia*, 467 U.S. 39, 46 (1984) (invoking *Gannett Co., Inc. v. DePaquale*, 443 U.S. 368 (1979)). As is true for Mr. Lemo, the prosecution's case "may turn upon the confession or other evidence that the defendant seeks to suppress, and the trial court's ruling on such evidence may determine the outcome." 443 U.S. at 398, n.1.[10]

Despite these axioms, a holding addressing whether the suppression hearing constitutes a "critical stage" of a criminal proceeding is glaringly absent from this Court's jurisprudence. This Court has addressed virtually every other stage of a criminal prosecution, holding many to be critical: *Massiah v. United States,* 377 U.S. 201 (1964) (post-indictment interrogation by government agent); *Miranda v. State of Arizona*, 384 U.S. 436 (1966) (custodial interrogation)*; United States v. Wade,* 388

[10] Many times, a suppression hearing is the only trial a defendant receives. *Waller*, 467 U.S. at 47. *Cf. Wright v. Van Patten*, 552 U.S. 120, 128 (2008) ("Indeed, with plea bargaining the norm and trial the exception, for most criminal defendants a change of plea hearing is *the* critical stage of their prosecution.") (emphasis in original). *See also* The Administrative Office of the United States Courts, *Judicial Facts and Figures*, Reporting Period End Date: September 30, 2018 (Table 5.4, Criminal Defendants Terminated by Type of Disposition) (2% of the 80,000 people who were defendants in federal criminal cases went to trial, which represented a decrease of 60% from 1998).

U.S. 218 (1967) (post-indictment lineup); *Coleman v. Alabama*, 399 U.S. 1 (1970) (preliminary hearing); *Estelle v. Smith*, 451 U.S. 454 (1981) (pretrial adversarial psychiatric examination); *White v. State of Md.,* 373 U.S. 59 (1963) (guilty plea hearing); *accord Iowa v. Tovar*, 541 U.S. 77 (2004); *Gomez v. United States*, 490 U.S. 858 (1989) (voir dire in a felony case); *Lafler v. Cooper*, 566 U.S. 156 (2012) (pretrial plea-bargaining process); *Gardner v. Fla.*, 430 U.S. 349 (1977) (sentencing hearing); *see also Marshall v. Rodgers*, 569 U.S. 58 (2013) (assuming without holding that post-trial motion hearing is a critical stage). *But see Gilbert v. California*, 388 U.S. 263 (1967) (taking of handwriting exemplars not a critical stage); *United States v. Ash*, 413 U.S. 300 (1973) (photographic display identification procedure not a critical stage); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (Florida's probable cause determination procedure not a critical stage).

This Court's cases "recognize that the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant." *Rushen v. Spain*, 464 U.S. 114, 117 (1983). *See also Rothgery v. Gillespie Cty., Tex.,* 554 U.S. 191, 212 (2008) ("[W]hat makes a state critical is what shows the need for counsel's presence."); *Lafler,* 566 U.S. at 165 ("The [Sixth Amendment] constitutional guarantee applies to pretrial critical stages that are part of the whole course of a criminal proceeding, a proceeding in which defendants cannot be presumed to make critical decisions without counsel's advice.")!

In *Kimmelman v. Morrison*, this Court endorsed that federal habeas relief is available under the Sixth Amendment where trial counsel's "primary error is failure

to make a timely request for the exclusion of illegally seized evidence—evidence which is "typically reliable and often the most probative information bearing on the guilt or innocence of the defendant." 477 U.S. 365, 379 (1986) (quoting *Stone v. Powell*, 428 U.S. 465, 490(1976)). Still, the Court in *Kimmelman* stopped short of declaring the suppression hearing to be a critical stage.

Other decisions from this Court muddle the question. *See, e.g., United States v. Raddatz,* 447 U.S. 667, 679 (1980) ("[T]he process due at a suppression hearing may be less demanding and elaborate than the protections accorded the defendant at the trial itself."); *Barber v. Page*, 390 U.S. 719, 725 (1968) (declaring that "[t]he right to confrontation is basically a trial right" when juxtaposing the denial of cross-examination of trial to cross-examination at the preliminary hearing). *United States v. Harris,* 403 U.S. 573, 584 (1971) (noting that Confrontation Clause precedent "seems inapposite to ... proceedings under the Fourth Amendment").

Lower courts have wielded these decisions to deny relief on suppression hearing claims. *See e.g. United States v. Burke*, 345 F.3d 416, 425–26 (6th Cir. 2003) (leveraging *Barber* and *Raddatz* to suggest that the Confrontation Clause is less potent at a suppression hearing than at a trial); *State v. Woinarowicz*, 720 N.W.2d 635, 641 (N.D. 2006) ("The Sixth Amendment right to confrontation is a trial right, which does not apply to pretrial suppression hearings."); *see also United States v. Robinson*, 663 F. App'x 215, 218 (3d Cir. 2016) (unpublished) ("[t]he Supreme Court has never suggested ... that the Confrontation Clause applies during a pre-trial suppression hearing"); *Ebert v. Gaetz,* 610 F.3d 404, 414 (7th Cir. 2010) (the

Confrontation Clause is "not implicated" at a suppression hearing); *United States v. Garcia*, 324 Fed. App'x 705, 708 (10th Cir. 2009) ("There is no binding precedent from the Supreme Court or this court concerning whether *Crawford* applies to pretrial suppression hearings. To the extent that we can divine clues from our case law concerning the resolution of this issue, they do not benefit [the defendant]."). *But see United States v. Daniels*, 930 F.3d 393, 405 (5th Cir. 2019) ("We've said before that, although the Sixth Amendment right to confront is a trial right, it also applies to suppression hearings").

Most lower courts to entertain the question have concluded that the suppression hearing is a critical stage.[11] However, those courts are far from consistent regarding the appropriate test or remedy where violations occur. *Compare Poteat v. United States,* 330 A.2d 229 (D.C. 1974) (defendant's assumed constitutional right to be present at suppression hearing could be forfeited by a failure to object) *with State v. Grey*, 256 N.W.2d 74, 76 (Minn. 1977) (unless accused has effectively waived his right to be present at suppression hearing, reversal of his conviction is required). Still

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[11] *E.g.*, *United States v. Hurse*, 477 F.2d 31 (8th Cir. 1973) (suppression hearing was critical stage at which defendant was entitled to be personally present); *United States v. Hamilton*, 391 F.3d 1066 (9th Cir. 2004) (absence of defendant and his counsel at suppression hearing constituted structural defect and violation of defendant's right to counsel); *United States v. Green*, 670 F.2d 1148, 1154 (D.C. Cir. 1981) (suppression hearing is a critical stage which affects substantial rights of the accused); *Henderson v. Frank*, 155 F.3d 159, 165 (3d Cir. 1998) (holding suppression hearing to be a critical stage); *U.S. ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1014 (7th Cir. 1988) (suppression hearing was critical stage); *Claudio v. Scully*, 982 F.2d 798 (2d Cir. 1992) (even the pretrial appeal of suppression ruling was a critical stage); *Commonwealth v. Holzer*, 389 A.2d 101, 107 (Pa. 1978) ("There is no doubt that a suppression hearing is a critical stage.")!

other courts have found no error at all. *E.g. Yates v. United States*, 418 F.2d 1228, 1229 (6th Cir. 1969) (finding no error where appellant excluded from suppression hearing where confession of codefendant implicating appellant was admitted in redacted form); *United States v. Pepe*, 747 F.2d 632 (11th Cir. 1984) (holding defendant had no Sixth Amendment right to be present for a thirteen-day *James* hearing at which government witnesses testified); *United States v. Gradsky*, 434 F.2d 880, 883 (5th Cir. 1970) (finding no error where defendants were excluded from evidentiary "taint" hearing where government witnesses testified); *United States v. Johnson*, 859 F.2d 1289, 1293 (7th Cir. 1988) (even assuming suppression is critical stage, failure to transport defendant was not error where issue was "purely legal"). *But see Kentucky v. Stincer,* 482 U.S. 730, 754 (1987) (three-justice dissent cautioning that "the propriety of the decision to exclude respondent from this critical stage of his trial should not be evaluated in light of what transpired in his absence. To do so transforms the issue from whether a due process violation has occurred into whether the violation was harmless.")

Federal court disagreement on whether the suppression hearing is a critical stage has substantial consequences, particularly for state prisoners turning to face the precarious winds of federal habeas review. In *Marshall v. Rodgers,* 569 U.S. 58 (2013), this Court explained that while federal courts sitting in habeas may "look to circuit precedent to ascertain whether it has already held that the particular point in issue is clearly established by Supreme Court precedent," a habeas court "may not canvass circuit decisions to determine whether a particular rule of law is so widely

accepted among the Federal Circuits that it would, if presented to this Court, be accepted as correct." *Id.* at 64.

The sheer frequency with which this Court takes "critical stage" questions creates a presumption that any clearly established law on the issue must be proceeding-specific. *See Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (defense counsel appearing via speaker phone at plea hearing not contrary to clearly established federal law); *Woods v. Donald*, 575 U.S. 312, 319 (2015) ("All that matters here, and all that should have mattered to the Sixth Circuit, is that we have not held that *Cronic* applies to the circumstances presented in this case. For that reason, federal habeas relief based upon *Cronic* is unavailable."); *see also Gomez v. Thaler*, 526 Fed. Appx. 355, 359 (5th Cir. 2013) (unpublished but invoked by Fifth Circuit in *United States v. Pleitz*, 876 F.3d 150, 158 (5th Cir. 2017)) (denying habeas relief because the Supreme Court has never addressed "whether the denial of counsel at a hearing on a motion to suppress is a "complete denial of counsel" at a "critical stage" of a criminal proceeding for the purposes of the Sixth Amendment"). *But see Williams v. Taylor*, 529 U.S. 362, 384, 391 (2000) (holding that the *Strickland* test provides sufficient guidance where "[m]ost constitutional questions that arise in habeas corpus proceedings—and therefore most "decisions" to be made—require the federal judge to apply a rule of law to a set of facts, some of which may be disputed and some undisputed.") This Court should grant certiorari to confirm that the suppression is a critical stage of the proceedings, as it was for Mr. Lemo.

III. This Case is Ideal to Decide This Question Because Mr. Lemo's Severe Deficits are Undisputed and No Interpretation Occurred.

This case presents a straightforward opportunity for this Court to outline the minimum Constitutional protections for defendants who speak no English and who receive no interpretation. Unlike many other cases involving defendants with limited English proficiency, it is beyond dispute that Mr. Lemo does not speak or understand English. His cognitive abilities are also severely limited. Further, the record is clear that Mr. Lemo received absolutely no interpretation for the entire testimony and cross-examination of the most critical witness against him—the police officer who had interrogated him and claimed that he confessed to an intentional murder.

When remanding for a post-conviction evidentiary hearing in this matter in 2017, the Pennsylvania Superior Court found that the record in this case "shows that Lemo's virtually complete inability to read or understand English, along with his limited mental capacity, undoubtedly hampered his interactions with the justice system." *Commonwealth v. Lemo*, No. 1437 WDA 2015, 2017 WL 3443802, at *6 (Pa. Super. Ct. Aug. 11, 2017).

Mr. Lemo did not receive any schooling in the United States or any English language instruction in his lifetime. Even after he emigrated in his late thirties, he lived within a refugee enclave where everyone spoke a Serbo-Croatian language.

Further, "by definition" Mr. Lemo has a "diminished capacit[y] to understand and process information, to communicate…and to understand other's reactions." *See Atkins*, 536 U.S. at 305. As a child, Mr. Lemo repeated the first, second and third grades a total of seven times before he finally was sent to a special education school

in Sarajevo. When Mr. Lemo was fifteen, thorough psychological testing was performed, and his overall IQ was measured at 56. Nearly four decades later, before the remanded post-conviction hearing, a Bosnian-American clinical psychologist re-tested Mr. Lemo in his native language and with appropriate cultural norms and found his full-scale IQ to be a consistent 57.

Despite his disabilities, Mr. Lemo clearly asserted on the record his right to full and contemporaneous interpretation after the prosecutor objected to the total lack of interpretation. The court did nothing to rectify the error and ordered the prosecutor to continue with her case.

This Court should grant certiorari where Mr. Lemo's case presents the ideal vehicle through which to announce the minimum Constitutional protections for criminal defendants who do not speak any English and receive no interpretation whatsoever of during the testimony of a key witness.

IV. Pennsylvania's Repeated Mishandling of this Case Cries Out for this Court's Intervention.

This case does not present a legal question that "would benefit from further percolation in the lower courts prior to this Court granting review." *See Calvert v. Texas*, 593 U.S. _____ (2021) (Statement of Sotomayor, J.) To the contrary, Pennsylvania already has caused Mr. Lemo over a decade of delay in seeking adjudication of this federal question, one that can easily be decided on the record.[12]

[12] These years have taken a considerable toll on Mr. Lemo. In 2017, the Bosnian-American expert found that he already suffers from moderate dementia due to his disabilities and social isolation. Mr. Lemo will suffer significant injury if Pennsylvania requires evidence from his own memory of his trial to prove prejudice.

Prior Proceedings

Mr. Lemo's initial direct appeal was denied in 2011.[13] The lawyer that Pennsylvania appointed never visited or even called Mr. Lemo. She never requested an interpreter, even though her same office had represented him at trial. Instead, she wrote him two letters in English. Mr. Lemo had no way of knowing that his direct appeal was even happening, let alone when it had been denied.

A kind fellow prisoner perceived Mr. Lemo's isolation and disabilities and managed to obtain his papers through "grunts" and "hand motions". He filed a post-conviction petition for him without the benefit of any transcript. Again, Pennsylvania appointed a lawyer who never spoke to him. Instead, counsel sent two letters in English asking why the *pro se* petition contained a jury claim. The frustrated friend wrote back, telling the lawyer that Mr. Lemo could not understand his letters and asked him to come to the prison with an interpreter and translated transcripts. Instead of doing any of these things, the lawyer immediately filed a "no-merit" letter. The post-conviction court, which had presided over the trial, immediately approved the "no-merit" letter and never inquired how the lawyer was able to investigate a

[13] Then Judge Christine Donohue was one of three judges on the Superior Court panel that denied Mr. Lemo's first direct appeal. Now Justice Donohue was the justice who noted her dissent from the Pennsylvania Supreme Court's 2020 denial of allowance of appeal. *See* Appendix B.

murder case within nineteen days of his appointment without an interpreter, investigator or even a travel voucher to the prison.[14]

The sole reason Mr. Lemo is before this Court is because that same friendly prisoner did not give up and immediately filed a *pro se* federal habeas petition. With a competent Bosnian interpreter and a record brimming with Pennsylvania's indifference to Mr. Lemo's rights, undersigned counsel easily prevailed on his post-conviction appeal, at the remanded post-conviction hearing, and finally on a motion to reinstate Mr. Lemo's direct appeal rights. The Constitutional and statutory violations were so blatant that the district attorney agreed to relief at all three stages.

[14] Pennsylvania does not allocate any state funds to indigent defense. *See Commonwealth v. Brown*, 196 A.3d 130 (Pa. 2018) (describing the "*ad hoc* fashion by which indigent defense services are funded from the local government level.) This funding structure further is problematic where a trial court, as it did here, transfers the burden of courtroom interpretation services to the public defender's office, justifying that "the county" is still funding the service. *See* 42 Pa.C.S. § 4416 (Cost of providing interpreter). Defendants represented by a public defender, then, pay for courtroom interpretation out of their own defense budget, whereas defendants with private bar counsel receive an interpreter out of the court administration budget. Even after the trial court was reversed during post-conviction, the interpreter it arranged for the remanded hearing sat completely silent during opening statements and further revealed to undersigned counsel that she was not certified and had never once interpreted a criminal proceeding. Ultimately, the trial court usurped the certified Bosnian interpreter brought (and funded by) the Federal Public Defender's Office to serve as the courtroom interpreter. There is little reason to believe that this trial court will take its future duty to protect Mr. Lemo's rights any more seriously.

The Instant Appeal

Even with this tormented case trajectory, the Pennsylvania appellate courts dodged the errors complained of in Mr. Lemo's reinstated direct appeal. As explained in footnote 4, *supra*, the Superior Court declined to announce the remedy for a crystal clear violation of Pennsylvania Rule of Criminal Procedure 569, a Rule designed to protect Mr. Lemo's autonomy and comprehension of his Constitutional right not to be compelled to be a witness against himself. *See also* Appendix A at 5-9.

With respect to the total lack of interpretation at the suppression hearing, the Superior Court opinion entirely ignored Mr. Lemo's claims that his Constitutional rights to presence and confrontation were violated, framing it only as "a claim that the trial court violated his Sixth Amendment right to the representation of counsel." *See* Appendix A at 9.[15]

The Superior Court then refused to reach the merits of even that truncated claim because "[d]espite the Commonwealth having raised this concern with the trial court, Appellant's counsel did not join the Commonwealth's concern or lodge his own objection on behalf of Appellant." Appendix A at 15. Nowhere in its opinion did the state court acknowledge that Mr. Lemo himself had asserted his right to have every word of the hearing interpreted for his benefit.

[15] Pennsylvania guarantees the defendant's presence at every stage of the trial, without any qualification that the stage be "critical." *See* Pa.R.Cr.P. 602(A).

Under the Superior Court's construction of waiver, even an entire trial that occurred in a defendant's absence could not be cured on direct appeal so long as his lawyer never formally objected.

This Court has found that the purpose of the contemporaneous objection rule is "substantially served" when the trial judge is made aware of the errors and has opportunity to take "appropriate corrective action." *Henry v. State of Miss.,* 379 U.S. 443, 448 (1965); *see also Osborne v. Ohio*, 495 U.S. 103 (1990) (rejecting excessively formalistic requirement that defense counsel object specifically to jury instructions when counsel had already pressed the issue of State's failure of proof); *Lee v. Kemna*, 534 U.S. 362, 376 (2002) ("There are, however, exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question.")

Where the courts of Pennsylvania have refused to address the federal questions fairly and clearly presented by Mr. Lemo, this Court should grant certiorari.

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that this Court should grant *certiorari* to review the judgment of the Pennsylvania Supreme Court.

Dated: May 21, 2021

Respectfully submitted,

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CERTIFICATE OF MEMBERSHIP IN BAR

I, LISA B. FREELAND, Federal Public Defender, hereby certify that I am a member of the Bar of this Court.

/s/Lisa B. Freeland
LISA B. FREELAND
Federal Public Defender

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

ESAD LEMO,
Petitioner,
v.
COMMONWEALTH of PENNSYLVANIA,
Respondent.

DECLARATION PURSUANT TO RULE 29.2
OF THE RULES OF THE SUPREME COURT

I hereby declare on penalty of perjury that on the below listed date, as required by Supreme Court Rule 29, the enclosed Motion for Leave to Proceed *in Forma Pauperis* and Petition for a Writ of Certiorari were delivered to a third party commercial carrier for next day delivery to the Clerk of the United States Supreme Court in Washington, D.C., postage and fees paid via Federal Express, on May 21, 2021, which is timely pursuant to the rules of this Court. The names and addresses of those served in this manner are as follows:

Scott S. Harris, Clerk
Supreme Court of the United States
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Washington, DC 20543

DATE: May 21, 2021

BY: */s/ Lisa B. Freeland*

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