

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Thomas Jur, *Petitioner*

v.

The State of New Hampshire, *Respondent*

On Petition for a Writ of Certiorari
To The New Hampshire Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Sixth and Fourteenth Amendments guarantee an interpreter to a criminal defendant who is unable to adequately comprehend the proceedings against him due to a limited understanding of the English language.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Thomas Jur respectfully petitions for a writ of certiorari to review the judgment of the New Hampshire Supreme Court.

OPINION BELOW

The opinion of the New Hampshire Supreme Court (Appendix A) is reported at 2014 N.H. LEXIS 45 and will be published in the New Hampshire Reports.

JURISDICTION

The judgment of the New Hampshire Supreme Court was entered on May 8, 2014. Appendix A. The instant petition is therefore timely. *See* Sup. Ct. Rule 13. The jurisdiction of this Court to review the judgment of the New Hampshire Supreme Court is invoked pursuant to 28 U.S.C. § 1257 (a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the United States Constitution provides in relevant part:

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 . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defence.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

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 the laws.

STATEMENT OF THE CASE

Thomas Jur was born in 1971 in southern Sudan. T 115, 117, 119. From age nine through thirteen, he attended school and was taught Dinka, the primary language in southern Sudan. T 118-120. English was not taught in Sudan. T 120. Rather, the Islamic-controlled government promoted the teaching of Arabic so that more people could read the Koran. T 120-122.

When Jur was still a boy, civil war broke out in Sudan. T 122-125. He described the war as being primarily between northern Muslims and southern Christians. T 123-125. He explained that those in the south who did not convert to Islam and join the Mujahideen would be shot. T 123-124.

When he was thirteen, the war came to his village. T 122-123. Some villagers were killed, and the schools and church were burned. T 122. All of the houses were burned down, and the survivors fled. *Id.* Jur escaped to Ethiopia, where he joined the Sudan People's Liberation Army ("SPLA"). T 122-123, 182-183. After training to become a soldier in Ethiopia, he returned to his homeland to fight, which he did for the next fifteen years. T 123-124.

While he was a soldier, Jur travelled to the northern capital city of Khartoum where he stayed for a time with his father, who was a government minister. T 124-126. In Khartoum, Jur was spying for the SPLA, and he attempted to discover the troop strength of the northern army, as well as the locations of their supplies and munitions. T 124-127, 182-183. However, his association with the SPLA was discovered by the local Mujahideen. T 127. Jur's father took him to the airport and put him on the first available plane, which landed in Cairo, Egypt. T 128.

Jur stayed in Cairo for three years. T 128. While there, he spoke with a person at the American Embassy in Cairo, who arranged for him to travel as a refugee to America. T 130. In 2003, Jur flew to Chicago, Illinois, and then boarded a plane to Manchester, New Hampshire. T 129-130. He had never heard of Manchester and he spoke only a few words of English. T 129-130.

Jur first found employment as a machine operator. T 131-132. Although he had difficulty understanding instructions, his supervisor would continually check on him to rectify any problems. T 132. Jur subsequently held a number of other jobs, and he encountered similar difficulties in these positions. *Id.* Jur studied English intermittently when he attended a course for Africans at a local church. H 8-9; T 132-133.

After his arrival in New Hampshire, Jur was convicted of six motor vehicle offenses that led to the New Hampshire Department of Safety's decision to seek to certify him as a habitual offender. *See* N.H. Rev. Stat. Ann. § 259:39 and § 262:19 (Supp. 2014). On June 30, 2011, Jur attended a habitual offender certification hearing in Concord. T 46-47, 51-52. The hearing was conducted by Brenda Hume. T 46, 50. Hume determined that Jur had accumulated a sufficient number of convictions within a five-year period to warrant his certification as a habitual offender. T 78, 82-83. At the conclusion of the hearing, Hume certified him as a habitual offender for a period of three years, and back-dated the commencement of the certification period to March 24, 2009. T 84; Def. Br. App. 14. Thus, Jur was able to petition for decertification on March 24, 2012. T 85.

Although Hume did not believe that an interpreter was needed, T 113, Jur misunderstood both the purpose and substance of the hearing. Jur thought that he was going to talk “to Commissioner of Concord. I don’t know, his name is John – or President, something like that.” T 137. Jur was happy to go to the Department of Safety on the date of the hearing, because he thought that he was going to get his license restored. T 137-138. He met with Hume, and he left the hearing believing that he understood what he needed to do to be able to drive again. T 138-142. When asked what happened in the hearing, Jur testified that “[s]he say if you have these papers from Jay and from Laconia, and from AAA, you will have your license now. Go and bring those ones and then you come, you have your license and my insurance.” T 140; *see also* T 165-167.

On the morning of November 4, 2011, Exeter Police Officer Nathan Goard was parked in the eastbound shoulder of New Hampshire Route 101. T 29-31. He was running radar on a section of the highway that had a posted sixty-five mile per hour speed limit. *Id.* At 5:25 a.m., he observed a car travelling ninety-one miles per hour. T 29, 31. Goard pulled the car over and identified the driver as Jur. T 32-33.

Jur told the officer that he was on his way to work. T 34. Goard determined that Jur was certified as a habitual offender, and he placed Jur under arrest. T 34-35. Goard testified that, during his interaction with Jur, he believed that there “was somewhat of a language barrier.” T 33. He explained that during his interaction with Jur, he spoke slowly, used simple language, and repeated himself a number of times. T 40-41.

Jur was indicted in February of 2012, and on March 13, 2012, defense counsel requested that the court provide an interpreter so that Jur could fully participate in all court proceedings. Def. Br. App. 15-16. This request was based, in part, upon the Sixth and Fourteenth Amendments to the United States Constitution. *Id.* On March 28, 2012, the court approved the motion and authorized the expenditure of funds for the services of a Dinka interpreter at all court hearings. Def. Br. App. 17.

On November 26, 2012, the day before trial, the court informed the parties that it had been unable to secure a Dinka interpreter. H 3. The court explained that it would engage in a colloquy with Jur to determine “what his English abilities are” and “then decide what to do.” H 3, 5.

After counsel reiterated the need for an interpreter, H 5, the court engaged in a colloquy with Jur. H 5-13. Jur was unable to recount what specific charge he faced, nor could he correctly explain the necessary prerequisites that led to the charge. H 9; *compare* T 78, 83. Although his previous cases resolved by plea, Jur answered “yes” when asked if he had previously gone to trial. H 10-11; Def. Br. App. 11.

The court asked Jur if he used an interpreter in his previous cases, and Jur responded in the affirmative. H 11. The following colloquy then took place:

Court: Okay. All right. So it sounds like it takes a little bit of communication back and forth with you and Attorney Malfitani to understand all of the words that he’s using; is that correct?

Jur: Yes, a lot.

Court: Okay. And have there been any questions that you've had or anything that he's explained to you that you haven't sort of been able to understand after working through it with him?

Jur: Yes.

Court: Okay. So there's some things you still don't understand, you're saying?

Jur: Yes, a little bit.

H 11-12.

The court proposed that another person from defense counsel's office be present with Jur while counsel cross-examined witnesses. H 13. Further, the court stated that it would allow time for Jur to consult with counsel about testimony that Jur did not understand. *Id.* The court acknowledged the due process implications, but was satisfied that, with the above accommodations, an interpreter was not necessary. H 13-14. Defense counsel objected to this ruling. H 14. Trial commenced the following day, and Jur was convicted. T 1; T 216.

On appeal, Jur argued that the trial court's refusal to grant him the services of an interpreter violated the Sixth and Fourteenth Amendments and the state constitution. *State v. Jur*, __ N.H. __, 2014 N.H. LEXIS 45, at *12 (May 8, 2014). He argued first that, given his poor comprehension of the English language and his timely request for an interpreter, the trial court erred by refusing to grant his pretrial request for an interpreter. *Id.*; Def. Br. 9-13, 21-23. Second, Jur argued that the trial court was under a continuing duty to ensure a fair trial and that his lack of comprehension became ever more apparent during trial. *Jur*, __ N.H. __,

2014 N.H. LEXIS 45, at *12; Def. Br. 14-15, 23-25. Thus, Jur urged, the trial court erred by failing to appoint an interpreter *sua sponte*. *Id.*

The New Hampshire Supreme Court acknowledged that this Court has not recognized a constitutional right to a court-appointed interpreter. *Jur*, __ N.H. __, 2014 N.H. LEXIS 45, at *14 n.6. However, the court determined that “a defendant whose English language abilities are so impaired as to prevent comprehension of what is occurring cannot, in any realistic sense, be deemed to be ‘present’” at his own trial. *Id.* at *16. The court went on to state that “the status of the right [to an interpreter] becomes less certain, however . . . [when] the defendant has some ability to understand and communicate, but clearly has difficulty.” *Id.* at *16-17.

The court found that a trial court’s determination as to whether to appoint an interpreter is dependent upon a variety of factors, such as the complexity of the case, the language ability of the defendant’s counsel, and the defendant’s knowledge of English. *Id.* at *17. The court reviewed the trial court’s decision in light of these factors, and found the decision not to appoint an interpreter to be a sustainable exercise of discretion. *Id.* at *23-24, 35. Although the court’s analysis was based on the state constitution, it also rejected Jur’s claim under the Sixth and Fourteenth Amendments: “As the Federal Constitution offers the defendant no greater protection than the State Constitution under these circumstances . . . , we also find no violation of the Federal Constitution.” *Id.* at *35.

REASONS FOR GRANTING THE WRIT

English is the most common language spoken in the United States, and it is the language used in nearly all governmental functions. United States Census Bureau, Camille Ryan, *Language Use in the United States: 2011* (Aug. 2013) at 1. However, in 2011 the Census Bureau reported that 21 percent of the population aged 5 and older spoke a language other than English at home. *Id.* at 2. Of this group, 15.4 percent reported speaking English “not well” and 7 percent reported speaking English “not at all.” *Id.* at 3. In raw numbers, this equates to over 13.5 million people who reported a deficiency in their ability to speak English. Moreover, the overall scope of this phenomenon continues to grow. Between 1980 and 2010, the percentage of the population age 5 and older who speak a language other than English in the home increased by 158.2%. *Id.* at 7.

Many of those who cannot effectively speak or comprehend English will find themselves charged with a criminal offense in a system that is premised upon such ability. For them, an interpreter is an essential prerequisite to the exercise of the panoply of trial rights that are enumerated in the Constitution. Lower courts, however, disagree as to when and under what circumstances an interpreter must be appointed. Moreover, in their effort to determine the need for an interpreter, lower courts turn to a variety of factors that are often prone to error. Without guidance from this Court, lower courts are left to make determinations as to the need for an interpreter on little more than an *ad hoc* basis.

I. WHILE THIS COURT HAS NEVER HELD THAT A DEFENDANT WHO IS UNABLE TO ADEQUATELY COMPREHEND THE PROCEEDINGS AGAINST HIM DUE TO A LIMITED UNDERSTANDING OF THE ENGLISH LANGUAGE HAS A CONSTITUTIONAL RIGHT TO AN INTERPRETER, NUMEROUS LOWER COURTS HAVE DECIDED THIS IMPORTANT FEDERAL QUESTION.

This Court has previously commented on the interplay between language and the Constitution. The Court stated that “[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.” *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (holding unconstitutional a state law that placed restrictions on teaching certain foreign languages). Similarly, in *Farrington v. Tokushige*, 273 U.S. 284 (1927), the Court observed that the Constitution protects “those who speak another tongue.” *Id.* at 298. The constitutional right to a fair trial demands more than mere physical presence in the courtroom. In another context, this Court has determined that “a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.” *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (discussing how incompetency undermines the concept of a fair trial).

Nevertheless, this Court has yet to decide whether criminal defendants who have a limited ability to speak and understand the English language have a constitutional right to an interpreter at their trial. *United States v. Si*, 333 F.3d 1041, 1043 n.3 (2003). This Court’s only pronouncement on the issue was in *Perovich v. United States*, 205 U.S. 86 (1907), wherein the Court noted that the

decision whether to appoint an interpreter while the defendant is testifying is “a matter largely resting in the discretion of the trial court.” *Id.* at 91.

Various federal circuits, on the other hand, have addressed this issue. *See United States v. Carrion*, 488 F.2d 12 (1st Cir. 1973); *United States ex rel. Negron v. New York*, 434 F.2d 386 (2nd Cir. 1970); *United States v. Martinez*, 616 F.2d 185 (5th Cir. 1980); *United States v. Sanchez*, 928 F.2d 1450 (6th Cir. 1991); *United States v. Johnson*, 248 F.3d 655 (7th Cir. 2001); *Luna v. Black*, 772 F.2d 448 (8th Cir. 1985); *United States v. Mayans*, 17 F.3d 1174 (9th Cir. 1994); *United States v. Edouard*, 485 F.3d 1324 (11th Cir. 2007). State courts have also addressed when and to what extent an interpreter must be appointed for a defendant. *See Ling v. State*, 702 S.E.2d 881 (Ga. 2010); *Ponce v. State*, 9 N.E.3d 1265 (Ind. 2014); *State v. Calderon*, 13 P.3d 871 (Kan. 2000); *Commonwealth v. Garcia*, 399 N.E.2d 460 (Mass. 1980); *In re Torres Murga*, 631 P.2d 735 (Okla. 1981); *Commonwealth v. Pana*, 364 A.2d 895 (Pa. 1976). Nevertheless, given the importance of the issue, “[t]here are surprisingly few reported decisions dealing with the right of an accused to an interpreter and the source, nature and extent of that right.” *United States ex rel. Navarro v. Johnson*, 365 F. Supp. 676, 681 n.3 (E.D. Pa. 1973) (*citing* former 36 A.L.R.3d 276). The *Navarro* court went on to note that “there has been no consistency in the approach which courts have taken with respect to the issue.” *Id.*

The lack of consistency continues to this day:

The basic rule recognized in all of the cases dealing with an accused's “right” to an interpreter is that the accused is entitled to interpretive services when he cannot otherwise understand or be understood in the criminal proceedings against him, but that he has no right, as such, to

have the evidence or court proceedings interpreted, and the courts in several cases have expressly stated that an accused has no absolute right to the appointment of an interpreter.

Jean F. Rydstrom, *Right of accused to have evidence or court proceedings interpreted*, 36 A.L.R.3d 276 (2012).

Courts continue to struggle to define the showing that a defendant must make to secure the appointment of an interpreter. In cases where a defendant does not request an interpreter but the court becomes aware of a defendant's language difficulty, approaches differ as to the necessity to appoint an interpreter *sua sponte*. Analytic differences abound, since courts vary widely in their assessment of which provisions of the Constitution are implicated when a defendant's comprehension of the English language is deficient. This case affords the Court an opportunity to hold that a defendant with a limited understanding of the English language is constitutionally entitled to the appointment of an interpreter. Moreover, this Court would be able to provide guidance and clarity to the lower courts regarding the nature, source, and extent of this right, as well as the factors to consider in determining when an interpreter is constitutionally required.

II. FACTORS EMPLOYED BY COURTS TO ASSESS THE NEED FOR AN INTERPRETER ARE PRONE TO ERROR.

In order to assess a defendant's particularized need for an interpreter, lower courts often turn to a variety of factors. However, many of these factors are prone to error, in that they fail to meaningfully gauge the need for an interpreter, are based on erroneous premises, or because employing a given factor could lead to

inconsistent results. Continued reliance on such factors will erroneously deprive defendants of needed interpretive services.

One such factor is “the complexity of the issues and testimony presented during trial.” *Carrion*, 488 F.2d at 14. The use of this factor poses two problems. First, courts appear to assume that a “simple” case stands on a different footing than a “complex” case. While this may be a meaningful distinction to lawyers and judges who routinely handle criminal trials, it disguises the reality that, to a layperson, all criminal trials involve complexity. The concept of proof beyond a reasonable doubt, the allocation of the burden of proof, and a defendant’s decision as to whether to testify arise in every trial. Issues involving differences between various mental states, the divergent roles of judges and juries, and the limitation on how evidence may be used arise frequently, even in very “simple” cases. Understanding these concepts is critical to understanding the import of issues and testimony at trial. Second, the words “simple” and “complex” are relative terms whose meanings depend upon one’s experience and perspective. To a judge who is fluent in English and has presided over a thousand cases, these terms mean something very different than to a layperson whose English comprehension is deficient.

Another factor relied on by courts is “the language ability of the defendant’s counsel.” *Id.* Certainly, an attorney’s fluency in the defendant’s native tongue may prove advantageous in attorney-client communications. However, it is a skill of

limited utility during a trial where the attorney cannot effectively perform his or her duty while simultaneously translating every spoken word.

Courts often look to “the extent to which the defendant can comprehend spoken English (*i.e.*, understand the English speech of other people)” and “the extent to which the defendant can express himself or herself in English.” *Tsen v. State*, 176 P.3d 1, 9 (Alaska Ct. App. 2008). Most judges, though, are not trained in linguistics, and may fail to recognize the limitations of their attempts to gauge a defendant’s level of comprehension:

In evaluating a defendant's English proficiency, a judge must be mindful that, even though a person might speak good conversational English, this is not enough to be able to comprehend complicated criminal proceedings. Judges often think that if a defendant is responsive to his questions and is able to understand what he is asking, even if the defendant speaks broken English, the assistance of an interpreter is unnecessary.

Iryna Dasevich, *The Right to an Interpreter for Criminal Defendants with Limited English*, *Jurist - Dateline*, Apr. 15, 2012, <http://jurist.org/dateline/2012/04/iryna-dasevich-criminal-interpreters.php> (last visited July 24, 2014). In other words, seemingly adequate conversational English skills are often a poor indicator of the level of comprehension required to fully understand complicated criminal proceedings. One commentator has noted that, “[a]s a result of language acquisition barriers, many immigrants, especially those who moved to the United States as adults, have mastered English at a “casual” conversational level – which allows them to handle everyday tasks like discussing job duties or taking care of their grocery shopping, – rather than at a fully bilingual level.” Stella Szantova

Giordano, “*We Have to Get By*”: *Court interpreting and its impact on access to justice for non-native English speakers*, *International Journal of Law, Language & Discourse*, Vol. 2.2, 17, 20 (June, 2012), <http://www.ijlld.com/index.php/journal-index/2012-index/97-ijlld-22-2012> (last visited July 24, 2014) (citation omitted).

In *Carrion*, the First Circuit recognized this problem: “If the defendant takes the stand in his own behalf, but has an imperfect command of English, there exists the . . . danger that he will either misunderstand crucial questions or that the jury will misconstrue crucial responses.” *Carrion*, 488 F.2d at 14.

Either alone or in combination, use of the above factors involves a significant risk that courts will conclude that defendants who need an interpreter are not entitled to one. This petition affords the Court an opportunity to clarify or reject these factors. In doing so, the Court would be afforded the concurrent opportunity to offer guidance on how best to ensure that defendants will be able to fully understand and participate in their own trial.

III. THIS CASE IS IDEAL FOR ADDRESSING THE ISSUE.

Since the late 1970s, much of the federal caselaw regarding the appointment of interpreters for the benefit of criminal defendants stems from the Court Interpreters Act, 28 U.S.C. § 1827, enacted in 1978. Thus, many federal cases in this area confine their analysis to statutory, as opposed to constitutional, interpretation. Under subsection (d)(1) of the Act, a trial judge shall utilize the services of an interpreter if a party or a witness who may present testimony “speaks only or primarily a language other than the English language . . . so as to inhibit

[his] comprehension of the proceedings or communication with counsel or the presiding judicial officer, or so as to inhibit [his] comprehension of questions and the presentation of [] testimony.”

According to the legislative history of the Court Interpreters Act, “Congress did not intend the Act to create new constitutional rights for defendants or expand existing constitutional safeguards.” *Tsen*, 176 P.3d at 7 (citations and quotations omitted). “Rather, the purpose of the Act is to mandate the appointment of interpreters under certain conditions and to establish statutory guidance for the use of translators in order to ensure that the quality of the translation does not fall below a constitutionally permissible threshold.” *United States v. Joshi*, 896 F.2d 1303, 1309 (11th Cir. 1990) (citing H.R.Rep. No. 1687, 95th Cong., 2d Sess. at 2-4 (1978)). Nevertheless, without guidance from this Court, the lower federal courts continue to speculate as to where that “constitutionally permissible threshold” lies.

For two reasons, the lack of guidance from this Court is felt most significantly in the various state courts. First, the constitutional buffer created by 28 U.S.C. § 1827 does not apply to the states. Due to this, many state courts analyze the need for an interpreter in light of their own interpretation of the Federal Constitution. However, these interpretations have been less than uniform. Second, the vast majority of criminal cases arise in state, as opposed to federal, courts. Thus, it is in the state court systems where the need for an interpreter most often arises.

This case is thus ideal for addressing the issue. As it arises from a state court, the constitutional question is unencumbered by issues relating to

1827. The material facts, as set forth in the transcript that comprises less than 300 pages, are simple and undisputed. Moreover, this case squarely raises the broad and important question presented in this petition that has not been, but should be, settled by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: August __, 2013

Respectfully submitted,

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