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# No Hablamos Habeas: How Incarcerated Immigrant Inmates Struggle with Ineffective Assistance of Counsel Language Access Claims

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**NO HABLAMOS HABEAS: HOW INCARCERATED  
IMMIGRANT INMATES STRUGGLE WITH  
INEFFECTIVE ASSISTANCE OF COUNSEL  
LANGUAGE ACCESS CLAIMS**

**Maria Pabon Lopez\* and Jessica Salafia\*\***

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## INTRODUCTION

The United States Constitution guarantees all defendants access to a fair and impartial criminal justice system.<sup>1</sup> To ensure that non-English speaking defendants have access to this fair and impartial criminal justice system, language access and effective assistance is imperative. From becoming familiar with how to file a claim, to the importance of accurate and adequate communications between client and attorney, the scope for constitutional concern is plethoric. The Sixth Amendment, for example, entitles defendants to, amongst other things, effective assistance of counsel for his or her defense.<sup>2</sup> How can counsel be effective if he or she does not speak the same language as his or her client? Is it possible to establish a consistent method of legal access for foreign language petitioners in habeas corpus cases?

In order to satisfy the Sixth Amendment right to effective assistance of counsel, counsel and client must be able to effectively communicate with each other.<sup>3</sup> For counsel and client to be able to communicate in circumstances where the client speaks a foreign language, counsel bears a greater burden of ensuring that communication is effective and that the client is confident that he or she understands and is understood.<sup>4</sup> This, in effect, ensures that counsel adheres to effective assistance as required by the Sixth Amendment.

There is no clear or consistent authority on foreign language access issues in the context of ineffective assistance of counsel. As a result, future litigants have little guidance in terms of how best to approach other foreign language issues going forward. These issues are herein illustrated primarily by the habeas cases of *Mendoza v. Carey*,<sup>5</sup> *Yang v. Archuleta*,<sup>6</sup> and *United States ex rel. Sanchez v. Jones*.<sup>7</sup> Ultimately, whilst some procedural safeguards have been implemented to protect

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<sup>1</sup> See, e.g., U.S. CONST. amends. V, VI, XIV.

<sup>2</sup> U.S. CONST. amend. VI.

<sup>3</sup> See *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012); see also ABA/SCLAID *Providing Services to Language Minority Clients*, Equal Justice Conference 2006, NATIONAL LEGAL AID & DEFENDER ASSOCIATION, at 14 (2006).

<sup>4</sup> *Id.*

<sup>5</sup> *Mendoza v. Carey*, 449 F.3d 1065 (9th Cir. 2006).

<sup>6</sup> *Yang v. Archuleta*, 525 F.3d 925 (10th Cir. 2008).

<sup>7</sup> *United States ex rel. Sanchez v. Jones*, No. 07 C 6099, 2008 U.S. Dist. LEXIS 121919 (N.D. Ill. July 9, 2008).

language minorities in the courtroom, such as specific training and selection of interpreters at the federal level,<sup>8</sup> these safeguards are not enough and certainly do not cure lost-in-translation attorney-client communications more generally.

This article starts by articulating the test under *Strickland v. Washington*, before turning to language access habeas cases and language interpretation to demonstrate the inadequate state of language access in the legal system. The article concludes by reiterating the importance of safeguards for clients who speak foreign languages inside and outside the courtroom and provides some recommendations to assist in implementing necessary safeguards.

### I. TEST UNDER *STRICKLAND*

The United States Supreme Court in *Strickland v. Washington* established a two-prong test to govern ineffective assistance of counsel claims.<sup>9</sup> For a defendant to obtain reversal of a conviction or to vacate a sentence based on ineffective assistance of counsel, he or she must show that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unreasonable performance, the result of the proceeding would have been different.<sup>10</sup> This second prong is the prejudice standard.<sup>11</sup>

The Supreme Court has also held that the Sixth Amendment right to effective assistance of counsel applies to pre-trial proceedings.<sup>12</sup> "It guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings."<sup>13</sup> The Court has expressly stated that critical stages include "the entry of a guilty plea."<sup>14</sup> The Sixth Amendment right must extend beyond pre-trial proceedings to also include *access* to said proceedings. How can effective assistance be adhered to only during legal *proceedings* and not encapsulate the very first attorney-client encounter? It is submitted that the right is violated if effective assistance is not

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<sup>8</sup> Appointment of interpreters for non-English speakers, as well as specific training and selection, is mandated under 28 U.S. Code § 1827.

<sup>9</sup> *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Frye*, 132 S. Ct. at 1408; *Lafler v. Cooper*, 132 S. Ct. 1376, 1384 (2012).

<sup>13</sup> *U.S. v. Wade*, 388 U.S. 218, 227-28.

<sup>14</sup> *Frye*, 132 S. Ct. at 1405; *Argersinger v. Hamlin*, 407 U.S. 25, 31, 34 (1972).

adhered to from entry to exit in the context of the criminal justice system. Effective assistance must be on a continuum of an immigrant's experience with the criminal justice system—not just during legal proceedings. One obvious example of where such assistance must be recognized is in relation to habeas claims.

## II. HABEAS CORPUS CLAIMS FOR FOREIGN LANGUAGE SPEAKING PETITIONERS

Habeas claims, made via writ of habeas corpus, provide a crucial last-ditch attempt for litigants to obtain relief in the criminal justice system. They are federal claims often challenging unconstitutional incarceration, alleged in circumstances where all remedies in state court have been exhausted.<sup>15</sup> The stakes, therefore, are high for habeas petitioners. Relatively recent case law only illustrates the tip of the iceberg concerning problems associated with foreign language access to habeas claims and access to the justice system more broadly.<sup>16</sup> The trend has been that most courts have denied the right to access legal materials generally, as well as specifically denying access to legal materials in a foreign language.<sup>17</sup> These circumstances can be seen in the context of equitable tolling. The case of *Mendoza v. Carey*, has been the most discussed case on this issue, namely because it “[came] out of left field,”<sup>18</sup> distinguished itself from the steady accord of case law denying access to legal materials, and gave new hope to foreign language habeas petitioners.<sup>19</sup>

This section provides a high-level chronology of case law in the context of equitable tolling. It highlights that the Ninth Circuit currently stands alone in protecting access to habeas through its interpretation of extraordinary circumstance as an equitable tolling requirement. It more broadly stresses the need for case-by-case application in circumstances where a non-English speaker seeks access to legal materials and to the legal system.

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<sup>15</sup> See Megan Grandinetti, *Ensuring Access to Justice for Non-English-Speaking Criminal Defendants: Denial of Access to Other-Language Legal Materials or Assistance As an Extraordinary Circumstance for Equitable Tolling*, 38 SETON HALL L. REV. 1479, 1480 (2008).

<sup>16</sup> See *Mendoza*, *supra* note 5; *Yang*, *supra* note 6; *Sanchez*, *supra* note 7.

<sup>17</sup> Jay W. Spencer, *Habeas Corpus Law in the Ninth Circuit After Mendoza v. Carey: A New Era?*, 31 SEATTLE U. L. REV. 1001, 1011 (2008).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

A. *The facts and findings in Mendoza*

In 2006, petitioner Mendoza filed a writ of habeas corpus claiming that lack of access to Spanish-language legal materials prevented him from learning about filing deadlines under the Anti-Terrorism and Effective Death Penalty Act (1996) (AEDPA) and therefore prevented his timely filing.<sup>20</sup> The elements Mendoza was required to establish to satisfy equitable tolling were that: (1) he had been pursuing his rights diligently, and (2) some extraordinary circumstance stood in his way.<sup>21</sup> As to the first element, Mendoza claimed that he requested Spanish-language legal material when he was first incarcerated but was told “to wait until he got to his regular assigned prison.”<sup>22</sup> Once he had arrived at his regular assigned prison, Mendoza claimed to have made several trips to the library but found only English-language materials and English-speaking librarians.<sup>23</sup> Mendoza eventually found a newly-arrived, bilingual inmate who was willing to offer assistance to Mendoza in filing his habeas petition.<sup>24</sup> As to the second element, Mendoza alleged that the prison’s law library’s lack of Spanish-language materials and his inability to obtain translation assistance before the requisite time deadline constituted extraordinary circumstances.<sup>25</sup> The Ninth Circuit Court agreed and remanded the matter for appropriate development on the record.<sup>26</sup>

The Court was, however, quick to reinforce the principle that equitable tolling may be justified if language barriers “actually prevent timely filing” but that a petitioner’s language limitations generally do not justify equitable tolling.<sup>27</sup> In *Kane v. Espitia* the Supreme Court held that a petitioner in jail awaiting trial did not have a clearly established right under federal law to access a law library as required for federal habeas relief.<sup>28</sup> The *Mendoza* Court expressly narrowed its decision to cases involving equitable tolling, rather than the actual grant of habeas relief for a constitutional violation.<sup>29</sup>

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<sup>20</sup> *Mendoza*, *supra* note 5, at 1067.

<sup>21</sup> *Id.* at 1068.

<sup>22</sup> *Id.* at 1067.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 1069.

<sup>25</sup> *Id.*

<sup>26</sup> *Mendoza*, 449 F.3d, at 1071.

<sup>27</sup> *Id.* at 1069-70.

<sup>28</sup> *Kane v. Espitia*, 546 U.S. 9, 10 (2005).

<sup>29</sup> *Mendoza*, *supra* note 5, at 1070-71.

This, in effect, allowed the Court to sidestep the Supreme Court's decision in *Kane* and grant relief in this instance. Conversely, in *Yang v. Archuleta* the court did not grant relief, and in doing so, reverted the issue of language access back to a strict approach, whereby no right of access to legal material nor foreign language-material was recognized.<sup>30</sup>

*B. The facts and findings in Yang*

In April 2008, based on similar facts, the Tenth Circuit Court in *Yang*<sup>31</sup> declined to follow *Mendoza*.<sup>32</sup> Yang filed a habeas writ and the district court ordered him to show cause as to why his petition should not be denied because it was not filed within the one-year limitation period under AEDPA.<sup>33</sup> Amongst other things, Yang urged equitable tolling due to his lack of English-language proficiency.<sup>34</sup> The district court rejected the argument, stating that it did not consider "difficulty with the English-language sufficient to warrant equitable tolling."<sup>35</sup>

The Court held that Yang did not allege with specificity "the steps he took to diligently pursue his federal claims"<sup>36</sup> and that he did not "set forth what actions he pursued to secure assistance with his language barrier inside or outside prison boundaries."<sup>37</sup> Yang had also alleged that his attorney for the state court appeal did not inform him of the filing deadline and he was not able to find an inmate to help him in time.<sup>38</sup> The court held that Yang's "conclusory statement"—that he "diligently pursued his rights and remedies"—did not suffice.<sup>39</sup> Similarly, in *United States ex rel. Sanchez v. Jones*, No. 07 C 6099, 2008 U.S. Dist. LEXIS 121919 (N.D. Ill. July 9, 2008), petitioner Sanchez did not frame his claims with the specificity required for equitable tolling relief, so the court rejected petitioner's argument.<sup>40</sup> The *Sanchez* decision is yet another recent example of the pushback from *Mendoza* at all levels of

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<sup>30</sup> *Yang*, *supra* note 6, at 929-30.

<sup>31</sup> *Id.* at 927.

<sup>32</sup> *Id.* at 929.

<sup>33</sup> *Id.* at 927.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Yang*, 525 F.3d at 930.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 928-29.

<sup>39</sup> *Id.*

<sup>40</sup> *Sanchez*, *supra* note 7, at 7-8.

the judicial system.

*C. The facts and findings in Sanchez*

In July 2008, the Northern District Court of Illinois in *United States ex rel. Sanchez v. Jones*<sup>41</sup> followed in *Yang*'s footsteps and rejected *Mendoza*.<sup>42</sup> The District Court in *Sanchez* was, however, bound by the decision in *Montenegro v. United States*.<sup>43</sup> "In *Montenegro*, the Seventh Circuit held that a pro se prisoner who could 'speak little English' and filed an untimely habeas petition was not entitled to equitable tolling due to the language barrier, his attorney's failure to respond to his letters, the prisoner's lack of legal knowledge, and delays caused by a transfer between prisons."<sup>44</sup> On this basis, the court rejected Sanchez's claim.<sup>45</sup>

Petitioner Sanchez alleged that he did not understand the tolling rules and that his state court counsel did not explain the relevant rules to him.<sup>46</sup> Sanchez also contended that Spanish was his first language and that he needed to have legal matters communicated in Spanish to understand them fully.<sup>47</sup> In response to the first claim, the court stated that Sanchez did not claim unawareness of the filing deadline, or that he was unable to secure translation assistance "despite timely and diligent efforts to do so."<sup>48</sup> The court therefore viewed Sanchez's claim as a general language barrier claim,<sup>49</sup> and held that it was insufficient to support equitable tolling.<sup>50</sup> In response to the second claim, the court stated that Sanchez "never intimated that he was unable to obtain any translation assistance despite diligent, consistent efforts to do so before the limitations period expired."<sup>51</sup> The court acknowledged the "slightly more lenient approach" taken by the court in *Mendoza* and *Yang*, though sharply discounted these cases as

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<sup>41</sup> *Id.* at 6-7.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 5.

<sup>45</sup> *Id.* at 7-8.

<sup>46</sup> *Sanchez*, *supra* note 7.

<sup>47</sup> *Id.* at 2.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* "[Sanchez] simply contends that he is pro se, has a limited education and limited literacy, and thus should be able to proceed despite his mistake."

<sup>50</sup> *Id.* at 4.

<sup>51</sup> *Id.* at 7.



inconsistent with Seventh Circuit authority.<sup>52</sup>

*D. Lessons learned from Mendoza, Yang and Sanchez*

Has *Mendoza* set a new trend, or will the courts continue to downplay its application in subsequent cases? In other words, will foreign language speaking petitioners continue to be denied access to legal materials in their own language? It has been suggested that the court in *Mendoza* “demonstrated a proper use of equitable tolling,” and that its approach to ensuring equal access to habeas claims “properly reflects the writ’s important role in protecting the rights of prisoners.”<sup>53</sup> The *Mendoza* decision sets a factual standard by which foreign language prisoners can measure their claims against considering whether to pursue litigation. It is submitted that this standard requires conscientious scrutiny of the facts of each case before applying the law in a way that is consistent with upholding a petitioner’s Constitutional rights, including the right to effective assistance of counsel. However, the cases subsequent to *Mendoza* bring this standard into question and, effectively put prisoners back at square one. It is true that prisoners have no constitutional right to counsel in post-conviction proceedings,<sup>54</sup> and broader application of *Mendoza* may “place an increased burden on judicial resources.”<sup>55</sup> However, the importance of factually distinguishing English-language-based habeas claims from foreign language-based habeas claims must be addressed to ensure access not only to the courts, but to effective assistance of counsel. Congruent with other scholars’ views, *Mendoza* strikes a sound balance between the protection of the right of equal access to the writ of habeas corpus and prevention of overburdening judicial resources<sup>56</sup> by adhering to a strict fact-based analysis. Therefore, the factual inquiry and subsequent application in *Mendoza* is reasonable and provides some necessary guidance.

III. EFFECTIVE ASSISTANCE OF COUNSEL AND THE ART OF INTERPRETATION

What role does effective assistance of counsel play in the

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<sup>52</sup> *Sanchez*, *supra* note 7, at 6–7.

<sup>53</sup> Spencer, *supra* note 17, at 1016.

<sup>54</sup> *Sanchez*, *supra* note 7, at 3; *Coleman v. Thompson*, 501 U.S. 722, 756 (1991).

<sup>55</sup> Spencer, *supra* note 17, at 1016.

<sup>56</sup> *Id.*

need for interpreters? In order to satisfy the Sixth Amendment right, it is imperative that counsel and client are able to effectively communicate.<sup>57</sup> For counsel and client to be able to communicate in circumstances where the client speaks a foreign language, it is axiomatic that counsel bears a greater burden of ensuring that communication is effective and that the client is confident that he or she understands and is understood.<sup>58</sup> This, in effect, ensures that counsel adheres to effective assistance as required by the Sixth Amendment.

This section highlights the importance of access to adequate interpretation at all stages of the legal system, not just upon reaching court. The fact that interpretation services are only guaranteed in court is a gross denial of fundamental rights and often results in miscommunication and misunderstanding. A client's entry into the criminal justice system and pre-proceeding consultation must be better acknowledged across the United States.

*A. Interpretation is a complex process which requires specialized knowledge, skill and competence*

Interpretation is not simply interpreting from one language to another and back again.<sup>59</sup> Rather, interpretation is a complex, rapid process which requires specialized knowledge, skill, ethics, and competence.<sup>60</sup> There are different modes of interpreting<sup>61</sup> which require distinctly different skill sets. For example, simultaneous interpretation "involves the interpreter's rendering into the foreign language whatever is being said in English, involving no pauses on the part of the English speaker."<sup>62</sup> Consecutive interpretation, which is frequently used for witness testimony, involves a speaker's pausing at regular intervals to allow the interpreter to render his or her speech into the target language, aloud for everyone in the courtroom to hear.<sup>63</sup> Thus, the speaker and the

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<sup>57</sup> See *Frye*, *supra* note 3, at 1402.

<sup>58</sup> See *id.*

<sup>59</sup> Luz M. Molina, *Language Access to Louisiana Courts: A Failure to Provide Fundamental Access to Justice*, 10 LOY. J. PUB. INT. L. 1, 11 (2008).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 12.

<sup>62</sup> *Id.* (citing SUSAN BERK-SELIGSON, *THE BILINGUAL COURTROOM: COURT INTERPRETERS IN THE JUDICIAL PROCESS* 38 (1990)). "This is the mode used at the counsel table, whereby the interpreter interprets for the defendant or litigant what the attorneys, judge, and English-speaking witnesses are saying."

<sup>63</sup> *Id.* at 12.

interpreter take turns and no overlapping speech should be heard. This mode of interpreting is typically used for foreign language witness testimony, rendering the testimony in English for the court, and interpreting the attorney's and judge's questions into the foreign language for the benefit of the witness. "Everything rendered in English by the interpreter is recorded for the court, whereas none of the foreign language testimony or questions rendered by the interpreter in the foreign language is recorded by the court reporter."<sup>64</sup>

Summary interpretation is reserved for technical legal language and:

involves distilling or condensing what has been said in the source language not the target language. This mode of interpreting is to be kept to a minimum in court interpreting, and is restricted to interpreting highly technical legal language, language that would be difficult to follow even for a native speaker of English.<sup>65</sup>

In addition to possessing the requisite skill level in the foreign language, the interpreter must understand and be able to appropriately interpret formal legal English, standard English, colloquial English and other sub-cultural varieties.<sup>66</sup>

These modes provide a high-level snapshot of the complexity of interpretation and the level of interpretation needed at all stages of the criminal justice process to ensure that the client is understood and that counsel is performing effectively. It is clear from the complexities raised that

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<sup>64</sup> *Id.*

<sup>65</sup> *Molina, supra note 59, at 12-13.*

<sup>66</sup> *Id.* at 13 (quoting BERK-SELIGSON, *supra note 49, at 19*). 'Formal Legal Language' is: 'the variety of spoken language used in the courtroom that most closely parallels written legal language; used by the judge in instructing the jury, passing judgment, and 'speaking to the record'; used by lawyers when addressing the court, making motions and requests, etc.; linguistically characterized by lengthy sentences containing much professional jargon and employing a complex syntax.' 'Standard English' is the 'variety of spoken language typically used in the courtroom by lawyers and most witnesses; generally labeled CORRECT English and closely paralleling that taught as the standard in American classrooms; characterized by a somewhat more formal lexicon than that used in everyday speech.' 'Colloquial English' is a: 'variety of language spoken by some witnesses and a few lawyers in lieu of standard English; closer to everyday, ordinary English in lexicon and syntax; tends to lack many attributes of formality that characterize standard English; used by a few lawyers as their particular style or brand of courtroom demeanor.' 'Subcultural Varieties' include the 'language spoken by segments of the society who differ in speech style and mannerisms from the larger community'.

communication for non-English speakers is paramount upon entry into the criminal justice system, and it should therefore alert practitioners to a heightened duty under the Sixth Amendment.

*B. The “front-end” of effective assistance of counsel — the foreign language speaking client’s entry into the criminal justice system and pre-proceeding consultation*

Language barriers faced by foreign language speakers and immigrants is intensified in the legal process, particularly where cases can directly impact a person’s liberty, such as the case in habeas claims.<sup>67</sup> State laws generally do not view the need for interpretation as constitutionally necessary to meet due process standards,<sup>68</sup> and, therefore, a number of states have not developed standards for the selection and appointment of interpreters.<sup>69</sup> At the federal level, appointment of interpreters for non-English speakers, as well as specific training and selection, is mandated under 28 U.S. Code § 1827. However, these measures only apply to judicial proceedings and do not address entry into the criminal justice system, including initial consultation with counsel.<sup>70</sup>

More broadly, Model Rules of Professional Conduct Rule 1.4 requires effective and competent communication between attorney and client, reasonable consultation with the client, keeping the client reasonably informed, and providing information to the client and explaining information necessary to make informed decisions.<sup>71</sup> In terms of communication with Limited English Proficient clients, the American Bar Association (ABA) Standing Committee on Legal Aid and Indigent Defendants has stated, amongst other things, that:

- a) [c]lear communication between the practitioner and client is at the core of effective practice.<sup>72</sup>
- b) [i]n order for . . . practitioners to meet their professional responsibilities to provide competent representation to the client . . . the practitioner either needs to communicate in the client’s language directly or through a competent

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<sup>67</sup> See Molina, *supra* note 59, at 2.

<sup>68</sup> *Id.* at 2–3.

<sup>69</sup> *Id.* at 3.

<sup>70</sup> 28 U.S.C. § 1827.

<sup>71</sup> MODEL RULES OF PROF’L CONDUCT R. 1.4. (1983).

<sup>72</sup> ABA/SCLAID, *supra* note 3, at 3.

interpreter. This responsibility attaches both to persons who speak a language other than English and to persons who rely on American Sign Language (ASL) to communicate.<sup>73</sup>

c) [p]ractitioners should not leave the decision as to the need for or the securing of an interpreter to their clients' discretion.<sup>74</sup>

While the use of bilingual staff to assist in language communication may at times be appropriate, informal and untrained interpreters should not be used and the use of family and friends as interpreters is discouraged.<sup>75</sup> In any event, it is not best practice.<sup>76</sup> The provider should:

[A]void the use of informal or untrained interpreters, including family members and friends of the person being served. . . Use of family and friends to interpret gives rise to serious risks that the interpretation will not be neutral and that the interpreter will not fully understand or be able to translate the legal options available. Furthermore, there may be times when the person doing the interpreting will have an unexpected conflict with the person being served by the provider.<sup>77</sup>

The California guidelines state, amongst other things, that "adequate communication is necessary in order to render 'competent' legal services."<sup>78</sup> Therefore, it is evident that some sort of formal qualification in the relevant language is necessary to be able to adequately interpret for the purposes of providing legal services. Bilingualism is not sufficient for court interpreting.<sup>79</sup> It undermines the right to effective assistance at the consultation and pre-trial stages. Alternatively, in the event that counsel needs to use informal or untrained interpreters, it is submitted that there is a duty to properly vet them in some other way comparable to that of certified interpreters.

*C. The "back-end" of effective assistance of counsel — case consequences and post-conviction mechanisms for*

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.* (citing Association of the Bar of the City of New York, Formal Opinion 1995–12, Committee on Professional and Judicial Ethics, July 6, 1995, page 8).

<sup>75</sup> *Id.* at 25.

<sup>76</sup> Molina, *supra* note 47, at 2.

<sup>77</sup> *Id.*

<sup>78</sup> ABA/SCLAID, *supra* note 3, at 16.

<sup>79</sup> Molina, *supra* note 59, at 11.

*claiming ineffective assistance of counsel for immigrant defendants*

Ineffective assistance of counsel claims are different where the client is an immigrant and/or foreign language speaker. The severe consequences of communication breakdown at this level come to life in such cases. This occurs because in every guilty plea entered by the non-English speaking defendant, the trial court should determine whether trial counsel—most often not Spanish speaking—disclosed every fact material to accused’s decision to waive jury trial and plead guilty. This goes beyond a general question posed as to whether the defendant understands that he is pleading guilty because this conclusory inquiry does not address counsel’s disclosures and performance in advising the client on the exercise of his jury trial right. This is a right personal to the accused which cannot be exercised by counsel as a matter of his professional judgment.<sup>80</sup> Unfortunately, Spanish speaking defendants with allegedly defective pleas have not been able to withdraw their guilty pleas.<sup>81</sup> Thus ineffective assistance of counsel habeas petitions are the last resort for these defendants.

Beyond language and language access deficiencies highlighted above in the cases of *Mendoza*, *Yang* and *Sanchez*, the Supreme Court in *Padilla v. Kentucky* addressed ineffective assistance regarding potential immigration consequences of a guilty plea in circumstances where counsel failed to provide affirmative and competent legal advice.<sup>82</sup>

*D. Padilla and the danger of ineffective assistance for immigrant defendants*

The facts in *Padilla* illustrate the danger of ineffective assistance for immigrant defendants. *Padilla* had lived in the United States as a permanent resident for over 40 years before pleading guilty to drug-related charges in Kentucky.<sup>83</sup> As a

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<sup>80</sup> *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

<sup>81</sup> See *United States v. Carillo-Guzman*, 242 F.3d 377 (8th Cir. 2000); (“Given Carillo-Guzman’s answers to the questions contained in his petition to plead guilty and posed at the change-of-plea hearing, as well as the availability of a Spanish interpreter before the hearing and the presence of two interpreters at the hearing, we are confident Carillo-Guzman understood the proceeding.”); see *United States v. Martinez-Cruz*, 186 F.3d 1102, 1104-05 (8th Cir. 1999); see also *United States v. Gonzalez*, 765 F.3d 732 (7th Cir. 2014).

<sup>82</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010).

<sup>83</sup> *Id.* at 356.

result of his guilty plea, Padilla faced deportation.<sup>84</sup> In post-conviction proceedings, Padilla claimed that his counsel failed to advise him of the deportation consequences before he entered the guilty plea.<sup>85</sup> Padilla also claimed that counsel told him that he did not have to worry about immigration status since he had lived in this country for so long.<sup>86</sup> The Court held that it had “little difficulty” concluding that Padilla had sufficiently alleged that his counsel was constitutionally deficient because counsel had to inform Padilla that his plea carried a risk of deportation.<sup>87</sup> The decision stands out as a significant safeguard for immigrant defendants, particularly because any person with a conviction that had not yet become final before the decision in *Padilla* on March 31, 2010 was automatically and immediately entitled to take advantage of the court’s holding.<sup>88</sup>

*Padilla* also raised the issue of “how defense counsel is to determine what immigration consequences are clear or unclear for purposes of fulfilling their Sixth Amendment advisement duty.”<sup>89</sup> It has been said that “some immigration consequences may be unclear due to a lack of established case law, a split in interpretation by courts, or vagueness that may result from specialized definitions and terms of art in immigration law.”<sup>90</sup> It can also be noted that some language access consequences may be unclear for identical reasons. For example, *Mendoza* provides narrow relief strictly in the context of equitable tolling and undeniably only in the Ninth Circuit. The case is not a Supreme Court authority and has been challenged in other circuits, illustrated by *Yang* and *Sanchez*, creating a split in interpretation and therefore providing no steady guidance for future litigants.

### *E. Broader constitutional concerns*

#### Language access claims and immigration-related claims

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<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 359.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 374.

<sup>88</sup> Jeffrey L. Fisher & Kendall Turner, *The Retroactivity of Padilla After Chaidez v. United States*, THE CHAMPION, Mar. 2013, at 43 (explaining that the Court in *Chaidez v. United States* held that the decision in *Padilla* does not generally apply retroactively).

<sup>89</sup> Hans Meyer, *Padilla v. Kentucky: The Duty of Defense Counsel Representing Noncitizen Clients*, 40 COLO. LAW. 37, 41 (2011).

<sup>90</sup> *Id.*

more broadly raise a number of related constitutional issues. Among them is the issue that the fates of noncitizen defendants in immigration-related claims “often depend on criminal defense counsel, who may well be the only line of immigration defense for their clients, because indigent noncitizens are not constitutionally entitled to appointed counsel in immigration proceedings.”<sup>91</sup> The success of language access claims raised on habeas or appeal often also depend on criminal defense counsel though this, too, is hindered by petitioners having no constitutional right to counsel in post-conviction proceedings.<sup>92</sup> Meyer writes:

[I]mmigration consequences of a particular offense often become clear by developing a few critical issues related to the case. . . immigration status is a critical issue to consider because immigration law does not subject all noncitizens to one unified set of consequences. Whether different criminal grounds of immigration law will apply often depends on a client’s specific immigration status and when it was obtained. Thus, understanding an individual client’s immigration history and status in many cases will serve to clarify both the immigration consequences that apply and the duty to advise about them.<sup>93</sup>

Similarly, it can be said that language access consequences often become clear by developing a few critical issues related to the case. We have started to see this in cases such as *Mendoza*. Language access is an even more critical issue to consider because not all clients will be subject to one unified set of consequences, unlike codified mandatory immigration consequences. The extent and relevance of foreign language access can only be determined on a case-by-case basis. Thus, understanding an individual client’s language, language history and language status in many cases will serve to clarify both the consequences that apply and the requisite duty counsel must meet in order to appropriately advise them.

#### CONCLUSION

It is imperative that counsel understand their duty under the Sixth Amendment in the context of foreign language access

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<sup>91</sup> *Id.* at 37.

<sup>92</sup> See *Sanchez*, *supra* note 7; see also *Coleman v. Thompson*, 501 U.S. 722, 756-57 (1991).

<sup>93</sup> Meyer, *supra* note 89, at 41.



and advise his or her clients accordingly from day one through to case completion. This heightened duty also applies to counsel in later circumstances where habeas claims can be made and appeals filed, despite there being no constitutional right to counsel on appeal. The right to counsel does not mean that a lesser or more relaxed constitutional standard of effective assistance applies, particularly where foreign language speakers are concerned.

Language access claims have a significant impact on a person's constitutional rights and therefore more must be done to adequately address the needs of immigrants and foreign language speaking clients. Lessons learned thus far suggest that three key procedural mechanisms be considered in pursuit of fair and impartial access to the justice system. First, qualified interpreters must be obtained in some capacity at the pre-proceedings phase.<sup>94</sup> No one can be confident that counsel has the requisite understanding of a foreign language speaking client and his or her background if an interpreter is not engaged from the outset. Second, not only should the habeas petition form include a question about the petitioner's native language, but forms themselves should also be available in foreign languages (which could be translated for the court) in order to assist the court in determining the merits and timeliness of such petitions. Congress should amend 28 U.S.C. § 2255 to include such requirements. Third, the court must establish more streamlined requirements in cases involving a foreign language speaking party. This does not downplay the importance of case-by-case analysis, but rather creates a level of certainty that attorneys can better grasp when advising foreign language speaking clients. The case law following such requirements will provide an important first step to better understanding the relationship between constitutional requirements as they apply to foreign language speakers and the criminal justice system going forward. It is a first step that is long overdue.

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<sup>94</sup> See Daniel J. Rearick, *Reaching out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C. R.-C. L. L. REV. 543, 573 (2004).