Bifurcated Review of Interpreter Determinations Under the Court Interpreters Act

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I. INTRODUCTION

The Court Interpreters Act (hereinafter "the Act") was promulgated in 1978 in response to the confluence of two developments in the United States: a bourgeoning immigrant population after changes in American immigration policy;[1] and federal lawmakers' growing awareness of cases in which federal judges had refused or had been reluctant to appoint interpreters for defendants with limited English ability.[2] Part of the Act's purpose was to guide trial judges in providing language interpreters for defendants who demonstrate need.[3]

One way that the Court Interpreters Act informs federal judges' discretion is by requiring the appointment of a certified interpreter under specified circumstances. Under § 1827(d)(1) of the Act, a criminal defendant in federal district court is entitled to a certified court-appointed language interpreter

> if the presiding judicial officer determines on such officer's own motion or on the motion of a party that [the defendant] . . . speaks only or primarily a language other than the English language . . . so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer.[4]

Thus, "a defendant is only statutorily entitled to the appointment of an interpreter if the district court determines that the defendant [or a witness]: (1) speaks only or primarily a language other than the English language;

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[1] Pub. L. No. 95-539, 92 Stat. 2040 (codified at 28 U.S.C. §§ 1827-1828 (2006)); *see also* 124 CONG. REC. H34880 (daily ed. Oct. 10, 1978) (statement of Rep. Richmond) (citing that in 1978, there were 25 million Americans whose primary language was not English and another 15 million in the deaf community).

[2] *See infra* Part II.

[3] *See, e.g.*, Carlos A. Astiz, *A Comment on Judicial Interpretation of the Federal Court Interpreters Act*, 14 JUST. SYS. J. 103, 103–04 (1990).

[4] 28 U.S.C. § 1827(d)(1) (2006).

and (2) this fact inhibits their comprehension of the proceedings or communication with counsel" or the presiding judicial officer.[5]

Since the passage of the Court Interpreters Act in 1978, several criminal defendants have appealed their convictions on the grounds that the district court misapplied § 1827(d)(1) by making an erroneous determination that the defendant did not have a right to an interpreter under the statute.[6] On appellate review, the trial judge's denial of an interpreter has traditionally been accorded substantial deference, being reviewed for either clear error[7] or for abuse of discretion.[8]

This deferential standard of review, however, may not be correct. Nowhere is this clearer than in a relatively unnoticed Ninth Circuit case, *United States v. Gonzalez*.[9] There, the district court denied Gonzalez an interpreter, finding that his comprehension was not "inhibited" because his language barrier was not a "major" difficulty.[10] Reviewing for only clear error, the Ninth Circuit affirmed.[11] As this case highlights, when trial judges apply § 1827(d)(1), they necessarily engage not only in fact-finding, but also in statutory interpretation. Trial judges must first define "inhibit" before they can apply that definition to a particular set of facts. Thus, the conclusion that the defendant's language barrier inhibits his comprehension is a factual finding, but it is predicated upon a statutory interpretation of the term "inhibit." According to the district court in *Gonzalez*, for example, only *major* language difficulties "inhibit" comprehension and communication.[12] Whatever the actual merits of that definition, it is enough to demonstrate that a § 1827 determination involves both statutory interpretation and factual findings. It is a well settled principle that appellate courts subject district court statutory interpretation to de novo review.[13] Although district court determinations under § 1827

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[5] United States v. Edouard, 485 F.3d 1324, 1337 (11th Cir. 2007) (quoting United States v. Johnson, 248 F.3d 655, 661 (7th Cir. 2001)).

[6] United States v. Amador, 214 F. App'x 303, 305 (4th Cir. 2007); United States v. Si, 343 F.3d 1116, 1120 (9th Cir. 2003); United States v. Cheng, No. 99-30073, 2000 WL 286288, at *1 (9th Cir. Mar. 16, 2000); Gonzalez v. United States, 33 F.3d 1047, 1048 (9th Cir. 1994); United States v. Coronel-Quintana, 752 F.2d 1284, 1291 (8th Cir. 1985); United States v. Cirrincione, 780 F.2d 620, 622 (7th Cir. 1985).

[7] *Si*, 343 F.3d at 1122; *Cheng*, 2000 WL 286288, at *1; *Gonzalez*, 33 F.3d at 1050.

[8] *Coronel-Quintana*, 752 F.2d at 1287.

[9] *Gonzalez*, 33 F.3d at 1047.

[10] *Id*. at 1051.

[11] *Id*.

[12] *Id*. at 1050.

[13] *E.g*., United States v. Shim, 584 F.3d 394, 395 (2d Cir. 2009); United States v. Maupin, 520 F.3d 1304, 1306 (11th Cir. 2008); United States v. Frechette, 456 F.3d 1, 7 (1st Cir. 2006). *See also infra* Part III.B.

entail both factual findings and statutory interpretation, under current doctrine such determinations are subject only to clear error or abuse of discretion review of factual findings.[14]

The absence of de novo appellate review of § 1827 determinations can have serious consequences. First, if the trial judge construes too narrowly the meaning of the term "inhibit," resulting in the denial of an interpreter to the defendant, the appellate court would be unable to scrutinize the judge's statutory interpretation under abuse of discretion or clear error review. Second, from an institutional standpoint, if district courts across the country construe the term "inhibit" in divergent ways, appellate courts would have no means of advancing a uniform statutory interpretation of the federal Court Interpreters Act.

These concerns are not illusory. Considering the steadily growing demand for interpreters in our federal court system, the principled and uniform protection of statutory court interpreter rights will become more, not less, salient. In recent years, the frequency of interpreter "events" in federal district courts has rapidly climbed from 189,044 events in 2003[15] to 282,721 events in 2008.[16] In addition, recent projections estimate that between 2005 and 2050, 67 million new immigrants will arrive in the United States.[17] Studies indicate that increased immigration in a federal district often leads to heavier caseloads of petty offense or immigration filings, which require more interpreters.[18] Moreover, the number of federal appeals claiming misapplication of the Court Interpreters Act has more than doubled from ten in the 1980s,[19] to at least twenty-four in the past

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[14] *See infra* Subsection III.C.

[15] Administrative Office of the U.S. Courts, Office of Public Affairs, *Court Interpreters Feel Impact of Illegal Immigration Caseload*, 37 THE THIRD BRANCH: NEWSLETTER OF THE FED. COURTS, 7 (Feb. 2005), *available at* http://www.uscourts.gov/news/TheThirdBranch/05-02-01/Court_Interpreters_Feel_Impact_of_Illegal_Immigration_Caseload.aspx. [hereinafter *Interpreters Feel Impact*]. The Administrative Office of the U.S. Courts defines an "event" as "one interpreter, one case number, one date." *Id*. Therefore, because trials often last several days, it would be reasonable to conclude that the number of defendants who need interpreters each year is smaller than the number of interpreter events.

[16] Press Release, Administrative Office of the U.S. Courts, *Court Interpreting Events Increased in FY 2008*, *available at* http://www.uscourts.gov/News/NewsView/09-01-28/Court_Interpreting_Events_ Increased_in_FY_2008.aspx (Spanish was used in 95.9 percent of the events and a total of 113 languages required interpretation throughout the year).

[17] Jeffrey Passel & D'Vera Cohn, *U.S. Population Projections: 2005-2050*, PEW RES. CENTER., Feb. 11, 2008, at i, *available at* http://pewresearch.org/pubs/729/united-states-population-projections.

[18] Annabel R. Chang, *Lost in Interpretation: The Problem of Plea Bargains and Court Interpretation for Non-English-Speaking Defendants*, 86 WASH. U. L. REV. 445, 455–56 (2008); *Interpreters Feel Impact*, *supra* note 15, at 7.

[19] United States v. Valladares, 871 F.2d 1564, 1565 (11th Cir. 1989); United States v. Gallegos-Torres, 841 F.2d 240, 242 (8th Cir. 1988); United States v. Bennett, 848 F.2d 1134, 1140 (11th Cir. 1988); United States v. Moya-Gomez, 860 F.2d 706, 739 (7th Cir. 1988); United States v. Lim, 794 F.2d 469, 470 (9th Cir. 1986); United States v. Coronel-Quintana, 752 F.2d 1284, 1291 (8th Cir. 1985);

decade.[20] All told, these statistics indicate that the demand for interpreters has and will continue to grow in the future. If indeed so many more people will come to rely on the protections of the Court Interpreter Act, we can safely assume that federal district judges will more and more frequently be called upon to conduct interpreter determinations under § 1827 of the Act. In turn, federal appellate judges will increasingly be called upon to review these determinations. To ensure that the Court Interpreters Act continues to be correctly and uniformly applied by federal district courts in the future, now is an appropriate time to evaluate whether federal appellate courts are properly reviewing district courts' application of the Act.

This Article argues that federal courts of appeals should eliminate the abuse of discretion standard of review in examining a district court's determination of whether an interpreter is required under the Court Interpreters Act. The Article begins by describing *Gonzalez v. United States*,[21] a case that demonstrates how determinations of linguistic need necessarily involve statutory interpretation. This aspect of interpreter determinations, however, is ignored under abuse of discretion appellate review. By reviewing the relevant case law, the Article will argue that the abuse of discretion standard is largely outdated, as it is merely a vestige of how courts dealt with court interpreters at common law, prior to the Court Interpreters Act. In reality, a district court determination of linguistic need pursuant to the Act is a mixed question of law and fact. Drawing from analogous bodies of law, this Article argues that federal courts of appeals should treat district court determinations of linguistic need the same way they examine comparable mixed questions of law and fact, under a

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Luna v. Black, 772 F.2d 448, 451 (8th Cir. 1985); United States v. Cirrincione, 780 F.2d 620, 633 (7th Cir. 1985); United States v. Maniego, 710 F.2d 24, 26 (2d Cir. 1983); United States v. Tapia, 631 F.2d 1207, 1209 (5th Cir. 1980).

[20] United States v. Hasan, 526 F.3d 653, 666 (10th Cir. 2008); United States v. Murillo, 284 F. App'x 982, 984 n.1 (3d Cir. 2008); United States v. Zaragoza, 543 F.3d 943, 949 (7th Cir. 2008); United States v. Edouard, 485 F.3d 1324, 1339 (11th Cir. 2007); United States v. Benitez-Arzate, 203 F. App'x 427, 428 (4th Cir. 2006); United States v. Amador, 214 F. App'x 303, 305 (4th Cir. 2007); United States v. Gonzales, 179 F. App'x 362, 364 (6th Cir. 2006); United States v. Salehi, 187 F. App'x 157, 175 (3d Cir. 2006); United States v. Garcia-Perez 190 F. App'x 461, 470 (6th Cir. 2006); United States v. Rodriguez, 211 F. App'x 467, 468 (6th Cir. 2006); United States v. Rodriguez, 137 F. App'x 682, 684 (5th Cir. 2005); United States v. Acuna-Navarro, 90 F. App'x 308, 312 (10th Cir. 2004); United States v. Bell, 367 F.3d 452, 464 (5th Cir. 2004); United States v. Aispuro-Guadiana, 97 F. App'x 76, 76 (8th Cir. 2004); United States v. Black, 369 F.3d 1171, 1174 (10th Cir. 2004); United States v. Camejo, 333 F.3d 669, 672–73 (6th Cir. 2003); United States v. Gonzales, 339 F.3d 725, 727 (8th Cir. 2003); United States v. Si, 333 F.3d 1041, 1042 (9th Cir. 2003); United States v. Sandoval, 347 F.3d 627, 632 (7th Cir. 2003); United States v. Minore, 40 F. App'x 536, 539 (9th Cir. 2002); United States v. Osuna, 3 F. App'x 739, 740 (10th Cir. 2001); United States v. Johnson, 248 F.3d 655, 659 (7th Cir. 2001); United States v. Acevedo-Toscano, No. 99-50064, 2000 WL 198066, at *1 (9th Cir. Feb. 18, 2000); United States v. Cheng, No. 99-30073, 2000 WL 286288 at *1 (9th Cir. Mar. 16, 2000).

[21] Gonzalez v. United States, 33 F.3d 1047, 1050 (9th Cir. 1994).

bifurcated standard of review that reviews factual findings for clear error and legal conclusions de novo.

II. APPLYING § 1827(D) DEMANDS STATUTORY INTERPRETATION

Although appellate courts have traditionally reviewed district court denials of interpreters under the Court Interpreters Act for clear error or abuse of discretion, this precedent seems to overlook the important fact that applying § 1827(d)(1) necessarily involves statutory interpretation.

This tension is thrown into sharp relief in *Gonzalez v. United States*.[22] There, the district court determined on the record, pursuant to § 1827(d), that Miguel Angel Gonzalez was not entitled to an interpreter in the proceedings leading up to his guilty plea.[23] Gonzalez ultimately pleaded guilty to conspiracy to possess cocaine with intent to distribute and using a telephone to commit a felony.[24] After the district court denied his motion to vacate the conviction, Gonzalez appealed, arguing, *inter alia*, that the district court erroneously denied his right to a qualified interpreter under the Court Interpreters Act.[25]

Both the magistrate judge who presided over Gonzalez's arraignment and plea hearing and the district court judge who denied the motion to vacate recognized that Gonzalez's primary language was Spanish and that he had "some difficulties" with English.[26] Each judge *sua sponte* conducted an inquiry, but neither found it necessary to appoint an interpreter.[27] The district court concluded that "[t]here is some language difficulty but not a *major one*."[28] Based on this finding, and on the fact that Gonzalez's wife was available to translate, the district court found it unnecessary to appoint an interpreter.[29]

On appeal, the Ninth Circuit began its analysis with the Court Interpreters Act, reciting that an interpreter must be appointed only when the "non-primary English speaker's skills are so deficient as to 'inhibit' comprehension of the proceedings."[30] The court held that the district court's determination that Gonzalez's "language difficulties did not constitute a 'major' problem" was a factual finding subject only to the

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[22] *Id*. at 1049–50.
[23] *Id*. at 1051.
[24] *Id*. at 1048.
[25] *Id*.
[26] *Id*. at 1050.
[27] *Gonzalez*, 33 F.3d at 1051.
[28] *Id*. at 1050 (emphasis added).
[29] *Id*. at 1050–51.
[30] *Id*. at 1050.

clear error standard of review.[31] That is, the appellate court could only have reversed if it was "left with a definite and firm conviction that a mistake ha[d] been committed" by the district court judge.[32]

In examining the record, the majority opinion cited two colloquies, the first of which took place at Gonzalez's plea hearing, between the magistrate judge and Gonzalez:

Court:	Do you understand?
Gonzalez:	Yeah, little bit.
Court:	What is your problem, language problem?
Gonzalez:	Well, no. I don't know how to read that much. I understand. I understand.[33]

The majority opinion also recited part of the change-of-plea hearing before the district court, when the following conversation took place between the trial judge, Gonzalez, and his attorney, Linstedt:

Court:	What did you do? Did you work with other people to buy drugs and sell them?
Gonzalez:	I used the telephone.
Court:	In addition to using the phone, what did you do?
Gonzalez:	I worked with Forcelledo.
Court:	Did you sell drugs to people?
Gonzalez:	Yes.
Court:	Did you deliver drugs to people?
Gonzalez:	Yes.
Court:	Was that drug cocaine?
Gonzalez:	Yes.
Court:	Where did you get the drugs you sold?
Linstedt:	You worked for Forcelledo?
Gonzalez:	Right.
Court:	Did you ever sell cocaine to somebody?
Gonzalez:	Yes.
Court:	Where did you get that cocaine?
Gonzalez:	Get it from Forcelledo.[34]

Although the Ninth Circuit admitted that Gonzalez's responses were

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[31] *Id*.

[32] Ibarra v. Baker, 338 F. App'x 457, 460 (5th Cir. 2009).

[33] *Gonzalez*, 33 F.3d at 1050.

[34] *Id*.

"brief and somewhat inarticulate," the court found that Gonzalez had been "consistently responsive" and had "only occasionally consulted his attorney."[35] Moreover, the court found it relevant that Gonzalez did not convey in the district court that he "was experiencing major [language] difficulty."[36] Thus, the Ninth Circuit accepted the lower court's finding that Gonzalez's difficulty with English was not a "major" problem, and agreed that his comprehension was not "sufficiently inhibited" to require the appointment of an interpreter under the Act.[37] Finding no clear error, the Ninth Circuit affirmed Gonzalez's conviction.[38]

In dissent, Judge Reinhardt scolded the majority for its "careless and hasty" review.[39] He argued that the majority's "error stems in large part from its unfortunate decision to review the district court's factual finding for clear error instead of reviewing its legal conclusions *de novo*."[40] Later in his dissent, Judge Reinhardt recharacterizes this error as "the majority's unfortunate decision to review only the factual, and not the legal, basis for the district court's decision."[41] Had the majority examined the district court's approach under the language and purposes of the Act, it would have noticed that "[t]here is absolutely no indication in the statute or its legislative history that a defendant must have a 'major' language problem to be granted an interpreter."[42] Rather, the plain language of the statute requires the judge to appoint an interpreter whenever the defendant's comprehension or communication is "inhibited."[43] Therefore, Judge Reinhardt noted, the district court was obligated to apply the "common, everyday meaning" of "inhibit," which is to "hinder."[44]

As the first and only judge to date to call for de novo review instead of a more deferential standard of review of interpreter determinations under the Court Interpreters Act, Judge Reinhardt's dissent in *Gonzalez* is an appropriate starting place for evaluating the relevant literature on whether

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[35] *Id*. at 1051.

[36] *Id*.

[37] *Id*.

[38] *Id*. at 1051−52.

[39] *Gonzalez*, 33 F.3d, at 1052 (9th Cir. 1994) (Reinhardt, J., dissenting).

[40] *Id*. at 1053.

[41] *Id*. at 1054.

[42] *Id*. at 1053.

[43] 28 U.S.C. § 1827(d)(1)(B) (2006).

[44] *Gonzalez*, 33 F.3d at 1053 (Reinhardt, J., dissenting). *See also id*. at 1052–53 (addressing that, although Judge Reinhardt believed the panel could have reversed solely based on the district court's incorrect reading of the statute, even under a clear error standard, the Ninth Circuit should have reversed the conviction for the district court's failure to conduct a full factual inquiry).

the abuse of discretion or clear error standard withstands scrutiny, and what the proper standard of review ought to be.

While Judge Reinhardt's dissent is an important step in articulating the proper standard of review, it is incomplete in two ways. First, Judge Reinhardt is unclear whether he believes the proper standard of review should have been pure de novo review, or whether the Ninth Circuit should have reviewed factual findings for clear error, and legal conclusions de novo. On one hand, Judge Reinhardt writes that the majority's "error stems in large part from its unfortunate decision to review the district court's factual finding for clear error *instead of* reviewing its legal conclusions *de novo*,"[45] suggesting that only the latter is proper. By contrast, other parts of his dissent describe the majority's failure as reviewing "only the factual, and not the legal, basis for the district court's decision,"[46] which suggests that Judge Reinhardt considered that the de novo and clear error standards of review should be applied together ("bifurcated review").

Second, and more important, Judge Reinhardt's dissent does not set forth the legal principles and reasoning that justify his call for de novo review. Instead, as the excerpts above demonstrate, the dissent only asserts that the majority erred in failing to employ de novo review, and mentions in retrospect what the majority would have found if it had done so. One can hardly fault the judge for not delving into the underlying legal principles in a two-page dissent. However, that does not mean that such reasons are not worth explaining. To persuade other judges that some other standard of review is superior to the abuse of discretion standard, one cannot rely on the assertions of a renowned circuit judge alone. Instead, one must turn to the legal principles and reasoning that guide judges when they choose which standard to apply in what circumstances.

In this regard, Mollie Pawlosky provides some insight into the legal basis for Judge Reinhardt's position. In a case note that focused on *Gonzalez*, Pawlosky states that "*de novo* review is appropriate in this situation because the 'starting point in interpreting a statute is its language, for if the intent of Congress is clear, that is the end of the matter.'"[47] By referencing this principle, Pawlosky provides more legal grounds for Judge Reinhardt's argument that the district court's determination in *Gonzalez* should have been reviewed de novo: because the district judge rendered an

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[45] *Id*. at 1053 (emphasis added).

[46] *Id*. at 1054.

[47] Mollie M. Pawlosky, Note, *When Justice Is Lost in the "Translation:"* Gonzalez v. United States, *an "Interpretation" of the Court Interpreters Act of 1978*, 45 DEPAUL L. REV. 435, 488 (1996).

(incorrect) statutory interpretation of the Court Interpreters Act, this legal conclusion should have been reviewed de novo.[48]

Although Pawlosky's contribution is helpful, she—like Judge Reinhardt—fails to clarify whether the proper standard should be exclusively de novo review or bifurcated review. More significantly, she supports her point about statutory interpretation with three cases, none of which are quite analogous to the situation in *Gonzalez*. In *Good Samaritan Hospital v*. *Shalala*, the Supreme Court reviewed de novo the district and appellate courts' interpretation of the Social Security Act.[49] However, the sole issue before the Court was one of statutory interpretation: whether to uphold the Secretary of Health and Human Services' reading of a provision concerning reimbursement of health providers.[50] As a pure question of law, this case is not quite analogous to appellate review of a district court's linguistic determination, which involves a mixed question comprising the trial judge's factual findings and legal conclusions.

Similarly, in the second case Pawlosky cites, *In re McLinn*, there was only a purely legal issue in question: whether federal appellate courts should give special deference to district judges' interpretation of state law, or whether it should review such determinations under the same de novo standard applied to district judges' interpretation of federal law.[51] In the process of resolving this question, the Ninth Circuit did reaffirm that it reviews de novo district judges' interpretation of federal law.[52] Again, however, because the case only involved a pure question of law, it was not quite apposite to appellate review of interpreter determinations involving mixed questions such as linguistic need.

Finally, Pawlosky cites a third decision, *United States v*. *Morgan*,[53] which she claims was a case involving the Court Interpreters Act in which the appellate "court used *de novo r*eview, finding that clear statutory language will ordinarily end the analysis."[54] In actuality, the case does not involve the Court Interpreters Act. Instead, the appellate court addressed the question of whether the fact that a criminal defendant is a fugitive from a prior state crime tolls the statute of limitations with respect to a subsequent, unrelated federal crime committed by that same individual.[55] The court recognized that the case turned on the proper interpretation of a

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[48] *Id*. at 488.

[49] Good Samaritan Hosp. v. Shalala, 508 U.S. 402, 409 (1993).

[50] *Id*. at 404.

[51] In re McLinn, 739 F.2d 1395, 1397 (9th Cir. 1984).

[52] *Id*. at 1398.

[53] United States v. Morgan, 922 F.2d 1495 (10th Cir. 1991).

[54] Pawlosky, *supra* note 47, at 488 (citing *Morgan*, 922 F.2d at 1496).

[55] *Morgan*, 922 F.2d at 1495.

statutory tolling provision, which stated that "[n]o statute of limitations shall extend to any person fleeing from justice."[56] The court recognized, "Because these are questions of statutory interpretation, we employ the de novo standard of review."[57] But like the other cases Pawlosky cites, *Morgan* involves a pure question of statutory interpretation; this differs from appellate review of district court determinations of linguistic need, which entail a mixed question of law and fact.

Critically, while these three cases convey a general principle that appellate courts should review de novo district judges' interpretation of federal statutes, they do not directly speak to how appellate courts should review district court determinations that embody a mixed question of law and fact, such as linguistic determinations. A more tailored approach should marshal cases that are analogous to appellate review of linguistic determinations to illustrate how appellate courts have consistently reviewed district court determinations that also involve a mixed question of law and fact implicating Sixth Amendment rights. This Article seeks to provide this more focused analysis.

Meanwhile, this Article takes a different approach from three other scholars who have also mentioned the possibility for de novo review of district court denials of court interpreters.[58] Leslie Dery argues that "[i]n making its factual [linguistic] determination, the district court is also resolving a question of law concerning the defendant's ability to vindicate Fifth and Sixth Amendment protections during trial."[59] Citing Judge Reinhardt's dissent in *Gonzalez*, Dery contends that "[a]s a conclusion of law that implicates substantive rights of great significance, the absence of an interpreter appointment mandates de novo review by the circuit court."[60] Dery's argument that "conclusion[s] of law that implicate[] substantive rights of great significance"[61] should automatically draw de novo review, is an interesting but inaccurate gloss on Judge Reinhardt's dissent in *Gonzalez*. A review of the judge's dissent reveals that he does not make this argument. Unfortunately, Dery does not cite any other authority that does.

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[56] 18 U.S.C. § 3290 (2006).

[57] *Morgan*, 922 F.2d at 1496.

[58] *See, e.g.*, Leslie V. Dery, *Amadou Diallo and the "Foreigner" Meme: Interpreting the Application of Federal Court Interpreter Laws*, 53 FLA. L. REV. 239, 288 (2001) (citing Judge Reinhardt's dissent in *Gonzalez*); Cassandra L. McKeown & Michael G. Miller, *Say What?: South Dakota's Unsettling Indifference to Linguistic Minorities in the Courtroom*, 54 S.D. L. REV. 33, 69 (2009) (citing Dery, *supra* at 288). *See also* Pawlosky, *supra* note 47, at 488 (citing Judge Reinhardt's dissent in *Gonzalez*).

[59] Dery, *supra* note 58, at 288.

[60] *Id*.

[61] *Id*.

But Dery is not alone in taking this position. Cassandra McKeown and Michael Miller have also made this argument in their article discussing ways to improve the South Dakota judiciary's approach to court interpreters.[62] In response to a recent South Dakota Supreme Court decision that reviewed the trial court's dismissal of a court interpreter for abuse of discretion,[63] McKeown and Miller assert, citing Dery, that "questions of whether to appoint an interpreter and whether the interpreter is rendering an accurate interpretation are questions which directly affect constitutional rights and should be deemed a question of law subject to de novo review."[64]

In support of their argument for de novo review, McKeown and Miller also cite a South Dakota Supreme Court case, *State v. Ball*.[65] John Ball was convicted of rape and appealed on the grounds that, *inter alia*, the trial court erred in "denying his request for mistrial because the prosecutor commented on his failure to testify."[66] The South Dakota Supreme Court noted that while "ordinarily, [t]he denial of a motion for mistrial will not be overturned unless there is an abuse of discretion . . . this case [did] not involve trial court fact finding," but rather, "the sole issue here is whether the prosecutor's comments on Ball's failure to testify violated the Fifth Amendment guarantee against self-incrimination."[67] The court concluded that this was a constitutional question, and that "[s]uch questions of law involving Fifth Amendment constitutional questions are considered under a different standard of review," namely de novo review.[68] The court was careful to add that it would still review the trial court's findings of fact for clear error, but that "[o]nce the facts have been determined, . . . the application of a legal standard to those facts is a question of law reviewed de novo," and "an alleged violation of a constitutionally protected right is a question of law reviewed de novo."[69]

Thus, Dery, McKeown, and Miller have all espoused some version of the argument that questions involving the absence of an interpreter, or the adequacy of interpretation, are questions that implicate constitutional rights, and therefore ought to be reviewed de novo. However, because Judge Reinhardt does not actually make this argument in his dissent in *Gonzalez*, the only case law these scholars cite is found in the South

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[62] McKeown & Miller, *supra* note 58, at 69.

[63] State v. Selalla, 744 N.W.2d 802 (S.D. 2008).

[64] McKeown & Miller, *supra* note 58, at 69 & n.269.

[65] State v. Ball, 675 N.W.2d 192 (S.D. 2004).

[66] *Id*. at 193.

[67] *Id*. at 197–98.

[68] *Id*. at 198.

[69] *Id*. at 199.

Dakota case discussed above. Moreover, no federal judge, including Judge Reinhardt, has argued that a defendant's right to an interpreter is per se a constitutional right. Such an argument has not and likely will not persuade federal appellate judges to disturb the abuse of discretion standard.

As discussed above, Judge Reinhardt's dissent in *Gonzalez* first suggested that appellate courts should review district court linguistic determinations de novo. However, Judge Reinhardt did not address the legal underpinnings for this position, nor was it clear from his dissent whether he meant to propose a purely de novo standard of review or a bifurcated standard of review. Although Pawlosky gives some insight into the legal basis for de novo review, the cases she cites are not analogous to *Gonzalez*-type cases, and her analysis does not resolve the ambiguity in Judge Reinhardt's dissent concerning pure de novo versus bifurcated review.

This Article shares Judge Reinhardt's position in favor of de novo review, but furthers the discussion by explaining the legal principles that justify the application of de novo review to district court determinations of linguistic need. And unlike Pawlosky's analysis, this Article cites cases that are most analogous to those involving appellate review of linguistic determinations, and identifies a common principle whereby appellate courts consistently apply a bifurcated standard of review to similarly mixed questions of law and fact. Accordingly, this Article concludes that the same bifurcated standard should be applied to district court determinations of linguistic need. Finally, while this Article shares Pawlosky and Judge Reinhardt's position in favor of de novo review, neither of them have specifically resolved whether this de novo review should be pure or bifurcated. Through the more tailored analysis described above, this Article concludes that district court determinations of linguistic need should be reviewed under a bifurcated standard of review.

But before turning to this argument, it is helpful to first shed more light upon how the abuse of discretion standard came to dominate the federal courts' approach to questions of court interpreters, even after the passage of the Court Interpreters Act. The following section will illustrate that the common law origin of the abuse of discretion standard is rooted in the notion that courts should be left alone to manage their own housekeeping. However, the prevalence of the abuse of discretion standard in appellate review of the application of the Court Interpreters Act appears less intentional.

III. THE ORIGIN OF THE ABUSE OF DISCRETION STANDARD

When criminal defendants first began appealing their convictions on the grounds that the district court had violated their rights under the Court Interpreters Act of 1978, federal appellate courts applied the same

deferential standard of review that they had applied at common law to interpreter cases before 1978: abuse of discretion.[70]

A. The Common Law Perovich Standard: Abuse of Discretion

At common law, the power to appoint language interpreters for criminal defendants in U.S. federal district courts rests within the discretion of the presiding judge.[71] In *Perovich v. United States*, the only Supreme Court case to address courtroom interpretation rights, the criminal defendant was convicted of murder and sentenced to death by a district court in Alaska.[72] On appeal, the defendant argued that the court erred in refusing to appoint an interpreter during the defendant's testimony.[73] The Court held that the trial judge's decision whether to appoint an interpreter for the defendant was only reviewable for abuse of discretion.[74] Finding no abuse, the Court affirmed Perovich's conviction.[75]

The *Perovich* standard was consistent with the statutory framework of the time, which consigned access to interpreters to the inherent authority of the courts.[76] For example, in the Judiciary Act of 1789, Congress empowered federal courts "to make and establish all necessary rules for the orderly conducting [of] business."[77] Pursuant to this power, the Supreme Court prescribed Rule 28 of the Federal Rules of Criminal Procedure, which allows federal courts to "select, appoint, and set the reasonable compensation for an interpreter."[78] According to some scholars, the historical statutory framework reflected a conception that interpretation was more "a matter of convenience to the district court rather than of constitutional protection for the defendant."[79]

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[70] *See infra* note 77 and accompanying text.

[71] *See* Perovich v. United States, 205 U.S. 86, 91 (1907) (appointing an interpreter "is a matter largely resting in the discretion of the trial court"); Dery, *supra* note 58, at 252–54.

[72] *Perovich*, 205 U.S. at 89.

[73] *Id*. at 91.

[74] *Id*. In other words, the Court would not disturb the district court's decision unless it found that the judge committed a clear error of judgment. *See, e.g*., United States v. Myers, 337 Fed App'x 864, 868 (11th Cir. 2009). Federal courts phrase their definition of "abuse of discretion" in various ways, and the definition herein reflects the common denominator.

[75] *Perovich*, 205 U.S. at 91–92.

[76] *See* Dery, *supra* note 58, at 253–54; McKeown & Miller, *supra* note 58, at 59 n.203.

[77] The Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73 (1789).

[78] FED. R. CRIM. P. 28. Prior to 1966, Rule 28 only provided for the appointment of expert witnesses. The interpreter provision was added in 1966, and the expert witness provision was stricken in 1972. FED. R. CRIM. P. 28 advisory committee's note.

[79] Dery, *supra* note 58, at 254. *See also* McKeown & Miller, *supra* note 58, at 59 ("However, early legislation seemed to focus more on increasing judicial efficiency than protecting non-English speakers.").

Although the *Perovich* Court did not explain its rationale for reviewing for abuse of discretion, it quickly gained a following among federal appellate courts addressing similar cases involving a criminal defendant's access to an interpreter in the district court.[80] Although in each of these cases the reviewing court affirmed the district judge's decision, some appellate courts did exhibit an awareness that the defendant's basic right to understand the nature of the proceedings was at stake.[81] Nevertheless, these courts ultimately deferred to the district court's determination as to whether such basic rights had been jeopardized.[82] However, the *Perovich* line of cases was briefly interrupted by an approach that paid greater attention to how a defendant's constitutional rights were implicated in courtroom interpretation.

B. The Constitutional Approach and the Perovich Standard

Beginning in the 1970s, several federal appellate courts began to recognize that in certain circumstances the provision of a competent interpreter is vital to safeguard a criminal defendant's constitutional rights.[83] The Second Circuit's watershed decision in *United States ex rel. Negron v. New York* pioneered this trend and remains the textbook example.[84] Negron, who was charged with murder, "neither spoke nor understood any English," and therefore could not communicate with his lawyer.[85] Instead, throughout the four-day trial, the *prosecution's* interpreter met with Negron and his lawyer during two recesses, each no longer than twenty minutes, to summarize the testimonies of the dozen English-speaking witnesses.[86] The New York state jury convicted Negron and sentenced him to twenty years to life.[87] Upon review, the Second Circuit reversed his conviction, concluding that the failure to provide an indigent criminal defendant, who neither speaks nor understands English, with a simultaneous interpreter violates his due process rights to a

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[80] *See*, *e.g.*, United States v. Rodriguez, 424 F.2d 205 (4th Cir. 1970); United States v. Sosa, 379 F.2d 525 (7th Cir. 1967); United States v. Desist, 384 F.2d 889 (2d Cir. 1967); United States v. Suarez, 309 F.2d 709 (5th Cir. 1962); Pietrzak v. United States, 188 F.2d 418 (5th Cir. 1951).

[81] *See, e.g.*, *Desist*, 384 F.2d at 902 ("We are aware that trying a defendant in a language he does not understand has a Kafka-like quality."); *Pietrzak*, 188 F.2d at 420 ("The court was convinced that the witness understood the questions and was capable of testifying without an interpreter.").

[82] *Desist*, 384 F.2d at 903 (finding no abuse of discretion); *Pietrzak*, 188 F.2d at 420 (similarly finding no abuse of discretion).

[83] *See* Pawlosky, *supra* note 47, at 441.

[84] United States ex rel. Negron v. New York, 434 F.2d 386, 387 (2d Cir. 1970).

[85] *Id*. at 388.

[86] *Id*.

[87] *Id*. at 387–88.

fundamentally fair trial and to be present at trial, and his Sixth Amendment rights to confront adverse witnesses and to effective assistance of counsel.[88]

Immediately after *Negron*, the First and Fifth Circuits tempered the Second Circuit's bold constitutional approach by restoring the *Perovich* abuse of discretion standard of review.[89] In *United States v. Carrion*, the defendant was convicted in federal district court of knowingly aiding and abetting heroin distribution.[90] On appeal, Carrion argued that the court's refusal to appoint an interpreter for him violated his constitutional rights.[91] The First Circuit reaffirmed that where a defendant has "obvious difficulty" speaking English, the presence of an interpreter is constitutionally required,[92] but observed that where, as in Carrion's case, the defendant "has some ability to understand and communicate, but clearly has difficulty," the right to an interpreter becomes less clear.[93] It may depend on "various factors, including the complexity of the issues and testimony presented during trial and the language ability of the defendant's counsel."[94] In this gray area, the court reasoned, "considerations of judicial economy would dictate that the trial court, coming into direct contact with the defendant, be granted wide discretion in determining whether an interpreter is necessary."[95] Finding that Carrion's language difficulty had not been adequately conveyed to the trial judge, the First Circuit concluded that the district court's refusal to appoint an interpreter was not an abuse of discretion.[96] Thus, the First Circuit restored *Perovich* by returning wide discretion to the district court judge to determine whether such a right had been triggered.

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[88] *Id*. at 389. ("Negron's trial lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment. . . . It is axiomatic that the Sixth Amendment's guarantee of a right to be confronted with adverse witnesses . . . includes the right to cross-examine those witnesses . . . . But the right that was denied Negron seems to us even more consequential than the right of confrontation. Considerations of fairness . . . forbid that the state should prosecute a defendant who is not present at his own trial . . . And 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.'" (quoting Dusky v. United States, 362 U.S. 402 (1962)).

[89] *See* Pawlosky, *supra* note 47, at 440.

[90] United States v. Carrion, 488 F.2d 12, 13 (1st Cir. 1973).

[91] *Id*. at 14.

[92] *Id*.

[93] *Id*.

[94] *Id*.

[95] *Id*.

[96] *Carrion*, 488 F.2d at 15.

In *United States v. Martinez*, the Fifth Circuit also restored abuse of discretion review under *Perovich*.[97] In *Martinez*, two defendants were convicted of various heroin-related crimes.[98] On appeal, Defendant Guardiola, who knew little English, argued that the district court erred in failing to appoint an interpreter for him during trial.[99] Denying Guardiola's claim, the Fifth Circuit explained: "The use of courtroom interpreters involves a balancing of the defendant's constitutional rights to confrontation and due process against the public's interest in the economical administration of criminal law. That balancing is committed to the *sound discretion* of the trial judge, reversible only on a showing of abuse."[100]

Because *Carrion* and *Martinez* relegated the defendant's constitutional rights to the discretion of the trial judge, the momentum of case law returned in the direction of *Perovich* by the late 1970s.[101] Thus, when President Carter signed the Court Interpreters Act[102] into law in 1978, the abuse of discretion standard of review was the dominant common law approach among federal appellate courts in court interpreter cases.

C. Extending the Perovich Standard into the Court Interpreters Act

In *United States v. Tapia*, the Fifth Circuit became the first circuit to apply the Court Interpreters Act in a case involving a criminal defendant's right to an interpreter.[103] The appellant, Martin Medina Tapia, was convicted of transporting aliens in violation of federal law.[104] Tapia appealed, arguing that the court erred in failing to appoint an interpreter to translate the English testimonies of several key prosecution witnesses.[105] As a result, Tapia claimed, he was unable to alert his counsel when the

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[97] United States v. Martinez, 616 F.2d 185, 188 (5th Cir. 1980).

[98] *Id*. at 186.

[99] *Id*. at 187.

[100] *Id*. at 188 (emphasis added) (citations omitted).

[101] Even after the passage of the Court Interpreters Act, defendants have occasionally brought interpreter claims at common law, claiming their constitutional rights have been violated. In the vast majority of these cases, appellate courts have continued to apply the *Perovich* abuse of discretion standard of review. *See, e.g*., United States v. Zaragoza, 543 F.3d 943 (7th Cir. 2008); United States v. Edouard, 485 F.3d 1324 (11th Cir. 2007); United States v. Si, 343 F.3d 1116 (9th Cir. 2003); United States v. Arthurs, 73 F.3d 444 (1st Cir. 1996); United States v. Gonzalez, 33 F.3d 1047 (9th Cir. 1994); United States v. Coronel-Quintana, 752 F.2d 1284 (8th Cir. 1985); Luna v. Black, 772 F.2d 448 (8th Cir. 1985); United States v. Cirrincione, 780 F.2d 620 (7th Cir. 1985).

[102] Court Interpreters Act of 1978, Pub. L. No. 95-539, 92 Stat. 2040 (codified as amended at 28 U.S.C. § 1827–28(2006)).

[103] United States v. Tapia, 631 F.2d 1207, 1208 (5th Cir. 1980); Pawlosky, *supra* note 47, at 446.

[104] *Tapia*, 631 F.2d at 1207.

[105] *Id*. at 1209.

testimonies were inaccurate, which violated his Sixth Amendment right to effective assistance of counsel.[106]

The Fifth Circuit remanded the case to the district court for two reasons. First, the record did not confirm whether Tapia received interpretation during the testimonies in question, so the district court needed to resolve the ambiguity.[107] More important, the trial judge neglected to make a determination of the defendant's linguistic need even though he was aware of the defendant's difficulty with English.[108] In the Fifth Circuit's view, this oversight violated the Act.[109] The court interpreted the Act to require that "*any indication* . . . that a criminal defendant speaks only or primarily a language other than the English language should trigger" an inquiry on the record.[110] To remedy the mistake, the Fifth Circuit instructed the district court to determine first whether an interpreter was present during the testimonies, and if not, whether the interpreter's absence inhibited Tapia's comprehension of the proceedings or communication with his lawyer "to such an extent as to have made the trial fundamentally unfair."[111] A finding of fundamental unfairness would render the district court in error so as to warrant a new trial.[112]

Tapia set the precedent of improperly commingling the federal common law and the new statutory framework for the provision of court interpreters.[113] For instance, although Tapia's argument on appeal was that his Sixth Amendment rights were violated, the Fifth Circuit focused on whether the trial court obeyed the Court Interpreters Act. Nowhere did the Fifth Circuit distinguish Tapia's constitutional right from his statutory right. Most importantly, although the Fifth Circuit purported to review the trial court's application of the Court Interpreters Act, it began its analysis by reciting the federal *common law* doctrine that "the appointment of an

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[106] *Id*.

[107] *Id*. at 1208–09.

[108] *Id*. at 1209 (reasoning that the trial judge was on notice of the defendant's language difficulty because he was "arraigned through an interpreter").

[109] *Id*. ("[T]he Court Interpreters Act of 1978 makes it incumbent upon a trial Court to make certain findings on the record, which are lacking in this case. We believe that in this case when the defendant Tapia was arraigned through an interpreter, the Court below, on its own motion, should have inquired whether the failure to have an interpreter with him throughout the proceedings inhibited Tapia's comprehension of the proceedings and communications with his counsel. This the Court, however, did not do.").

[110] *Tapia*, 631 F.2d at 1209 (emphasis added).

[111] *Id*. at 1210.

[112] *Id*.

[113] *See, e.g.*, Pawlosky, *supra* note 47, at 448.

interpreter is *discretionary* with the Court"[114] then cited a line of cases applying the *Perovich* standard.[115]

Although the *Tapia* court gave no explanation for treating the constitutional rights and statutory rights as coterminous, many federal appellate courts have followed suit, importing the common law abuse of discretion standard of review into their applications of the Court Interpreters Act. Since *Tapia*, federal appellate courts have reviewed about twenty-eight cases examining a criminal defendant's *statutory* right to adequate interpretation under the Act.[116] Just as the *Perovich* standard was the prevailing common law approach in 1978, so it has become the dominant standard of review for cases brought under the Court Interpreters Act. In twenty-three of the twenty-eight appellate cases (79 percent) brought *under the Act*, the court of appeals reviewed the district court's decision under the *Perovich* abuse of discretion standard.[117] Although some circuits have reviewed applications of the Act under a similar

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[114] *Tapia*, 631 F.2d at 1209 (emphasis added).

[115] *Id*. (citing United States v. Sosa, 379 F.2d 525. 527 (7th Cir. 1967) and Suarez v. United States, 309 F.2d 709, 712 (5th Cir. 1962)).

[116] This number reflects the number of decisions as of June 2009. United States v. Hasan, 526 F.3d 653, 658 (10th Cir. 2008); United States v. Amador, 214 F. App'x 303, 305 (4th Cir. 2007); United States v. Edouard, 485 F.3d 1324, 1337 (11th Cir. 2007); United States v. Salehi, 187 F. App'x 157, 175 (3d Cir. 2006); United States v. Rodriguez, 211 F. App'x 467, 468–70 (6th Cir. 2006); United States v. Bell, 367 F.3d 452, 464 (5th Cir. 2004); United States v. Black, 369 F.3d 1171, 1174 (10th Cir. 2004); United States v. Si, 333 F.3d 1041, 1042–443 (9th Cir. 2003); United States v. Sandoval, 347 F.3d 627, 632 (7th Cir. 2003); United States v. Johnson, 248 F.3d 655, 659 (7th Cir. 2001); United States v. Cheng, No. 99-30073, 2000 WL 286288 at *1 (9th Cir. Mar. 16, 2000); United States v. Mata, No. 98-4843, 1999 WL 427570 at *3 (4th Cir. June 25, 1999); United States v. Osuna, 189 F.3d 1289, 1291 (10th Cir. 1999); United States v. Arthurs, 73 F.3d 444, 447 (1st Cir. 1996); Huitron v. United States, No. 94-55805, 1995 WL 37350 at *2 (9th Cir. Jan. 30 1995); United States v. Mayans, 17 F.3d 1174, 1179 (9th Cir. 1994); Gonzalez v. United States, 33 F.3d 1047, 1048–49 (9th Cir. 1994); United States v. Lopez, No. 93-3316, 1993 WL 503076 at*3 (6th Cir. Dec. 7, 1993); United States v. Shin, 953 F.2d 559, 561 (9th Cir. 1992); United States v. Markarian, 967 F.2d 1098, 1104 (6th Cir. 1992); United States v. Catalano, No. 91-50372, 1992 WL 212322 at*1 (9th Cir. Sept. 3, 1992); United States v. Paz, 981 F.2d 199, 200 (5th Cir. 1992); United States v. Perez, 918 F.2d 488, 490 (5th Cir. 1990); Valladares v. United States, 871 F.2d 1564, 1565 (11th Cir. 1989); United States v. Bennett, 848 F.2d 1134, 1140 (11th Cir. 1988); United States v. Lim, 794 F.2d 469, 470 (9th Cir. 1986); United States v. Coronel-Quintana, 752 F.2d 1284, 1291 (8th Cir. 1985); United States v. Tapia, 631 F.2d 1207, 1209 (5th Cir. 1980).

[117] *See Edouard*, 485 F.3d at 1337; *Salehi*, 187 F. App'x at 175; *Bell*, 367 F.3d at 463; *Black*, 369 F.3d at 1174; *Si*, 343 F.3d at 1122; *Sandoval*, 347 F.3d at 632; *Johnson*, 248 F.3d at 661; *Cheng*, 2000 WL 286288 at *1; *Mata*, 1999 WL 427570 at *3; *Arthurs*, 73 F.3d at 447; *Huitron* 1995 WL 37350 *2; *Mayans*, 17 F.3d at 1179; *Gonzalez*, 33 F.3d at 1051; *Lopez*, 1993 WL 503076 at *4; *Shin*, 953 F.2d at 561; *Markarian*, 967 F.2d at 1104; *Catalano*, 1992 WL 212322 at *1; *Paz*, 981 F.2d at 200; *Valladares*, 871 F.2d at 1566 ; *Bennett*, 848 F.2d at 1141; *Lim*, 794 F.2d at 471; *Coronel-Quintana*, 752 F.2d at 1291; *Tapia*, 631 F.2d at 1209.

deferential standard,[118] the Eleventh Circuit captured the mainstream approach to court interpreter cases: "The appointment of an interpreter, both under the Court Interpreters Act and as a constitutional matter, is committed to the sound discretion of the trial judge, and we review the court's handling of this issue for abuse of discretion."[119]

Thus, despite the Court Interpreters Act's straightforward command that a judge "shall utilize the services of the most available certified interpreter" when the defendant's language barrier "inhibits" his comprehension or communication, the *Tapia* court reinforced the common law notion that the decision to appoint an interpreter remained discretionary.[120] Although the *Tapia* court offered no justification for preserving the abuse of discretion standard, perhaps due to a combination of momentum, muddling, and accident, federal appellate courts today typically review district court denials of interpreters under the Court Interpreters Act for abuse of discretion or the similarly deferential clear error standard. In light of the provenance of the abuse of discretion standard, federal courts of appeals may want to consider whether, in the context of applying a statutory regime, a different standard of review finds more support in legal principles and case law.

IV. REPLACING THE ABUSE OF DISCRETION STANDARD WITH A BIFURCATED STANDARD OF REVIEW

In *Gonzalez*-type cases to date, federal appellate courts have reviewed the district court's denial of an interpreter under one of two deferential standards. Some, such as the Ninth Circuit, review only the factual findings of the lower court for clear error,[121] whereas other courts, following the tradition set by *Tapia*, examine the statutory claim under the abuse of discretion standard of review.[122] The following section argues that neither approach is correct. When an appellate court examines the trial judge's refusal to appoint an interpreter under the Court Interpreters Act, the court should treat the issue as a mixed question of law and fact. Factual findings should be reviewed for clear error, but matters of statutory interpretation are questions of law that require de novo review. This is how appellate courts have examined other comparable district court

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[118] As discussed *supra* footnote 31 and accompanying text, the Ninth Circuit reviews a district court's factual findings under the Act for clear error.

[119] *Edouard*, 485 F.3d at 1337.

[120] United States v. Tapia, 631 F.2d 1207, 1209 (5th Cir. 1980).

[121] *E.g.*, United States v. Gonzalez, 33 F.3d 1047, 1050 (9th Cir. 1994).

[122] *E.g.*, United States v. Coronel-Quintana, 752 F.2d 1284, 1290–91 (8th Cir. 1985).

determinations, and they should consider treating linguistic determinations similarly.

A. Statutory Interpretation and De Novo Review

It is well-settled that when courts of appeals review a district court's application of a statute, the district court's factual findings are reviewed for clear error, and its interpretation and application of the statute are questions of law reviewed de novo. Appellate courts have applied this bifurcated standard of review to district court applications of a broad spectrum of criminal law statutes, including the Sentencing Guidelines,[123] a federal statute of limitations,[124] the Speedy Trial Act,[125] and the Juvenile Delinquency Act.[126] This last example is particularly instructive in how it distinguishes between questions of fact versus questions of law.

In *United States v. C.M.*, a juvenile defendant was charged with six counts of delinquency for transporting illegal aliens.[127] During his trial, C.M. filed motions to suppress evidence and dismiss the charges on the grounds that the government had violated the Juvenile Delinquency Act (JDA) during his arrest and detainment.[128] In pertinent part, the JDA requires the arresting officer: (1) to "immediately" advise the juvenile of his rights; (2) to promptly notify the parents of the juvenile's custody; and (3) to bring the juvenile before a magistrate for arraignment "forthwith."[129] The district court concluded that while there were violations of the JDA, it

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[123] *E.g.*, United States v. Shafer, 573 F.3d 267, 272 (6th Cir. 2009) ("We review the sentencing court's interpretation of the guidelines de novo and the district court's factual findings for clear error. 'A matter requiring statutory interpretation is a question of law requiring de novo review, and the starting point for interpretation is the language of the statute itself.'" (citations omitted)); United States v. Kirkland, 337 Fed. App'x. 792, 793 (11th Cir. 2009) ("In a § 3582(c)(2) proceeding, 'we review *de novo* the district court's legal conclusions regarding the scope of its authority under the Sentencing Guidelines.' 'We review *de novo* questions of statutory interpretation.'" (citations omitted)).

[124] *E.g.*, United States v. Trainor, 376 F.3d 1325, 1329–30 (11th Cir. 2004) ("The district court's findings of fact are reviewed for clear error. The proper interpretation of a statute, however, is a question of law that we review de novo." (citations omitted)).

[125] *E.g.*, United States v. Pete, 525 F.3d 844, 848 n.3 (9th Cir. 2008) ("The district court's application of the STA is reviewed *de novo,* and its factual findings are reviewed for clear error." (citations omitted)).

[126] *E.g.*, United States v. C.M., 485 F.3d 492, 498 (9th Cir. 2007) ("Compliance with the JDA is a question of statutory interpretation reviewed de novo. We review de novo whether the juvenile and his or her parents or guardian were notified 'immediately' of the juvenile's rights, since such questions 'turn on the legal interpretation of 'immediate.' Whether the parents or guardian of a juvenile have been properly notified pursuant to 18 U.S.C. § 5033 is a predominately factual question that we review for clear error. Whether a juvenile has been arraigned 'forthwith' is a mixed question of law and fact reviewed de novo." (citations omitted)).

[127] *Id.* at 497.

[128] *Id.* at 498.

[129] *Id.*

did not deny C.M. due process; consequently, his motion to dismiss was denied.[130] The district court proceeded to find C.M. delinquent on all counts and sentenced him to twenty-one months in custody and three years of supervised release.[131]

On appeal, C.M. argued that the district court's determination that the violations of the JDA did not deny C.M. due process was reversible error.[132] At the outset, the Ninth Circuit observed that questions of statutory interpretation are reviewed de novo.[133] Accordingly, the court reviewed de novo whether the juvenile was notified "immediately" of his rights because such questions "turn on the legal interpretation of 'immediate.'"[134] Likewise, the court reviewed de novo whether the juvenile was arraigned "forthwith."[135] By contrast, because whether the parents were notified of the juvenile's detainment was a "predominately factual question," the court reviewed that issue for clear error.[136] This case exemplifies how appellate courts, in reviewing district court determinations that involve questions of law and fact, distinguish between questions of fact, which draw clear error review, as opposed to matters of statutory interpretation, which are questions of law subject to de novo review.

The Court Interpreters Act is no exception. Each time a district court judge determines that an interpreter is unnecessary under the Court Interpreters Act, the judge engages in statutory interpretation whether he knows it or not. Nowhere is this clearer than in *Gonzalez*. There, the district judge determined that Gonzalez's language difficulty did not constitute a "major problem," and therefore his comprehension was not sufficiently inhibited so as to trigger his right to an interpreter under the Act.[137] However, as Judge Reinhardt's dissent pointed out, nowhere in the Act or its legislative history does it indicate that the defendant's comprehension is "inhibited" only if his language difficulty is "major."[138] Whereas the district judge in *Gonzalez* interpreted the statute to mean that only a "major" language problem would "inhibit" comprehension, Judge Reinhardt construed the same provision to mean that any language difficulty that "hinders" the defendant in any way also "inhibits" his

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[130] *Id*.
[131] *C.M*., 485 F.3d at 498.
[132] *Id*.
[133] *Id*.
[134] *Id*.
[135] *Id*.
[136] *Id*.
[137] Gonzalez v. United States, 33 F.3d 1047, 1050–51 (9th Cir. 1994).
[138] *Id*. at 1053.

comprehension.[139] As *Gonzalez* illustrates, when trial judges apply the Court Interpreters Act in linguistic determinations, they must implicitly interpret how much linguistic hardship a defendant must experience before his comprehension is "inhibited" within the meaning of the Act. Thus, every determination of linguistic need ineluctably requires statutory interpretation. These legal conclusions should be subject to de novo review.

Furthermore, once a judge has calibrated the degree of language difficulty sufficient to "inhibit" comprehension under the Act, he must apply this standard to the facts. The application of the law to facts is also a question of law reviewable de novo.[140] In particular, one constitutive element of applying law to facts is deciding which facts are to be included or excluded in evaluating whether the standard is met. For instance, when a judge is deciding whether to appoint an interpreter, he may consider "the complexity of the issues and testimony presented during trial and the language ability of the defendant's counsel."[141] Other factors, however, should not be relied upon when applying the law. For example, in *Gonzalez*, Judge Reinhardt correctly argued that "the district court's reliance upon the assistance of Gonzalez's wife in making its determination was improper as a matter of law," since Gonzalez's wife was a co-defendant and therefore incapable of being an impartial interpreter.[142] These choices about what factors to include or exclude frame how a judge applies the law to the facts, and, therefore, are questions of law reviewable de novo.

In sum, a trial judge's determination of whether a defendant is entitled to an interpreter under the Court Interpreters Act is not a matter of discretion, but a mixed question of law and fact. Admittedly, the judge's ultimate decision that an interpreter is unnecessary is a finding of fact, subject only to clear error review. Nevertheless, the district court judge's interpretation of "inhibit," and his application of that legal standard to the facts, are significant questions of law that must be reviewed de novo. Therefore, when appellate courts review district court refusals to appoint an interpreter under the Court Interpreters Act, they should apply this bifurcated standard of review.

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[139] *See supra* note 44 and accompanying text.

[140] *Cf*. United States v. Nacchio, 573 F.3d 1062, 1066 (10th Cir. 2009) ("When evaluating the district court's interpretation *and application* of the Sentencing Guidelines, we review legal questions de novo and factual findings for clear error . . . ." (emphasis added)); United States v. Pete, 525 F.3d 844, 848 n.3 (9th Cir. 2008) ("The district court's *application* of the STA is reviewed *de novo*, and its factual findings are reviewed for clear error."(emphasis added)).

[141] United States v. Carrion, 488 F.2d 12, 14 (1st Cir. 1973).

[142] Gonzalez v. United States, 33 F.3d 1047, 1054 (9th Cir. 1994).

B. Achieving Consistent Standards of Review

In other comparable contexts where appellate courts review district court determinations that involve mixed questions of law and fact, and that implicate Sixth Amendment rights, the standard of review has never been abuse of discretion. Instead, because these determinations involve mixed questions of law and fact, factual findings are reviewed for clear error and legal issues are examined de novo. Applying this same bifurcated standard of review to district court determinations of linguistic need would bring court interpreter law into alignment with closely related areas of appellate review.

For example, in many cases, defendants who have been convicted and sentenced will make a motion to vacate the sentence on the grounds that their attorney's conflict of interest violated their Sixth Amendment right to effective assistance of counsel.[143] If the district court denies the motion to vacate, and the defendant appeals, it is well-established among federal appellate courts that "[t]he question of whether a conflict of interest impermissibly tainted an attorney's performance is a mixed question of law and fact."[144] Accordingly, the appellate court reviews the district court's findings of fact for clear error, but reviews de novo "the lower court's ultimate legal determination whether an unconstitutional conflict actually existed."[145]

The reason for the bifurcated standard of review is that "[i]neffectiveness is not a question of 'basic, primary, or historical fac[t],'"[146] but depends on whether counsel's performance was *so deficient* that it compromised the defendant's right to effective assistance of counsel.[147] Determining "how much" incompetence is sufficient to trigger a violation of the Sixth Amendment is a question of law. Thus, the judge

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[143] *E.g.*, Armienti v. United States, 313 F.3d 807, 809 (2d Cir. 2002); United States v. Moore, 159 F.3d 1154, 1155 (9th Cir. 1998); Familia-Consoro v. United States, 160 F.3d 761, 764 (1st Cir. 1998); Edens v. Hannigan, 87 F.3d 1109, 1111–12 (10th Cir. 1996); United States v. Auerbach, 745 F.2d 1157, 1158 (8th Cir. 1984).

[144] *Familia-Consoro*, 160 F.3d at 764.

[145] *Id*. at 764–65. ("In embracing the de novo standard, we join virtually every other circuit in the land.") (citing cases from the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits). The *Familia-Consoro* court also noted that several other circuits employed the bifurcated standard of review for questions of fact and questions of law. *Id*. at 765 n.4 (citing cases from the Third, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuits).

[146] Strickland v. Washington, 466 U.S. 668, 698 (1984) (quoting Townsend v. Sain, 372 U.S. 293, 309 n.6 (1963)).

[147] *See id*. at 687 ("First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."); United States v. Raineri, 42 F.3d 36, 43 (1st Cir. 1994) ("Since *Strickland*, the standard of review may be more rigorous where the issue is not a matter of historical fact but of *deciding how much competence is enough*." (emphasis added)).

must ascertain not only whether the defendant's counsel made mistakes, but whether those mistakes were serious enough to compromise the defendant's right to effective counsel.

In the context of linguistic need, the judge likewise must determine not only if the defendant has difficulty with English, but whether that difficulty is serious enough to "inhibit" the defendant's ability to comprehend the proceedings. Thus, district court determinations on linguistic need are similar to findings regarding conflict of interest. In both contexts, the defendant requests the court to take some action to vindicate his Sixth Amendment rights, but before the court can act, it must make a determination involving questions of fact and law. Given this similarity, appellate courts should treat them consistently and apply the bifurcated standard of review in both cases, reviewing factual findings for clear error and legal conclusions de novo.

A stronger comparison may be drawn between a district court determination under the Court Interpreters Act and a district court ruling under the Speedy Trial Act (STA).[148] "The Speedy Trial Act, which is designed to protect a criminal defendant's constitutional right to a speedy trial and to serve the public interest in bringing prompt criminal proceedings, requires that a defendant's trial commence within seventy days from his indictment or initial appearance, whichever is later."[149] Otherwise, upon the motion of the defendant, the district court must dismiss the indictment.[150] Meanwhile, the STA also enumerates specific types of delays in proceedings that do not count toward the seventy-day maximum.[151] In many instances, a defendant moves to dismiss the indictment, claiming that the period between his indictment (or arraignment) and trial exceeded seventy days in violation of his rights under the STA.[152] Where the district court denies the motion and the defendant appeals, federal circuits uniformly treat the district court's ruling as a mixed question of law and fact, reversing factual findings only for clear error and reviewing legal conclusions de novo.[153]

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[148] 18 U.S.C. § 3161 (2006).

[149] United States v. Harris, 566 F.3d 422, 428 (5th Cir. 2009) (quoting United States v. Stephens, 489 F.3d 647, 652 (5th Cir. 2007)).

[150] United States v. Bloate, 534 F.3d 893, 897 (8th Cir. 2008).

[151] 18 U.S.C. § 3161(h)(1)–(8) (2006).

[152] *See* 18 U.S.C. § 3162 (2006) ("If . . . no indictment or information is filed within the time limit required by section 3161(b) as extended by section 3161(h) of this chapter, such charge against that individual . . . shall be dismissed or otherwise dropped").

[153] *E.g.*, United States v. Pakala, 568 F.3d 47, 57 (1st Cir. 2009); United States v. Loera, 565 F.3d 406, 411 (7th Cir. 2009); United States v. Sobh, 571 F.3d 600, 602 (6th Cir. 2009); *Harris*, 566 F.3d at 428; United States v. Chavez-Gonzalez, 321 F. App'x 914, 914 (11th Cir. 2009); *Bloate*, 534

In cases under the STA, the most common dispute on appeal is whether certain periods of delay are properly excludable under the STA from counting toward the seventy-day limit. Under the STA, certain categories of excludable delays are defined by open-ended language, which requires the district court to interpret the boundaries of a specific exclusion. For example, in *United States v. Bloate*, the defendant contested the district court's finding, which excluded twenty-eight days between the day the defendant received an extension to file pretrial motions (September 7) and the day the defendant formally waived his right to file pretrial motions (October 4).[154] On appeal, the Eighth Circuit noted that this scenario—an extension of a deadline—did not fit neatly under subsection 3161(h)(1)(F), which exempts from computation "any period of delay resulting from other proceedings concerning the defendant, including but not limited to . . . (F) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion."[155] Since the defendant technically never filed the pretrial motion, this provision was not triggered. However, the Eighth Circuit reasoned that the phrase "including but not limited to" indicates that the enumerated examples of excludable delays under subsections 3161(h)(1)(A)-(J) are meant to be illustrative and not exhaustive of delays "resulting from other proceedings concerning the defendant."[156] Indeed, the court noted that several other circuits had found that "pretrial preparation time," though not enumerated in the statute, was excludable under subsection 3161(h)(1).[157] Thus, because the extension was granted for additional pretrial preparation, the Eighth Circuit concluded that it was excludable under subsection 3161(h)(1) and affirmed the district court's identical determination.[158]

As *Bloate* demonstrates, a district court's denial of a motion to dismiss under the STA entails not only findings of fact but also questions of law that require interpreting the metes and bounds of statutory provisions. Similarly, as discussed above, a district court's refusal to appoint an interpreter under the Court Interpreters Act is predicated on both the judge's findings of fact as well as his interpretation of the statute. Where both these statutes serve to protect criminal defendants' Sixth Amendment rights, and both involve mixed questions of law and fact, it stands to reason

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F.3d at 897; United States v. Henry, 538 F.3d 300, 303 (4th Cir. 2008); United States v. Nash, 946 F.2d 679, 680 (9th Cir. 1991).

[154] *Bloate*, 534 F.3d at 897.

[155] *Id*.; 18 U.S.C. § 3161(h)(1)(F) (2006).

[156] *Bloate*, 534 F.3d at 897–98.

[157] *Id*. (citing cases from the First, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits).

[158] *Id*. at 898.

that district courts' application of these statutes should be subject to consistent standards of review. Rather than clinging to the abuse of discretion standard, appellate courts should examine determinations under the Court Interpreters Act using the same bifurcated standard of review with which they approach determinations under the STA.

However, if this proposition is correct, it invites one to ask why the bifurcated standard of review is not applied by appellate courts to mental competency determinations, which are arguably the most similar to determinations of linguistic need. A defendant's mental competency implicates basic constitutional rights in many of the same ways as language competency. A mentally incompetent defendant cannot meaningfully understand the nature of the charges against him, much less consult his lawyer or assist in the preparation of his defense.[159] Nevertheless, the federal law is settled that when a district court finds a criminal defendant competent to stand trial, appellate courts review that finding only for clear error.[160] Where language and mental competency proceedings are so similar in nature and effect, it would seem inconsistent and unreasonable to apply a bifurcated standard of review to linguistic determinations when competency determinations are only reviewed for clear error.

As it turns out, the clear error standard commonly associated with competency determinations is only half the story. In reality, appellate courts view a district court's competency determination as a mixed question of law and fact.[161] Certainly a district court's decision that a defendant is competent is a finding of fact. However, "[a]lthough competence is a factual issue, that term . . . is not self-defining."[162] Because competency to stand trial implicates important constitutional rights, "the *legal standard* by which competency is to be evaluated is constitutionally mandated," and "do[es] not vary according to the views of a particular court."[163] Therefore, it is the province of appellate courts to speak to the content of that standard: "[W]hether the district court applied the appropriate test is a question of law, subject to *de novo* review."[164]

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[159] *See* Indiana v. Edwards, 128 S. Ct. 2379, 2382–83 (2008).

[160] *See, e.g.*, United States v. Smith, 338 F. App'x 544, 547 (7th Cir. 2009); United States v. Murphy, 572 F.3d 563, 569 (8th Cir. 2009); United States v. Martinez-Hernandez, 312 F. App'x 984, 985 (9th Cir. 2009); United States v. DeShazer, 554 F.3d 1281, 1286 (10th Cir. 2009); United States v. Moghaddam, 299 F. App'x 418, 419 (5th Cir. 2008).

[161] *E.g.*, Lafferty v. Cook, 949 F.2d 1546, 1550 (10th Cir. 1991).

[162] *Id*.

[163] *Id*. (emphasis added).

[164] United States v. Wayt, 24 F. App'x 880, 882 (10th Cir. 2001); Dusky v. United States, 362 U.S. 402, 402 (1960) (The proper "legal standard" for competency is "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational

Accordingly, when federal courts of appeals examine whether the district court applied the correct legal standard in determining the defendant's mental competency, they have consistently reviewed the district courts' legal conclusions de novo.[165]

In light of this, the example of competency determinations does not weaken, but actually bolsters, the proposition that linguistic determinations should be subject to a bifurcated standard of review. Similar to "competency," the concept of whether a defendant's comprehension is "inhibited" is not self-defining. *Gonzalez* reminds us that different judges can interpret "inhibit" in different ways. More importantly, because language difficulty endangers fundamental constitutional rights, the correct legal standard for when a language difficulty "inhibits" the defendant is fixed by the requirements of due process under the Constitution and may not vary from court to court. As such, the legal standard that district courts apply in linguistic determinations is a question of law subject to de novo review.

The abuse of discretion standard of review has no place in appellate review of district court determinations under the Court Interpreters Act. Linguistic determinations, which entail statutory interpretation as well as factual findings, are decidedly not matters of discretion but mixed questions of law and fact that demand bifurcated review. Moreover, as the examples above demonstrate, appellate courts have consistently examined comparable district court determinations under a bifurcated approach, reviewing the lower court's factual findings for clear error and its legal conclusions de novo. Thus, the abuse of discretion review of district court determinations under the Court Interpreters Act has been but an aberration of law. As a matter of legal principle and consistency, appellate courts should examine district court determinations under the Court Interpreters Act under the bifurcated standard of review.

V. CONCLUSION

For thirty years, under the abuse of discretion standard of review, federal appellate courts have deferred to district court judges' reading of the Court Interpreters Act. However, it is the province of appellate courts to independently interpret the meaning of the Act's critical language. In particular, it is the appellate court's role to translate "inhibit" into a

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understanding—and whether he has a rational as well as factual understanding of the proceedings against him.").

[165] *See, e.g.*, United States v. Sanchez-Gonzalez, 109 F. App'x 287, 290 (10th Cir. 2004); *Wayt*, 24 F. App'x at 882; Sena v. New Mexico Prison, No. 98-2016, 1998 WL 788828, at *2 (10th Cir. Nov 12, 1998); Rumbaugh v. Procunier, 753 F.2d 395, 413 (5th Cir. 1985).

meaningful legal standard for determining whether a defendant's language difficulty is serious enough to require appointing an interpreter.

If courts of appeals take up this responsibility by adopting the bifurcated standard of review, they would not only rectify a long-standing legal inconsistency, but they would also bring added uniformity and accountability to the implementation of the Court Interpreters Act. Particularly in districts with heavy caseloads involving interpreters, if district court judges know that their application of the Act will be subject to closer scrutiny on appeal, some may take greater care to articulate the precise linguistic standard by which they adjudicate whether the defendant needs an interpreter. If certain defendants who deserve interpreters slip through the cracks—which is perhaps inevitable—at least courts of appeals would have greater freedom, when they revisit the original denial of an interpreter, to inquire as to whether the judge applied the correct interpretation of the Court Interpreters Act. These outcomes would be consistent with the value of fairness that the Court Interpreters Act was meant to protect.