Constitutions and Language Access

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I. Basic Constitutional Considerations

Any consideration of the constitutional implications of language access issues must start with some fundamentals about the applicable constitutional concepts. Of first importance is the federal due process jurisprudence. At its most basic level, in the context of disputes resolved through legal process, due process guarantees a "fair hearing in a fair tribunal." *In re Murchison,* 349 U.S. 133, 136 (1955). In 1972, the Supreme Court of the United States recognized that

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." It is equally fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."

Fuentes v. Shevin, 407 U.S. 67, 80 (1972) (quoting *Baldwin v. Hale,* 68 U.S. (1 Wall.) 223, 233 (1864) and *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965)) (other citations omitted). Due Process requires "the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge,* 424 U.S. 319, 333 (1976). *Cf. Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433 (1982) ("Due Process Clause grants the aggrieved party the opportunity to present his case and have its merits fairly judged").

The due-process considerations are enhanced, in obvious ways, by the equal protection guarantee and the fundamental right of access to the courts. *See Christopher v. Harbury,* 536 U.S. 403, 415 n.12 (2002) (holding the right to be "grounded in the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause, the First Amendment Petition Clause, the Fifth Amendment Due Process Clause, and the Fourteenth Amendment Equal Protection and Due Process Clauses."). *See also id*. at 415 (access to the courts is a "fundamental right" that is a "separate and distinct right to seek judicial relief for some wrong."). A cognate right to access is found in the open courts, right to remedy, and access provisions found in 37 state constitutions and implicit in at least one more. *See* Jennifer Friesen, State Constitutional Law: Litigating Individual Rights, Claims and Defenses § 6-2(a), p. 347 n.11; *Richardson v. Carnegie Library Rest., Inc.,* 763 P.2d 1153, 1161 (N.M. 1988), *overruled in part on other grounds by Trujillo v. City of Albuquerque,* 965 P.2d 305

(N.M. 1998). Additionally, in criminal cases, other rights, such as the right to confront witnesses, are implicated.

II. Due Process and Access in Criminal Cases

For more than a half century, the Supreme Court has instructed that an "elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is . . . an opportunity to present objections." *Mullane v. Central Hanover Bank and Trust Co.,* 339 U.S. 306, 314 (1950). The "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id*. Application of these principles to circumstances where a party's participation in a matter is limited because of language barriers should be obvious. It is impossible to participate in a case, where the charges or claims, the testimony of witnesses, or the instructions or admonitions of a judge are not fully understood. No informed decision to "default, acquiesce or contest" can then take place.

Still, due process and other constitutional provisions only afford limited protection under existing precedents. As the Supreme Court has recognized, that "the right to be heard operates "within the limits of practicality." *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971).

Thus, the United States Supreme Court has not held that the right to a court-appointed interpreter is constitutionally mandated and thus has had to be supplemented by statutory authority. The closest precedent came in 1907, when the Supreme Court stated: "One [claim] is that the court erred in refusing to appoint an interpreter when the defendant was testifying. This is a matter largely resting in the discretion of the trial court, and it does not appear from the answers made by the witness that there was any abuse of discretion." *Perovich v. United States,* 205 U.S. 86, 91 (1907).

Instead, the majority of important cases, particularly in criminal law, have developed at the circuit level. Thus, the Seventh Circuit unambiguously declared:

> a defendant in a criminal proceeding is denied due process when: (1) what is told to him is incomprehensible; (2) the accuracy and scope of a translation at a hearing or trial is subject to grave doubt; (3) the nature of the proceeding is not explained to [the defendant] in a manner designed to insure his full comprehension; or (4) a credible claim of incapacity to understand due to language difficulty is made and the district court fails to review the evidence and make appropriate findings of fact.

United States v. Cirrincione, 780 F.2d 620, 634 (7th Cir.1985).

In so holding, that circuit built upon the pioneering work of the Second Circuit, which held that the provision of interpreter services to a non-English proficient party is

required by due process in criminal cases. *Negron v. New York,* 434 F.2d 386, 390 (2d Cir. 1970) (where loss of liberty is at stake, due process and "as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded."). A handful of other cases from various circuits have since also recognized a constitutional dimension to the denial of an interpreter. *See, e.g., U.S. v. Mayans,* 17 F.3d 1174, 1180–81 (9th Cir.1994) (holding that the defendant's Fifth Amendment due-process rights were violated when interpreter withdrawn by court); *U.S. v. Sanchez,* 928 F.2d 1450, 1456 (6th Cir. 1991), *overruled on other grounds, U.S. v. Jackson-Randolph,* 282 F.3d 369 (6th Cir. 2002); *U.S. v. Bennett,* 848 F.2d 1134, 1141 (11th Cir. 1988) (same); *U.S. v. Carrion,* 488 F.2d 12, 14–15 (1973) (same without specifying constitutional basis of right); because, in part, defendant and counsel did not explain the problem to the court).

States have also recognized a constitutional basis for a right to an interpreter. California has an explicit constitutional provision: As to those charged with felonies, a "person unable to understand English who is charged with a crime has a right to an interpreter throughout the proceedings." Cal. Const. art. 1, § 14. Some state courts have interpreted more general constitutional provisions to arrive at the same result. *See, e.g., Tehrani v. State,* 764 So.2d 895, 898 (Fla. 5th D.C.A. 2000) ("A non-English speaking defendant has the right to an interpreter, a right grounded on due process and confrontation considerations of the Constitution."); *State v. Rios,* 539 P.2d 900, 902 (Ariz. 1975) (state must provide interpreter to criminal defendants "unable to comprehend the English language sufficiently to exercise their rights to confrontation, cross-examination and the effective assistance of counsel."); *State v. Pina,* 361 N.E.2d 262, 267 (Ohio App. 1975) ("failure to ensure that non-English speaking defendants are given the same opportunity as others to be present, to speak in their defense and to understand what is taking place, in whatever language they possess, reaches constitutional proportions," violating rules set by the Ohio Supreme Court, equal protection, and due process); *State v. Faafiti,* 513 P.2d 697, 699 (Hi. 1973) ("It is general law that where a defendant cannot understand and speak English, the judge is required to appoint an interpreter to aid a defendant. Otherwise, a trial held in his presence would be meaningless to him and would violate our concept of due process, as he would not be given his day in court.").

As indicated above, practical considerations can affect a court's approach to interpreter services. Although *Mathews* holds that "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard," 424 U.S. at 348, the Eleventh Circuit expressed a common theme when it stated that a court's use of an interpreter should "represent[] a proper balancing of appellants' 'constitutional rights to confrontation and due process against the public's interest in the economical administration of criminal law.'" *U.S. v. Bennett,* 848 F.2d 1134, 1141 (11th Cir. 1988 (quotation omitted). Thus, whether an interpreter is necessary in any particular

instance has been consigned to the "wide discretion" of the trial court. *U.S. v. Carrion,* 488 F.2d 12, 14 (1st Cir. 1973), *cert. denied,* 416 U.S. 907 (1974).

III. Due Process and Access in Civil Cases

Due process not only provides protection to criminal defendants, but it also applies to parties in civil actions. The Supreme Court has held that "the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 429 (1982). In fact, as Justice Frankfurter explained, the "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Comm. v. McGrath,* 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

Thus, due process "has been interpreted as preventing the States from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." *Boddie v. Connecticut,* 401 U.S. 371, 380 (1971). In fact, as a matter of the related fundamental right to access to the courts, the *Boddie* Court held "absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Id*. at 377. Nonetheless, courts have not extended any right to an interpreter in civil cases.