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CRIMINAL LAW

CONFRONTATION — RIGHT TO A TRANSLATOR

Few courts have discussed the right of an accused to have simultaneous interpretation at a criminal trial. The Supreme Court has not directly ruled on the issue¹ and the Second Circuit has reviewed the problem only tangentially.² *United States ex rel. Negron v. State of New York*³ is the first decision to hold that lack of adequate translation for a Spanish-speaking defendant rendered the trial constitutionally infirm.⁴

Convicted at a jury trial of murder, Negron, who neither spoke nor understood any English,⁵ was sentenced to from twenty years to life imprisonment. The district court granted a writ of habeas corpus⁶ after remedies for direct review had been exhausted.⁷

Negron's lawyer spoke no Spanish and was unable to communicate

¹ See *Perovich v. United States*, 205 U.S. 89, 91 (1907) (appointment of an interpreter for purposes of defendant's testimony held to be discretionary with trial judge's estimation of defendant's ability to understand interrogation). Cf. *Felts v. Murphy*, 201 U.S. 123 (1906).

² See *United States v. Desist*, 384 F.2d 889, 901-03 (2d Cir. 1967), *aff'd*, 394 U.S. 244 (1968) (since defendant was not indigent and a law firm retained by him included a French-speaking partner, there was no infringement of due process or fair trial in a government refusal to provide, at Government expense, an interpreter to render simultaneous translation of the proceeding); *United States v. Guerra*, 334 F.2d 138, 142-43 (2d Cir.), *cert. denied*, 379 U.S. 936 (1964) (errors in translation by interpreter in transposition of defendant's statements from first to third person were of minimal significance and did not preclude possibility of fair trial); *United States v. Paroutian*, 299 F.2d 486, 490 (2d Cir. 1962) (the fact that no interpreter was appointed and that an attorney was forced to act as an interpreter in no way prejudiced due process where no question of fact was at issue and defendant did not testify). Cf. *Asphalt Paving Co. v. Odasz*, 85 F. 754, 756 (2d Cir. 1898). Other courts have considered the competence of a particular interpreter, e.g., *Thiede v. Utah*, 159 U.S. 510 (1895) (use of a juror as an interpreter was held not to be prejudicial); *United States v. Guerra*, 334 F.2d 138 (2d Cir. 1964); *Lujan v. United States*, 209 F.2d 190, 192 (10th Cir. 1953). The reality of a language barrier in a specific case was discussed in *Pietrzak v. United States*, 188 F.2d 418, 420 (5th Cir.), *cert. denied*, 342 U.S. 824, (1951). The right was implied in *Tapea-Corona v. United States*, 369 F.2d 366 (9th Cir. 1966) (*per curiam*).

³ 434 F.2d 386 (2d Cir. 1970).

⁴ *Id.* at 387.

⁵ Defendant was a native Puerto Rican who worked in the United States for several months between 1963 and 1965. He emigrated here again in 1966 and was here only a few months, working as a potato packer, when a brawl broke out between him and his roommate resulting in the roommate's death. The defendant had only a sixth grade Puerto Rican education. *Id.* at 387.

⁶ *United States ex rel. Negron v. State of New York*, 310 F. Supp. 1304 (E.D.N.Y. 1970). See 1A J. MOORE, FEDERAL PRACTICE, ¶ 0.230[2] (2d ed. 1967).

⁷ While in the state courts, the conviction was affirmed without opinion by the Appellate Division, 29 A.D.2d 1050, 290 N.Y.S.2d 871 (1968). Leave to appeal was denied by the New York Court of Appeals, July 12, 1968, and certiorari was denied by the Supreme Court, *Negron v. New York*, 395 U.S. 936 (1969). See *Negron v. United States*, 434 F.2d at 388, n.1.

with his client without an interpreter. The result was only a twenty minute interview before trial, and, with the gratuitous aid of an interpreter retained on behalf of the prosecutor, intermittent questioning at trial.⁸ Only two of the fourteen prosecution witnesses spoke Spanish at the trial and their testimony was interpreted simultaneously for the court. There was no such interpretation of English to Spanish for Negron.

In affirming the district court, the circuit court opined that, where put on notice as to a communication barrier, defendant's right to confrontation⁹ and the requirement of a reasonable ability to consult with his counsel,¹⁰ demand affirmative action by the court to insure awareness of a derivative right entitling him to the assistance of a competent translator.¹¹ And, if necessary, such translator is to be supplied at state expense.¹²

The rationale of the court went beyond considerations of fairness¹³ to say that the right which they were espousing was the right of an accused to participate effectively in his own defense.¹⁴ Negron's right to be confronted with adverse witnesses necessitated that he hear more than the babble of their voices.¹⁵

⁸ This interpreter translated the trial court's instructions for Negron with respect to his right to peremptory challenges of prospective jurors, and, during two recesses in the four day trial, met for several minutes to summarize the testimony of the English-speaking witnesses. English testimony was never translated for Negron while the trial was in progress. 434 F.2d at 388.

⁹ U.S. CONST. amend. VI. "In all criminal prosecutions, the accused shall enjoy the right to . . . be confronted with the witnesses against him. . . ." *Id.* The right was made applicable to the states through the fourteenth amendment. *Pointer v. Texas*, 380 U.S. 400, 403 (1965).

Two opposing theories have evolved in carving out inevitable exceptions to this right: a good faith prosecutorial standard and an evidentiary standard incorporating exceptions to the hearsay rule.

Note, 19 KAN. L. REV. 533, 534 (1971). See 5 J. WIGMORE, EVIDENCE 1362 (3d ed. 1940).

¹⁰ Citing *Dusky v. United States*, 362 U.S. 402 (1960) (per curiam). The test of whether one actually present is competent to stand trial is his "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." *Id.* See Note, *Incompetency to Stand Trial*, 81 HARV. L. REV. 454, 458 (1967). See generally *People v. Forlano*, 249 F. Supp. 174, *aff'd*, 355 F.2d 934 (2d Cir. 1966).

¹¹ 434 F.2d at 389.

¹² *Id.* at 391. Cf. *Gideon v. Wainwright*, 372 U.S. 335, 339-40 (1963); *United States v. Arlen*, 252 F.2d 491, 495 (2d Cir. 1958).

¹³ See U.S. CONST. amend. XIV. The court, relying on *Pointer v. Texas*, 380 U.S. 400 (1965), stated that the right of confrontation includes the right to cross examination as basic to our concept of fairness. 434 F.2d at 389. See also *Burton v. United States*, 391 U.S. 123, 128 (1968) (right to confrontation necessitates an opportunity to cross examine, test recollection, and sift consciences); *Barber v. Page*, 390 U.S. 719 (1968); *Douglas v. Alabama*, 380 U.S. 415 (1965); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

¹⁴ 434 F.2d at 389, citing, e.g., *Lewis v. United States*, 146 U.S. 370 (1892).

¹⁵ See *Terry v. State*, 21 Ala. App. 100, 105 So. 386 (1925) (defendant was a deaf mute); *Garcia v. State*, 151 Tex. Crim. 593, 210 S.W.2d 574 (1948); *State v. Vasquez*, 101 Utah 444, 121 P.2d 903 (1942) (defendant spoke "broken English"). The court stated

As the court itself indicated, this decision is of significant precedential value.¹⁶ It is, however, difficult to comprehend why a right as basic to our system as this has not previously been subject to judicial scrutiny.¹⁷ Hopefully, there will now be more meaningful participation in the trial by those indigent defendants with a language barrier.

EVIDENCE — INCONSISTENT STATEMENTS

Within the realm of evidentiary procedure lies the problem of the propriety of introducing extrinsic evidence to impeach the credibility of a given witness. In determining the admissibility of such evidence the court initially must decide whether the evidence is of a collateral¹⁸ nature, for if this be the case, no evidence may be admitted thereon.¹⁹ It was with this determination in mind that the Court of Appeals for the Second Circuit in *United States v. Lester*,²⁰ decided that the "mo-

that defendant's failure to object at trial was not detrimental, because he had not waived a right which was not known to exist. 434 F.2d at 390. See generally *Illinois v. Allen*, 397 U.S. 337 (1970); *Johnson v. Zerbst*, 304 U.S. 458 (1938). Such an argument would also indicate full retrospective and prospective application. See also *United States v. Liguori*, 430 F.2d 842 (2d Cir. 1970); *Van Alstyne, In Gideon's Wake: Harsher Penalties and the "Successful" Criminal Appellant*, 74 YALE L.J. 606 (1965).

¹⁶ 434 F.2d at 387.

¹⁷ Full time interpretation is provided by the Government for those who require such in the district court of Puerto Rico. See JUD. CONF. REP. 59 (1966).

¹⁸ If it be asked what "collateral" means, we are obliged either to define it further, . . . in which case it is a mere epithet, not a legal test, . . . or to illustrate by specific examples . . . in which case we are left to the idiosyncrasies of individual opinion upon each instance."

3A J. WIGMORE, WIGMORE ON EVIDENCE § 1003 (Chadbourn Rev. 1970) [hereinafter WIGMORE]. The only apparent authoritative test is that laid down in Attorney General v. Hitchcock, 1 Exch. 91, 154 Eng. Rep. 38 (1847), asking whether facts predicated a prior contradiction may be introduced for purposes independent of that contradiction. As for United States jurisdictions accepting this test see WIGMORE, § 1021 n.1. While it may be somewhat difficult to determine whether a matter is, or is not "collateral," Wigmore provides us with a classification of facts not collateral. WIGMORE §§ 1004-1005.

¹⁹ See *United States v. Williamson*, 424 F.2d 353 (5th Cir. 1970); *Head v. Halliburton Oilwell Cementing Co.*, 370 F.2d 545 (5th Cir. 1966). For a look at what is, and what is not "collateral" matter, see note 20 *infra*. See also WIGMORE §§ 1004-05 for a test of whether a matter is collateral.

²⁰ 248 F.2d 329 (2d Cir. 1957). The court here realized the impropriety of attack on collateral matters and thus noted that:

although a party may not cross examine a witness on collateral matters in order to show that he is generally unworthy of belief, and may not introduce extrinsic evidence for that purpose . . . a party is not so limited in showing that the witness had a *motive* to falsify the testimony he has given.

Id. at 334 (emphasis added).

The proposition that bias, interest, or hostility of a witness is never collateral matter has been uniformly upheld. See *United States v. Battaglia* 394 F.2d 304 (7th Cir. 1968), *rehearing denied*, 394 F.2d 327, *vacated*, 394 U.S. 310 (1969), *aff'd on rehearing*, 432 F.2d 1115 (1970); *Barnard v. United States* 342 F.2d 309 (9th Cir.) *cert. denied*, 382 U.S. 948 (1965); *United States v. Haggett*, 438 F.2d 396 (2d Cir. 1971); *Tinker v. United States*, 417 F.2d 542 (D.C. Cir. 1969); *Majestic v. Louisville & N.R. Co.*, 147 F.2d 621 (6th Cir. 1945). See generally WIGMORE §§ 948-950; J. PRINCE, RICHARDSON ON EVIDENCE § 503 (9th ed. 1964) [hereinafter RICHARDSON]. Courts have held that testimonial motivation