TWO STEPS FORWARD, ONE STEP BACK: THE WAIVER OF AN INTERPRETER AND THE INCIDENTAL LOSS OF THE RIGHTS TO CONFRONTATION, ASSISTANCE OF COUNSEL, AND PRESENCE AT TRIAL

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I. INTRODUCTION

Based on the U.S. Latino demographics, there definitely exists a need for Spanish language support in American governmental services in general and in all courts in particular. During a criminal trial, the forum primarily addressed in this article, an accused can be protected from injustices through the adherence to invaluable federal constitutional rights. American jurisprudence dictates that the only reliable approach to the abandonment of these rights occurs when the accused knowingly and voluntarily expresses a waiver.

The implicit right to an interpreter assumes an even more critical posture in our courts when we consider our nation's immigration history and the growth of the limited-English-proficient (LEP) population. Germans became the first linguistic minority in the 1700s. English settlers directed their linguistic phobias against Germans, as documented during World War I with the passage of state legislation prohibiting the teaching or use of languages other than English in the instructional program.[1] As time passed, the newly adopted Mexican-descent "residents by conquest" and the subsequent arrival of Spanish-speaking immigrants from Mexico replaced the German-speaking population as objects of the dominant population's *linguaphobia*.[2]

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1. E.g., Meyer v. Nebraska, 262 U.S. 390, 400-01 (1923).

2. *See generally* Lupe S. Salinas, *Linguaphobia, Language Rights and the Right of Privacy*, 3 STAN. J. C.R. & C.L. 53 (2007).

Based on the U.S. Latino growth over the first 150 years after the defeat of Mexico by American forces, the need for court interpreter services has expanded geometrically. According to the 2000 Census, of the 47 million Americans who spoke a foreign language, about 28 million (60 percent) spoke Spanish.[3] In a mere decade, the 2010 Census reported 61 million Americans who spoke a foreign language, including about 38 million (62 percent) who spoke Spanish.[4] In 2011, with a U.S. Latino population of almost 51 million, 13 million claimed an inability to function well or at all in English.[5] Stated another way, one in four Latinos, an incredible 25 percent, admit that they are not fluent in English. These numbers will increase if Congress follows immigration and political history by adjusting the status of those Dreamers and other undocumented persons who received a suspension of deportation by President Obama's executive action in late 2014.

To address these language needs, the American Bar Association (ABA) endorsed the improvement of court procedures intended to provide language minorities with access to the courts and to protect accused persons as they face and confront witnesses in criminal cases. The ABA Language Access Project studied needs across the nation and issued language access standards adopted in 2012 by the House of Delegates.[6] Based on the fundamental right of access to the courts and on the growing number of persons with limited English proficiency ("LEP"), the ABA publicly adopted these standards in order to enhance the evenhanded administration of justice. When LEP persons are brought before the criminal courts, for example, they must have adequate language assistance to confront witnesses against them.

The ABA standards refer to constitutional rulings, such as *Lau v. Nichols*,[7] and statutory and regulatory provisions that establish minimum requirements for the affirmative access to justice goals. *Lau* addressed the

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3. *Id*. at 61-62. Erik C. Gopel, ed., The World Almanac and Book of Facts 2005, at 10, 629 (2005) (U.S. Latino population includes citizens, both native-born and naturalized, resident aliens, and undocumented aliens).

4. CAMILLE RYAN, LANGUAGE USE IN THE UNITED STATES: 2011 AMERICAN COMMUNITY SURVEY REPORTS, U.S. Census Bureau 11 (Aug. 2013), *available at* http://www.census.gov/prod/2013pubs/acs-22.pdf

5. *Id.*

6. American Bar Association, *ABA Standards for Language Access in Courts* (Feb. 6, 2012),http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_standards_for_language_access_proposal.authcheckdam.pdf.

7. Lau v. Nichols, 414 U.S. 563 (1974).

requirement of Title VI of the Civil Rights Act of 1964[8] that in combination with "Guidance" documents issued by the Department of Justice[9] seek to protect against the exclusion of persons from participation in the benefits of a federally-funded program on the basis of race, color, or national origin. Primarily, the standards promote the belief that "as a fundamental principle of law, fairness, and access to justice," courts should provide language services so that LEP persons will also have access.[10]

The ABA report focuses on interpreter needs, an area that substantially impacts LEP litigants. The presence and availability of trained interpreters is particularly urgent in state courts where most Americans seek justice. The federal courts have a more firmly-established system, inspired in great part by the passage of the Federal Interpreter Act and the implementation of certification programs.[11] An interpreter is a person who is fluent in both English and another language, listens to a communication in one language, and orally converts the declaration to another language. Based on the realities of differing linguistic abilities, another recognized level of ability is that of a qualified interpreter. This person's ability to interpret in the legal setting has been assessed as less than certified based on an exam score or based on the unavailability of an exam for a particular language. A certified court interpreter additionally possesses the skill to interpret in all three modalities (simultaneous, consecutive, and sight or document translation).

Of critical importance, considering the substantial economic inequality among Americans, the standards provide that "[c]ourts shall inform all LEP individuals that interpreter services are provided at no charge."[12] Although state budgets need to provide judicial support, where genuine cost issues arise, the Department of Justice has access to funds to accommodate language assistance programs.

Since Latinos represent the largest growing language group in the nation, their need for an interpreter has increased proportionately. Consequently, Latinos encounter confrontation of witnesses and access to

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8. 42 U.S.C. § 2000d (2007).

9. Department of Justice, Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition against National Origin Discrimination Affecting Limited English Proficient Persons, 67 Fed. Reg. 41455 (June 18, 2002).

10. A.B.A., *supra* note 6, at 1.

11. 28 U.S.C. § 1827 (2007).

12. *ABA Standards for Language Access in State Courts Outline*, http://www.americanbar.org/content/dam/aba/migrated/legalservices/sclaid/downloads/ABA_Standards_for_Language_Access_in_State_Courts.authcheckdam.pdf.

the courts issues daily.[13] This is why the authors urge judicial and legislative remedies to address concerns expressed by a judge of the Texas Court of Criminal Appeals that in the case of LEP accused persons "for every two steps forward there is one step back."[14]

In Part II, the authors express concerns over the position taken recently by the Texas Court of Criminal Appeals with regards to the waiver of an interpreter involving LEP persons. They address the "Garcia" experience in Texas, referring to three *Garcia* cases that address the attendant constitutional rights protected by having the aid of an interpreter.[15] The authors focus on the newest 2014 ruling, a dangerous precedent that departs from the broader protections of the first two *Garcia* cases. The authors then discuss the impropriety of this retreat.

In Part III, the authors address the invaluable constitutional rights that the U.S. Constitution extends to the accused via the Sixth Amendment and the judicially-created interpreter rights of the LEP accused. Additionally, the authors analyze court cases that address the rights adversely impacted by the absence of an interpreter. These rights include the confrontation and cross-examination of the accused, assistance of counsel, and, as interpreted by the courts, his right to be "present" not only, physically, but also mentally.[16]

Part IV analyzes the concept of waiver of fundamental rights and discusses procedures to ensure the integrity of a knowing and voluntary abandonment of vital rights. The need for reliability is markedly critical. Rules regarding harmlessness of alleged constitutional trial errors can lead to unjust results. The authors also discuss the evident rule that an accused may waive fundamental constitutional rights if he does so with full awareness of the dangers. Further, his action must include an explicit and clear decision to abandon one of these critical rights.

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13. *See* Thomas M. Fleming, Annotation, *Right of Accused to Have Evidence or Court Proceedings Interpreted, Because Accused or Other Participant in Proceedings is Not Proficient in the Language Used*, 32 A.L.R. 5th 149 (1995), for an idea as to the gravity of the interpreter issue in the United States.

14. Garcia v. State (*Garcia III*), 429 S.W.3d 604, 617 (Tex. Crim. App.), *cert. denied*, 135 S. Ct. 679 (2014).

15. *See generally* Garcia v. State (*Garcia I*), 210 S.W.2d 574 (Tex. Crim. App. 1948); Garcia v. State (*Garcia II*), 149 S.W.3d 135 (Tex. Crim. App. 2004); Garcia v. State (*Garcia III*), 429 S.W.3d 604 (Tex. Crim. App. 2014), for a discussion on the three significant interpreter-related "Garcia" decisions (named for the accused in each case).

16. *See* Drope v. Missouri, 420 U.S. 162 (1975); *see* United States *ex rel.*Negron v. New York, 434 F.2d 386 (2d Cir. 1970).

Simultaneously, the authors express concerns that these waivers adhere to well-established authority that require that the accused act competently and voluntarily. They propose safeguards to enhance the likelihood that these rights are properly abandoned. The authors also distinguish when counsel can effectively waive certain trial rights on behalf of a client from circumstances when counsel may not unilaterally decide for her client. Intertwined in this discussion is a comment about the distinctions between structural and trial errors. The authors contend that the deprivation of an interpreter constitutes a structural error, in contrast to a trial error, since the deprivation impacts the very framework of the trial.

In Part V the authors detail the reasons why *Garcia III* epitomizes an erroneous decision. They also discuss remedies to overcome linguistic barriers in criminal proceedings, including the creation of a judicial remedy similar to the *Faretta*-type interrogation when an accused desires to waive his right to a trial without an interpreter.[17] Finally, considering the growth of the linguistically-challenged population, particularly among Latinos, the authors recommend that judicial administrators seek to adhere to the recommendations set forth in the ABA Access to the Courts Project.

Finally, in Part VI the authors conclude with the claim that the waiver in *Garcia III* fails to meet the *Johnson v. Zerbst* standard[18] and with the contention that the totality of the circumstances—notwithstanding defense counsel's ability to obtain a limited sentence of twenty years in a murder case—reflects a structural error in that the framework of the entire trial was affected by the figurative absence of the accused, the lack of effective involvement in the cross-examination and confrontation, and the lack of simultaneous or more immediate consultation with counsel.

II. *GARCIA* III: A DANGEROUS PRECEDENT REGARDING INTERPRETER ASSISTANCE

Texas courts have a distinctive compilation of *Garcia* interpreter decisions. *Garcia v. State* ("Garcia I"), in 1948, held that failure to provide an interpreter to an accused who could not understand English violated his constitutional rights.[19] The Texas Court of Criminal Appeals observed that

17. *See* Faretta v. California, 422 U.S. 806, 807-09 (1975).

18. *See generally* Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("[W]aiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege").

19. *Garcia I*, 210 S.W.2d at 579.

many Latinos speak and understand only the Spanish language in Hidalgo County and the Rio Grande Valley border area.[20] The court expressed that these LEP persons, when they appear as an accused, possess the right to confrontation of witnesses under the same conditions as faced by the English-speaking accused: "Equal justice so requires. The constitutional right of confrontation means something more than merely bringing the accused and the witness face to face; it embodies and carries with it the valuable right of cross-examination of the witness."[21]

In 2004 decision, in another *Garcia v. State* case ("*Garcia II*"), the same court again addressed the interpreter issue.[22] *Garcia II* involved a jury trial with "mostly English-speaking witnesses," but the judge nonetheless failed to provide an interpreter for the LEP accused.[23] Garcia entered a plea of not guilty, made bail, and hired an attorney who did not speak Spanish. Garcia communicated through the attorney's bilingual assistant. During the state's case, the judge observed that no one interpreted for the accused.[24] Although the assistant sat next to or near Garcia, she explained that she never interpreted for the accused, nobody advised her to interpret, and she feared she would disrupt the trial if she did.[25]

Garcia II explained that the assistant's bilingual status and proximity "to Garcia did not automatically elevate her to [interpreter] status" since she was not sworn in, was not directed to interpret, and did not in fact interpret.[26] As to the forfeiture of the right to confrontation, *Garcia II* concluded it would be "illogical to require a non-English-speaking defendant to assert his right to an interpreter in a language he does not understand when he may very well be unaware that he has the right in the first place."[27]

Garcia II placed the burden on the trial judge to ensure that the accused has an interpreter once the judge knows of the existence of an LEP

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20. *See generally Garcia III*, 429 S.W.3d 604 (Tex. Crim. App.) (jurisdictionally set in Hidalgo County, Texas), *cert. denied*, 135 S. Ct. 679 (2014).

21. *Garcia I*, 210 S.W.2d at 601.

22. *See* Garcia v. State (*Garcia II*), 149 S.W.3d 135, 145 (Tex. Crim. App. 2004)("At trial, the judge was aware that [the accused] needed a translator. The pretrial proceedings were translated for [him]. Defense counsel discussed [his] language difficulty during voir dire.").

23. *Id*. at 136.

24. *Id*. at 139.

25. *Id.*

26. *Id*. at 142.

27. *Id.* at 144.

status.[28] The court compared the experience of the linguistically challenged accused to one who is "forced to observe the proceedings from a soundproof booth or seated out of hearing at the rear of the courtroom, being able to observe but not comprehend the criminal processes whereby the state had put his freedom in jeopardy."[29] Ten years later, the same Texas court announced *Garcia III*, which included a strongly-worded dissenting opinion that described the majority opinion as a retreat from the progress the court displayed in the first two *Garcia* decisions and in other cases.

In *Garcia v. State* ("*Garcia III*") a jury found Irving Magana Garcia, a Spanish-speaking accused, guilty of murder in Hidalgo County, Texas, the same county where *Garcia I* arose.[30] The jury then determined an adequate cause existed and sentenced Garcia to the maximum twenty years in prison.[31] After the Thirteenth Court of Appeals affirmed the judgment,[32] Garcia sought review from the Court of Criminal Appeals, which then affirmed the lower court's decision.[33] The U.S. Supreme Court thereafter denied Garcia's petition for writ of certiorari.[34] The Court's discretionary decision not to hear the issue presented in *Garcia III* does not indicate that the Supreme Court approved the ultimate decision or reasoning of the Texas Court of Criminal Appeals.[35]

According to Joseph A. Connors III, Garcia's appellate counsel, his client asserted that the deceased was going for a weapon, knew the deceased had a violent past, and heard of threats by the deceased to kill Garcia.[36] The accused and the deceased had a history of mutual differences since the deceased kidnapped Garcia's wife and released her only upon the

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28. *Garcia II,* 149 S.W.3d at 145.

29. *Id.* at 141 (citing State v. Natividad, 526 P.2d 730, 733 (Ariz. 1974)).

30. Garcia v. State, 429 S.W.3d 604, 610 (Tex. Crim. App. 2014).

31. *Id.*

32. Garcia v. State, No. 13-11-00547-CR, 2013 Tex. App. LEXIS 2328, at *11 (Tex. App.—Corpus Christi Mar. 7, 2013).

33. *Garcia III*, 429 S.W.3d at 605.

34. Garcia v. Texas, 135 S. Ct. 679 (2014).

35. FreeAdvice Staff, *What is the effect of denying petition for certiorari by the Supreme Court of the United States?*, FREEADVICE, http://law.freeadvice.com/litigation/appeals/denying_centiorari.htm#ixzz3NbFSeZ8k (last visited Mar. 28, 2015).

36. *See Garcia III*, 429 S.W.3d 604; E-mail from Joseph A. Connors III, McAllen, Texas to author Professor Lupe S. Salinas (Nov. 14, 2014, 10:33 CST) (on file with author).

payment of ransom money.[37] By finding Garcia guilty of intentionally causing the death, the jury tacitly rejected the self-defense claim.

The *Garcia III* trial judge conducted a full motion for new trial hearing with Garcia present.[38] At the conclusion, regarding Garcia's waiver of the right to an interpreter, the judge concluded Garcia "waived it verbally. He never objected to an interpreter not being present."[39] The judge recalled that he talked to Garcia and his counsel, specifically stating "I want to say it was up here on the bench where we were talking and he said he didn't want one, so it's a waiver."[40] The court also pointed to "trial strategy" for the rejection of an interpreter.[41] The court added that this waiver occurred "during an unrecorded bench conference."[42]

Another critical point involves the trial judge's apparent awareness from a pre-trial proceeding that Garcia utilized an interpreter since he did not understand or speak the English language.[43] Under these circumstances, the judge had a statutory and case law obligation, absent a valid and explicit waiver, to appoint an interpreter for Garcia.[44] At this same hearing, Garcia's trial counsel, who is bilingual, testified that he conversed with and "informed Garcia that he did not want an interpreter because [the process] would be . . . distracting for [both] the jury and" for him in his concentration while a conversation took place right beside him.[45]

While defense counsel acknowledged that Garcia and he "agreed not to ask for an interpreter," counsel nonetheless admitted that he did not believe Garcia openly waived this right.[46] Affidavits entered into evidence at the hearing by Garcia and his counsel affirmed that Garcia did not engage in a specific waiver.[47] Further distorting the "waiver" concept, the prosecuting attorney testified that counsel told her that Garcia "did not want an

37. E-mail from Joseph A. Connors III, McAllen, Texas to author Professor Lupe S. Salinas (Nov. 14, 2014, 10:33 CST) (on file with author).

38. Garcia v. State, No. 13-11-00547-CR, 2013 Tex. App. LEXIS 2328, at *4 (Tex. App.—Corpus Christi Mar. 7, 2013).

39. *Id.*

40. *Id.* at *5.

41. The issue regarding the effective assistance of counsel is not addressed in this article. The *Garcia III* trial judge mentioned but did not articulate how this "trial strategy" of rejecting an interpreter allowed the jury to make a "sudden passion" finding. *Id.* at *6.

42. *Id.*

43. *Id.* at *18.

44. *Id.* at *10.

45. *Id*. at *10-11.

46. Garcia v. State, No. 13-11-00547-CR, 2013 Tex. App. LEXIS 2328, at *11 (Tex. App.—Corpus Christi Mar. 7, 2013).

47. *Id.*

interpreter, and she understood this to be a waiver."[48] The intermediate appellate court then aggravated what the authors contend is an insufficient waiver standard by ruling that "Garcia effectively made an *express* waiver of his right to a translator."[49] Instead of an explicit waiver decision by Garcia, the facts more correctly indicate an insufficient *implied* waiver. The official record lacks any awareness by the accused as to the adverse impact not having an interpreter could have on the attainment of his various constitutional rights.

Garcia III then went before the Texas Court of Criminal Appeals for discretionary review. Seven of the nineteen witnesses against Garcia testified in Spanish, and an interpreter narrated their testimony in English for the jury.[50] As to the other twelve witnesses, Garcia could not contemporaneously understand their testimony since he had no interpreter to relate their testimony into Spanish. For these witnesses, Garcia's counsel served as his limited interpreter by providing him with an after-the-fact "very brief summary" of what the witnesses said that was "harmful."[51] When Garcia testified in his own defense, the court's interpreter translated his Spanish testimony into English for the jury.[52]

In an analogous factual situation, the Texas Court of Criminal Appeals observed in *Baltierra v. State* that the trial judge "commendably appointed counsel fluent in the Spanish language and thereby afforded appellant a basic aspect of effective assistance of counsel, ability to communicate. But effectuating that important constitutional requirement should not be taken as implementing the constitutional right of confrontation."[53] The Court criticized the idea that counsel should be burdened with the "obvious distracting implications" of serving as an interpreter for the accused, noting that counsel has a Sixth Amendment duty to provide effective assistance of counsel but the right of confrontation for an LEP accused is a duty imposed upon the judge.[54]

In the event any of these English-speaking witnesses mentioned facts related to self-defense and/or Garcia's basis for or lack of having fear of an immediate threat to his life, only Garcia could have explained and

48. *Id.* at *12.
49. *Id*. at *13 (emphasis added).
50. Garcia v. State, 429 S.W.3d 604, 610 (Tex. Crim. App. 2014).
51. *Id.*
52. *Id.*
53. Baltierra v. State, 586 S.W.2d 553, 559 n.11 (Tex. Crim. App. 1979) (en banc).
54. *Id.*

articulated how he viewed the evidence. In addition, with interpreter assistance, if he understood simultaneously what the English language witness stated, he could have realized at that time whether the testimony was substantially accurate or if he knew of a witness who could rebut the testimony, thus providing him with the opportunity to present a complete defense.

In *Garcia III*, the Texas Court of Criminal Appeals adopted the lower appellate court's view that the accused explicitly waived his right to an interpreter.[55] The opinion raises the serious question as to the obligation of a jurist who is indisputably aware that the accused lacks the ability to speak and understand English and nonetheless fails to appoint an interpreter for him.[56] Should the judge instruct the court reporter to transcribe for the record the waiver colloquy between the trial judge and the accused before an appellate court may conclude that an accused has waived his right to an interpreter? The Texas Court of Criminal Appeals in *Garcia* III held that "the record does not have to contain such a detailed discussion, as long as the record otherwise affirmatively reflects that a waiver occurred."[57]

The "record" referred to in *Garcia III* apparently centers on the judge's recollection after the jury trial as to what he learned not from Garcia but from Garcia's counsel regarding the decision to proceed without an interpreter.[58] Inevitably, this after-the-fact procedure lessens the ability to determine accurately whether the accused "knowingly, intelligently, and voluntarily" waived his Sixth and Fourteenth Amendment rights to confrontation, to counsel, and to be present at his trial.

Notwithstanding harsh comments by the author of the *Garcia III* dissenting opinion regarding defense counsel, his success in overcoming a potential life sentence and attaining a reduced twenty-year sentence for Garcia is quite commendable and a tribute to his litigation abilities.[59] The authors nevertheless utilize this factual setting as an opportunity to

55. *Garcia III*, 429 S.W.3d at 605.
56. *Id.* at 612.
57. *Id.* at 605.
58. *Id.* at 606.
59. *Id*. at 621. Lead author Salinas, a retired judge, served several years as a visiting criminal trial judge in Hidalgo County, Texas. He personally knows the impeccable reputations that both the judge and the defense attorney enjoy among members of the legal profession. Notwithstanding their professional credentials, unfortunately interpreter-related issues arise frequently in all parts of the nation. For this reason, the authors, with all due respect to the legal officials involved, urge that standard procedures be implemented nationally to ensure that waiver decisions attributed to the accused are in fact made explicitly and voluntarily.

encourage the implementation of procedures to prevent the appellate issues that arose in *Garcia III* and to minimize future implied and inadvertent "waivers" of fundamental rights. The authors contend that the "record" established in this case must actually exist or at least be clarified to avoid doubts in future cases regarding the fundamental rights of an accused.

The accused depended completely on Spanish language assistance to comprehend the proceedings, what was being said about him, and how he could obtain the most effective assistance of counsel. Assuming *arguendo* that a judge permitted a jury trial to proceed in the absence of granting the basic constitutional right to counsel and the accused, forced to proceed *pro se*, obtained an acquittal, has the accused nevertheless been denied due process of law? The accused has obviously been deprived of his rights. Such deviations from the procedural guarantees of the Sixth Amendment and from other statutory rights designed to minimize injustice require a solution.

As to the waiver record, Garcia's bilingual trial counsel explained why he did not want an interpreter. He admitted that no court official explained to Garcia that he had a right to an interpreter via the confrontation clauses of both the federal and state constitutions.[60] Counsel further acknowledged that he and his client never appeared before the judge to engage in a *Faretta*-type discussion about the pros and cons of waiving the right to an interpreter.[61] When the trial lawyer informed Garcia that he did not want to deal with the distraction of an interpreter, Garcia merely responded, "[w]hatever you want."[62]

Garcia's vague and imprecise response indicated the dilemma, on one hand, of remaining oblivious to the testimony and, on the other, of having a counsel distracted by the interpreter. This "record" hardly connotes that the accused intelligently, competently, and voluntarily waived his vital right to the assistance of an interpreter. Garcia's counsel posed a very valid concern of a verbal interference during the trial. However, this distraction can be eliminated by using equipment to arrange for inaudible interpretive communications during a jury trial. In any case, counsel's concern does not convert the decision to proceed without an interpreter into an explicit and unambiguous choice by the accused.

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60. *Id.* at 605.
61. *Id.*; *see* Faretta v. California, 422 U.S. 806, 807-09 (1975).
62. *Garcia III*, 429 S.W.3d at 605-06.

The Texas Court of Criminal Appeals, in affirming *Garcia III*, cited *Davison v. State* in support of the assertion that a record other than a waiver colloquy sufficed to validate an abandonment of a basic right.[63] While *Davison* is instructive, the circumstances are drastically distinguishable from the due process rights involved in *Garcia III*. *Davison* involved a plea of guilty where the judge deviated from the statutory requirements relating to the range of punishment of an enhanced state jail felony.[64] *Garcia III*, on the other hand, involved the forfeiture of three basic due process rights that derive from the Sixth and Fourteenth Amendments.[65]

Davison involved a plea of guilty without a specific punishment recommendation to burglary of a building, a state jail felony punishable up to two years. Davison learned of this limited range orally from the judge, and he acknowledged this standard range in writing.[66] However, he also pled true to three felony enhancement allegations, factors that made him potentially eligible for a maximum twenty years in prison. A few months after the plea, the judge conducted the punishment hearing at which time the pre-sentence investigation officer testified that the enhancement paragraphs would subject the defendant to punishment for "a second degree felony," as compared to the state jail felony, but the officer did not specify the exact range of punishment. Before the punishment arguments began, the judge stated the penalty range was "two to twenty," the defense made no comment or correction, and the judge sentenced Davison to the maximum twenty-year sentence.[67]

The *Garcia III* majority relied on *Davison* to find that a sufficient record existed that Garcia competently waived his right to an interpreter.[68] The majority explained:

> [T]he record in the present case sufficiently reflects that appellant knowingly, intelligently, and voluntarily waived his right to an interpreter. The record here contains evidence that trial counsel told appellant that he had a right to an interpreter, that appellant agreed with counsel not to request an interpreter, and that appellant and counsel

63. *See* Davison v. State, 405 S.W.3d 682 (Tex. Crim. App. 2013).

64. *Id.*

65. These rights include the right to be present, the right to confrontation, and the right to assistance of counsel. *See*, *e.g.*, United States *ex rel.* Negron v. New York, 434 F.2d 386 (2d Cir. 1970).

66. *Davison*, 405 S.W.3d at 684-85.

67. *Id.* at 685.

68. Garcia v. State, 429 S.W.3d 604, 608-09 (Tex. Crim. App. 2014).

> communicated their desire not to have an interpreter to the trial judge, albeit in an off-the-record bench conference.[69]

Arguably, the statement concerning Garcia's awareness is not only conclusory but also incompatible with the claim that Garcia made a "knowing" waiver. The non-existence of any proof that Garcia knew what specific rights he actually forfeited by not having an interpreter controvert a competent and intelligent abandonment.

Davison correctly viewed *Boykin v. Alabama* as imposing a duty upon the judge to establish on the record sufficient evidence to demonstrate the knowing and voluntary quality of a guilty plea.[70] In contrast to the *Garcia III* circumstances, *Davison* actually points to a real-time "record" as it is understood by litigators as opposed to conjecture or a conclusory statement about a "waiver" in a post-trial hearing. The *Davison* "record" involves a court reporter's transcript that shows that the accused knew or became aware of the range of punishment and that he did not object until after he received the maximum possible sentence.[71]

In another plea of guilty case, the Court noted that "[b]y personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he also will develop a more complete record to support his determination in a subsequent post-conviction attack."[72] Regarding this judicial duty, the *Boykin* Court observed that, in order to validate the simultaneous waiver of several constitutional rights under the Due Process Clause, the accused must act with full awareness in the "relinquishment or abandonment of a known right or privilege."[73] Furthermore, since a guilty plea is an admission of all the elements of a formal charge, "it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."[74] Similarly, since the waiver of an interpreter results in his practical mental absence and his inability to assist in confrontation, the accused cannot appreciate the repercussions of his decision unless he is provided with "an understanding of the law in relation to the facts."[75]

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69. *Id.* at 609.
70. *Davison*, 405 S.W.3d at 690; *see* Boykin v. v. Alabama, 395 U.S. 238 (1969).
71. *Davison*, 405 S.W.3d at 692.
72. McCarthy v. United States, 394 U.S. 459, 466 (1969).
73. *Boykin*, 395 U.S. 238 at n. 5 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
74. *Id.* (quoting *McCarthy*, 394 U.S. 459 at 466).
75. *Id.*

Boykin refers to the requirement that the Court and the prosecution "spread on the record" the prerequisites of a valid waiver.[76] Pointing to the waiver of the right to counsel issue in *Carnley v. Cochran*, *Boykin* highlighted the Court's earlier comment regarding the existence of a waiver.[77] In *Carnley* the Court instructed that the "record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer."[78] The need to determine if the accused "intelligently and understandingly" made any decision in *Garcia III* is the crux as to whether his "waiver" is valid. In other words, is the response "whatever you want" sufficient to renounce explicitly any fundamental right intelligently and affirmatively? The authors do not believe that these essential rights should be treated with such limited regard.

The *Garcia III* majority opinion cites *Davison* as support for the decision that Garcia's interpreter waiver satisfied due process.[79] *Davison* provided an example of a valid waiver, but the *Garcia III* court deviated from the *Carnley* standard and the clear mandate to establish a voluntary and intelligent waiver.[80] In this regard, while *Davison* found the record supported finding a voluntary and intelligent guilty plea, *Garcia III* strayed from this standard by tolerating vague references in the *Garcia* III record to rationalize the finding of an affirmative and explicit waiver.[81] Objectively viewed, *Garcia III* and *Davison* differ significantly.

Based on the history of the *Garcia I* and *II* cases, and the overall progress that Texas had made in its interpreter jurisprudence, Judge Elsa Alcala, along with two other members of the Texas Court of Criminal Appeals, dissented. Judge Alcala asserted that the trial judge's single question asking counsel for the accused if he wanted a language interpreter did not meet the requirements to establish a voluntary waiver of the federal constitutional right to an interpreter.[82] The dissent readily conceded that a reference other than a transcript record of the actual questions to and responses by the accused could qualify as a waiver. Notwithstanding, she

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76. *See Boykin*, 395 U.S. at 242.
77. *Id.*
78. Carnley v. Cochran, 369 U.S. 506, 516 (1962).
79. *Garcia III*, 429 S.W.3d at 608.
80. *See* Davison v. State, 405 S.W.3d 682 (Tex. Crim. App. 2013); *Garcia III*, 429 S.W.3d 604; *Cochran*, 369 U.S. 506.
81. *Compare Davison*, 405 S.W.3d 682 *with Garcia III*, 429 S.W.3d 604.
82. *Garcia III*, 429 S.W.3d at 610 (Alcala, J. dissenting).

differed with the majority that the "record" created at the motion for new trial hearing adequately established a knowing and voluntary waiver.[83]

The limited record developed at the motion for new trial hearing revealed that the off-the-record discussion at the bench included the prosecutor, Garcia's trial counsel, the accused, and the trial judge. There is no comment as to whether the accused had the aid of an interpreter at the off-the-record discussion. According to the dissent, the record established that the judge did not propound any question beyond merely asking defense counsel if the accused wanted an interpreter:

> This single question and answer constituted the entirety of any discussions between the court and appellant with respect to whether appellant wanted an interpreter. At no time did the trial judge question appellant or his attorney about their reasons for declining an interpreter or about whether appellant's waiver of an interpreter was being made knowingly and voluntarily, and the trial court did not make any factual findings addressing whether appellant's waiver was made knowingly and voluntarily, although the court did determine that the waiver was made due to trial strategy.[84]

Judge Alcala underscored that the judge knew Garcia was not English-proficient and thus discounted the value of an unrecorded bench discussion in which counsel responded to a question from the judge that his client did not want an interpreter.[85] The Court reporter later documented this "single question and answer" at the new trial hearing.[86] According to the dissent, the trial judge's query of counsel insufficiently satisfied the burden imposed by law to determine if the waiver by the accused was voluntary or the product of coercion.[87] Most importantly, although Garcia was present, the record was devoid of any question directed by the judge to the accused,[88] a process that could have assisted with the ultimate question: Did Garcia voluntarily abandon his right to an interpreter? This deficiency reinforces the need for a contemporaneous record.

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83. *Id.* at 611.
84. *Id.*
85. *Id.* at 617.
86. *Id.* at 611.
87. *Id.* at 612.
88. *Id.*; Garcia v. State, 13-11-00547-CR, 2013 Tex. App. LEXIS 2328, at 5 (Tex. App.—Corpus Christi Mar. 7, 2013) (unpublished). The judge's statement at the new trial hearing indicates that he discussed the topic of waiver with counsel *and* with Garcia. *Id.* No other evidence clearly corroborates this claim.

The dissent noted that Garcia could not have voluntarily waived his rights since coercion became a factor. Garcia faced a choice between having "an interpreter and counsel being unable to concentrate,"[89] or "no interpreter and counsel being able to concentrate."[90] Judge Alcala described this choice between "implementation of one constitutional right, the right to confront witnesses, versus abridgement of another constitutional right, the right to effective assistance of trial counsel" as rendering as involuntary the resulting choice.[91]

Judge Alcala acknowledged the "great strides" Texas had made towards fair trials, but then she conceded that the majority ruling in *Garcia III* represented a regressive decision by permitting a monolingual LEP accused to face not just any criminal trial but a murder trial without assistance from an interpreter. This backward move adversely impacts the growing Latino population in Texas as well as the rapid Latino growth throughout the United States. Non-English speakers and those with only a poor grasp of English comprise approximately nine percent of the population in Texas, or roughly two million people.[92] Judge Alcala expressed her concerns as to the thousands of non-English speakers like Garcia who could appear as defendants in Texas criminal courts and whose linguistic inability made them "entirely dependent on courts to provide language translators for them."[93]

The Alcala dissent also noted that the majority ignored Garcia's appellate complaint that he did not engage in an appropriate waiver by stating:

> An actual waiver colloquy need not be on the record; here, the waiver was not on the record but there was a representation to the trial court by counsel that appellant did not want an interpreter; therefore, the waiver

89. *See Garcia III,* 429 S.W.3d. at 612. As a prosecutor and as a judge, author Salinas has seen circumstances where the interpreter's voice level was loud and distracting. In defense of Garcia's counsel, a former judge and an outstanding trial lawyer, the use of the term "inept" by the dissent to describe counsel and his decision not to want an interpreter comes across as both offensive and unbecoming of the judiciary.

90. *Garcia III*, 429 S.W.3d at 617.

91. *Id.*

92. *See* CAMILLE RYAN, LANGUAGE USE IN THE UNITED STATES: 2011 AMERICAN COMMUNITY SURVEY REPORTS, U.S. Census Bureau 11 (Aug. 2013), *available at* http://www.census.gov/prod/2013pubs/acs-22.pdf (nine percent of Texans surveyed in 2010 who spoke a non-English language at home rated their English-speaking ability as "not at all," the highest of any state).

93. Garcia v. State, 429 S.W.3d 604, 617 (Tex. Crim. App. 2014).

> was valid. The fallacy in this reasoning is that it erroneously presumes that counsel's statement to the trial court indicating that appellant did not want an interpreter constituted a valid waiver of appellant's constitutional rights, the issue of which was the disputed matter before the Court and which this Court never addressed.[94]

Judge Alcala, along with two other jurists, vigorously questioned the majority's claim that the accused made an explicit waiver. Arguably, proof of such an abandonment is lacking. In addition, the trial judge never addressed Garcia directly to inform him of the consequences of a waiver of an interpreter. Even though the majority jurists concluded that a litigant does not waive his fundamental rights "unless he says so plainly, freely, intelligently, sometimes in writing and always on the record,"[95] they proceeded to approve the waiver on the basis of Garcia's "whatever you want" comment to his lawyer. Finally, Judge Alcala questioned the trial judge's failure to utilize the interpreter present in court for the LEP trial witnesses to inquire of Garcia "if he knew he had a right to an interpreter, if he wanted to waive one, and if so, whether his waiver was being made intelligently, knowingly, and voluntarily,"[96] proof necessary to meet the basic rule set forth in the *Johnson v. Zerbst* waiver standard.[97]

III. AN ACCUSED POSSESSES INVALUABLE BUT WAIVABLE CONSTITUTIONAL RIGHTS

In relevant part, the Sixth Amendment mandates that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defen[s]e."[98] In *Pointer v. Texas*, police arrested Pointer and a companion on armed robbery charges. The prosecution took them before a state judge for a preliminary hearing where the prosecutor examined witnesses, even though Pointer did

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94. *Id.* at 618.
95. *Id.* at 618 (citing Marin v. State, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993)) (emphasis removed from original).
96. *Id.* at 620.
97. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).
98. U.S. CONST. amend. VI.

not have a lawyer.[99] The victim testified in detail and identified Pointer as the robber. Pointer did not cross-examine the victim, but he tried to question other witnesses. Before the actual trial, the victim moved to California and did not intend to return to Texas.[100]

At the trial, the prosecutor offered the victim's transcribed testimony as evidence against Pointer, and his lawyer objected on the basis of denial of confrontation.[101] The trial judge overruled the objection since Pointer had the "opportunity of cross examining the witnesses there against him."[102] Upon review, the Supreme Court held that the substitution of the transcript of the victim's hearing testimony for his actual trial testimony denied Pointer the opportunity to have the benefit of counsel's cross-examination of the principal witness against him.[103] The Court further explained that the right of an accused to confront the witnesses against him is a fundamental right made "obligatory on the States by the Fourteenth Amendment."[104] The Court pointed to cross-examination as an integral aspect of the right of an accused to confront the witnesses against him since it is an invaluable tool in "exposing falsehood and bringing out the truth in the trial of a criminal case."[105]

The Sixth Amendment rights previously discussed assume a new twist when the courts address the interpreter rights of the LEP accused. With the demographic changes in the United States, interpreter issues have similarly increased. The LEP accused has accentuated the importance of how the assistance or absence of an interpreter can impact the rights to confrontation and cross-examination of witnesses and the effective assistance of counsel.[106] Fluency of the accused in a language other than English usually compromises these rights if this linguistic barrier is not addressed and corrected.[107]

An LEP accused whose dominant language is Spanish will have a difficult time in being "informed of the nature" of the accusation, in being

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99. Pointer v. Texas, 380 U.S. 400, 401 (1965).
100. *Id.*
101. *Id.*
102. *Id.* at 402.
103. *Id.* at 407-08.
104. *Id*. at 403.
105. *Id.* at 404.
106. *See* U.S. CONST. amend. VI.
107. This article addresses the need for oral language interpreters. The right to sign interpreters for the deaf requires identical constitutional analysis. *See* TEX. CODE CRIM. PROC. ANN. art. 38.31 (West 2013).

"confronted" by the witnesses against him, in having the assistance of his lawyer, and in presenting a complete defense. If the accused does not understand the content of what is being stated under oath, he can neither inform his counsel of the falsity of what the witness stated nor of the existence of witnesses who could rebut the state's testimony. In this entire process, the LEP accused is, for all practical purposes, absent from the trial.

The interpreter issue has been extensively addressed throughout the United States.[108] In a ruling in the early days of California statehood, the state's high court addressed the treatment of an exclusively Spanish-speaking accused named Jacinto Arao whose murder trial was conducted entirely in English without an interpreter.[109] A similar deprivation occurred in an Hidalgo County, Texas death penalty case in the 1880s where the accused was too poor to employ an interpreter. The opinion simply justified the denial of an interpreter since there was no law requiring the court to furnish one for the accused.[110] Through the 1930s, the linguistic indifference and insensitivity continued. One Arizona case did not provide relief since the eyewitnesses testified in Spanish, and they corroborated what the English-speaking witness stated.[111]

It was not until *State v. Vasquez* in 1942 that the need for an interpreter began to gain more respect when analyzed from the perspective of the right to confront witnesses who appeared against the accused.[112] *Vasquez* thus became the first "modern" case where a state court provided protection for a non-English speaking defendant. Like *Garcia* III, *Vasquez* involved a murder allegation mixed with a self-defense claim.[113] Once the first witness began, counsel requested an interpreter because Vasquez was unable to

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108. *E.g.*, Tejeda-Mata v. Immigration & Naturalization Serv., 626 F.2d 721, 728 (9th Cir.1980); United States *ex rel.* Negron v. New York, 434 F.2d 386, 387 (2nd Cir. 1970); Gonzalez v. V.I., 109 F.2d 215, 217 (3d Cir. 1940); State v. Natividad, 526 P.2d 730, 733 (Ariz. 1974); Garcia v. State, 210 S.W.2d 574, 581 (Tex. Crim. App. 1948); United States v. Santos, 397 F. App'x 583, 588 (11th Cir. 2010); United States v. Camejo, 333 F.3d 669, 672 (6th Cir. 2003); United States v. Mata, No. 98-4843, 1999 WL 427570, at *3 (4th Cir. June 25, 1999); United States v. Johnson, 248 F.3d 655, 664 (7th Cir. 2001).

109. LEONARD PITT, THE DECLINE OF THE CALIFORNIOS: A SOCIAL HISTORY OF THE SPANISH-SPEAKING CALIFORNIANS, 1846-1890, at 70-71 (University of California Press, 1966). *See* People v. Jacinto Aro, 6 Cal. Unrep. 207, 208 (Cal. 1856).

110. Livar v. State, 9 S.W. 552, 554 (Tex. Ct. App. 1888).

111. Escobar v. State, 245 P. 356, 359 (Ariz. 1926). In another Texas case, the accused objected to conducting the trial without an interpreter and to the fact his attorneys were unable to speak or understand the "Mexican language." Zunago v. State, 138 S.W. 713, 718 (Tex. Crim. App. 1911).

112. *See* State v. Vasquez, 121 P.2d 903, 905 (Utah 1942).

113. *Id*. at 904.

understand the English-speaking witness.[114] The trial judge denied the request because the right to an interpreter "was a right" the defendant was not entitled to in "an English speaking court."[115] When Vasquez requested to testify in Spanish, along with an interpreter to aid the English-speaking courtroom participants, the prosecution objected.[116] After the court failed to rule on or make an inquiry into the request, the accused retired from the witness stand without testifying.[117] The appellate court reversed on the basis of cumulative errors that denied Vasquez a fair trial.[118]

After *Vasquez*, twenty-eight years passed before, in *Negron v. New York*, two separate federal courts more methodically addressed the constitutional interpreter issue.[119] A native of Puerto Rico, Negron left his wife and children on the island and moved to New York to work on a small farm.[120] During an afternoon of excessive liquor consumption, Negron and DelValle, a fellow worker, engaged in an argument during which time DelValle called Negron a "cabrón," meaning, "cuckold," a term suggesting that Negron's wife cheated on him. Negron angrily lost control, killed DelValle, and alleged it was an accident.[121]

Negron was charged with murder, convicted after a jury trial, and sentenced to prison.[122] Due to his indigent status, he had a legal aid attorney at trial. After his murder conviction was affirmed, the U.S. Supreme Court denied certiorari.[123] Negron then proceeded with a pro se habeas corpus petition in which the judge described the issue as requiring a decision regarding:

> [W]hether there was an obligation upon the State court to advise Negron that, if he so desired, he was entitled to a court-appointed interpreter to translate the testimony of the English-speaking witnesses either for or against him, and whether the failure to so advise Negron and to appoint

114. *Id.* at 905.
115. *Id.* at 906.
116. *Id.* at 907.
117. *Id.* at 911.
118. *Id.* at 907.
119. United States *ex rel.* Negron v. New York, 310 F. Supp. 1304, 1305 (E.D.N.Y. 1970), *aff'd*, United States *ex rel.* Negron v. New York, 434 F.2d 386, 387 (2nd Cir. 1970).
120. United States *ex rel. Negron*, 310 F. Supp. at 1305.
121. *Id.* at 1306 (showing that Negron asserted that the death was accidental).
122. United States *ex rel.* Negron v. New York, 434 F.2d 386, 387-88 (2d Cir. 1970).
123. United States *ex rel.Negron*, 310 F. Supp. at 1305, *cert. denied*, 395 U.S. 936 (1969).

> such an interpreter deprived him of his constitutional rights under the Sixth and Fourteenth Amendments.[124]

The district judge concluded that Negron experienced a denial of his constitutional right to confrontation of witnesses.[125] Notwithstanding Negron's probabilities of guilt, the judge found his trial "lacked the basic and fundamental fairness required by the due process clause of the Fourteenth Amendment."[126] After the judge granted Negron's application for a writ of habeas corpus,[127] the prosecution appealed to the Second Circuit Court of Appeals.[128]

The habeas facts indicate that police investigator Gallardo interviewed Negron and testified to several incriminating statements Negron made regarding his killing the victim. An illiterate and indigent person, Negron "did not comprehend the testimony of the English-speaking witnesses" and could not afford to hire an interpreter.[129] The court recognized that investigator Gallardo provided crucial testimony against him in English, and this diminished Negron's ability to confront his credibility.[130] Under the circumstances, Negron also could not communicate with his monolingual counsel.[131] Thus, Negron could not effectively cross-examine Gallardo and others to test their credibility, memory and accuracy.[132]

In contrast to Gallardo's claims, Negron testified that it was DelValle who had the knife and that the two struggled over it.[133] Of the state's fourteen witnesses, Negron and the other two who testified in Spanish had their testimony translated by the court interpreter for the benefit of the court and the jury.[134] All the others testified in English, and, as a result, "as far as Negron was concerned, the bulk of the testimony of the witnesses against him was unintelligible."[135] The habeas judge, in granting relief, rationalized that the interpreter never provided Negron either with a simultaneous

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124. *Id.* at 1305.
125. *Id.* at 1309.
126. *Id.*
127. *Id.*
128. *See* United States *ex rel.* Negron v. New York, 434 F.2d 386 (2d Cir. 1970).
129. United States *ex rel.* Negron v. New York, 310 F. Supp. 1304, 1307 (E.D.N.Y. 1970).
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.* at 1306.
134. *Id.*
135. *Id.*

interpretation or a substantial summary of the testimony of the English-speaking witnesses, "nor did the court direct her so to do. In other words, it was a one-way street."[136]

The federal district judge found that Negron "neither understood the witnesses nor that he had a right to an interpreter" and that his attorney and the interpreter met with Negron "during two brief recesses in the course of the three-day trial" to communicate, "at least to some extent, the nature of the testimony of the English-speaking witnesses", a claim Negron denied.[137] The judge stated that the ex post facto witness summaries "could not have been complete or verbatim and were hardly sufficient to satisfactorily apprise Negron of the nature and substance of the testimony against him with sufficient precision to enable him or his attorney to conduct a full, effective and contemporaneous cross-examination."[138] The interpreter further regarded herself as "the interpreter for the prosecution" and admitted that she was in court only about half of each of the three days of the trial.[139]

The habeas judge, noting the absence of a federal ruling regarding the right of an accused to an interpreter, acknowledged that several state courts had addressed the issue.[140] One state court concluded that "[m]ere confrontation of the witnesses would be useless, bordering upon the farcical, if the accused could not hear or understand their testimony."[141] After describing how Negron's cross-examination made references to portions of the testimony of prosecution witnesses, the judge commented that "this random and haphazard approach could not protect Negron from the prejudice he may have suffered by not being able to instantly cross-examine these witnesses."[142]

The prosecution argued that Negron was not substantially prejudiced, but the habeas judge rejected this claim, finding the difficulty in assessing prejudice and, as a result, the ability to conclude that the error was harmless beyond a reasonable doubt.[143] As to a waiver of the interpreter, the judge

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136. *Id.*

137. United States *ex rel.* Negron v. New York, 310 F. Supp. 1304, 1307 (E.D.N.Y. 1970).

138. *Id.*

139. *Id*. at 1306-07 (quotations in original).

140. *Id.* at 1307-08 (citing Terry v. State, 21 Ala. App. 100, 105 (1925)).

141. *Id.* at 1308 (quoting Terry v. State, 21 Ala. App. 100, 105 (1925)) (citing Garcia v. State, 210 S.W. 2d 574 (Tex. Crim. App. 1948)) (citing State v. Vasquez, 121 P. 2d 903 (Utah 1942)).

142. *Id.* at 1307.

143. *Id*. at 1308 (citing Chapman v. California, 386 U.S. 18 (1967)).

stated that the "transcript is barren of any evidence to support such a finding."[144] The judge also reaffirmed the "presumption against the waiver of fundamental constitutional rights," stating that courts "must be mindful at all times of the background, experience and general conduct of the accused alleged to have waived the right."[145] Specifically, considering Negron's background, which included his lack of awareness with the New York court system, his failure to ask for an interpreter is understandable.[146] The judge concluded that "neither Negron nor his attorney [could] be charged with a waiver."[147]

Judge Irving R. Kaufman, writing for the Second Circuit Court of Appeals, ruled from the bench that Negron's trial was constitutionally infirm since it lacked adequate interpretation of those English-language portions of his murder trial.[148] In other words, without an interpreter, Negron lost the basic right to realize other incidental constitutional rights. The relevant facts have been discussed. Except infrequently, Negron did not participate in the development of his defense. Incredibly, through the assistance of an interpreter, Negron's attorney conferred directly with him at the jail for twenty minutes before trial.[149]

Later, during the trial, the court interpreter provided Negron mere *ex post facto* summaries of what the witnesses incomprehensibly stated by visiting with him and his lawyer during two short recesses for no more than twenty minutes.[150] The appellate court concluded that these brief and belated Spanish communications hardly sufficed to apprise Negron with sufficient precision to enable him or his attorney to conduct an effective cross-examination.[151] The court described the language neglect as follows: "To Negron, most of the trial must have been a babble of voices. Twelve of the state's fourteen witnesses testified against him in English."[152]

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144. *Id.* at 1309.

145. *Id.* (citing United States v. Drummond, 354 F.2d 132, 148 (2d Cir. 1965), *cert. denied*, 384 U.S. 1013 (1966)).

146. Based upon a visit to Puerto Rico, author Salinas found that trials in local courts are conducted in Spanish while federal court trials, which are conducted in English, necessarily utilize interpreters extensively.

147. United States *ex rel. Negron*, 310 F. Supp. at 1309.

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

149. *Id.* at 388.

150. *Id.*

151. *Id*. at 389. The right to be confronted with adverse witnesses, applicable to the states through the Fourteenth Amendment, includes the right to cross-examine those witnesses. Pointer v. Texas, 380 U.S. 400, 405 (1965).

152. *Negron*, 434 F.2d at 388.

Judge Kaufmann expressed greater concern over the loss of a right that "seems to us even more consequential than the right of confrontation. Considerations of fairness, the integrity of the fact-finding process, and the potency of our adversary system of justice forbid that the state should prosecute a defendant who is not present at his own trial unless by his conduct he waives that right."[153] The Second Circuit further declared that Negron's inability to respond to specific testimony would inevitably hinder effective cross-examination, adding, "[n]ot only for the sake of effective cross-examination, however, but as a matter of simple humaneness, Negron deserved more than to sit in total incomprehension as the trial proceeded."[154] The appellate court voided the state prosecution since the accused, for all practical purposes, was "not present at his own trial."[155] After all, to be considered "present," the accused should "possess sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding."[156]

The *Negron* appellate decision established that where an accused is limited only to comprehension in Spanish, protection of his constitutional rights requires the services of a competent interpreter. The court described as callously inappropriate for a multilingual nation's criminal justice system to prosecute an accused with a "crippling language handicap" without providing an interpreter.[157] *Negron* thus became a landmark case that set the standard for the rights of non-English speakers to be present at and participate in criminal court proceedings, to confront witnesses, and to enjoy the effective assistance of counsel. The well-reasoned opinion perhaps explains why the Supreme Court has seldom addressed the right to an interpreter issue.

While progress has generally occurred, LEP Latinos who currently face criminal accusations encounter injustices in both federal and state courts. One area of conflict centers on the decision whether an accused needs an interpreter. This issue usually involves Latinos and others who might understand or speak "some English." Latinos know blacks and

153. *Id.* at 389 (citing Illinois v. Allen, 397 U.S. 337 (1968)) (citation omitted).

154. *Id.* at 390. In a hearing before the habeas judge, Negron testified: "I knew that I would have liked to know what was happening but I did not know that they were supposed to tell me." *Id.*

155. *Id*. at 389.

156. *Id.*; *see* Drope v. Missouri, 420 U.S. 162, 171 (1975) ("…a person whose mental condition is such that he lacks the capacity to understand the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to trial.").

157. *Negron*, 434 F.2d at 390.

Anglos who speak "some Spanish." If accused in a criminal case, these non-Latinos will not be able to comprehend a trial in Spanish in a Latin American nation nor can they carry on a comprehensible conversation. Neither should a Latino who is not fluent in English face the impossibility of fully understanding the nature of a criminal accusation and the claims being made by witnesses or of testifying articulately about what occurred.[158]

Uniformity regarding the implementation of language access in the courts is essential to a fair and just system. This need is even more imperative in a bifurcated court system where federal and state courts coexist and have their respective obligations to interpret the application of federal and state constitutional rights. The concept is well-settled that the federal constitution and statutes provide the "supreme law of the land."[159] In addition, while the interpretation of the Bill of Rights is granted to both federal and state courts, the minimum protections provided are those set forth by the federal courts.

For instance, a state's legislature or the highest appellate court may provide an accused with more protection than that granted by federal courts. Where this occurs, principles of comity—the mutual respect between the two governments—prescribe that federal courts will respect the state's provision of more extensive safeguards.[160] However, if the state court desires to grant more protection than the federal courts dictate, it must indicate "clearly and expressly" that its decision rests on "bona fide separate, adequate, and independent state grounds," such as the state constitution.[161] Otherwise, where a state court decision fairly appears to rest primarily on federal law, or intertwined with federal law, and the adequacy of any state-law ground is not facially apparent, the U.S. Supreme Court presumes that federal law controlled the state court's decision.

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158. Gonzalez v. Virgin Islands, 109 F.2d 215, 217 (3d Cir. 1940) (Since the two accused men had resided in an English-speaking community for a considerable period and since each gave statements in English to the chief of police, their claim of ignorance of English seems highly improbable); Luera v. State, 63 S.W.2d 699, 701 (Tex. Crim. App. 1933) (Evidence existed that Luera could speak English).

159. U.S. CONST. art. VI, cl. 2.

160. Michigan v. Long, 463 U.S. 1032, 1040-41 (1983). In discussing the jurisdictional conflicts between state and federal courts, the Supreme Court expressed the belief that the showing of independent state grounds by local courts in their opinion will allow these state courts "an opportunity to develop their jurisprudence unimpeded by federal interference, while simultaneously preserving the integrity of federal law." *Id.* at 1041.

161. *Id.*

IV. STRUCTURAL AND TRIAL ERRORS AND THE WAIVER OF FUNDAMENTAL CONSTITUTIONAL RIGHTS

Most of the issues that arise in a criminal proceeding address infringements of federal constitutional rights of the accused. These violations, which take place during a trial, are referred to as "trial errors." Today's rule is radically different from the rule of appellate review adopted by the English courts in the mid–1800s when the erroneous admission or exclusion of evidence was presumed to have caused prejudice that required a new trial. The courts applied this presumption to even insignificant items of evidence and errors in jury instructions. Consequently, retrials became so routine that critics mockingly described English litigation as "terminated only by the death of one of the parties."[162] Parliament responded with the passage of harmless-error legislation that barred a new trial on the basis of improperly admitted evidence or an incorrect jury instruction unless the appellate court found a "substantial wrong or miscarriage has thereby been occasioned," determined by assessing whether the error was likely to impact the outcome of the case.[163]

As with other aspects of English common law, American courts adopted the English harmless-error rule. However, when the English rejected the rule, American judges not only adhered to the old rule but also expanded the rule to cover a wide range of trial errors, "requiring new trials no matter how technical or seemingly insignificant the error."[164] As the retrials mounted, reformers urged adoption of harmless-error legislation, and, during the early 1900s, a substantial number of states adopted such legislation. Many others later modeled their statute after the 1919 federal harmless-error statute.[165]

The harmless-error rule rose to prominence by virtue of the holding in *Chapman v. California*.[166] According to *Chapman*, "all fifty states have harmless-error statutes or rules," joining the federal government which operated since 1919 under a statute that federal court judgments shall not be reversed for "errors or defects which do not affect the substantial rights of the parties."[167] *Chapman* concluded that some constitutional errors, "in the

162. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 1555 (13th ed. 2012).
163. *Id.*
164. *Id.*
165. *Id.* at 1556.
166. *See generally* Chapman v. California, 386 U.S. 18 (1967).
167. *Id.* at 22 (citing 28 U.S.C. § 2111 (2014)).

setting of a particular case, are so unimportant and insignificant that they may," "consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."[168] In deciding what constitutes a harmless trial error, the Court in *Fahy v. Connecticut* stated: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[169] *Chapman* pointed to prior cases as examples of "some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error."[170]

In contrast to a mere harmless trial error, a structural error includes federal constitutional errors that establish a "defect affecting the *framework* within which the trial proceeds, rather than simply an error in the trial process itself."[171] If a structural error exists, then questions related to harmlessness are inapplicable. In other words, even if the evidence of guilt is overwhelming, the presence of a structural error discards the guilty verdict based upon the lack of fairness in the criminal proceedings.[172]

Arizona v. Fulminante, which involved the murder of the defendant's 11-year-old stepdaughter, addressed the structural error rule.[173] Fulminante called police to report the child missing, but his inconsistent statements immediately caused suspicion.[174] He thereafter moved to another state where he was charged as a felon in possession of a firearm.[175] Once in federal prison, he met a man who actually operated as a government agent.[176] After falsely telling Fulminante that he heard of possible threats from other inmates because of rumors that he had killed the young girl, the agent offered protection in return for Fulminante's telling him about the incident.[177] Fulminante agreed and confessed.[178]

The Arizona Supreme Court concluded the confession had been coerced, but the majority found that overwhelming evidence of guilt

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168. *Id.* at 22.
169. Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963).
170. *Chapman*, 386 U.S. at 23. Chapman cited as exemplary the cases of Gideon v. Wainwright, 372 U.S. 335 (1963) (total deprivation of counsel); Payne v. Arkansas, 356 U.S. 560 (1958) (coerced confession); and Tumey v. Ohio, 273 U.S. 510 (1927) (trial before a biased judge). *Id*. at n. 8.
171. Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (emphasis added).
172. *Id*. at 288 (citations omitted).
173. *Id.* at 282.
174. *Id*.
175. *Id.*
176. *Id.* at 282-83.
177. *Id.* at 283.
178. *Id.*

rendered the admission harmless.[179] The court reconsidered its ruling, reversed the conviction, and ordered a retrial without the agent's coerced confession, concluding that U.S. Supreme Court precedent barred a harmless-error analysis in cases of coerced confessions.[180]

The U.S. Supreme Court agreed with Arizona's determination that Fulminante's confession to a government agent had been coerced by a threat of physical violence.[181] Recognizing that "coercion can be mental as well as physical," the Court found that this threat overpowered Fulminante into confessing in order to receive protection from other prisoners.[182] The Court had previously held that the Due Process Clause bars convictions based on confessions that result from coercion, either physical or psychological, even if the statements made by the accused appear truthful.[183]

However, the *Fulminante* majority departed from this precedent and held that the harmless-error rule applies to a coerced confession.[184] Proceeding under this new standard, the Court nonetheless affirmed the state court judgment and found that the admission of the confession was not harmless beyond a reasonable doubt.[185] The plurality of four justices noted that the majority overruled extensive "precedent without a word and in so doing dislodges one of the fundamental tenets of our criminal justice system."[186]

Dissenting in *Fulminante*, former Chief Justice Rehnquist referred to the limited circumstances involving structural errors.[187] In contrast to the majority, the Chief Justice classified the admission of Fulminante's statements as an *involuntary* confession, i.e., a classic "trial error" that is quite distinguishable from other circumstances.[188] Classic structural errors, for example, include *Gideon v. Wainwright* which involved "the total deprivation of the right to counsel at trial"[189] and *Tumey v. Ohio* which

179. *Fulminante,* 499 U.S.at 288.
180. *Id.* at 284-85.
181. *Id*. at 284.
182. *Id.* at 287-88; *accord*, Blackburn v. Alabama, 361 U.S. 199, 206 (1960); Payne v. Arkansas, 356 U.S. 560, 561 (1958) (Interrogating officer promised accused that if he confessed, the officer would protect him from an angry mob outside the jail).
183. Rogers v. Richmond, 365 U.S. 534, 540-41 (1961); *see also Payne*, 356 U.S. at 561.
184. *Fulminante*, 499 U.S. at 288.
185. *Id.* at 285, 288-89, 302.
186. *Id*. at 289.
187. *Id.* at 309-10.
188. *Id.* at 309 (emphasis added; quotations in original).
189. *Id.* (citing Gideon v. Wainwright, 372 U.S. 335 (1963)).

involved a judge who lacked impartiality in that he had a financial interest in the outcome of the case.[190] Chief Justice Rehnquist pointed to these two cases as representing "structural defects in the constitution of the trial mechanism" that "defy analysis by 'harmless-error' standards."[191] In those situations, the "entire conduct of the trial from beginning to end is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial."[192]

Since *Chapman*, the Court has added other examples to the group of structural constitutional errors that, by definition, are not subject to harmless-error analysis. Within this category, the Court has identified the unlawful exclusion of members of the race of the accused from the grand jury that returned the indictment.[193] In these racially-tainted situations, a harmless-error review to assess the sufficiency of the evidence can never satisfy these questions since "discrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review."[194]

Unfortunately, Chief Justice Rehnquist placed the erroneous admission of an involuntary and possibly coerced confession on the same level as that of the admission of illegally obtained evidence in determining whether the harmless-error standard applies to review the conviction.[195] In other words, the confession issue implicates fundamental due process concerns and cannot possibly be compared to the admission of evidence obtained through police misconduct. The exclusionary rule remedy approved by *Mapp v. Ohio* in 1961 has unfortunately been subjected to many exceptions by the Court.[196]

Similar to the exemplary structural defects, denial of language interpreter assistance is of fundamental concern. The Second Circuit in *Negron* compared proceeding against an LEP accused on a murder charge without the assistance of an interpreter to being akin to the exclusion of the

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190. *Fulminante,* 499 U.S. at 309 (citing Tumey v. Ohio, 273 U.S. 510, 535 (1927)).

191. *Id.*

192. *Fulminante,* 499 U.S. at 309-10.

193. *Id.* at 310. (citing Vasquez v. Hillery, 474 U.S. 254 (1986)).

194. *Hillery*, 474 U.S. at 263-64. In *Fulminante*, Chief Justice Rehnquist distinguished the admission of an involuntary confession, a trial error, from a "structural defect" such as the denials of the rights to self-representation at trial and to a public trial. *Fulminante*, 499 U.S. at 310.

195. *Fulminante*, 499 U.S. at 310.

196. *See* Mapp v. Ohio, 367 U.S. 643 (1961); U.S. CONST. amend. IV; *see also* United States v. Leon, 468 U.S. 897 (1984) (good faith); Hudson v. Michigan, 547 U.S. 586 (2006) (social costs to society and option to sue for civil rights deprivation).

accused from his trial.[197] The courts recognize that an accused can be excluded from his trial if, by his conduct, he waives that right, as occurred in *Illinois v. Allen*.[198] Over a century ago, the Court declared that an accused has the right to be present in the courtroom at every stage of his trial, including jury selection.[199] *Allen*, however, involved an exception in that the accused repeatedly engaged in disorderly conduct and speech that obstructed the ability to carry on the trial.[200]

The accused in *Garcia III* did nothing explicitly to waive his "presence." Notwithstanding, many federal courts have mistakenly held that the absence of an interpreter for a non-English-speaking accused during trial does not establish plain error, or, in the alternative, hold that "any actual error was harmless."[201] The accused then has the burden of establishing this plain-error level of scrutiny if they choose to appeal. Thus, although the court concedes an error occurred, the court often concludes that the defendant was not significantly harmed.[202] Even in cases where the error is obvious, courts justify the decision by noting "the absence of an objection to inadequate interpretation at trial and use the absence of an objection as a critical rationale for denying relief."[203]

This argument is severely flawed because it fails to recognize the effects any misinterpretation might have and the inability by the LEP accused to understand the testimony effectively. The accused is the only one who likely knows the factual evidence in its entirety. Even an apparently insignificant fact can play an important role in the jury's determination unless someone, like the accused, can assist in clarifying the

197. United States *ex rel.* Negron v. New York, 434 F.2d 386, 387 (2nd Cir. 1970). *See* Lewis v. United States, 146 U.S. 370, 372 (1892).

198. Illinois v. Allen, 397 U.S. 337, 343 (1970).

199. *Lewis*, 146 U.S. at 376 (failure of the record to disclose presence of the accused merits a reversal of the judgment).

200. *Allen*, 397 U.S. at 346.

201. Will Turner, *Que Dijo? The Plain Error Rule's Effective Denial of Due Process to Non-English-Speaking Criminal Defendants,* 3 ALA. C.R. & C.L. L. REV. 141, 141 (2013); *see also* United States v. Santos, 397 F. App'x 583, 588 (11th Cir. 2010); United States v. Camejo, 333 F.3d 669, 672 (6th Cir. 2003).

202. For statutory methods to address forfeitures and waivers in federal proceedings, *see* United States v. Olano, 507 U.S. 725, 732-35 (1993); *see also* FED. R. CRIM. P. 52 (a) and (b).

203. *See* Will Turner, *Que Dijo? The Plain Error Rule's Effective Denial of Due Process to Non-English-Speaking Criminal Defendants,* 3 ALA. C.R. & C.L. L. REV. 141, 146 (2013); *see, e.g.,* United States v. Gonzales, 339 F.3d 725, 728-729 (8th Cir. 2003); United States v. Camejo, 333 F.3d 669, 672 (6th Cir. 2003); United States v. Santos, 397 F. App'x 583, 588 (11th Cir. 2010).

issue. Consequently, the absence of an interpreter can have devastating results regarding the right to confrontation.[204]

Clearly, the *Garcia III* error undermined the fairness of the criminal proceeding as a whole and significantly harmed Garcia by depriving him of numerous constitutional rights. Since the court did not determine that Garcia entered into an explicit and unambiguous waiver of his rights, the error adversely impacted the entire trial. Garcia's trial without assistance from an interpreter constituted a structural error that affected every aspect of the trial. This defect infected the trial from the inception in that Garcia was not afforded the same protections as others who understand and speak English. He was unable to catch critical and, at times, apparently insignificant testimony that could have been overlooked by counsel. Garcia, and not his attorney, would be the only person to know the noteworthy and pertinent details. Although Garcia's attorney agreed to provide a brief summary during a break in court proceedings of each witness's testimony,[205] this procedure is inherently insufficient to protect Garcia's right to confrontation. Effective cross examination confrontation—by which Garcia could assist in identifying contradictions that only Garcia would be able to know—is lost if there is no interpreter.

Rather than deeming waiver of vital rights presumptively unavailable, the Supreme Court adheres to the opinion that a right can be waived.[206] Even the "most pervasive" of all rights,[207] the Sixth Amendment right to counsel, may be waived if done competently and voluntarily.[208] *Johnson v. Zerbst*, a federal case that addresses this right, continues to be regarded as the leading authority regarding the waiver doctrine.[209] In *Zerbst*, after the

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204. For statutory methods to address forfeitures and waivers in federal proceedings, *see* United States v. Olano, 507 U.S. 725, 732-35 (1993); *see also* FED. R. CRIM. P. 52 (a) and (b).

205. Garcia v. State, 429 S.W.3d 604, 605 (Tex. Crim. App. 2014).

206. For instance, in a capital murder allegation, the Court found an accused, by pretrial agreement to a lesser charge, knowingly and voluntarily waived his double jeopardy defense. Ricketts v. Adamson, 483 U.S. 1, 10 (1987).

207. Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).

208. Johnson v. Zerbst, 304 U.S. 458, 465 (1938).

209. *Id.*; *see* Edwards v. Arizona, 451 U.S. 477, 488 (1981) (Burger, J., concurring) (whether resumption of interrogation is a result of a voluntary waiver should be resolved under the traditional standards established in Johnson v. Zerbst); *see also* Fare v. Michael C., 442 U.S. 707, 724-725 (1979); North Carolina v. Butler, 441 U.S. 369, 374-375 (1979); Brewer v. Williams, 430 U.S. 387, 404 (1977); Faretta v. California, 422 U.S. 806, 835 (1975) (for the position that the traditional *Zerbst* waiver doctrine maintains its dominance as the leading standard).

accused was convicted, the judge denied habeas corpus relief even though he believed Johnson was deprived of his right to counsel.[210] During the detention of Johnson and an alleged partner, who remained in jail due to inability to provide bail, counsel assisted them in pre-indictment matters.[211] Yet, once the indictment issued, the two men appeared before the judge who immediately arraigned, tried, convicted, and sentenced them to over four years in prison without the assistance of counsel.[212]

Johnson admitted he had not requested counsel from the trial judge, although he had made this request to the prosecutor. The prosecutor denied that Johnson asked him for counsel or that he told Johnson he did not have a right to counsel for a non-capital crime.[213] Once the issue reached the U.S. Supreme Court, *Zerbst* discussed how the Sixth Amendment guarantee of the assistance of counsel served as a safeguard of fundamental human rights of life and liberty in the effort to establish barriers against arbitrary or unjust deprivations.[214] The Court further stated that a judge, in a criminal proceeding, lacked the authority to deprive an accused of his liberty unless the accused has a lawyer or waives the assistance of counsel.[215]

Waiver generally denotes relinquishment, renunciation, and abandonment. As to what a waiver requires, the Court stated that judges should "indulge every reasonable presumption against waiver" of fundamental rights and should not "presume acquiescence in the loss of fundamental rights."[216] When directly alerted to an issue of constitutional concern, the trial judge's obligations increase with greater reason.[217] As *Zerbst* dictates, a "waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in

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210. *Zerbst*, 304 U.S. at 459.
211. *Id*. at 460.
212. *Id.*
213. *Id.* at 460-61. The prosecutor apparently talked to Johnson about the practice of not appointing counsel. How else would the accused Johnson, a lay person, know of the existing distinction and customary practice regarding counsel for capital and non-capital crimes?
214. *Id.* at 462-63.
215. *Id.* at 463.
216. *Id.* at 464 (citations omitted); *accord*, Glasser v. United States, 315 U.S. 60, 70-71 (1942) (A presumption exists against the unspoken waiver of constitutional rights; the trial judge is entrusted with the duty to assure that the trial is conducted with alertness for protection of the essential rights of the accused.).
217. Glasser v. United States, 315 U.S. 60, 72 (1942).

each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[218]

In *Carnley v. Cochran* the accused was not granted counsel on felony charges, alleging incestuous sexual intercourse with and fondling of his minor daughter.[219] Carnley's offenses were included within the state's Child Molester Act, a provision that did not include incest until the act was amended subsequent to the date of the allegation against Carnley.[220] Certain portions of the same statute authorized only jail sentences, permitted the accused to petition for a psychiatric or psychological examination to assist the court, and provided for commitment of a convict to a state hospital for rehabilitation.[221]

The Court found Carnley's prosecution without a lawyer failed to meet the protections afforded by the Due Process Clause of the Fourteenth Amendment.[222] The unfairness of trying Carnley without a lawyer was magnified by the judge's shortcomings as to the instructions and his inability to discharge effectively the roles of both judge and defense counsel. The judge tried to assist Carnley, but there were important omissions related to whether the accused should testify and what "consequences might follow if he did testify. He chose to testify and his criminal record was brought out on his cross-examination."[223]

The Court noted other events, which served to "accentuate the unfairness of trial without counsel. Petitioner is illiterate. He did not interpose a single objection during the trial," and the only two witnesses against him, his daughter and a 15-year-old son, testified without being subjected to any meaningful "cross-examination worthy of the name."[224] Since "the record does not show that the trial judge offered and [Carnley] declined counsel," the Court held that a trial without the assistance of counsel, unless intelligently and understandingly waived by him, resulted in a violation of his rights under the Fourteenth Amendment.[225] As previously mentioned, *Carnley* issued this warning: "Presuming waiver from a silent

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218. *Zerbst*, 304 U.S. at 464.
219. Carnley v. Cochran, 369 U.S. 506, 506-07 (1962).
220. *Id.* at 507-08.
221. *Id.* at 509-10.
222. *Id.* at 510 (citing Rice v. Olson, 324 U.S. 786, 789-791 (1945) (Plea of guilty did not waive constitutional right to counsel; a question concerning the power of a state court to try an Indian for burglary indicates the complex issues that required counsel.)).
223. *Id.* at 511.
224. *Id.* at 511-12.
225. *Id.* at 512-13.

record is impermissible. The record must show, *or there must be an allegation and evidence which show*, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."[226]

Another relevant case, *Boykin v. Alabama*, involved the reversal of a robbery conviction, which resulted from pleas of guilty to five counts punishable each from 10 years to death.[227] As the trial approached, the judge determined that Boykin was indigent, appointed counsel, and, only three days later, during the arraignment, Boykin entered his pleas; nothing in the record reveals either that the judge asked questions concerning the plea or that Boykin addressed the court.[228] Thus, nothing on the record could establish the voluntariness of Boykin's guilty pleas, a prerequisite to an affirmative and competent waiver of his constitutional rights.

Boykin, a young African American, entered his pleas to a jury that under state law had to decide the punishment, including death.[229] The prosecution presented eyewitness testimony, but appointed counsel conducted only a brief and token cross-examination, perhaps since the three-day period before the plea did not provide sufficient preparation.[230] His counsel presented neither Boykin as a witness nor any character evidence on his behalf, even though nothing indicated that Boykin had a prior criminal record.[231] The jury found Boykin guilty and sentenced him to death.[232]

The Alabama Supreme Court upheld the conviction, although three of the seven justices dissented, criticizing the inadequacy of the record, which failed to establish that Boykin intelligently and knowingly pleaded guilty.[233] The U.S. Supreme Court agreed with the dissenting state justices and reversed the conviction, since the record lacked evidence that the accused voluntarily and understandingly entered his pleas.[234] The Court explained that a valid plea of guilty effectively waived the right to trial by jury, the right to confrontation of the witnesses against the accused, and the privilege against compulsory self-incrimination. The Court rejected an implicit

226. *Id.* at 516 (emphasis added).
227. Boykin v. Alabama, 395 U.S. 238, 240 (1969).
228. *Id.* at 239-40.
229. *Id.* at 240.
230. *Id.*
231. *Id.*
232. *Id.*
233. *Id.* at 241.
234. *Boykin*, 395 U.S. at 243-44.

waiver of these rights. Instead, *Boykin* required an explicit waiver, which could not be presumed from a record lacking any clear comments in this regard.[235]

U.S. Supreme Court authority mandates procedural safeguards to ensure the knowing and voluntary abandonment of a right. These requirements are particularly critical in view of the reality that the fifty state court jurisdictions could have distinctive waiver interpretations. For instance, in *Marin v. State*, the Texas Court of Criminal Appeals addressed the trial judge's ability to classify the legislatively-dictated ten-day trial preparation period as unessential or whether the right is one that required an explicit waiver that could be raised for the first time on appeal in the absence of an objection at trial.[236] Once the trial proceeded without an objection, Marin arguably waived his right to complain on appeal of the trial court's failure to allow additional preparation time.[237]

Marin recognized that certain rights of an accused are forfeited by a failure to exercise them.[238] On the other hand, some rights are so fundamental that they merit special protection and cannot be forfeited by inaction. Instead, an accused who wants to relinquish such a right must do so expressly.[239] These fundamental rights cannot be waived because an accused did not object. Instead, the state must first obtain his consent to ignore these rights by obtaining an "express" waiver.[240] *Marin* distinguished fundamental rights from other types of rights that are forfeited or procedurally defaulted, if the accused does not clearly request them.

Marin identifies "jurisdiction" of the courts as one category of "nonwaivable, nonforfeitable" obligations, citing the example that a person, *even if he consents*, may not be tried in Texas for a felony by a county court at law.[241] A second category describes rights considered so fundamental to the proper functioning of the adjudicatory process that they warrant special protection.[242] These rights must be implemented by the system, unless expressly waived. An example is the right to have an interpreter present during a trial. In this situation, the judge must appoint an interpreter unless

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235. *See id*. at 242-43.
236. Marin v. State, 851 S.W.2d 275, 280 (Tex. Crim. App. 1993).
237. *Id.* at 277.
238. *Id.* at 278.
239. *Id.* at 278-79.
240. *Id.* at 279 (citing Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).
241. *Id.* (emphasis added).
242. *Id*. at 278.

the accused wishes, for whatever strange reason, to abandon or waive this right.

A final category includes those rights that are to be implemented upon request, with forfeiture or procedural default applying only to this category.[243] In contrast, waivable rights do not disappear so easily. Mere silence does not suffice. An accused can abandon fundamental rights, but he can never be "deemed to have done so in fact unless he says so plainly, freely, and intelligently, sometimes in writing and always on the record."[244]

A judge has an independent duty to implement fundamental rights absent an effective and unambiguous waiver by the accused. The ten-day preparation rule is one of those rules that define what is a tolerably fair trial under the Texas justice system, since disregard of this protective rule necessarily undermines confidence in the outcome of trial. The reasoning behind this view centers, for one, on the integrity of the justice system. This necessarily includes observance of the view that our system of justice should void an unconstitutional practice and grant a new trial, even if the evidence was overwhelming and the jury would have convicted the accused in a trial conducted with the observance of all the fundamental rights, such as having counsel by his side.[245]

Even though the rights belong to the accused, circumstances exist when counsel can effectively enter a waiver. Generally, fundamental structural rights can be waived only by the accused. If an accused desires to proceed *pro se*, as authorized under *Faretta v. California*, he may waive his constitutional right to assistance of counsel "if he knows what he is doing and his choice is made with eyes open."[246] Otherwise, in most cases, an attorney controls the representation and might unilaterally, on behalf of her client, waive one of the three types of rights discussed in *Marin*. A major question arises as to counsel's authority to act in lieu of and without consulting the client.

Acceptance by the accused of assistance of counsel does not automatically translate into a waiver or relinquishment of other rights, particularly Sixth Amendment rights. Of course, when an accused accepts a

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243. *Id.*

244. Marin v. State, 851 S.W.2d 275, 279-80 (Tex. Crim. App. 1993); *see* Glasser v. United States, 315 U.S. 60, 71 (1942) (The trial judge possesses the duty to ensure that the trial is conducted with attentiveness for the essential rights of the accused.).

245. *Marin*, 851 S.W.2d at 281.

246. Faretta v. California, 422 U.S. 806, 835 (1975) (citing Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279 (1942)).

hired or appointed lawyer to manage and present his case, "law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas."[247] One exemplary area involves counsel's unilateral agreement to selection of a jury before a U.S. magistrate judge as opposed to before the U.S. district court judge. The Supreme Court upheld this type of decision since it involved the attorney's discretionary trial strategy and scheduling powers.[248] On behalf of the accused, counsel can decide other rights that address the client's permissive rights.[249]

The Supreme Court, on the other hand, has enumerated certain rights that are not generally available for unilateral waiver by counsel. For example, *Brookhart v. Janis* held that the right of an accused to plead not guilty and to have a trial where he could confront and cross-examine adversary witnesses cannot be waived by his counsel without his explicit consent.[250] Brookhart unequivocally stated he would not plead guilty, but his lawyer nonetheless agreed to a "truncated" trial proceeding that effectively permitted the prosecution to call witnesses solely to establish the elements of the crime and, pursuant to state procedure, barred defense counsel from offering evidence or cross-examining any witnesses.[251]

While Brookhart expressly waived his right to a jury trial, he never explicitly or implicitly pleaded guilty. Under these circumstances, the Court held that counsel for the accused did not have the authority to waive the constitutional rights of an accused.[252] The Court reaffirmed the presumption against the waiver of constitutional rights as well as the need to establish clearly on the record that the accused intentionally relinquished or abandoned a known right.[253]

On the other hand, confronted with a distinct fact situation involving an uncooperative accused, the Court later conceded that circumstances can

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247. *Faretta*, 422 U.S. at 820.

248. *See* Gonzalez v. United States, 553 U.S. 242 (2008); *see also* New York v. Hill, 528 U.S. 110, 114-15 (2000) (Counsel's waiver of speedy trial upheld as scheduling matter for lawyer's benefit.).

249. *See* United States v. Olano, 507 U.S. 725, 729, 735-36 (1993) (Counsel's unilateral decision without consent or input by client to allow alternate jurors to enter deliberation room with regular jurors not error since the rule is permissive.); *see also* Taylor v. Illinois, 484 U.S. 400, 404 (1988) (Counsel maintains control over important decisions regarding the management of the trial, including failing to list witnesses.).

250. Brookhart v. Janis, 384 U.S. 1, 4 (1966).

251. *Id.* at 6-7.

252. *Id.* at 7.

253. *Id.* at 7-8; *see* Glasser v. United States, 315 U.S. 60, 70 (1942); *see also* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

justify an attorney having to make critical decisions without the explicit input of the client.[254] While an attorney does not have to obtain consent for every tactical decision made during a trial,[255] certain decisions to waive basic trial rights are so significant that they cannot be made by an agent or counsel for the accused. As a general rule, an accused has the "ultimate authority" to decide whether to plead guilty.[256] Concerning waivers of fundamental rights, an attorney must consult with and obtain consent of the accused to take the recommended action.[257] While a guilty plea may be an advantageous and strategic move for the accused, a guilty plea, as a general rule, exceeds the description of strategy and effectively operates as a conviction.[258] Consequently, counsel lacks authority to consent unilaterally to a guilty plea for her client, and any agreement by the client has to be explicit and unambiguous.[259] The client's mere tacit acquiescence to plead guilty is insufficient.[260]

In contrast, *Florida v. Nixon* permitted counsel's trial strategy of conceding guilt before the jury on behalf of his obstinate client, even though it served as "the functional equivalent of a guilty plea."[261] The Court proceeded to distinguish *Nixon* from *Boykin* where the guilty plea effectively served as a "stipulation that no proof by the prosecution need be advanced."[262] In *Nixon*, counsel maintained the right to confront witnesses, to exclude prejudicial evidence, and, in the event of trial errors, to the right to appeal, which include procedures waived in a traditional guilty plea,[263] and abandoned in a waiver of a plea of guilty.

The Court further distinguished the full presentation of evidence to the jury in *Nixon* from that of the abbreviated proceeding in *Brookhart v. Janis*, involving a shortened bench trial at which the State would be relieved of its complete obligation to present proof of guilt, where guilt was not contested, and that fairly resembled a guilty plea.[264] The Court, accordingly, created the *Nixon* exception to the *Boykin* explicit waiver requirement.[265] Since

254. *See* Florida v. Nixon, 543 U.S. 175 (2004).
255. Taylor v. Illinois, 484 U.S. 400, 417-18 (1988).
256. *Nixon*, 543 U.S. at 187 (citing Jones v. Barnes, 463 U.S. 745, 751 (1983)).
257. *Id*. at 187.
258. *Id.* (citing Boykin v. Alabama, 395 U.S. 238, 240, 242 (1969)).
259. *Id.* at 187-88 (citing Boykin v. Alabama, 395 U.S. 238, 242 (1969)).
260. *Id.*
261. *Id.* at 188 (citing Nixon v. Singletary, 758 So. 2d 618, 624 (2000)).
262. *Nixon*, 543 U.S. at 188 (citing Boykin v. Alabama, 395 U.S. 238, 242-43 (1969).
263. *Id.*
264. *Id.*
265. *See Nixon*, 543 U.S. 175 (2004); *Boykin*, 395 U.S. at 242, 244.

counsel repeatedly explained his proposed trial strategy, and Nixon constantly refused to answer him, he was not required to continue his futile attempts to gain express consent before conceding Nixon's guilt.[266] In the exceptional *Nixon* situation, Justice Ginsburg found counsel's admission of guilt to the jury was not unreasonable.[267] The justice saw that counsel sincerely believed the concession would minimize chances of confusing the jury and would maximize the possibility of more credibly presenting and proving mitigating aspects in order to spare his client's life.[268]

V. AN ACCUSED WHO CANNOT UNDERSTAND THE TESTIMONY IS NOT MENTALLY PRESENT, IS UNABLE TO CONFRONT THE WITNESSES, AND IS LESS ABLE TO ENJOY THE ASSISTANCE OF COUNSEL

Negron, the leading case on the right to an interpreter, possesses many similarities to and distinctions from *Garcia III*. While Negron could not communicate directly with his counsel, Garcia had the full ability to converse with his.[269] In *Negron*, an interpreter in two brief recesses provided Negron with summaries of the witnesses' testimony while Garcia's counsel provided him with the same service only after "harmful" comments were made by witnesses.[270] In both cases, the judges obviously knew of the linguistic limitations of the accused, a condition the *Negron* appellate court found to be "as debilitating to his ability to participate in the trial as a mental disease or defect. But it was more readily 'curable' than any mental disorder."[271]

The need for clarity and consistency on the Court's commitment to the confrontation clause requires some adjustments. Obviously, our jurisprudential adherence to the principle of *stare decisis* creates obstacles to the modification of precedents. Professor Justin Driver recognizes the belief, among many jurists, that consistency in decisions is essential to one's reputation, but Driver observes that "judicial inconsistency itself

266. *Nixon*, 543 U.S. at 189.
267. *Id.* (rationalizing that the deficiency standard of *Strickland v. Washington* more appropriately applied in *Nixon* to determine if trial counsel's concession strategy was unreasonable and adversely affected the outcome of the trial); *see* Strickland v. Washington, 466 U.S. 668 (1984).
268. *Nixon*, 543 U.S. at 190-91.
269. United States *ex rel.* Negron v. New York, 434 F.2d 386, 388 n. 2 (2d Cir. 1970).
270. Garcia v. State, 429 S.W.3d 604, 605 (Tex. Crim. App. 2014).
271. *Negron*, 434 F.2d at 390.

often contains considerable virtue, as it demonstrates a willingness to engage in continued contemplation and reflection—traits that excellent judges must possess."[272]

Professor Driver discussed the experiences of several Supreme Court Justices, including John Paul Stevens and Harry Blackmun, as they adjusted their views on certain issues. These two justices had reputations as moderate conservatives when they joined the Court, but they made a leftward shift in their later years on the bench, particularly with regards to the death penalty.[273] Justice Felix Frankfurter acknowledged this inevitable change in judicial views when he stated, "Wisdom too often never comes, and so one ought not to reject it merely because it comes late."[274] Justice Robert Jackson stated the same concept quite eloquently in *Massachusetts v. United States* when he stated, "I see no reason why I should be consciously wrong today because I was unconsciously wrong yesterday."[275]

Driver's comments serve as a segue to our recommendation that the Supreme Court assume the courage displayed by those jurists willing to acknowledge that they ruled imperfectly. Justices on the Court will hopefully confess that the often cited *Carnley* language requires clarification and a commitment to the guidance provided by *Zerbst*. *Carnley* opened the door to broadening the concept of "record" to include "an allegation and evidence."[276] The use of these quoted words are noteworthy and instructive. A "record" is anything that has been entered in the formal written record of a court proceeding and can be proved by production of

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272. Justin Driver, *Judicial Inconsistency as Virtue: The Case of Justice Stevens*, 99 GEO. L.J. 1263, 1265 (2011).

273. *Id*. at 1270-71, 1274, 1277("leftward trajectory" of Justice Stevens); *see* Baze v. Rees, 553 U.S. 35, 81 (2008) (Stevens, J., concurring) (Full recognition of the diminishing force of the principal rationales for retaining the death penalty should lead this Court and legislatures to reexamine the question recently posed by Professor Salinas, a former Texas prosecutor and judge: "Is it time to Kill the Death Penalty?" *See* Salinas, 34 AM. J. CRIM. L. 39 (2006)); *see also* Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) ("I no longer shall tinker with the machinery of death," complaining that for more than 20 years he had made efforts "to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor.").

274. Driver, *supra* note 272, at 1275 n. 66 (citing Henslee v. Union Planters Nat'l Bank & Trust Co., 335 U.S. 595, 600 (1949) (Frankfurter, J., dissenting)).

275. *Id*. at 1275 n. 67 (citing Massachusetts v. United States, 333 U.S. 611, 639-40 (1948) (Jackson, J., dissenting)).

276. Carnley v. Cochran, 369 U.S. 506, 516 (1962).

that record, such as the court reporter's transcript or statement of facts.[277] The concept of an "allegation" is less certain as to its meaning. As the Court stated in *Carnley*, a trial without counsel represented a manifested constitutional infirmity. Further, where there was not even an allegation of affirmative waiver, much less a showing, the accused was "entitled to relief from his unconstitutional conviction."[278]

Boykin noted that a guilty plea waived several trial rights of the accused, including a jury trial, the confrontation of witnesses, and the privilege against compulsory self-incrimination. The Court would not allow an implicit waiver of these rights and instead required an explicit waiver that could not be presumed from a silent record.[279] *Garcia III* is similar to *Boykin* because Garcia impliedly waived his right to an interpreter. Under the circumstances, the alleged explicit waiver of an interpreter led to the attendant loss of his rights to be present, to confront his accusers effectively, and to the full assistance of counsel. The waiver of confrontation of one's accusers is an important federal right that *Boykin* declares cannot be presumed.

In *Garcia III*, the trial judge did not appear clear about when and how the interpreter waiver was made by stating, "I want to say it was up here on the bench where we were talking, and he said he didn't want one, so it's a waiver."[280] These words suggest an uncertainty that reaffirms the need to conduct such questions on the record.[281] Only in this fashion can all persons involved be definite that the accused actually accepts a trial in which he will be, for all practical purposes, not mentally present. Under the circumstances as described by the judge, one must conclude the waiver did not occur in a fashion that can be classified as a "record," i.e., a documentation of an incident or conversation.

Further, Garcia's attorney admitted he did not inform Garcia of his constitutional right to confront the witnesses against him.[282] Therefore, it appears Garcia impliedly "waived" his right to an interpreter without actually knowing that he had the right to one. All he knew is that his

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277. THE FREE DICTIONARY BY FARLEX, http://legal-dictionary.thefreedictionary.com/matter+of+record (last visited Apr. 12, 2015).

278. *Carnley*, 369 U.S. at 516-17.

279. *See* Boykin v. Alabama, 395 U.S. 238, 242-43 (1969).

280. Garcia v. State, 429 S.W.3d 604, 606 (Tex. Crim. App. 2014).

281. *See Boykin*, 395 U.S. at 244 (citing Commonwealth *ex rel.* West v. Rundle, 428 Pa. 102, 105-06, 237 A. 2d 196, 197-98 (1968) (explaining the concerns about "collateral proceedings that seek to probe murky memories")).

282. *Garcia III*, 429 S.W.3d at 610 (Alcala, J., dissenting).

attorney did not want to have an interpreter because of concerns that the audible interpretation would create a distraction and interfere with his defense duties. Since Garcia never knew of his rights, he did not have the opportunity to weigh the pros and cons of waiving an interpreter.

The authors merely urge that trial judges primarily and appellate judges secondarily, the ultimate arbiters, direct all counsel, both defense and prosecutors, to adhere to constitutional and due process mandates. In order to protect the accused and his constitutional rights, the trial judge must monitor and ensure that those rights dictated as fundamental in the Sixth Amendment are extended to an accused unless he "expressly" waives them. An implied waiver, i.e., one characterized as an obscure, inferred, unstated, or unspoken waiver, must not substitute for the clarity required by *Zerbst* and other Supreme Court authorities. In contrast, for a waiver to be express, it must include synonymously descriptive words such as specifically, explicitly, deliberately, and/or unambiguously. The rights enumerated in protection of an accused, enshrined in the Bill of Rights based on unfair historical experiences, mandate more respect than that afforded in *Garcia III*.

A trial lawyer has a duty to allow the accused to be present and to participate in confrontation of witnesses.[283] Considering counsel's ability in *Garcia III* to reduce the murder punishment to that of a second-degree felony, the authors do not address the reasonably competent professional assistance issue. Instead, the focus is on the need for remedial procedural practices and safeguards to prevent the future loss of valuable constitutional rights. The judge has the primary duty to ensure that the accused knows of his interpreter rights by conducting an oral examination with the assistance of a neutral and certified interpreter. This procedure will permit a recorded determination that the accused competently and voluntarily desires to waive not only the assistance of an interpreter but also the related Sixth Amendment rights.[284]

While an accused has a well-established right to the assistance of counsel, the accused also has the constitutional right to proceed without

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283. *See* Gonzalez v. Phillips, 195 F. Supp. 2d 893, 900 (E.D. Mich. 2001) (Counsel utilized an interpreter for several trial preparation meetings, but not for the trial itself. The failure to obtain an interpreter at trial falls outside the range of reasonably competent professional assistance).

284. *See generally* Barker v. Wingo, 407 U.S. 514, 526 (1972); *Boykin*, 395 U.S.at 242; Miranda v. Arizona, 384 U.S. 436, 475 (1966); *Carnley*, 369 U.S. at 516; *Zerbst*, 304 U.S. at 464.

counsel when he voluntarily and intelligently elects to do so. In *Faretta v. California*, the accused rejected his public defender and asked to represent himself.[285] Faretta had previously represented himself, possessed a high school education, and expressed concerns that the public defender handled too many cases.[286] The judge held a hearing to inquire into the ability of the accused to conduct his own defense and to question him specifically about his knowledge about the hearsay rule and the challenge of potential jurors.[287] The judge reluctantly granted Faretta's waiver of counsel, but he later conducted another hearing and expressed concerns about Faretta's ability to defend himself.[288] The judge reversed his ruling, adding that Faretta had no constitutional right to conduct his own defense.[289]

Upon Faretta's review by the Supreme Court, the Court reversed the actions of the state court on the basis of statutory federal practices, which protected the right of self-representation by providing that "parties may plead and manage their own causes personally" or by the assistance of counsel.[290] The Court went a step further and found support for self-representation in the construction of the Sixth Amendment:

> [I]n all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.[291]

These rights, basic to our adversary system of criminal justice, have become part of the "due process of law" guaranteed by the Fourteenth Amendment to defendants in all U.S. courts. This amendment, adopted in the post-Civil War era, commands "nor shall any State deprive any person of life, liberty, or property, without due process of law."[292]

A reading of the Sixth Amendment not only provides that a defense shall be made for the accused but also grants the accused the personal right

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285. Faretta v. California, 422 U.S. 806, 807 (1975).
286. *Id.*
287. *Id.*
288. *Id*. at 808-09.
289. *Id.* at 810.
290. *Id.* at 812-13 (citing Judiciary Act of 1789, § 35, 1 Stat. 73, 92 (1789) (codified as amended at 28 U.S.C. § 1654 (1949)).
291. *Faretta*, 422 U.S. at 818 (quoting from U.S. CONST. amend. VI).
292. *Id*. (quoting from U.S. CONST. amend. XIV, § 1).

to make his defense. As *Faretta* stated, "It is the accused, not counsel, who must be 'informed of the nature and cause of the accusation,' who must be 'confronted with the witnesses against him,' and who must be accorded 'compulsory process for obtaining witnesses in his favor.'"[293] Simultaneously, the wording of the Sixth Amendment underscores the view that an accused has a vital role in being an integral participant in deciding his or her liberty interests.

When an accused engages in self-representation, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. As a result, it is imperative that before he decides to proceed *pro se*, pursuant to *Zerbst*, the accused must "knowingly and intelligently" relinquish these protective benefits. *Faretta* observed that the accused has to be informed of the risks and detriments of self-representation so that an appellate court will be able to conclude that he knew the consequences of what he decided.[294]

In *Garcia III*, the authors view the unassertive "whatever you want" response by the accused as an uncertain and less-than-eager approval of the decision to proceed without an interpreter. This doubt alone emphasizes why *Zerbst* required a clear and certain record, the *Carnley* allegation comment notwithstanding, that would establish that an accused engaged in a "waiver," i.e., an intentional abandonment of a *known* right or privilege.[295]

An accused cannot act clearly and competently if he is not aware of the ramifications surrounding his decision. In addition, the existence of an intelligent waiver of any fundamental right depends "upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."[296] Apparently, the trial court did not hear evidence of Garcia's familiarity with criminal courts in the United States or of his citizenship. His LEP linguistic circumstances definitely indicate that he was from Mexico or another Latin American country. Additionally, most American court officials are aware that the justice systems of the United States and Latin America blatantly differ in that the

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293. *Faretta*, 422 U.S. at 819; *see also* Gideon v. Wainwright, 372 U.S. 335 (1963) (explaining that the Sixth Amendment's "Assistance of Counsel" language infers that an accused can insist on having counsel directly acting on his behalf on legal matters, a right eventually made applicable to the states by the Supreme Court).

294. *Id.* at 835.

295. Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (emphasis added).

296. *Id.*

Spanish-speaking nations do not provide the accused with the protections our American system requires.

In addition to informing the accused of the consequential loss of several constitutional rights by waiving an interpreter, a judge should have discussed with the accused the availability of options to minimize these very real distractions that Garcia's counsel was concerned about. Undoubtedly, a person of Garcia's cultural and linguistic background should know details of the procedures of a trial before being asked to abandon his right to assistance of an interpreter.

The facts of *Garcia III* demand judicial flexibility and commitment to conducting court reporter-transcribed hearings or colloquies. A proposed remedy should include an automatic pretrial procedure in criminal trials of recording conversational exchanges and dialogues between the judge, prosecutor, accused, and defense counsel which, based on the interpreter waiver in *Garcia III*, could be symbolically memorialized as a *Garcia* hearing. The *Garcia* hearing will provide procedural safeguards in accusations involving LEP defendants. Besides the issue of the voluntariness of a waiver required by *Zerbst*, a *Garcia* hearing would address the issues that author Salinas addressed in a previous article about the questionable ability of monolingual jurists to assess the fluency level and interpreter needs of the LEP accused.[297]

As in the *Faretta*-type hearing, the major, and hardly revolutionary, recommendation in a *Garcia* hearing would include the mandatory transcription by a court reporter of the colloquy between the judge and the accused whenever an issue arose concerning whether the accused would insist upon or abandon certain constitutional rights such as that to an interpreter. Only this approach to the alleged abandonment of the right to be present and to confront witnesses can prevent the result in *Garcia III* of an implied "waiver" of an interpreter and the loss of several related fundamental constitutional protections.

Another issue that remained unanswered is the category of error which best describes the *Garcia III* interpreter waiver. Instead of a trial error, the proceedings in *Garcia III* reflect a type of constitutional error classified as a "structural defect" or error. The U.S. Supreme Court has not issued any

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297. Lupe S. Salinas & Janelle Martinez, *The Right to Confrontation Compromised: Monolingual Jurists Subjectively Assessing the English-Language Abilities of Spanish-Dominant Accused*, 18 AM. U. J. GENDER SOC. POL'Y & L. 543, 552-53 (2010); WEBSTER'S NEW COLLEGIATE DICTIONARY 319 (1958) (The word "fluent" is defined as "Ready in the use of words; voluble; ready; hence, flowing; smooth; facile; as, a fluent speaker.").

opinion that holds a *Garcia III* fact pattern to constitute a structural error. *Negron*, at the federal appellate level, compellingly identifies the interpreter deprivation as structural in nature. By applying *Boykin* and other precedents dealing with structural error, one has ample basis for concluding that the *Garcia III* error amounts to a "structural defect" that violates the Fourteenth Amendment's Due Process Clause.

The error involved in the "waiver" of an interpreter, as well as the errors in the denial of presence and confrontation by the accused, defies analysis by harmless-error assessments because this error affects "the framework within which the trial proceeds."[298] Stated differently, even before the commencement of the trial, the *Garcia III* judge and lawyer made decisions that defined the framework of how the trial would be handled. Without any exact and explicit discussion with the accused actually transcribed on the "record," the judge and the counsel, with the knowledge of the prosecutor, determined that Garcia's appearance without an interpreter, for all practical purposes, amounted to consent on his part that he would not be mentally present since he would not understand the proceedings.

Since a structural error is involved, the need for a clear and unequivocal abandonment of a right to an interpreter is even more imperative. Proceeding without an interpreter results in the deprivation of multiple constitutional protections. With all due respect to the *Garcia III* trial judge, who without a doubt faces incredible time pressures and heavy dockets, the informal approach and judicial acceptance of an alleged waiver inevitably resulted in a ripple effect regarding the deprivations of several fundamental rights. This interpreter issue cannot and should not be classified as a trial error merely because the initial error became more egregious and shocking "during presentation of the case to the jury."[299]

During the *Garcia III* trial, as in the *Allen* removal case, the accused was effectively excluded from the trial and remained ignorant of the proceedings. It was as if he were not present. The accused, the most important person involved, could not understand what was being said about him, rendering confrontation impossible. Accordingly, Garcia could not possibly, as mandated by the Sixth Amendment, enjoy the right to be present and informed of the details of the accusation, to be confronted with

298. Arizona v. Fulminante, 499 U.S. 279, 309-10 (1991).
299. *See id*. at 307-08.

the witnesses against him, and to have the complete assistance of counsel for his defense.[300]

Garcia's ignorance and unawareness of the proceedings, of the testimony, and of the comments by court officials, during the evidence and the jury instructions, resulted in the fundamental right to be present. The fact that counsel's outstanding performance resulted in a reduced punishment does not alleviate the constitutional error committed. Furthermore, the affirmance of *Garcia III* by the Texas Court of Criminal Appeals does not address the very real issue as to whether the proof in the record established that the accused made an explicit waiver, i.e., one made knowingly and voluntarily. Even Garcia's attorney conceded that he had not fully discussed these consequences with the client. Since the Supreme Court denied certiorari, the authors hope that Garcia obtains justice in a collateral attack by establishing a principle that requires as a remedy, a court reporter-transcribed hearing for waivers involving interpreters. If future "Garcias" are shown to have made a waiver knowingly and voluntarily, on a clear and specific record, then justice will have been done.

VI. CONCLUSION

When an accused has been denied counsel at trial, this constitutes a *per se* constitutional error. The Court in *Glasser* stated: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial."[301] Similarly, the official deprivation of assistance by an interpreter and its consequential but unintended forfeiture of critical Sixth Amendment rights to confrontation and assistance of counsel and to the due process right to presence at trial can under no circumstances be tolerated or measured. These interpreter-related limitations impinge on the rights of the LEP accused to be treated equally as persons who are proficient in English. It is impossible to weigh the harm done in these circumstances.

The U.S. Constitution's Sixth and Fourteenth Amendments grant the LEP accused the implicit right to be present during his criminal trial, the explicit rights to confront the witnesses against him, and to have the full and effective assistance of counsel. From these enumerated rights, courts

300. U.S. CONST. amend. VI.
301. Glasser v. United States, 315 U.S. 60, 76 (1942).

have found the implicit right to an interpreter.[302] Only through a capable and trained interpreter can these various rights be protected. By means of the concepts derived from the Fourteenth Amendment due process clause, the accused cannot be deprived of the right to be present during his trial unless his misbehavior prompts his removal.[303]

In *Illinois v. Allen*,[304] the Supreme Court addressed the confrontation rights of the accused when circumstances require his absence from trial due to misbehavior.[305] *Allen* involved a disruptive accused, who contributed to his removal after several warnings. In this situation, the accused effectively abandoned his right to be present. *Garcia III* involved a person unaware of the American justice system, who did nothing to encourage or contribute to the loss of his rights. In the case of this linguistically-challenged accused, however, his LEP status should not be used to deprive him of the same rights other accused English-speaking persons enjoy, i.e., presence and the full comprehension of the proceedings.

Stated differently, the LEP accused might be physically present, yet simultaneously mentally absent and, thus not involved at all in his trial. Only an interpreter can correct this problem. Otherwise, the right of a LEP accused to confront witnesses speaking in English will be lost in the "babble."[306] Proceeding without an interpreter deprives the accused of his right to the assistance of counsel since the accused cannot possibly share with counsel his comments regarding the truth, falsity, or distortion of what the witness stated.

Regardless of the inherent risks in proceeding without an interpreter, judges will permit an accused to waive this right if the LEP accused makes this decision. To do so, however, the accused must be clearly informed that he has this right. Since it is an option designed to assist a LEP accused, the defendant should not be advised, urged, forced, or cajoled by the judge or his lawyer to abandon this right. In *Garcia III*, the decision to forego the assistance of an interpreter could have been avoided. In the four-decade span of criminal court practice and observation, author Salinas, during his service as a prosecutor and retired judge, has witnessed the use of equipment, including headphones for the accused and an insulated mask for the interpreter, to facilitate inaudible communications during a jury trial.

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302. *See* United States *ex rel*. Negron v. New York, 434 F.2d 386, 390-91 (2d Cir. 1970).
303. *See* Illinois v. Allen, 397 U.S. 337, 343 (1970).
304. *Id.* at 337.
305. *I*d. at 338.
306. *Negron*, 434 F.2d at 388.

Returning to the fundamentals of the waiver doctrine, only through a clear record, besides a docket sheet entry or one's memory, can a trial and appellate court judge be able to determine if a knowing and voluntary waiver of valuable rights has been accomplished. The *Carnley* language must be modified to require an explicit abandonment of a right. The alternative that "there must be an allegation and evidence" only obscures the issue when it arises in a criminal trial. If necessary, *Carnley* needs to be partially overruled or at least clarified to establish that the proof of a waiver or abandonment must appear in a contemporaneous recorded transcript. Part of this procedural adjustment of *Carnley* will require a judge to instruct the court reporter to record the proceeding to document whether an accused knowingly, competently, and voluntarily renounced a specific right.

Negron imposed a duty upon a jurist who discovers that an accused has a language barrier. *Garcia* III did not realize this obligation. Worse, the appellate courts allowed this oversight to prevail. The U.S. Supreme Court, Congress, and/or the respective state legislative bodies should develop safeguards, including corrective and remedial procedures to avoid doubts as to the entitlement and subsequent loss of constitutional rights reserved for the accused.

The right to an interpreter has evolved into an even more critical issue in twenty-first century America. First, the Latino population increased geometrically since 1970. Millions have migrated and reside in all parts of the United States. The confrontation and assistance of counsel issues apply not only to courts in proximity to the Mexican border but also to courts in the South where a significant migration of Latinos has occurred, an event that has created linguistic challenges for courts in these states.[307] Between 2000 and 2010, Texas experienced the nation's highest numeric population increase, adding 4.3 million people with California in second place.[308] Even more demanding for the provision of language services, the southern states of Florida (2.8 million), Georgia (1.5 million), and North Carolina (1.5 million) represent the third, fourth, and fifth highest population percentage increases of LEP persons respectively.[309]

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307. *See, e.g.*, State v. Torres, 368 S.E.2d 609, 611 (N.C. 1988); Ramos v. Terry, 622 S.E.2d 339, 340 (Ga. 2005).

308. Paul Mackun and Steven Wilson, *Population Distribution and Change: 2000 to 2010,* at 2 (Mar. 2011), *available at* http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf.

309. *Id.*

The authors recognize that some of the remedies will require more taxpayer expenditures. Where constitutional rights and liberty interests are involved, there is no realistic method by which a financial cost can be balanced against the deprivations involved. The authors also realize that many smaller communities will have fiscal difficulties. The good news is that local governments can petition the Department of Justice for federal funds to finance interpreters and the equipment necessary for the provision of professional services.[310]

Only through the utilization of interpreters can an appellate court be sufficiently certain as to whether an accused has competently and voluntarily entered a waiver. After all, fulfillment of these safeguards constitutes a critical step towards adherence to the indispensable rights, which our Founding Fathers deliberately preserved in the Sixth Amendment. The authors conclude with this question: Is it asking too much of federal and state courts of this nation to require the court reporter, an integral member of the judicial staff, to record, in open court, a brief question and answer colloquy between the judge and the accused as to his or her awareness of rights and as to the decision to waive or abandon this right to have the assistance of an interpreter?

After all, the preamble states that the U.S. Constitution was established in order to form a more perfect union and to establish justice, a general term which includes such invaluable concepts such as fairness, impartiality, and integrity. Only in this fashion of "going the extra mile" and recording the decision by an accused to engage in a waiver can any doubt be overcome as to whether the accused has knowingly, intelligently, competently, and voluntarily abandoned a fundamental constitutional right. The so-called "record" in *Garcia III* unfortunately deviated from the traditional concept of a record, a judicial term which connotes proof, documentation, and, principally, testimony from the accused, the person most affected.

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310. Letter from Thomas Perez, Assistant Att'y Gen., Civil Rights Div., Dep't. of Justice, to Chief Justices/State Court Administrators, at 5 (Aug. 16, 2010), *available at* http://www.najit.org/advocacy/Statements/AAGLEPLetter.pdf; *see also* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., FED. COORDINATION AND COMPLIANCE SECTION, FEDERAL FUNDING PROGRAMS FOR STATE AND LOCAL COURT ACTIVITIES TO ADDRESS ACCESS TO JUSTICE FOR LIMITED ENGLISH PROFICIENT (LEP) INDIVIDUALS, (2011), *available at* http://www.lep.gov /resources/courts/081811_Language_Access_Funding_Chart_for_State_Courts.pdf.