

No. 01-24-00141-CR

**In the Court of Appeals
for the First District of Texas**

FILED IN
1st COURT OF APPEALS
HOUSTON, TEXAS
5/29/2024 4:45:07 PM

Erick Martinez
Appellant

DEBORAH M. YOUNG
Clerk of The Court

v.

The State of Texas
Appellee

On Appeal from Cause No. 95182-CR
From the 300th District Court of Brazoria County, Texas

Brief for the Appellant

Oral Argument Not Requested

Clay Hearrell
Attorney for the Appellant
Bar Number 24059919
11200 Broadway Street,
Suite 2743
Pearland, Texas 77584
clay@getbackcontrol.com
346-528-7447

Identity of Parties and Counsel

Appellant	Erick Martinez TDCJ ID Number 02488063 Connally Unit 899 FM 632 Kenedy, Texas 78119
Defense Counsel at Trial	Mr. Luis Ledesma, Jr. P.O. Box 204 West Columbia, TX 77486
Prosecutors at Trial	Cierra Abernathy Brazoria County District Attorney's Office 111 E. Locust Angleton, TX 77515 David Tamez Brazoria County District Attorney's Office 111 E. Locust Angleton, TX 77515
Judge Presiding	The Honorable Judge Chad D. Bradshaw 300 th District Court Brazoria County, Texas 111 E. Locust Angleton, TX 75515
Appellant's Counsel	Clay Hearrell The Law Office of Clay Hearrell 11200 Broadway Street, Suite 2743 Pearland, Texas 77584

Table of Contents

Identity of Parties.....	ii
Table of Contents.....	iii
Table of Authorities.....	v
Statement of the Case.....	7
Statement Regarding Oral Argument.....	9
Issue Presented.....	10
The trial court committed reversible error by failing to appoint an interpreter to assist the Appellant at the hearing on the Appellant’s Motion to Adjudicate	
Statement of Facts.....	11
Summary of Argument.....	17
Argument and Authorities.....	18
Applicable Law.....	
A. Due Process.....	
B. The Right of the Accused to be Present in the Courtroom, Assist in His Own Defense, and Confront his Accusers.....	
C. Statutory Right to an Interpreter.....	
D. Rights of the Accused During a Hearing on a Motion to Adjudicate Guilt.....	
E. Court’s Duty to Appoint an Interpreter and Duty to Inquire.....	
F. Waiver.....	

G. Standard of Review.....	26
H. Harmful Error.....	27
Analysis.....	29
A. The Trial Court was Aware that the Appellant Could Not Speak English or Understand the Proceedings.....	29
B. The Trial Court Had a Duty to Appoint an Interpreter Yet Failed to Provide.....	33
C. If the Trial Court Did Not Have Actual Knowledge That the Appellant Could Not Understand the Proceedings and Needed an Interpreter; Then The Trial Court Had Cause to Inquire Further Yet Failed to Do So.....	36
D. Waiver.....	39
E. Standard of Review.....	40
F. Due Process Right to be Present and Right to Assist in Defense.....	41
G. Right to Confront Accusers.....	42
H. Statutory Right to an Interpreter.....	43
I. Harm Analysis.....	44
J. Conclusion.....	47
Prayer.....	47
Certificate of Compliance.....	49
Certificate of Service.....	49

Table of Authorities

Cases

<i>Amador v. State</i> , 221 S.W.3d 666 (Tex. Crim. App. 2007).....	26
<i>Balderas v. State</i> , 517 S.W.3d 756 (Tex. Crim. App. 2016).....	26
<i>Baliterra v. State</i> , 586 S.W.2d 553 (Tex.Crim.App. 1979).....	21, 24-26, 39
<i>Cagnon v. Scarpelli</i> , 411 U.S. 778 (1973).....	23
<i>Cantu v. State</i> , 993 S.W.2d 712 (Tex.App. – San Antonio 1999).....	24
<i>Castrejon v. State</i> , 428 S.W.3d 179 (Tex.App. – Houston[1st Dist.] 2014).....	25
<i>Chambers v. Mississippi</i> , 410 US 284 (1973).....	18
<i>Delaware v. Van Arsdell</i> , 475 U.S. 673, 684 (1986).....	46
<i>Ferrell v. Estelle</i> , 568 F.2d 1128 (5th Cir 1978).....	18
<i>Garcia v. State</i> , 210 S.W.2d 574 (Tex.Crim.App. 1948).....	20-21
<i>Garcia v. State</i> , 149 S.W.3d 135 (Tex.Crim.App. 2004).....	20-21, 24, 26, 39
<i>Garcia v. State</i> , 161 S.W.3d 28 (Tex.App. – Houston [14th Dist.] 2014).....	20-21
<i>Haggard v. State</i> , 612 S.W.3d 318 (Tex.Crim.App. 2020).....	28
<i>Hernandez v. State</i> , 862 S.W.2d 193 (Tex.App. -Beaumont 1993).....	27
<i>Hughes v. State</i> , 2024 WL 2306275 (Tex.Crim.App. 2024).....	23, 26-29, 36, 39
<i>Jaimes v. State</i> , 611 S.W.3d 78 (Tex.App. – Houston [14th Dist.] 2020).....	26
<i>Joung Youn Kim v. State</i> , 331 S.W.3d 156 (Tex.App. -Houston [14th Dist.] 2011).....	20, 24-25, 29
<i>Leon v. State</i> , 25 S.W.3d 841 (Tex.App. – Houston [1st Dist.] 2000).....	26
<i>Linton v. State</i> , 275 S.W.3d 493 (Tex. Crim. App. 2009).....	18-22, 26-27
<i>Love v. State</i> , 543 S.W.3d 835 (Tex.Crim.App. 2016).....	28

<i>Marin v. State</i> , 851 S.W.2d 275 (Tex.Crim.App. 1993).....	39
<i>Miller v. State</i> , 692 S.W.2d 88 (Tex.Crim.App. 1985).....	19
<i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972).....	23
<i>Pineda v. State</i> , 176 S.W.3d 244 (Tex.App. -Houston [1st Dist.] 2004).....	28
<i>United Sattes vs. Cirrincione</i> , 780 F.2d 620 (7th Cir.1985).....	19, 41
<i>United States v. Huang</i> , 960 F.2d 1128 (2d Cir 1992).....	19, 27
<i>Valladares v. United States</i> , 871 F.2d 1564 (11th Cir 1989).....	18
<i>Vasquez v. State</i> , 819 S.W.2d 932 (Tex.App. – Corpus Christi 1991).....	24-25
<i>Villarreal v. State</i> , 853 S.W.2d 170 (Tex.App. – Corpus Christi 1993).....	25
<i>Wells v. State</i> , 611 S.W.3d 396, 411 (Tex.Crim.App. 2020).....	28

Constitutional Provisions

U.S. Const. Amend. VI.....	19
U.S. CONST. amend XIV §1.....	23

Statutory Provisions

TEX.CODE CRIM. PROC. art. 38.30.....	11-12, 21, 31
--------------------------------------	---------------

Rules

Tex. R. App. P. 44.2(a).....	28
------------------------------	----

STATEMENT OF THE CASE

On April 7, 2022, the Appellant, Erick Martinez, was indicted in Cause No. 95182-CR for the offense of Aggravated Robbery alleged to have been committed on or about the 9th day of March 2022 in Brazoria County, Texas (C.R. at 4). On June 24, 2022, the Appellant entered a plea of guilty to the offense of Aggravated Robbery (II R.R. at 5). The court accepted the Appellant's plea but deferred a finding of guilt and, pursuant to the plea agreement, placed the Appellant on deferred adjudication community supervision for a period of eight years (II R.R. at 10; C.R. at 35-36). The court also assessed a fine of \$500, court cost in the amount of \$290 and attorney's fees in the amount of \$812.50 (C.R. at 35). On February 14, 2023 the State filed a Motion to Adjudicate Guilt stating that the Appellant had violated the terms of his deferred adjudication probation by committing six specific violations (C.R. at 37-39). The State then filed a First Amended Motion to Adjudicate Guilt on April 17, 2023, alleging that the Appellant had violated the terms of his deferred adjudication probation by committing 14 specific violations (C.R. at 40-43). After several resets, the court held a hearing on the State's First Amended Motion to Adjudicate Guilt on January 18, 2024 (III R.R.). At this hearing, the Appellant entered a plea of not true to each of the allegations within the State's motion (III R.R. at 14). At the conclusion of the hearing, the court found true as to 11 of the 14 allegations in the State's First Amended Motion to

Adjudicate Guilt, adjudicated the Appellant as guilty of the offense of Aggravated Robbery, and sentenced the Appellant to 50 years confinement in Texas Department of Criminal Justice Institutional Division (III R.R. at 70-73; C.R. at 63-65). The undersigned counsel was appointed on January 18, 2024 and trial counsel was allowed to withdraw (C.R. at 58 and 63). Notice of Appeal was timely filed on February 16, 2024 (C.R. at 68).

STATEMENT REGARDING ORAL ARGUMENT

The undersigned attorney for the Appellant does not request oral argument.

ISSUE PRESENTED

The trial court committed reversible error by failing to appoint an interpreter to assist the Appellant at the hearing on the Appellant's Motion to Adjudicate

STATEMENT OF FACTS

The Appellant was originally indicted on April 7, 2022 for the first degree felony offense of Aggravated Robbery, alleged to have been committed on or about March 9, 2022 in Brazoria County, Texas (C.R. at 6). Mr. Luis Ledesma, Jr. was appointed on March 15, 2022 to represent the Appellant on that initial charge (C.R. at 8). On June 24, 2022, the Appellant appeared with his attorney Mr. Luis Ledesma, Jr. before the Honorable K. Randall Hufstetler of the 300th District Court of Brazoria County, Texas, and entered a plea of guilty (C.R. 35; II R.R.). At the time of the plea, Judge Hufstetler entered an order pursuant to §38.30 of the Texas Code of Criminal Procedure which made a judicial determination that the Defendant "...does not understand and speak the English language and an interpreter must be sworn to interpret for the defendant." (C.R. at 31). Ms. Rosario Rivera was appointed and served as the Appellant's attorney at that plea hearing (C.R. at 31). At two different points during the course of the plea the Appellant indicated that he was having trouble understanding the proceedings, and at one point Judge Hufstetler specifically inquired about the Appellant's ability to understand English (II R.R. at 6-7; and II R.R. at 8). As a result of that hearing, Judge Hufstetler deferred a finding of guilt and placed the Appellant on deferred adjudication community supervision for a period of eight years and assessed a \$500 fine (C.R. at 35; II R.R. at 10).

Thereafter, the Appellant was placed on a Spanish-speaking case load supervised by Probation Officer Vanessa Rodriguez (III R.R. at 17). Ms. Rodriguez seems to have communicated with the Appellant in Spanish, specifically noting that “In his case (Appellant’s)...” she would go over the conditions of community supervision in Spanish (III R.R. at 26).

On February 14, 2023 the State filed a Motion to Adjudicate Guilt in this case (C.R. at 37-39). This motion alleged that the Appellant had committed six different violations of the terms of community supervision set out in paragraphs 1, 5, 6, 8, 25, and 30 (C.R. at 37-39). On April 17, 2023, the State filed a First Amended Motion to Adjudicate Guilt in this case (C.R. at 40-43). This amended motion set out 14 different violations of the terms of community supervision set out in paragraphs 1, 5, 6, 8, 18, 19, 25, and 30 (C.R. at 40-43). On April 20, 2023 the case was set for a contested hearing on the State’s first amended motion to be held on May 19, 2023 (C.R. at 44). On the May 19, 2023 hearing date, the Honorable Judge Chad Bradshaw was now presiding over the 300th District Court of Brazoria County, Texas, and although the hearing on the State’s first amended motion was again reset, the court did enter an order pursuant to §38.30 of the Texas Code of Criminal Procedure with a judicial determination that the Defendant “...does not understand and speak the English language and an interpreter must be sworn to interpret for the defendant.” (C.R. at 46). Ms. Rosario Rivera was

appointed as the interpreter for the May 19, 2023 hearing that was ultimately reset (C.R. at 46). The hearing on the State's first amended motion would be reset twice more before being called for a contested hearing on January 18, 2024 (C.R. at 49-50; III R.R. at 1 -5).

At the January 18, 2024 contested hearing on the State's First Motion to Adjudicate Guilt, the Appellant was represented by Mr. Luis Ledesma, Jr (III R.R. 1-5). The Appellant did not have an interpreter present to assist him at the contested hearing on the State's First Amended Motion to Adjudicate Guilt (III R.R. at 5-6). As soon as the case was called for the contested hearing, the following exchange occurred between Judge Bradshaw and the Appellant:

“Court: All right. I have before me this motion, which you can have the court read aloud. You're entitled to have it read aloud to you, or you can waive its reading. What would you like to do?

Appellant: ***I don't understand it. I don't get it.***

Court: All right. So, are you waiving having the motion read aloud to you?

Appellant: ***I don't even know what you're saying, sir.***

Court: Okay. So, you have the right to have this first-amended motion read to you aloud right now; or if you understand the allegations that are set forth in the motion to adjudicate guilt, you can waive their reading. What would you like to do?

Appellant: I waive.

Court: You'll waive it?

Appellant: ***What? I don't understand. Can I get a translation?***

Court: A translation?

Appellant: Yeah.

Ledesma: You don't understand the words?

Appellant: ***I don't speak English like that.***

Court: You don't speak English like that? ***Well, how do you speak it?***

Appellant: ***I don't...***

Court: You can give up your right to have me read this aloud to you, or if you...
Appellant: You can read it.
Court: ... want, I can read it.
Appellant: You can read it.
Court: Okay. I'll read it to you."
(III R.R. at 5-6 *emphasis added*)

Following that exchange, the court read aloud the entire State's First Amended Motion to Adjudicate Guilt (III R.R. at 6-14). When the court finished, the Appellant entered a plea of "Not Guilty," which was corrected to "Not True" (III R.R. at 14). From that point forward till the end of the hearing, the Appellant only answered with a two-word response of either "yes, sir" or "no, sir" (III R.R. at 14-73). In response to the Court's questioning, Mr. Ledesma indicated that the Appellant was not a U.S. citizen but that he did understand the immigration consequences that he was facing (III R.R. at 15-16).

The State's first witness was Vanessa Rodriguez (III R.R. at 17). Ms. Rodriguez testified that she was employed by Brazoria County Adult Supervision Department and that she was assigned to a general caseload of Spanish-speaking clients (III R.R. at 18). Ms. Rodriguez identified the Appellant and testified that she was his supervision officer (III R.R. at 18). She further testified that at her first visit with the Appellant, she reviewed the conditions of probation with the Appellant in Spanish (III R.R. at 26). Ms. Rodriguez also testified about the contents of the probation file and testified that the Appellant violated the

conditions of his probation by failing to provide his address; failing to report on October 27, 2022; failing to report on December 1, 2022; failing to report on January 31, 2023; failing to disclose contact with law enforcement in January 2023; failing to disclose contact with law enforcement in March 2023; failing to complete an anti-theft class; and failing to report to the county jail in August 2022 (III R.R. at 18-26).

The State's second witness was Carlos Finley, a loss prevention officer from Home Depot (III R.R. at 28). Mr. Finley directly accused the Appellant of committing a theft from a Home Depot in Harris County, Texas, where Mr. Finley worked in July 2022 (III R.R. at 22-38). Although Mr. Finley testified to recognizing the Appellant in court, he also testified that the Appellant was not apprehended the day of the theft and that his identity was ascertained by a group of Home Depot loss prevention officers based on a Tik Tok video that they saw from a different date (III R.R. at 35). On cross examination, Mr. Finley conceded that there was a point in the investigation where he falsely identified a completely different person as the one individual that they believed had committed the theft (III R.R. at 37).

The State's third witness was Jaime Trejo (III R.R. at 38). During his testimony, Jaime Trejo directly accused the Appellant of robbing and pistol whipping him in early 2023 (III R.R. at 40). Mr. Trejo further accused the

Appellant of shooting at him, assaulting his brother on a separate date, and threatening him through a third party (III R.R. at 43, 45, and 49-51). Mr. Trejo did identify the Appellant in court but also testified that he did not know the Appellant prior to their incident and that he had ascertained his identity from talking to people in the neighborhood (III R.R. at 46-47).

The State's fourth witness was Harris County Deputy Constable Michael Jason (III R.R. at 56). Constable Jason testified about his involvement in a vehicle pursuit wherein he directly accused the Appellant of committing the offense of Evading with Vehicle (III R.R. at 57-60). Constable Jason also testified about finding a handgun in the median along the pursuit route which they attributed to the Appellant (III R.R. at 61).

The State abandoned 10, 11, and 12 from the State's First Amended Motion to Adjudicate Guilty (III R.R. at 67). After closing arguments, the court found the remaining allegations true, adjudicated the Appellant Guilty of the first-degree felony offense of Aggravated Robbery, made a finding of deadly weapon, and sentenced the Appellant to 50 years confinement in the Texas Department of Criminal Justice Institutional Division (III R.R. at 71-73).

SUMMARY OF ARGUMENT

The Appellant could not understand the proceedings or assist in his defense because the trial court failed to appoint an interpreter to assist the Appellant. The issue of whether the Appellant needed an interpreter to understand the proceedings was raised before the trial court multiple times, yet the trial court failed to adequately inquire as to whether the Appellant needed the services of an interpreter. Or, if the court determines that the trial court conducted an adequate inquiry into the issue, the trial court abused its discretion by failing to appoint an interpreter to assist the Appellant. The trial court's failure to appoint an interpreter violated the Appellant's right to be present in the court room, right to assist in his own defense, and right to confront his accusers, thereby denying him due process of law necessitating reversal.

ARGUMENT AND AUTHORITIES

Applicable Law

The right to adequate interpretation services is a fundamental requirement of the due process of law, essential both to the ability of an accused to be present to assist in his own defense and the right to confront his accusers.

A. Due Process

The essence of the right to due process is an accused's fair opportunity to defend against the State's charges. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). A fundamental requirement of due process is the appointment of an interpreter when an accused cannot understand the proceedings. *Linton v. State*, 275 S.W.3d 493, 500 (Tex. Crim. App. 2009).

The trial court has wide discretion in handling translation issues in a manner that accounts for a variety of factors such as the accused's understanding of English, the complexity of the proceedings, and the nature of the testimony. *Valladares v. United States*, 871 F.2d 1564, 1566 (11th Cir 1989). The interpretation services provided need not be perfect, but they must be sufficiently adequate to ensure that the accused is able to understand and participate in the proceedings. *Linton*, 275 S.W.3d at 501. The trial judge bears the responsibility of ensuring that the accused has that minimum level of understanding required by the federal constitution. *Ferrell v. Estelle*, 568 F.2d 1128, 1132 (5th Cir 1978), *op*

withdrawn on appellant's death, 573 F.2d 867 (1978). Within the context of denial of adequate interpretation services, the court should look to four factors in determining whether an accused has been denied due process. *Linton*, 275 S.W.3d at 505, citing *United States vs. Cirrincione*, 780 F.2d 620, 634 (7th Cir.1985). Due process is denied an accused when what is told to him is incomprehensible, there is a doubt as to the accuracy of the translation provided, the nature of the proceeding is not explained to the accused in a way designed to insure comprehension, or the trial court fails to review evidence and make findings related to a credible claim of incapacity due to language issues. *Cirrincione*, 782F.2d at 634. However, ultimately the due process question becomes whether the services provided were “fundamentally unfair.” *Linton*, 275 S.W.3d at 503, quoting *United States v. Huang*, 960 F.2d 1128, 1136 (2d Cir 1992). The constitutional requirement of due process includes both the right of an accused to confront his accusers and the right of an accused to assist in his own defense.

B. Right of the Accused to be Present in the Courtroom, Assist in His Own Defense, and Confront His Accusers

The Sixth Amendment of the United States Constitution guarantees the accused in a criminal case the right to confront the witnesses against him. U.S. Const. Amend. VI. As such, the accused in a criminal case has a right to be physically present in the court room. *Miller v. State*, 692 S.W.2d 88, 90

(Tex.Crim.App. 1985). The right to be present in the courtroom extends beyond mere physical presence and includes the right to comprehension of the proceedings. *Joung Youn Kim v. State*, 331 S.W.3d 156, 162 (Tex.App. -Houston [14th Dist.] 2011, pet. ref'd). For this reason, federal courts and the Texas courts have long recognized that the right to be present requires the appointment of an interpreter for an accused that does not understand the English language. *Garcia v. State*, 149 S.W.3d 135, 140-141 (Tex.Crim.App. 2004). An accused in a criminal case also has a right to assist in his own defense, and to do so, the accused must be able to understand the proceedings. *Linton*, 275 S.W.3d at 500. Failure to provide an interpreter to an accused that does not understand English deprives him of the right to be present and the right to assist in his own defense.

Similar to the right to assist in his own defense is the right of an accused to confront the witnesses against him. The guarantee of this confrontation right to all accused is a particularly important concern within the State of Texas and the court's of this State emphasizing this concern since the 1948 decision in *Garcia v. State*, which eloquently stated:

“...[W]e know that in this State, especially along the Rio Grande border, our citizenship is comprised of Latin Americans who speak and understand only the Spanish language. These citizens, as also nationals of the Republic of Mexico (which was the status of appellant), when brought before the courts of this State charged with crimes against the laws of this State, are entitled to be tried according to the Constitution and laws of this State. This, of necessity, means they are entitled to be confronted by the witnesses under the same conditions as apply to all others. 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. Unless appellant was in some manner, either through his counsel or an interpreter, afforded knowledge of the testimony of the witness, the right of cross-examination could not be exercised by him.”

Garcia v. State, 210 S.W.2d 574, 580 (Tex.Crim.App. 1948). See also *Baliterra v. State*, 586 S.W.2d 553, 557 (Tex.Crim.App. 1979) and *Garcia v. State*, 149 S.W.3d 135, 141 (Tex.Crim.App. 2004).

An accused that is unable to understand the proceedings cannot confront the accusations that are made against him. The confront witnesses includes the right to confrontation. When an accused is denied the right to have the proceedings translated into a language he can understand, then that accused is denied the right to effectively confront and cross examine witnesses. *Garcia v. State*, 161 S.W.3d 28, 29-30 (Tex.App. – Houston [14th Dist.] 2014, no pet.). This right is of particular importance when the State calls witnesses to testify against an accused. *Baliterra*, 586 S.W.2d 553 at 559. And when an accused faces a multitude of witnesses the denial of an interpreter will cause even greater harm. *Garcia*, 161 S.W.3d at 30.

C. Statutory Right to an Interpreter

The right to have an interpreter appointed to assist an accused has been set out in statute in Article 38.30 of the Texas Code of Criminal Procedure.

TEX.CODE CRIM. PROC. art. 38.30(a). This article mandates that upon motion filed by either party or the court’s own motion, if it is determined that an accused

in a criminal proceeding does not understand and speak the English language, an interpreter “...must be sworn to interpret for the person charged...” *Id.* This statute addresses the right of the accused to be present and the right of the accused to confront his accusers. This statute imposes a duty upon the trial court to determine a communication solution that will protect the accused’s constitutional rights. *Linton*, 275 S.W.3d at 501. The requirements of this statute are triggered by a motion from either party or by court upon its own motion. TEX.CODE CRIM. PROC. Art. 38.03(a).

D. Rights of Accused During a Hearing on a Motion to Adjudicate Guilt

An accused has a right to due process at a hearing on a motion to adjudicate guilt. As such, an accused facing a hearing on a motion to adjudicate guilt has a due process right to be present at the hearing, assist in his own defense, have the proceeding present in a language he can understand, and the right to confront witnesses against him. Additionally, the Appellant argues that an accused facing a contested hearing on a motion to adjudicate guilt should enjoy the protection of the confrontation clause and the statutory protections of Article 38.03(a) of the Texas Code of Criminal Procedure.

The Fourteenth Amendment of the United States Constitution mandates that no state shall deprive a person of life, liberty, or property without due process of

law. U.S. CONST. amend XIV §1. An accused on parole enjoys freedom subject to some degree of assurance that he will be revoked only for failure to abide by the terms of the probation. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). An accused on probation is in the same position because in both scenarios an accused a loss of liberty that necessitates the protection of due process. *Cagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). A hearing on a motion to adjudicate guilt is in some respects different from and in some respects similar to a hearing on a motion to revoke probation. A revocation of probation hearing is a post-conviction procedure, whereas an accused facing a hearing on a motion to adjudicate guilty has not been convicted or adjudicated of an offense. *Hughes v. State*, 2024 WL 2306275, *4 (Tex.Crim.App. 2024)(designated for publication)¹. As far as due process is concerned, there is no difference between a revocation hearing and a hearing on a motion to adjudicate. *Id.* at *6. Therefore an accused has a due process right to be present at a hearing on a motion to adjudicate guilty in the same manner as in a probation revocation hearing.

E. Court’s Duty to Appoint an Interpreter and Duty to Inquire

The fundamental rights protected by utilizing an interpreter to assist an accused in a criminal proceeding are predicated upon the trial judge’s knowledge

¹ Although the mandate has not issued yet and this case is not final, it likely will issue soon. The Cause Number with the Texas Court of Criminal Appeals is No. PD-0164-22. Delivered May 22, 2024

or notice that the accused cannot communicate in English. *Garcia*, 149 S.W.3d at 144-145. The trial court must appoint an interpreter upon receiving notice that the accused cannot speak English. *Baliterra*, 586 S.W.2d at 559. This notice may come from a formal motion by any party consistent with Article 38.03(a), a request by a party, a notice by a party, the court's own observations, some finding by the court, or judicial notice of the accused's inability to speak English. TEX.CODE CRIM. PROC. Art. 38.03(a); *Joung Youn Kim*, 331 S.W.3d at 163; and *Garcia*, 149 S.W.3d at 145. When a trial judge is aware that an accused has a problem understanding the English language, the judge has an independent duty to implement this right. *Garcia*, 149 S.W.3d at 145. Even if the judge is not absolutely aware that the accused has a problem with the English language, the trial judge has a duty to inquire whether the rights of the accused would be safeguarded in the absence of an interpreter whenever the issue has been raised before the trial judge to some extent. *Cantu v. State*, 993 S.W.2d 712, 721 (Tex.App. – San Antonio 1999, pet. ref'd). If an accused is denied an interpreter and fails to object, then the reviewing court must determine whether there were circumstances to show that the trial court should have inquired into the matter sua sponte. *Vasquez v. State*, 819 S.W.2d 932, 937 (Tex.App. – Corpus Christi 1991, pet. ref'd). The reviewing court may reverse a conviction where a trial judge failed to inquire into the ability of the accused to understand the English language when

the issue is raised. *Vasquez*, 819 S.W.2d at 937 citing *Baliterra*, 586 S.W.2d at 558-559. The duty to appoint and the duty to inquire can be raised at any point during the proceeding and the accused may request an interpreter whenever a need arises. *Castrejon v. State*, 428 S.W.3d 179, 185 (Tex.App. – Houston[1st Dist.] 2014, no pet.). The court must appoint an interpreter or inquire into the ability of the accused to understand English when it becomes known to the court that the accused does not speak or understand English. *Baliterra*, 586 S.W.2d at 559 and *Vasquez*, 819 S.W.2d at 937.

F. Waiver

The right to be present is a fundamental right that can only be denied if expressly waived by the accused, and so too is the right of an accused that does not understand English to have the assistance of an interpreter a fundamental right that cannot be denied unless it is expressly waived. *Joung Youn Kim*, 331 S.W.3d at 162. The right to be present, to assist in his own defense, and to confront the witnesses all endure throughout the entire duration of the trial. *Baliterra*, 586 S.W.2d at 559.

An accused may waive his right to an interpreter by failing to file a motion with the court or failing to object to the absence of an interpreter at the trial court level. *Villarreal v. State*, 853 S.W.2d 170, 171 (Tex.App. – Corpus Christi 1993, no pet.). However, an accused does not waive his right to an interpreter by failing to

file a motion with the court or failing to object if the record demonstrates that the accused lacked an understanding of the proceedings. *Leon v. State*, 25 S.W.3d 841, 843 (Tex.App. – Houston [1st Dist.] 2000, no pet.). An accused that does not understand English does not waive his right to an interpreter by failing to object. *Baliterra*, 586 S.W.2d at 559. To the contrary, a trial judge has an affirmative obligation and independent duty to appoint an interpreter when he is aware that an accused cannot understand English unless there is an explicit waiver on the record made knowingly and voluntarily by the accused. *Ex Parte Zantos-Quebas*, 429 S.W.3d 83, 89 (Tex.App. – Houston [1st Dist.] 2014, no pet.) citing *Garcia*, 149 S.W.3d at 145).

G. Standard of Review

A trial court's decision to appoint an interpreter for an abuse of discretion. *Balderas v. State*, 517 S.W.3d 756, 777–778 (Tex. Crim. App. 2016). Whether the trial court took adequate steps to ensure that an accused understood the proceedings is also reviewed by an abuse of discretion standard. *Linton*, 275 S.W.3d at 502. The trial court's decision will not be reversed absent a clear abuse of discretion. *Jaimes v. State*, 611 S.W.3d 78, 81-82 (Tex.App. – Houston [14th Dist.] 2020, pet ref'd). This review is limited in nature and restricted to the information before the trial court at the time of the ruling. *Amador v. State*, 221 S.W.3d 666, 677 (Tex. Crim. App. 2007). A trial judge's decision shall not be

reversed under an abuse of discretion standard unless the court's ruling lies outside the zone of reasonable disagreement. *Linton*, 275 S.W.3d at 503. A trial court may commit reversible error if the judge refuses a request for a translator without first determining the accused's understanding of the proceedings. *Hernandez v. State*, 862 S.W.2d 193, 197 (Tex.App. -Beaumont 1993). A variety of factors can impact whether an accused receives adequate interpretation services. *Linton*, 275 S.W.3d at 503. The ultimate question on review is whether the proceedings were fundamentally unfair. *Huang*, 960 F.2d at 1136.

H. Harmful Error

If the trial court commits error by violating an accused's due process right to be present, due process right to assist in his own defense, confrontation clause right to be present, or confrontation clause right to confront accusers by failing to provide adequate translation services for an accused that the court knows cannot communicate in English or by failure to inquire into the need for translation services when the circumstances indicate that there may be a problem with the accused's ability to communicate in English, then that error is subject to a harmful error analysis. Errors involving due process rights or confrontation clause rights are constitutional errors. *Hughes* at *13. As such, the reviewing court is required to reverse the judgment of conviction and/or sentence imposed unless the court determines beyond a reasonable doubt that the error did not contribute to the

conviction or punishment. *Id* at *13, quoting Tex. R. App. P. 44.2(a). In determining beyond a reasonable doubt whether a constitutional error was harmless, the reviewing court will consider any and all circumstances in the record that have a bearing on the analysis. *Hughes*, at *13. This harmful error analysis is performed in a neutral light rather than in a light most favorable to the court's decision and the State bears the burden of showing beyond a reasonable doubt that the error was harmless. *Hughes*, at *13 citing *Love v. State*, 543 S.W.3d 835, 846 (Tex.Crim.App. 2016), *Haggard v. State*, 612 S.W.3d 318, 328 (Tex.Crim.App. 2020) and *Wells v. State*, 611 S.W.3d 396, 411 (Tex.Crim.App. 2020).

Another test also used in reviewing the trial court's failure to appoint an interpreter is the "reasonably substantial relationship". *Pineda v. State*, 176 S.W.3d 244, 248 (Tex.App. -Houston [1st Dist.] 2004, pet. ref'd). The reasonably substantial relationship test focuses on the effect of the error on the accused's ability to advance his defense and requires that the accused's presence have a reasonably substantial relationship to his opportunity to defend himself in order to find harm. *Id*. Each case must be evaluated individually keeping mind that the test does not determine the effect of the error on the outcome but rather the effect of the error on the ability of the accused to advance his defense. *Adanandus v. State*, 866 S.W.2d 210, 219 (Tex.Crim.App. 1993). A major consideration in the individual application of the reasonably substantial relationship test is the nature of the

proceedings and the activity that transpired during the accused's absence, such as whether testimony was offered or cross examination performed while the accused was unable to assist. *Joung Youn Kim*, 331 S.W.3d at 164.

Both the constitutional harmless error test and the reasonably substantial relationship test are valid measures of harm that should be utilized in this case. The reviewing court should over turn the trial court's conviction and/or sentence if harm is found under either test from the court's error. *Hughes*, at *13 and *14.

Analysis

The court had notice that the Appellant could not communicate in English and either failed to appoint an interpreter for the Appellant or failed to inquire further into the Appellant's communication problems, thereby denying the Appellant his right to be present in the courtroom right to assist in his own defense, right to confront his accusers, and statutory right to an interpreter, despite the absence of an express waiver of these rights, in a manner that harmed the ability of the accused to advance his defense.

A. The Trial Court Was Aware that the Appellant Could Not Speak English or Understand the Proceedings

The trial judge was provided actual notice, from multiple different sources, that the Appellant was not able to speak English and/or did not understand the proceedings yet failed to utilize an interpreter to assist the Appellant at his hearing

on the State's First Amended Motion to Adjudicate Guilt. On January 18, 2024 the Appellant appeared before Judge Bradshaw of the 300th District Court of Brazoria County, Texas, for a contested hearing on the State's First Motion to Adjudicate Guilt (III R.R. at 1-5). Appellant, who is not a US citizen, was accompanied by his attorney, Mr. Luis Ledemsa but was not provided an interpreter (III R.R. at 5-6 and 15-16). At this hearing the Appellant was confused by the proceedings and spoke up, addressing the presiding judge and saying:

"I don't understand it;"

"I don't get it;"

"I don't even know what you're saying;"

"What? I don't understand. Can I get a translation?;"

"I don't speak English like that;" and

"I don't (speak English)."

(III R.R. 5-6).

In response, the trial judge read aloud the motion to adjudicate and asked the Appellant for his plea, to which the Appellant answered, "Not guilty" before speaking with his attorney and correcting his response to "Not true" (III R.R. 14). Following the Appellant's plea of Not True until the end of the hearing, all responses and statements made by the Appellant were mere two-word answers of either "yes, sir" or "no, sir" (III R.R. 14-73). The Appellant expressly told the trial

judge six times at the start of the hearing that he did could not understand the proceedings and/or could not speak English and also asked the trial judge for a translator. These statements provided direct and actual knowledge that the Appellant could not understand the proceedings, could not speak English, and needed a translator.

During the course of the hearing the court heard testimony from Brazoria County Community Supervision Officer Vanessa Rodriguez (III R.R. at 17). Rodriguez testified that she supervised the Appellant on a Spanish speaking case load and also testified that she communicated with the Appellant in Spanish (III R.R. at 17-18 and III R.R. at 26). The testimony of Vanessa Rodriguez specifically informed the trial judge that the Appellant was a Spanish speaker that she communicated with in Spanish, which provided the trial judge with actual knowledge that the Appellant could not understand the proceedings.

Furthermore, the court's file contained actual notice informing the trial judge that that the Appellant was a Spanish speaker and that a translator was necessary in this case. The Appellant first appeared in this case before Judge Hufstetler, the then presiding judge of the 300th District Court, on June 24, 2022 when he entered a plea of guilty and was placed on Deferred Adjudication Community Supervision for this offense. An interpreter was appointed for the Appellant at this plea hearing and for that hearing, Judge Hufstetler entered a written order under §38.30 of the

Texas Code of Criminal Procedure which made a judicial determination that the Defendant “...does not understand and speak the English language and an interpreter must be sworn to interpret for the defendant.” (C.R. at 31). This document was in the court’s file and provided the court with actual knowledge that the Appellant could not speak English and need an interpreter. Additionally, the Appellant also appeared previously before Judge Bradshaw on May 19, 2023 for a contested hearing on his Motion to Adjudicate Guilt that was ultimately reset (C.R. 46). In connection with this hearing, Judge Bradshaw entered a written order under §38.30 of the Texas Code of Criminal Procedure which made a judicial determination that the Defendant “...does not understand and speak the English language and an interpreter must be sworn to interpret for the defendant.” (C.R. 46). This document was also in the court’s file providing actual notice that the Appellant could not speak English and needed an interpreter. This second order is significant because the findings made were by the same judge that ultimately presided over the contested Motion to Adjudicate where the Appellant was not provided with an interpreter. Nothing in the record explains why the trial judge found an interpreter to be necessary for the Motion to Adjudicate scheduled for May 19, 2023 but unnecessary for the actual contested hearing on the Motion to Adjudicate that was held on January 18, 2024.

B. The Trial Court Had a Duty to Appoint an Interpreter for the Appellant Yet Failed to Provide

When the trial court in a criminal proceeding is aware that the Appellant does not understand the proceedings or does not speak English, due process of law, the right of an accused to be present in the courtroom, the right of an accused to assist in his own defense, the right of an accused to confront accusers, and Texas Statute, all require that the trial court to devise a strategy, such as the appointment of a translator, to safeguard rights of the accused.

The Appellant in this case was tried, adjudicated, and sentenced at a hearing on a Motion to Adjudicate filed by the State. A Motion to Adjudicate is certainly a criminal proceeding the kind and type that would necessitate the use of an interpreter. The trial court in this case has actual notice that the Appellant was unable to speak English and needed a translator in the form of written orders from two different district court judges, including the trial judge, finding that the Appellant could not speak English and needed an interpreter. Case law indicates that a trial court may not have actual notice that an accused needs an interpreter for a motion to adjudicate just because an interpreter was previously appointed for the accused at the original trial four years earlier that the same judge presided over. *Garnica v. State*, 53 S.W.3d 457 (App. 6 Dist. 2001). However, the orders in the court's file finding that the Appellant could not speak English and needed an

interpreter should still be considered as one factor in determining that the court had a duty to ensure the Appellant could understand the proceedings and/or appoint an interpreter. Furthermore, the *Garnica* case is distinguishable in several ways. In this case, there were multiple district court judges who made the determination that the Appellant could not speak English and needed an interpreter. Furthermore, one of those judges was the actual trial judge for the final hearing where an attorney was not used, and unlike the scenario of *Granica* where the trial court failed to appoint an interpreter for a revocation hearing four years after initially appoint one in the original, the trial judge in this case made the determination that a translator was necessary less than a year before the revocation hearing occurred. *Id.* Multiple orders from multiple district court judges, including the trial judge less than a year earlier, should indicate that the trial court had knowledge that the Appellant needed an interpreter and should indicate that the court's failure to appoint an interpreter denied the Appellant his constitutional and statutory rights.

Furthermore, the Appellant himself stood before the trial judge and told him repeatedly that he could not understand what was going on while practically begging for an interpreter. Six times, in very simple direct terms, the Appellant told the trial court that he could not understand the proceedings, did not speak English, and needed an interpreter. (III R.R. 5-6). The trial judge may be in the best position to observe the accused and has wide discretion in determining

whether the appointment of an interpreter is necessary. However, realistically, what more could a foreign born non English speaking defendant be expected to do to inform the trial judge that he cannot understand English and needs an interpreter? To suggest that the exchange between the Appellant and the trial judge was inadequate to make the court aware that the Appellant needed an interpreter would establish a very dangerous precedent.

The trial judge also heard testimony from a professional quasi law enforcement officers employed by the community supervision office which indicated that the Appellant's supervision was part of a Spanish speaking caseload and that she communicated with the Appellant in Spanish. The trial court's duty to appoint an interpreter can arise at any point where the trial court becomes aware of the issue. Even if the Appellant had failed to speak up and repeatedly tell the trial judge that he could not understand the proceedings, even if the trial court had not seen the previous judge's order finding the Appellant needed an interpreter; and even if the trial judge could not recall his own prior order finding that the Appellant needed an interpreter; the trial court should had actual knowledge that an interpreter was needed based on the testimony that the Appellant was on a Spanish speaking probation docket with a probation officer that communicated with him in Spanish.

Nothing in the record rebuts or in any way refutes the Appellant's claim that he could not understand the proceedings and needed an interpreter. Because the trial judge was aware that the Appellant could not speak English and could not understand the proceedings, the trial judge was required to employ some strategy such as the appointment of an interpreter to assist the Appellant. The fact that the Appellant appeared before the court for a hearing on a motion to adjudicate guilt is irrelevant to the court's duty in this regard. The due process right to be present in the courtroom extends to probation revocations and also to hearings on motion to adjudicate guilt. *Hughes* at *14.

C. If the trial court did not have actual knowledge that the Appellant could not understand the proceedings and needed an interpreter; then the trial court had cause to inquire further yet failed to do so

Even if a trial court does not have actual knowledge that an accused cannot understand the proceedings, the court has a duty to inquire sua sponte into the abilities of the accused if there are circumstances that raise the issue. On appeal, a reviewing court will review the record to determine whether such circumstances existed. The arguments urged to show that the trial court had actual knowledge of the Appellant's inability to understand the proceedings are the same arguments that indicate at a minimum the trial judge should have inquired further into the Appellant's ability to understand the proceedings.

The previous order from a different district court judge finding an interpreter to be necessary, the previous order from the trial court judge where he had found an interpreter to be necessary at another hearing, the Appellant's own plea for an interpreter as he explained that he could not understand the proceedings, the probation officer's testimony that the Appellant was on a Spanish speaking caseload, and the probation officer's testimony that she communicated with the Appellant in Spanish are all different circumstances that are each individually sufficient to meet the low burden qualifying as circumstances that raise the issue. Any one of these circumstances should have prompted the trial court to stop the proceedings, regardless of what point in the hearing they were at, and inquire further into whether the Appellant understood what was going on or needed an interpreter.

The record indicates that, very early in the proceedings, there was a brief exchange between the trial court and the Appellant which went as follows:

“Court: All right. I have before me this motion, which you can have the court read aloud. You're entitled to have it read aloud to you, or you can waive its reading. What would you like to do?
Appellant: ***I don't understand it. I don't get it.***
Court: All right. So, are you waiving having the motion read aloud to you?
Appellant: ***I don't even know what you're saying, sir.***
Court: Okay. So, you have the right to have this first-amended motion read to you aloud right now; or if you understand the allegations that are set forth in the motion to adjudicate guilt, you can waive their reading. What would you like to do?
Appellant: I waive.

Court: You'll waive it?
 Appellant: ***What? I don't understand. Can I get a translation?***
 Court: A translation?
 Appellant: Yeah.
 Ledesma: You don't understand the words?
 Appellant: ***I don't speak English like that.***
 Court: You don't speak English like that? ***Well, how do you speak it?***
 Appellant: ***I don't...***
 Court: You can give up your right to have me read this aloud to you, or if you...
 Appellant: You can read it.
 Court: ... want, I can read it.
 Appellant: You can read it.
 Court: Okay. I'll read it to you."
 (III R.R. at 5-6 ***emphasis added***)

Following this exchange, the Appellant gave only answers of “yes, sir” or “no, sir.”

There is no real guidance in the case law as to what extent the court is required to inquire into the Appellant’s ability to understand the proceedings or to speak English. This exchange is woefully insufficient to determine the abilities of an accused and reads instead like the trial court was just trying to move along the proceedings in a case where neither side had requested an interpreter. The ONLY inquiry the court made was the question “You don’t speak English like that? Well, how do you speak it?” to which the Appellant responded “I don’t...” (III R.R. 5-6).

This exchange resolved nothing and would be insufficient for any court to confidently proceed. Stating that a court has a duty to inquire would suggest that there is some obligation to find out the truth of a matter or settle an open question.

The trial court in this case did not inquire into whether the Appellant could

understand the proceedings or speak English as required. This failure deprived the Applicant of his due process rights, his right to be present, his right to assist in his own defense, his right to confront his accusers, and his statutory right to an interpreter.

D. Waiver

An accused that does not understand English does not waive his right to an interpreter by failing to object. *Baliterra*, 586 S.W.2d at 559. Neither the right to be present under due process nor the right to confront accusers is subject to forfeiture. *Hughes*, at *9-*10 The trial court has an affirmative obligation and independent duty to appoint an interpreter when he is aware that an accused cannot understand English unless there is an explicit waiver on the record made knowingly and voluntarily by the accused. *Ex Parte Zantos-Quebas*, 429 S.W.3d 83, 89 (Tex.App. – Houston [1st Dist.] 2014, no pet.) citing *Garcia*, 149 S.W.3d at 145). Absent a valid waiver, which must be plainly, freely, intelligently, and on the record, the issue may be raised on appeal. *Marin v. State*, 851 S.W.2d 275, 279 (Tex.Crim.App. 1993) and *Hughes*, at *9.

In this case, the Appellant did all he could to alert the trial judge to an issue before eventually acquiescing to the process and confining himself to yes/no answers. At no point did the Appellant affirmatively waive his rights to an

interpreter and this right is not subject to forfeiture by acquiescence or failure to object. As such, the issue can be reviewed on appeal.

E. Standard of Review

An abuse of discretion standard is applied to decisions regarding the appointment of an interpreter and also to whether the court took adequate measures to inquire into the accused's ability to understand the proceedings. This review is limited to the information known to the trial judge at the time of the ruling. In this matter, the court abused its discretion in failure to appoint an interpreter and also abused its discretion with regard to its inquiry into the Appellant's ability to understand the proceedings. At no point during the hearing did the court make a finding that the Appellant could or could not understand the proceedings, speak English, or needed an interpreter. The record contains an explicit plea from the Appellant telling the court that he could not understand the proceedings and asking for an attorney to be appointed. The only effort the court made to inquire was to ask "You don't speak English like that? Well how do you speak it?" to which the Appellant replied "I don't." (III R.R. 5-6). The court was clearly alerted to the fact that there was an issue and made no real attempt to ascertain the degree of the Appellant's understanding. The court's decision to deny an interpreter and the decision not to inquire beyond asking "You don't speak English like that? Well how do you speak it?" are the very definition of arbitrary. Any well reasoned

approach would have necessitated either the immediate appointment of a translator or an actual meaningful inquiry into the Appellant's ability to understand the proceedings. The trial court's failure to appoint an interpreter or inquire into the Appellant's ability to understand persisted throughout the proceedings as a the State's probation officer testified that the Appellant was part of Spanish speaking case load and that she communicated with the Appellant in Spanish. To deny the appointment of an interpreter or fail to inquire further into the issue, under the circumstances presented, is clearly beyond the realm of reasonable disagreement and a clear abuse of discretion.

F. Due Process Right to be Present and Right to Assist in Defense

Because the Appellant was denied the ability to have the proceedings presented in a manner that he could understand, he was denied his due process right to be present. This further denied him the ability to assist in his own defense, also in violation of due process. There is a four prong test for due process violations. The court should consider whether what is told to the accused is incomprehensible, whether there is a doubt as to the accuracy of the translation provided, whether the nature of the proceeding is not explained to the accused in a way designed to insure comprehension, or whether the trial court fails to review evidence and make findings related to a credible claim of incapacity due to language issues. *Cirrincone*, 782F.2d at 634. In this case, the trial court failed in

to protect the due process rights of the Appellant in all four respects. The first point favors the Appellant because the Appellant told the court that he did not understand these proceedings. This assertion is corroborated by prior court orders and the testimony of the probation officer. The second point favors the appellant because when no translation is provided, then there certainly wasn't an accurate translation provided. The third point favors the Appellant because there was no mechanism utilized to explain the proceedings to the Appellant, aside from the court's reading of the motion, which was done in a language the Appellant did not understand. Finally the fourth point was violated because the court made no real inquiry into the Appellant's abilities beyond asking "You don't speak English like that? Well how do you speak it?" to which the Appellant replied "I don't." The Appellant's due process rights were clearly violated by the trial court and that violation necessitates reversal of the conviction and remand for a new trial.

G. Right to Confront Accusers

The Appellant was also denied his constitutional right to confront his accusers. Probation revocations are different than full criminal trials. A defendant in a probation revocation may not have the same right to confront his accusers as a defendant at a full criminal trial. This is in part because the defendant in a probation revocation has already been found guilty and sentenced for the underlying offense.

The Appellant argues that a hearing on a motion to adjudicate guilt should be differentiated from a probation revocation hearing. In a hearing on a motion to adjudicate guilt, the accused has not been found guilty or sentenced for the underlying offense. A hearing on a motion to adjudicate guilt involves factual allegations regarding the failure of an accused to complete conditions of the deferred adjudication, and the consequences of an adjudication may involve loss of liberty by imprisonment. This alternate nature which differs significantly from a probation revocation should include the right to confront accusers. Pursuant to that right to confront accusers, the Appellant has a separate grounds that protect his right to be present for the proceedings and have the proceedings present in a manner he can understand. This is particularly important in a case such as this one, where multiple witnesses testified asserting criminal acts committed by the Appellant that, if he were able to understand, he may be able to assist his attorney in challenging their accounts.

H. Statutory Right to an Interpreter

This failure also violated the Applicant's statutory right to an attorney. The statute may be triggered by the motion of any party or may be initiated by the court. Upon determination that the accused cannot speak English the statute requires the appointment of an interpreter. The trial court in this case was aware from several different sources, including the accused himself in open court, that the

Appellant could not speak English. The court should not be allowed to skirt the obligations of the statute simply by not making a determination that the Appellant cannot speak English. In this case, the court was presented directly with the fact that the Appellant could not speak English and the trial judge should have taken up the issue on his own motion to make the determination that the accused could not speak English. Failure to make that determination when presented with an accused that specifically tells the court that he can't speak English runs counter to the spirit and intent of this rule, and in ignoring the Appellant's claim that he could not speak English, the court failed to comply with the statutory burden to appoint an interpreter. Furthermore, the provisions of this statute apply to any criminal proceeding. Although short of a full jury trial, a hearing on a motion to adjudicate guilt should be considered a criminal proceeding and as such, the trial court committed reversible error by denying the Appellant his statutory right to an interpreter.

I. Harm Analysis

The first test utilized in determining the harm of the court's error is the constitutional harmless error test. Under the requirements of this test, the court shall reverse the conviction and/or sentence unless the State can show beyond a reasonable doubt that the error did not harm the Appellant. In this case, the Appellant was denied his due process right to be present and assist in his own

defense. This right was denied from the onset of the hearing on the State's motion to adjudicate guilt and persisted through each witness. During the State's case, the State called a probation officer to testify about the Appellant's understanding of the rules of probation and the Appellant's performance on probation. The Appellant would have first hand knowledge of these matters and, were he present to assist in his defense, could provide his attorney with valuable insight into the alleged violations. The State also called a loss prevention officer, a private citizen, and a police officer to testify. Each of these individuals testified about alleged criminal activity of the Appellant that they personally were said to have witnessed. None of these witnesses actually knew the Appellant and each of these witnesses had issues with their testimony for fertile cross examination. The loss prevention officer actually identified the wrong person as the criminal actor before settling on the Appellant as the alleged culprit. The citizen who claimed to be a victim of the Appellant did not know the Appellant and learned who he was from hearsay around the neighborhood. The officer that testified link the Appellant to a gun not found on the Appellant's person but found along the route of travel during a traffic stop. It is easy to see plenty of reason to believe that the Appellant could have changed the outcome of these proceedings had he been able to understand what was going on an been actually present during for purposes of due process. At a

minimum, there is no way that the State can prove beyond a reasonable doubt that the Appellant did not suffer any harm from the trial court's error.

The Appellant was also denied his confrontation clause right to be present. This includes the right to confront his accusers by assisting in their cross examination which, as previously expressed, could have been vital to his defense. In reviewing the harm of a confrontation clause error, the court should assume that the damaging effect of cross examination would have been fully realized.

Delaware v. Van Arsdell, 475 U.S. 673, 684 (1986). Fully realized cross examination of these witnesses utilizing the assistance of an accused that could actually understand the proceedings could have had a massive impact on the conviction and/or sentence. At a minimum, the State cannot show beyond a reasonable doubt that this error was harmless.

The court should also evaluate harm under the reasonable substantial relationship test. This test evaluates whether the ability of the Appellant to advance his defense was harmed by his absence at a particular point in a proceeding. In this case, the Appellant was absent from the entirety of the hearing on the motion to adjudicate guilty. The Appellant was not present during opening statements, direct of the State's witnesses, cross of the State's witnesses, and closing arguments. The Appellant may very well have assisted with advancing his defense in each of these phases. Most pointedly, the Appellant's presence would

have been indispensable during cross examination. There is no doubt that the Appellant absence due to inability to understand the proceedings would have had a reasonable substantial relationship to his ability to advance his defense.

J. Conclusion

By denying the Appellant an opportunity to have the proceedings present in a manner he could understand, the court constructively denied the Appellant his right to be present. Since the Appellant was denied his due process right to be present, he was likewise denied his due process right to assist in his own defense. The Appellant was also denied any right that may exist to confront his accusers and the right to be present under the confrontation clause. Further the Appellant was denied his statutory right to an interpreter under Texas law. Each decision of the trial court with regard to translation services was made arbitrarily and without proper consideration, clearly outside the zone of reasonable disagreement. As a result, the Appellant suffered clear harm and was unjustly adjudicated before being sentenced to confinement in Texas Department of Criminal Justice, Institutional Division, for 50 years.

PRAYER

For these reasons, the Appellant, Erick Martinez, urges the court to reverse the conviction this matter and enter a judgment of acquittal, or in the alternative,

remand for further proceedings consistent with the protection of the constitutional and statutory rights.

Respectfully Submitted,

/s/ Clayton Hearrell

Clayten Hearrell

State Bar Number 24059919

The Law Office of Clay Hearrell

11200 Broadway Street, Suite 2743

Pearland, Texas 77584

clay@getbackcontrol.com

346-528-7447

Certificate of Compliance

The word-processing software used to write this brief reports it's length at 10,335 words before subtracting for any of the contents that may be excluded under Rule 9.4(i)(1).

Certificate of Service

I served this brief on all parties by e-service at the time of filing.

/s/ Clayton Hearrell
Clayton Hearrell

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Envelope ID: 88234420

Filing Code Description: Brief Not Requesting Oral Argument

Filing Description:

Status as of 5/29/2024 4:51 PM CST

Associated Case Party: Erick Martinez

Name	BarNumber	Email	TimestampSubmitted	Status
Clayten Hearrell		clay@getbackcontrol.com	5/29/2024 4:45:07 PM	SENT

Associated Case Party: The State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Thomas J. Selleck	18010500	Bcdaeservice@brazoriacountytx.gov	5/29/2024 4:45:07 PM	SENT