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Zachary C. Bolitho
Campbell University School of Law

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THE HEARSAY AND CONFRONTATION CLAUSE PROBLEMS CAUSED BY ADMITTING WHAT A NON-TESTIFYING INTERPRETER SAID THE CRIMINAL DEFENDANT SAID

Zachary C. Bolitho*

INTRODUCTION

Over 24.4 million non-English speakers currently live in the United States.¹ That number is projected to rise.² This reality presents unique challenges to many of our social institutions, including the criminal justice system.³ One of those challenges is described in the following, regularly occurring, scenario.

A police officer arrests a suspected criminal. The officer wishes to interview the suspect but there is a problem. The officer speaks English. The suspect does not. The officer, therefore, recruits a bilingual individual (often another police officer) to serve as an interpreter during the interview. The interview then proceeds in four steps. First, the officer asks a question in English. Second, the interpreter conveys the question to the suspect in his native language. Third, the suspect answers the question in his native language. Fourth, the interpreter conveys the suspect's answer to the officer in English.

Fast forward six months. The suspect has been formally charged with a crime, and the case is proceeding to trial. For one reason or another, the prosecutor does not call the interpreter to testify at the defendant's trial. The prosecutor does,

* Assistant Professor, Campbell University School of Law, Raleigh, North Carolina, and former federal prosecutor with the U.S. Department of Justice. The author would like to thank Stefan Longo for his research assistance and William Woodruff and Daniel Tilly for their helpful comments on earlier drafts of this Article.

1. See ROSEANN DUEÑA GONZÁLEZ ET AL., *FUNDAMENTALS OF COURT INTERPRETATION, THEORY, POLICY, AND PRACTICE*, XLVIII (2d ed. 2012) (“As of 2012, more than 24.4 million people in the United States . . . are unable to speak or understand English at the level required to knowingly or intelligently participate in court proceedings or to utilize court services.”); see also CHRISTINE P. GAMBINO ET AL., U.S. CENSUS BUREAU, *ENGLISH-SPEAKING ABILITY OF THE FOREIGN-BORN POPULATION IN THE UNITED STATES: 2012*, at 2–3, <https://www2.census.gov/library/publications/2014/acs/acs-26.pdf> (reporting that the foreign-born population in the U.S. increased from 14.1 million in 1980 to 40.8 million in 2012, with approximately half of those 40.8 million speaking English “less than ‘very well’”).

2. DUEÑA GONZÁLEZ, *supra* note 2, at 27 (stating that “U.S. Census data project a significant growth” in non-English speakers residing in the U.S.).

3. SUSAN SHAH ET AL., U.S. DEP’T OF JUSTICE, *OVERCOMING LANGUAGE BARRIERS: SOLUTIONS FOR LAW ENFORCEMENT* 4–5 (2007), https://storage.googleapis.com/vera-web-assets/downloads/Publications/overcoming-language-barriers-solutions-for-lawenforcement/legacy_downloads/Overcoming_Language_Barriers_FINAL.pdf (describing the obstacles presented to law enforcement officers by the increasing population of non-English speakers).

however, call the investigating officer as a witness. The prosecutor asks the officer to tell the jury what the defendant said during the interview. The officer lacks the ability to tell the jury what words the defendant uttered during the interview because the defendant was speaking a foreign language. But, the officer does have the ability to tell the jury what the non-testifying interpreter said that the defendant said.

At this point, the antennae of any trial lawyer should be raised. Do the hearsay rules allow an officer to testify about what an interpreter said the defendant said outside of court? Even if such testimony is admissible under the hearsay rules, would the defendant have a right to cross-examine the interpreter under the Confrontation Clause of the Sixth Amendment? Those important questions have been posed to state and federal courts nationwide, with varying results.

Over the last several decades, most courts have held that neither the hearsay rules nor the Confrontation Clause prevent the introduction of what a non-testifying interpreter said the defendant said.⁴ But, that has not always been the majority position. The admissibility of this category of statements is an issue the courts have struggled with for over a century.⁵ The earlier courts (i.e., pre-1970s) often excluded

4. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 4 FEDERAL EVIDENCE § 8:52 (4th ed. 2014) (“Many courts approve testimony describing admissions by the defendant, where the testifying witness does not understand his language and relies instead on someone who translated into English what he said.”); see also *State v. Lopez-Ramos*, 913 N.W.2d 695, 698–99 (Minn. Ct. App. 2018) (holding that neither the Confrontation Clause nor the hearsay rules prohibited the introduction of statements made by a non-testifying interpreter during a police interrogation).

There are a small number of courts, however, that have held relatively recently that such testimony is inadmissible hearsay. See, e.g., *State v. Garcia-Trujillo*, 948 P.2d 390, 393 (Wash. Ct. App. 1997) (holding that the detective’s testimony about what the defendant said through an interpreter was inadmissible hearsay); see also *People v. Villagomez*, 730 N.E.2d 1173, 1182 (Ill. App. Ct. 2000) (“[U]nless the person who acts as the interpreter testifies as to the taking of the statement, the statement is inadmissible hearsay.”). And, two courts have recently excluded statements made through a non-testifying interpreter on Confrontation Clause grounds. *United States v. Charles*, 722 F.3d 1319, 1323 (11th Cir. 2013) (holding that the Confrontation Clause was violated by allowing an officer to testify about statements the defendant made through an interpreter when the interpreter was not subject to cross examination); *Taylor v. State*, 130 A.3d 509, 512 (Md. Ct. Spec. App. 2016) (holding that the Confrontation Clause provided a deaf defendant with the right to cross examine a sign language interpreter used by the police during the defendant’s interrogation).

5. Compare *People v. Yute*, 56 Cal. 119, 121 (1880) (explaining that the trial court should have excluded testimony by a court reporter regarding what the defendant said through an interpreter in another court proceeding because the “interpreter, or some other witness who heard and understood the language in which the statements of the defendant were made, should have been called to prove them”), with *Commonwealth v. Vose*, 32 N.E. 355, 355 (Mass. 1892) (finding that testimony of what the defendant said through an interpreter did not violate the hearsay rules because “[t]he fact that a conversation was had through an interpreter affects the weight, but not the competency of the evidence.”).

such statements on hearsay grounds.⁶ Over time, however, many courts have become more willing to admit statements made by a non-testifying interpreter.⁷

The courts have primarily reached the conclusion that the hearsay rules permit these out-of-court statements through the use of two similar, but fundamentally different, theories: (1) the “language conduit theory”; and (2) the “agency theory.”⁸ Both theories find their genesis in Federal Rule of Evidence 801(d)(2)’s declaration that party opponent statements are exempt from the rule against hearsay.⁹

Under the language conduit theory, the interpreter is little more than a telephone line through which statements pass from one person (the defendant) to another (the testifying witness). Even though the witness is testifying as to what words came out of the interpreter’s mouth, as opposed to the defendant’s, the language conduit theory treats the defendant as the declarant for purposes of the hearsay analysis.¹⁰ Put another way, the language conduit theory pretends that the defendant spoke directly to the testifying witness in English. The statement, therefore, is treated as the defendant’s and is admitted as a party opponent statement under Rule 801(d)(2)(A).¹¹

6. See *Saavedra v. State*, 297 S.W.3d 342, 347 (Tex. Crim. App. 2009) (“Early on, many jurisdictions seemed to hold . . . that the statement of an out-of-court interpreter . . . ‘was manifestly hearsay.’”); see also *Scotto v. Dilbert Bros., Inc.*, 263 A.D. 1016, 1016 (N.Y. App. Div. 1942) (holding that statements made to a police officer through an interpreter were “hearsay and inadmissible” because the interpreter was “not called to testify as to the correctness of his interpretation”); *State v. Epstein*, 55 A. 204, 208 (R.I. 1903) (finding that testimony regarding what a witness said out of court by a non-testifying interpreter was “clearly hearsay” because the testifying witness “only knew what was in fact said by him from what the interpreter told them that he had said”); *Turner v. State*, 232 S.W. 801, 802 (Tex. Crim. App. 1921) (reversing conviction on hearsay grounds where a police officer testified regarding statements the defendant made through a non-testifying interpreter); Case Note, *Evidence—Hearsay—Statements Through Interpreter*, 29 YALE L.J. 455, 459 (1920) (“It is clear that words which a witness has understood only by the translation of another are hearsay. And the general rule is that the witness cannot therefore testify as to what was said.”)

7. See CLIFFORD S. FISHMAN & ANNE T. MCKENNA, 4 JONES ON EVIDENCE § 27:37 (7th ed. 2013) (reporting that the “prevailing view” in the courts today is that the hearsay rules should not result in the exclusion of statements made by a defendant through a non-testifying interpreter); see also *People v. Gutierrez*, 916 P.2d 598, 600 (Colo. App. 1995) (“[A] growing majority of jurisdictions now allow[] admission of translated testimony in appropriate circumstances . . .”).

8. See BARBARA E. BERGMAN ET AL., 2 WHARTON’S CRIMINAL EVIDENCE § 8:7 (15th ed. 2013) (discussing the two theories the courts have used to resolve the hearsay issue). A small number of courts have also admitted out of court statements made by a non-testifying interpreter based on the residual hearsay exception found in Rule 807 or a state equivalent. See, e.g., *State v. Montoya-Franco*, 282 P.3d 939, 941–42 (Or. Ct. App. 2012).

9. State courts have relied on the provisions of their evidentiary codes that largely mirror Rule 801(d)(2).

10. See *United States v. Vidacak*, 553 F.3d 344, 352 (4th Cir. 2009) (explaining that the “translations did not create double hearsay because [the interpreter] was merely a ‘language conduit’ and not a declarant under the hearsay rule”); see also *Correa v. Superior Court*, 40 P.3d 739, 746 (Cal. 2002) (stating that under the language conduit theory “the statement simply is considered to be the statement of the original declarant, and not of the translator, so that no additional level of hearsay is added by the translation”).

11. See *United States v. Ushakow*, 474 F.2d 1244, 1245 (9th Cir. 1973) (explaining that the interpreter was merely a “language conduit” between the defendant and the witness and, therefore, the interpreted statements were “within the same exception to the hearsay rule as when a defendant and another are speaking the same language”); see also FED. R. EVID. 801(d)(2)(A) (declaring that a statement

The courts applying the agency theory have reached the same result by way of a different route. Under the agency theory, the interpreter is treated as an agent of the defendant who was authorized to make statements on the defendant's behalf.¹² A defendant is presumed to have selected the interpreter as his agent simply by communicating through the interpreter during a conversation.¹³ Courts have gone so far as to treat bilingual police officers or other government-selected interpreters as the defendant's agent during interrogations.¹⁴ Once the interpreter is declared the defendant's agent, the statements made by the interpreter are rendered admissible as non-hearsay statements of a party opponent's agent.¹⁵

When the government seeks to introduce an out-of-court statement against a criminal defendant, the hearsay hurdle is not the only one that must be cleared. The statement must also be admissible under the Sixth Amendment's Confrontation Clause.¹⁶ Relatively few courts have addressed the Confrontation Clause issue presented by the introduction of statements made by a non-testifying interpreter since the Supreme Court's groundbreaking 2004 decision in *Crawford v. Washington*.¹⁷ Of those courts to consider the issue post-*Crawford*, there is a split of authority at both the state and federal level. In terms of federal courts, the Fifth and Ninth Circuits

is "not hearsay" if "[t]he statement is offered against a party and . . . was made by the party in an individual or representative capacity").

12. See *State v. Robles*, 458 N.W.2d 818, 821 (Wis. Ct. App. 1990).

13. See *id.* at 822 ("Absent evidence to the contrary, a suspect's choice to communicate through an interpreter signals that the interpreter is the suspect's agent."); see also 29A AM. JUR. 2D *Evidence* § 835 (2014) (recognizing that there is a "presumption of agency" that may be rebutted by the defendant in certain circumstances).

14. See *United States v. Da Silva*, 725 F.2d 828, 831 (2d Cir. 1983) (treating the interpreter of out of court statements as the defendant's agent for hearsay purposes even though the interpreter was an employee of the U.S. Customs Service); see also *United States v. Alvarez*, 755 F.2d 830, 859–60 (11th Cir. 1985) (treating a federal law enforcement officer as the defendant's agent where the officer interpreted for another officer during an interrogation); *People v. Gutierrez*, 916 P.2d 598, 600 (Colo. Ct. App. 1995) (treating a police informant who served as an interpreter between undercover police officer and defendant as the defendant's agent); Casen B. Ross, Comment, *Clogged Conduits: A Defendant's Right to Confront His Translated Statements*, 81 U. CHI. L. REV. 1931, 1949 (2014) ("Even when the government provides a translator or when the translator is an employee of the government, an agency relationship may still exist.").

15. See, e.g., *Da Silva*, 725 F.2d at 831 (stating that an officer could testify as to statements made by the defendant to an interpreter because "the prevailing view is that the translator is normally to be viewed as an agent of the defendant; hence the translation is attributable to the defendant as his own admission and is properly characterizable as non-hearsay under Rule 801(d)(2)(C) or (D)"). FED. R. EVID. 801(d)(2)(C) provides that a statement is "not hearsay" if it "is offered against an opposing party . . . and was made by a person whom the party authorized to make a statement on the subsection." Similarly, FED. R. EVID. 801(d)(2)(D) provides that a statement is "not hearsay" if "it is offered against an opposing party . . . and was made by the party's agent or employee on a matter within the scope of that relationship while it existed."

16. See JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S EVIDENCE MANUAL, § 14.03[1] (9th ed. 2011) (providing an overview of the relationship between the hearsay rules and the Confrontation Clause).

17. 541 U.S. 36 (2004).

have held that a defendant has no Sixth Amendment right to cross examine the interpreter,¹⁸ while the Eleventh Circuit has reached the opposite conclusion.¹⁹

Although the courts have been grappling with the admissibility of statements made by a non-testifying interpreter for years, it is an area that has received relatively little scholarly attention. Such attention is needed for three reasons. First, the rising population of non-English speakers²⁰ is likely to result in increased attempts to introduce statements made by non-testifying interpreters in criminal trials.

Second, the hearsay and Confrontation Clause issues raised by the introduction of interpreted statements are complex. One federal appellate judge has described the Confrontation Clause issue as a “novel and difficult question of constitutional law in an area where the Supreme Court’s jurisprudence is still evolving.”²¹ Given the existence of a circuit split, this is certainly an issue that may attract Supreme Court review.²²

Third, most courts are incorrectly answering both the hearsay and Confrontation Clause questions with little resistance (or even attention) from scholars. Underlying the incorrect decisions is a misunderstanding of the task that interpreters perform. This Article seeks to dispel the myth that language interpretation—especially crime scene and stationhouse interpretation—is a scientific exercise performed by experts who are the linguistic equivalent of calculators that convert measurements from metric to standard. The reality is that language interpretation is a difficult task that requires significant training, skill, and judgment.²³ Interpreters are not merely language conduits or presumptive agents of the speaker; rather, they are separate hearsay declarants who are often making “testimonial”²⁴ statements against a criminal defendant.

18. *United States v. Ye*, 808 F.3d 395, 401–02 (9th Cir. 2015) (finding no Confrontation Clause violation where investigators testified regarding statements the defendants made by a non-testifying interpreter); *United States v. Orm Hieng*, 679 F.3d 1131, 1141 (9th Cir. 2012) (same); *United States v. Budha*, 495 F. App’x 452, 454 (5th Cir. 2012) (same); *Hernandez v. State*, 662 S.E.2d 325, 330 (Ga. Ct. App. 2008) (same); *People v. Morel*, 8 Misc. 3d 67, 71–72 (N.Y. App. Term 2005) (same); *Cassidy v. State*, 149 S.W.3d 712, 715–16 (Tex. Crim. App. 2004) (same).

19. *See United States v. Charles*, 722 F.3d 1319, 1330–31 (11th Cir. 2013) (finding a Confrontation Clause violation where an officer testified about what a non-testifying interpreter said that the defendant said during an interview, but affirming the defendant’s conviction because the violation did not amount to plain error); *see also* Tom S. Xu, *Confrontation and the Law of Evidence: Can the Language Conduit Theory Survive in the Wake of Crawford?*, 67 VAND. L. REV. 1497, 1516–17 (2014) (describing the circuit split created by the Eleventh Circuit’s decision in *Charles*).

20. *See Susan Heavey*, *Use of Language other than English in the U.S. on the Rise: Census*, REUTERS, (Aug. 6, 2013), <https://www.reuters.com/article/us-usa-language-census-idUSBRE97514V20130806> (“The number of people in the United States who speak a language other than English at home has nearly tripled over the past three decades, far outpacing the overall population growth.”).

21. *Charles*, 722 F.3d at 1332 (Marcus, J., concurring in judgment).

22. *See generally* SUP. CT. R. 10(a) (stating that one of the considerations the Supreme Court considers when deciding whether to grant certiorari is whether “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter”).

23. *See* DUEÑA GONZÁLEZ, *supra* note 2, at 19–25 (explaining the complexity of language interpretation and discussing the skills required of a reliable interpreter).

24. *See generally* *Williams v. Illinois*, 567 U.S. 50, 65 (2012) (alterations in original) (explaining that under the Confrontation Clause “[t]estimonial statements of witnesses absent from trial [can be] admitted

This Article proceeds in four parts. Part I provides an in-depth discussion of the hearsay problem raised by admitting statements made by a non-testifying interpreter. It explores the historical treatment of the problem and discusses the development of the agency and language conduit theories. Additionally, Part I highlights the flaws with both theories—the language conduit theory is based on a false premise regarding the task of interpreting, and the agency theory contradicts well settled principles of agency law.

Part II discusses the Confrontation Clause issue by describing the current state of the law and arguing that the Sixth Amendment is violated when the government admits statements that a non-testifying interpreter made to a police officer outside of court. Specifically, when an interpreter tells a police officer what the defendant said, the interpreter has made a “testimonial” statement under *Crawford* and its progeny—particularly *Melendez-Diaz v. Massachusetts*²⁵ and *Bullcoming v. New Mexico*.²⁶ Part III provides practical advice on how prosecutors and police officers can obtain and admit such statements without violating the hearsay rules and the Confrontation Clause. A brief conclusion follows in Part IV.

I. THE RULE AGAINST HEARSAY AND THE ADMISSION OF STATEMENTS MADE BY A NON-TESTIFYING INTERPRETER

A majority of the federal and state courts to address the issue in recent years have held that the rule against hearsay does not prevent a witness from testifying about what a non-testifying interpreter said that the defendant said outside of court.²⁷ Some courts have reached that conclusion by relying on the language conduit theory, and others have relied on the agency theory.²⁸ Both theories are explained and critiqued below. But, first an overview of basic hearsay principles and a discussion of the historical treatment of this particular hearsay issue is necessary.

A. Overview of relevant hearsay principles

The Federal Rules of Evidence define hearsay as “a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted.”²⁹ A “declarant” is the

only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine”).

25. 557 U.S. 305 (2009).

26. 564 U.S. 647 (2011).

27. See MUELLER & KIRKPATRICK, *supra* note 4 (“Many courts approve testimony describing admissions by the defendant, where the testifying witness does not understand [the defendant’s] language and relies instead on someone who translated into English what he said.”); see also FISHMAN & MCKENNA, *supra* note 8 (explaining that the “prevailing view” in the courts is that statements made by a non-testifying interpreter are not barred by the rule against hearsay).

28. See BERGMAN ET AL., *supra* note 8, § 8:7. A small number of state courts have relied on the residual or “catch all” hearsay exception. See, e.g., *State v. Montoya-Franco*, 282 P.3d 939, 939 (Or. Ct. App. 2012).

29. FED. R. EVID. 801(c). Most state courts have adopted the identical or a substantially similar definition of hearsay. See DEBORAH JONES MERRITT & RIC SIMMONS, *LEARNING EVIDENCE* 25 (2015) (“The Federal Rules have also influenced many state courts and legislatures. The rules apply only to

“person who makes the out-of-court statement that is reported or otherwise introduced at trial through a witness or a document.”³⁰ Hearsay statements are inadmissible,³¹ unless they fall within an exemption found in Rule 801(d)³² or an exception found in Rules 803, 804, or 807.³³

There are two categories of exemptions found in Rule 801(d)(2)—prior statements of a witness and party opponent statements.³⁴ The party opponent exemption is the relevant exemption here. It is a broad exemption—encompassing all statements made by a party and offered by an adverse party.³⁵ There are five ways that a statement can qualify as a party opponent statement: (A) statements made by the party opponent in an individual or representative capacity; (B) statements of another that have been adopted by the party opponent; (C) statements made by a person who was authorized to speak on behalf of the party opponent; (D) statements made by an agent or employee of the party opponent; and (E) statements made by a defendant’s coconspirator during and in furtherance of the conspiracy.³⁶ If a statement falls within one of the five categories, it is, by definition, not hearsay. Many statements are admitted under Rule 801(d)(2). In fact, it is one of the most common reasons why out-of-court statements are admitted during trials.³⁷

The hearsay waters are hard enough to navigate when only one statement is involved. The waters become even more treacherous when a party seeks to introduce an out-of-court statement that has *another* out-of-court statement imbedded within it. For example, a police officer seeks to testify as follows in a robbery trial: “During my investigation, the bank teller told me [hearsay statement #1] that shortly before the robbery the defendant entered the bank and said [hearsay statement #2] ‘I will back in a few minutes to make a big withdrawal.’” This example presents what is commonly referred to as “multiple hearsay,” “double hearsay,” or “hearsay-within-hearsay.”³⁸

There is a specific evidence rule, Rule 805, that applies when a party seeks to introduce hearsay-within-hearsay. Rule 805 mandates that “each part of the

federal courts, but more than forty states have adopted state codes that are very similar to the Federal Rules.”)

30. GLEN WEISSEBERGER & JAMES J. DUANE, FEDERAL RULES OF EVIDENCE: RULES, LEGISLATIVE HISTORY, COMMENTARY AND AUTHORITY § 801.4 (7th ed. 2011).

31. FED. R. EVID. 802.

32. The provisions found in Rule 801(d) are referred to as “exemptions” or “exclusions” because statements that fall within them are, by operation of the rules, non-hearsay even though they satisfy the definition set forth in Rule 801(c). See G. MICHAEL FENNER, THE HEARSAY RULE 40 (3d ed. 2013) (“It is important to understand that 801(d) does not create exceptions to the hearsay rule; rather, it excludes certain statements from the rule itself. . . . The definition in [Rule 801(d)] very clearly states that they are not hearsay.”); see also MERRITT & SIMMONS, *supra* note 29, at 463 (stating that “[t]o honor [Rule 801(d)]’s identification of these statements as ‘not hearsay,’ we will call them exemptions rather than exceptions”).

33. FED. R. EVID. 803, 804, 807.

34. FED. R. EVID. 801(d)(1), (2).

35. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 4 FEDERAL EVIDENCE § 8:44 (4TH ED. 2014 & SUPP. 2018).

36. FED. R. EVID. 801(d)(2)(A)–(E).

37. MERRITT & SIMMONS, *supra* note 29, at 635.

38. WEISSEBERGER & DUANE, *supra* note 30, § 805.1.

combined statements conform[] with an exception to the rule” against hearsay.³⁹ In other words, the proponent must separate out the individual hearsay statements and identify a Rule 801(d) exemption or a Rule 803, 804, or 807 exception that applies to each statement. If an exception or exemption cannot be found for each level of hearsay, then the statement will be excluded as inadmissible hearsay.⁴⁰

Keeping that in mind, consider the situation where a witness testifies as to what a non-testifying interpreter told him that the defendant said during an interview. At first blush, this appears to be a classic Rule 805 hearsay-within-hearsay issue involving two out-of-court statements by two separate declarants: (1) the defendant’s statement to the interpreter in the defendant’s native tongue; and (2) the interpreter’s statement to the witness in English. In the first statement, the hearsay declarant would be the defendant. In the second statement, the hearsay declarant would be the interpreter. Under Rule 805 the witness’s testimony as to what the interpreter said the defendant said would be inadmissible unless each statement fell within a Rule 801(d) exemption or a Rule 803, 804, or 807 exception.

The statement from the defendant to the interpreter would be admissible as a party opponent statement under Rule 801(d)(2)(A).⁴¹ The much more difficult question concerns the admissibility of the statement from the interpreter to the witness. The courts have responded to that question by developing the language conduit theory and the agency theory. Although different, both theories have the effect of rendering the Rule 805 hearsay-within-hearsay analysis unnecessary when a witness testifies as to what a non-testifying interpreter said that the defendant said.⁴²

Most courts to consider the issue in recent years have used one or both theories to permit a witness to testify about what a non-testifying interpreter said that the defendant said. In the past, however, many courts viewed such testimony as inadmissible hearsay.⁴³ Since an appreciation of history is necessary to understand the present, the next section examines the historical treatment of this issue. That

39. FED. R. EVID. 805. Rule 805 only specifically mentions “exceptions,” but it “should be read to also reach statements that qualify as ‘not-hearsay’ under Rule 801(d).” MUELLER & KIRKPATRICK, *supra* note 4, § 8.79.

40. See FENNER, *supra* note 32, at 382 (“When testimonial or documentary evidence is built upon multiple layers of hearsay, then, before the evidence will be admissible, there must be an exception for each layer.”).

41. *E.g.*, United States v. Roe, 670 F.2d 956, 963 (11th Cir. 1982) (“A defendant’s own statements are admissible against him as party admissions under Fed. R. Evid. 801(d)(2)(A).”); see also ROY R. RAY, TEXAS LAW OF EVIDENCE CIVIL AND CRIMINAL § 789 (3d ed. 1980) (“If a declarant makes a statement in a foreign tongue and A translates this statement to B who does not understand the language in which it was originally spoken, the original declaration may be admissible if proper proof of it is made, as an admission of a party.”).

42. See, *e.g.*, United States v. Da Silva, 725 F.2d 828, 831 (2d Cir. 1983) (explaining that the “translator is normally to be viewed as an agent of the defendant; hence is translation his attributable to the defendant as his own admission and is properly characterized as non-hearsay under Rule 801(d)(2)(C) or (D)”); see also United States v. Shubin, 722 F.3d 233, 248 (4th Cir. 2013) (“[T]he absence in court of the interpreter did not render the statements inadmissible as hearsay because the interpreter was not the declarant, but only a ‘language conduit.’”).

43. See generally Case Note, *supra* note 6, at 459 (“[W]ords which a witness has understood only by the translation of another are hearsay. And the general rule is that the witness cannot therefore testify as to what was said.”).

section is followed by a thorough discussion and critique of the language conduit and agency theories.

B. Historical perspective

President Harry Truman once said, “there is nothing new in the world except the history you do not know.”⁴⁴ That is undoubtedly true with respect to the issue of whether a witness can testify about statements made by a non-testifying interpreter. Due to the large number of non-English speakers now residing in the United States,⁴⁵ the issue has been raised regularly in recent years. Despite its recent prevalence, this issue is not new. It has been confronting courts for over a century.⁴⁶ The majority approach today, however, stands in stark contrast to the approach that once prevailed.

Today, most courts allow a witness to testify as to what a non-testifying interpreter said the defendant said.⁴⁷ Historically, the “general rule” was that “words which a witness has understood only by the translation of another are hearsay.”⁴⁸ The following sections chronicle the shift from a general rule of exclusion to a general rule of admission.

1. *The Late 1870s to the 1960s*

Concomitant with the rise in United States immigration in the late 19th and early 20th centuries,⁴⁹ courts were confronted with the issue of admitting statements made by a non-testifying interpreter.⁵⁰ What emerged from the courts was a consensus—although not complete agreement—that admitting such statements violated the rule against hearsay.⁵¹ As reported in a 1920 edition of the *Yale Law*

44. *Truman Quotes*, TRUMAN ST. U., <http://www.truman.edu/about/history/our-namesake/truman-quotes/> (last visited Mar. 26, 2019).

45. See Heavey, *supra* note 20.

46. See, e.g., *Territory v. Big Knot on Head*, 11 P. 670, 670–71 (Mont. 1886) (holding that testimony of a witness regarding what a non-testifying interpreter said the defendant said during an interview was “manifestly hearsay” and inadmissible).

47. *FISHMAN & MCKENNA*, *supra* note 7, § 27:37.

48. Case Note, *supra* note 6, at 459; see also *People v. Gutierrez*, 916 P.2d 598, 600 (Colo. 1995) (recognizing that older cases treated statements made by a non-testifying interpreter as hearsay, but explaining that “a growing majority of jurisdictions now allows admission of translated testimony in appropriate circumstances assuring its reliability, on the theory that the interpreter serves as an agent of, or a language conduit for, the declarant”).

49. See generally History.com Editors, *U.S. Immigration Before 1965*, HIST., <http://www.history.com/topics/u-s-immigration-before-1965> (last visited Oct. 29, 2009) (explaining that the United States experienced a “major wave[] of immigration . . . from the 1880s to 1920”).

50. See, e.g., *People v. Lee Fat*, 54 Cal. 527, 530–31 (1880); see also *Kalos v. United States*, 9 F.2d 268, 271 (8th Cir. 1925); *People v. John*, 69 P. 1063, 1064 (Cal. 1902); *State v. Noyes*, 36 Conn. 80, 80–82 (1869); *Hawaii v. Kawano*, 20 Haw. 469, 474–76 (1911); *People v. Chin Sing*, 242 N.Y. 419, 420–21 (1926); *State v. Epstein*, 55 A. 204, 208 (R.I. 1903); *Turner v. State*, 232 S.W. 801, 802 (Tex. Crim. App. 1921).

51. See, e.g., *Fat*, 54 Cal. at 531 (finding that trial court erred by admitting a court reporter’s notes of what a defendant said through an interpreter during a preliminary examination where the interpreter did not testify at trial); *Sing*, 242 N.Y. at 422 (concluding that testimony as to what the defendants said through a non-testifying interpreter “was hearsay and inadmissible”); *Turner*, 232 S.W. at 802 (reversing

Journal: “It is clear that words which a witness has understood only by the translation of another are hearsay. And the general rule is that the witness cannot therefore testify as to what was said.”⁵²

The Supreme Court of the Territory of Montana’s 1886 decision in *Territory of Montana v. Big Knot on Head* is a good example of how the early courts resolved the issue.⁵³ In *Big Knot on Head*, the defendants were members of the Piegan tribe who were charged with stealing horses.⁵⁴ The defendants did not speak English, and they were interviewed by an interpreter who worked for the government.⁵⁵ At trial, prosecution witnesses testified that the interpreter told them that the defendants confessed to the crime.⁵⁶ Reversing the convictions, the appellate court ruled that the testimony as to what the defendants told the interpreter “was manifestly hearsay.”⁵⁷ The *Big Knot on Head* court explained that out-of-court statements made to an interpreter “stood in the same relation as those made to any other person.”⁵⁸

Other early courts spoke just as unequivocally on the issue.⁵⁹ Consider the Court of Appeals of New York’s decision in *People v. Sing*.⁶⁰ There, a Chinese defendant was accused of murder.⁶¹ The police interrogated him with the assistance of two Chinese interpreters chosen by the police.⁶² Neither of the interpreters testified at trial. Instead, the prosecution presented “third parties” who testified regarding

conviction on hearsay grounds where the trial court permitted an investigator to testify regarding statements the defendant made through a non-testifying interpreter).

52. Case Note, *supra* note 6, at 459; *see also Evidence—Hearsay—Report of Testimony Given Through an Interpreter*, 15 HARV. L. REV. 859, 859 (1902) (explaining that when a third party seeks to testify as to what another individual said outside of court through an interpreter “it is hard to meet the objection of hearsay”).

53. 11 P. 670 (Mont. 1886).

54. *Id.* at 670.

55. *Id.* at 670–71.

56. *Id.* at 670.

57. *Id.* at 671.

58. *Id.*

59. *See, e.g., Indian Fred v. State*, 282 P. 930, 933 (Ariz. 1929) (opining that testimony from a deputy sheriff about what the defendants said through an interpreter was “clearly hearsay,” but finding the error was harmless because the same information was also introduced by the interpreter who “testified in person as to the statements made by defendants”); *People v. Ah Yute*, 56 Cal. 119, 121 (1880) (finding that the trial court erred by allowing a court reporter to testify about what the defendant said through an interpreter at a prior court hearing because the reporter “did not pretend to testify from his own knowledge or recollection of what the witness said, but from the shorthand notes of what the interpreter had said. The interpreter, or some other witness who heard and understood the language in which the statements were made, should have been called to prove them”); *State v. Epstein*, 55 A. 204, 208 (R.I. 1903) (holding that the trial court erred by admitting testimony from police officers regarding what the defendant said through an interpreter because “it was clearly hearsay testimony; for [the officers] only knew what was in fact said by [the defendant] from what the interpreter told them that he said”); *Turner v. State*, 232 S.W. 801, 802 (Tex. Crim. App. 1921) (reversing the defendant’s robbery conviction because the trial court admitted the sheriff’s testimony about what the defendant told him through an interpreter, which the court held was “hearsay and inadmissible”).

60. 152 N.E. 248, 248 (1926).

61. *Id.*

62. *Id.*

what the interpreters said that the defendant said during the interrogation.⁶³ The defendant was convicted of murder, and he appealed.⁶⁴ The *Sing* court reversed, remarking that the testimony “was so clearly [hearsay] as not to permit any serious discussion of the question.”⁶⁵ In reaching that conclusion, the court highlighted that the interpreters were not the defendant’s agent because the defendant “had nothing to do with” their selection.⁶⁶

The same approach largely prevailed in the mid-Twentieth century, as demonstrated by the Supreme Court of Nebraska’s 1955 decision in *Garcia v. State*.⁶⁷ There, the defendant was convicted of murder. At trial, the government called the county sheriff to testify about his interview of the defendant.⁶⁸ Because the defendant did not speak English, the sheriff used an interpreter to assist with the questioning.⁶⁹ The defendant lodged a hearsay objection to the sheriff’s testimony about what the interpreter said the defendant said.⁷⁰

The trial court initially allowed the sheriff’s testimony, but later sustained the defendant’s objection and prevented the sheriff from testifying as to what the interpreter said the defendant said.⁷¹ The *Garcia* court found that the trial court erred by initially allowing the testimony because “the correct rule is that the testimony of a witness as to a statement made by another person is hearsay when he understood it, not as originally given, but as translated by an interpreter not then under oath.”⁷² The court, however, refused to reverse the defendant’s conviction because the error was harmless.⁷³

During the 1800s and early 1900s, the federal courts confronted the issue less frequently than their state counterparts. The most thorough federal court opinion discussing the issue is the U.S. Court of Appeals for the Eighth Circuit’s decision in *Kalos v. United States*.⁷⁴ In *Kalos*, the defendant was charged with receiving and

63. *Id.*

64. *Id.*

65. *Id.*; see also *People v. Ong Git*, 137 P. 283, 286 (Cal. Dist. Ct. App. 1913) (holding that trial court correctly excluded evidence from a coroner’s inquest that was conducted using an interpreter who did not testify at trial because admitting the evidence “would have been a transgression of the rule of evidence which excludes hearsay testimony.”); *Boyd v. State*, 180 S.W. 230, 232–33 (Tex. Crim. App. 1915) (stating that testimony by police officers regarding what a victim said through an interpreter was “purely hearsay. [The officers] knew nothing that occurred, except the conversation in the Spanish language, which [the interpreter] interpreted to them”).

66. *Sing*, 152 N.E. at 248.

67. 68 N.W.2d 151 (Neb. 1955); see also *State Farm Mut. Auto. Ins. Co. v. Ganz*, 119 So. 2d 319, 321 (Fla. Dist. Ct. App. 1960) (“Plaintiff’s testimony as to what an interpreter told him someone else said was incompetent as hearsay and should have been excluded.”).

68. *Garcia*, 68 N.W.2d at 156, 158–59.

69. *Id.* at 159.

70. *Id.*

71. *Id.*

72. *Id.*; see also *Gallegos v. People*, 403 P.2d 864, 868 (Colo. 1965) (en banc) (“The general rule in criminal and civil cases is that a witness may not testify to another’s statements made in conversation through an interpreter, because such testimony, being based upon interpretation rather than personal knowledge, is hearsay.”).

73. *Garcia*, 68 N.W.2d at 159.

74. 9 F.2d 268 (8th Cir. 1925).

concealing unlawfully imported morphine.⁷⁵ A critical piece of evidence was the testimony of the postmaster from whom the defendant retrieved the morphine-filled package.⁷⁶ The defendant was Greek and did not speak English.⁷⁷ He conversed with the postmaster through a man named Leventis who was also present at the post office.⁷⁸

At trial, the prosecution called the postmaster as a witness.⁷⁹ He relayed to the jury what Leventis told him the defendant had said.⁸⁰ The defendant was convicted, and he argued on appeal that the trial court erroneously admitted the postmaster's testimony.⁸¹ The Eighth Circuit agreed, explaining that the defendant "did not take Leventis to the postmaster to act for him as his agent . . . , and the statements made there in the English language by Leventis were not admissible."⁸²

Not only did most courts of the era generally treat statements made by a non-testifying interpreter as hearsay, legal commentators did as well. As the foremost Evidence scholar, John Henry Wigmore, explained in his 1923 treatise:

A person conversing with a third person through an interpreter is *not qualified* to testify to the other person's statement because he knows them only through the hearsay of the interpreter. Ordinarily, therefore, the third person's words cannot be proved by any one except the interpreter himself.⁸³

At that time, most courts and commentators simply treated out-of-court statements made by an interpreter the same as any other out-of-court statements—they were inadmissible if offered to prove the truth of the matter asserted, unless an exception applied.⁸⁴

75. *Id.* at 269.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 271.

81. *Id.* at 269, 271.

82. *Id.* at 271 (citing *State v. Terline*, 51 A. 204 (R.I. 1902)). It is worth noting that the military courts of the era reached the same conclusion under the Manual for Courts Martial. See *United States v. Kauffman*, 14 C.M.A. 283, 294–297 (1963). In *Kauffman*, the defendant was an Air Force captain who had been convicted of conspiring with the enemy. *Id.* at 286. As part of the investigation, he was questioned by foreign police officers through an interpreter. *Id.* at 69–70. One of the foreign officers testified at the defendant's court martial, and he introduced statements that the defendant made through the interpreter. *Id.* at 74. The defendant was convicted, and on appeal he argued, *inter alia*, that the trial court erred by admitting the statements. *Id.* The *Kaufmann* court held that the statements were "hearsay testimony [and] should not have been admitted over appellant's objection." *Id.* at 77. In support of its conclusion, the court explained that under the Manual for Courts-Martial the general rule is that "a statement made through an interpreter may be proved only by the testimony of the interpreter or by other evidence of the statement itself and may not be proved by evidence of the interpreter's translation." *Id.* at 74. Although an exception existed for cases where the defendant made the interpreter his agent, the court found no agency relationship existed here. *Id.* at 77.

83. 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 812(3) (2d ed. 1923); see also 1 RONALD A. ANDERSON, WHARTON'S CRIMINAL EVIDENCE §254 (12th ed. 1955) (stating a "witness cannot testify to the extrajudicial statements of another person, spoken in a language not understood by him, but translated for him by an interpreter, as such repetition by the witness of the interpreter's statement of what the other person said is hearsay").

84. See, e.g., *People v. John*, 69 P. 1063 (Cal. 1902), overruled by *Correa v. Superior Court*, 40 P.3d 739 (Cal. 2002). The court in *John* provided the following analogy in support of its conclusion that

The early courts did recognize an exception in cases where the interpreter was acting as the agent of a party opponent.⁸⁵ It was a limited exception that applied where a non-English speaking party selected the interpreter for the purpose of facilitating a conversation with an English speaker.⁸⁶ As one commentator explained in 1912:

When a person selects an interpreter to communicate with another person and to receive the answers such interpreter is the accredited agent of the one employing him and the statements of the interpreter in the course of the employment are admissible as original evidence and are in no sense hearsay.⁸⁷

Put another way, absent proof that the party expressly formed a principal-agent relationship with the interpreter, out-of-court statements made by a non-testifying interpreter were treated as inadmissible hearsay.⁸⁸ The early courts did not

introducing statements made to an interpreter through a third-party witness who overheard the conversation was hearsay:

A person charged with crime makes a confession to one John Doe; Doe meets Richard Roe and relates to him what defendant had told him. At the trial John Doe is called as a witness, and testifies that he had truly narrated to Richard Roe what the defendant said. Then it is sought to have Richard Roe state what John Doe had said, instead of asking John Doe such questions. We may suppose John Doe has a poor memory, and has forgotten the particulars of the confession, but will swear positively that he made a true statement to Richard Roe, who does remember.

Id. at 1064. The *John* court stated that allowing Roe to testify as to the statement would be to “make a new rule of evidence.” *Id.* And, the court saw no reason that the result should be any different simply because an interpreter was involved. *Id.*; see also Beth Gottesman Lindie, Comment, *Inadequate Interpreting Services in Courts and the Rules of Admissibility of Testimony on Extrajudicial Interpretations*, 48 U. MIAMI L. REV. 399, 420 (1993) (“Traditionally, courts have found that testimony of a witness regarding an out-of-court statement made by another person through an interpreter was inadmissible as hearsay because the witness understood the statement not as originally given but only as translated by an interpreter not then under oath. The courts believed this testimony was inadmissible because the witness, who only understood the statement as translated, was not testifying from personal knowledge.”).

85. See, e.g., *State v. Terline*, 51 A. 204, 208 (R.I. 1902) (“[T]he only exception which we find to the rule as thus stated is that, in those cases where the interpreter acts as the agent of the witness in translating his testimony, it is held that what the interpreter said is admissible on the ground that the language of the interpreter in such a case is to be taken prima facie, at any rate, as the language of the witness who employs him and speaks through him.”).

86. Case Note, *supra* note 6, at 459 (1920) (“[T]here is one main exception to the above rules . . . if a party selects an interpreter for his communication, that interpreter is his agent and the interpreter’s words are to be regarded *prima facie* as his own.”); see also *People v. Chin Sing*, 242 N.Y. 419, 422 (1926) (“[O]nly cases . . . to sustain the admission of such evidence are cases where the interpreter had been selected by common consent of the parties . . . or by the party against whom the statements of the interpreter were offered . . .”).

87. *People v. Randazzio*, 87 N.E. 112, 116 (N.Y. 1909) (quoting JONES ON EVIDENCE § 265 (2d ed. 1912)).

88. See *Kalos v. United States*, 9 F.2d 268, 271 (8th Cir. 1925) (pointing out the lack of evidence showing that the defendant selected the interpreter “to act for him as his agent in [the] conversation”); *Scheerer v. Harber*, 36 Ind. 536, 541 (1871) (finding that the interpreter was not the party’s agent because there was no evidence that the interpreter “was appointed at his instance, or even with his consent”); *People v. Chin Sing*, 242 N.Y. 419, 422–23 (1926) (explaining that determination of whether interpreter is the party’s agent should be determined by “the ordinary rules of principal and agent”); *Gulf, Colo. & Santa Fe Ry. Co. v. Giun*, 116 S.W.2d 693, 696 (Tex. Comm’n App. 1938).

adopt a presumption of agency nor were they generally willing to view a government-provided interpreter as the defendant's agent.⁸⁹

There were, however, a few courts that treated the narrow agency exception more like a gaping hole—one that swallowed the general rule prohibiting the admission of statements made by a non-testifying interpreter. Take for example the Court of Appeals of New York's 1909 decision in *People v. Randazzo*.⁹⁰ The defendant, an Italian speaker, was charged with murder.⁹¹ During the investigation, the defendant was interviewed through an interpreter who had been procured by the district attorney.⁹² The interview was transcribed by a stenographer.⁹³ The interpreter did not testify, but the trial court allowed the prosecution to introduce the interview transcript.⁹⁴ On appeal, the defendant argued that the interview transcript was inadmissible hearsay because it contained what the interpreter told the district attorney that the defendant said.⁹⁵

The *Randazzo* court rejected the hearsay argument on the basis that the interpreter was the defendant's agent and, therefore, the statements were admissible as non-hearsay statements of a party opponent.⁹⁶ In reaching that conclusion, the court attached little significance to the fact that the district attorney selected the interpreter.⁹⁷ According to the *Randazzo* court, the interpreter was effectively a dual agent serving both the district attorney and the defendant.⁹⁸ The defendant's lack of agreement to have the interpreter serve as his agent was immaterial because "a person who is unable to speak or understand our language is compelled by necessity to communicate his ideas through the means of an interpreter and it matters not whether the interpreter is selected by him or some other person in order to make his statement original evidence."⁹⁹ In other words, the defendant had to speak through an

89. See *Chin Sing*, 242 N.Y. at 422 (finding testimony to be inadmissible hearsay and pointing out that the "[d]efendant had nothing to do with the selection" of the two men who served as interpreters for the police and case was, therefore, unlike those "where the interpreter had been selected by common consent of the parties . . . or by the party against whom the statements were offered in evidence"); see also *United States v. Kauffman*, 14 C.M.A. 283, 295, 297 (1963) (holding that an East German Special Agent who served as an interpreter during an interrogation was not the defendant's agent because "there [was] nothing in the record to indicate that [the defendant] ever stated, was asked, or specifically consented to the use of [the Special Agent], as interpreter," and the "respective relations of [the defendant] and [the officer] to the interpreter were vastly different. [The officer] produced the interpreter in connection with his conquest of [the defendant] and brought her to the meeting."); *Terline*, 51 A. at 208 (explaining that the interpreter "was the official interpreter in the district court, and that he was not the defendant's agent. His interpretation of the defendant's testimony, therefore, was improperly admitted . . .").

90. 194 N.Y. 147 (1909).

91. *Id.* at 149.

92. *Id.* at 154.

93. *Id.*

94. *Id.*

95. *Id.* at 156–57.

96. *Id.* at 156.

97. *Id.* at 157.

98. *Id.*

99. *Id.*; see also *Groc v. Delaware & Hudson Co.*, 174 A.D. 505, 506 (N.Y. App. Div. 1916) (relying on *Randazzo* for the proposition that an interpreter can be treated as an agent of a party opponent even if there is no "express agency through personal selection of the interpreter or an authority implied from near relationship to the one being interpreted").

interpreter and, therefore, any person who interpreted the defendant's words automatically became his agent in the eyes of the *Randazzo* court.

The *Randazzo* court rested its decision in part on the Supreme Judicial Court of Massachusetts' 1901 decision in *Commonwealth v. Storti*.¹⁰⁰ *Storti* itself contains little analysis of the hearsay issue; rather, it relies on that court's 1892 one-page decision in *Commonwealth v. Vose*.¹⁰¹ Throughout the years, other courts have also pointed to *Vose* as authority for the agency approach to resolving the hearsay question raised by admitting statements made by a non-testifying interpreter.¹⁰² In *Vose*, the defendant was convicted of providing an unlawful abortion for a woman who later died.¹⁰³ The defendant spoke English, and the woman spoke French.¹⁰⁴ The defendant's wife interpreted for them, and the conversation was overheard by a third-party.¹⁰⁵ At trial, the third-party testified—over the defendant's objection—as to what the interpreter said that the defendant said.¹⁰⁶ The defendant was convicted, and he appealed on the basis that the trial court incorrectly admitted the statements.

The *Vose* court rejected the defendant's argument and concluded that the statements were admissible because the interpreter was the defendant's agent.¹⁰⁷ In support of its decision, the court declared that “[w]hen two persons who speak different languages, and who cannot understand each other, converse through an interpreter, they adopt a mode of communication in which they assume that the interpreter is trustworthy, and which makes his language presumptively their own.”¹⁰⁸ The court further explained that if “nothing appears to show that their respective relations to the interpreter differ, they may be said to constitute him their joint agent.”¹⁰⁹ According to *Vose*, the interpretation provided by an interpreter “is *prima facie* deemed to be correct,” and the fact that the statements were made through an interpreter “affects the weight, but not the competency, of the evidence.”¹¹⁰

Although the *Vose* court appeared to limit its holding to cases where neither party had a superior relationship with the interpreter, a small minority of 19th and early 20th century courts—such as *Randazzo*—failed “to recognize and give effect to this qualification . . . result[ing] in certain cases reaching conclusions which, while declared to be supported on the ground that an agency existed, are not, in fact so supported and the evidence, while admitted, was none the less hearsay.”¹¹¹ Over

100. 58 N.E. 1021 (Mass. 1901).

101. *Id.* at 1023 (citing *Commonwealth v. Vose*, 32 N.E. 355 (Mass. 1892)).

102. *See, e.g.*, *Lee v. United States*, 198 F. 596, 601–03 (7th Cir. 1912) (relying on *Vose* and adopting its reasoning); *Meacham v. State*, 33 So. 983–84 (Fla. 1903) (same); *Oullette v. Ledoux*, 30 A.2d 13, 15 (N.H. 1943) (same); *see also* George E. Fee, Editorial Note, *An Interpreter's Statement as Affected by the Hearsay Rule*, 1 U. CIN. L. REV. 73, 90 (1927) (identifying *Vose* as the “leading case in support” of the agency exception).

103. *Commonwealth v. Vose*, 32 N.E. 355 (Mass. 1892).

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. Fee, *supra* note 103, at 91.

time, however, the minority approach has become the majority approach with most courts now applying the agency exception and its cousin, the language conduit approach, to broadly permit the introduction of statements made by a non-testifying interpreter.¹¹² The next section discusses this evolution.

2. *The 1970s to Present*

Although the cause of the shift from exclusion to admission is difficult to determine, it is clear that the shift began in the 1970s, intensified in the 1980s and 1990s, and has continued to the present day. Much of the change was generated by a series of federal appellate court decisions, beginning with the Ninth Circuit's 1973 opinion in *United States v. Ushakow*.¹¹³ Although *Ushakow* is a short *per curiam* opinion, it served as the primary catalyst for the "language conduit" approach that many courts have since used to resolve the hearsay question.

In *Ushakow*, the defendant was convicted of possessing marijuana with the intent to distribute.¹¹⁴ The government introduced the contents of a conversation the defendant and a Spanish-speaking coconspirator had through an interpreter.¹¹⁵ The Ninth Circuit affirmed and cursorily resolved the hearsay issue by stating that the interpreter "was merely a language conduit" between the defendant and the Spanish-speaker.¹¹⁶ Thus, the "testimony is within the same exception to the hearsay rule as when a defendant and another are speaking the same language."¹¹⁷ The *Ushakow* court's conclusion is unsupported by citation to authority and its opinion devoid of analysis. Nonetheless, it has been continually relied upon as support for the proposition that an interpreter is merely a language conduit and, therefore, not a declarant for hearsay purposes.¹¹⁸

112. See, e.g., *Cruz-Reyes v. State*, 74 P.3d 219, 223 (Alaska Ct. App. 2003) ("The federal and state courts that have addressed this issue in recent years have generally held that an interpreter does not add another layer of hearsay—either under the theory that the interpreter acted as an agent of the declarant, or under the theory that the interpreter merely acted as a language conduit between the participants in the conversation (or some combination of the two theories).").

113. 474 F.2d 1244 (9th Cir. 1973) (*per curiam*); see also *Saavedra v. State*, 297 S.W.3d 342, 347 n.25 (Tex. Crim. App. 2009) (recognizing that the "phrase 'language conduit' seems to have first appeared" in *Ushakow*); Daniel Benoit, Note, *Constitutional Law/Evidence—United States V. Charles: A Post-Crawford Analysis of an Interpreter as a Declarant: Did the Eleventh Circuit Take its Decision a Bridge Too Far?*, 37 W. NEW ENG. L. REV. 301, 308 (2015) ("The first indication that an interpreter was considered a mere language conduit was in the 1973 Ninth Circuit case of *United States v. Ushakow*.").

114. *Ushakow*, 474 F.2d at 1245.

115. *Id.*

116. *Id.* The *Ushakow* court could have resolved the hearsay question more cleanly by simply relying on the conspirator exception to hearsay because all parties to the conversation (including the interpreter) appear to have been involved in the conspiracy. See *United States v. Da Silva*, 725 F.2d 828, 832 n.3 (2d Cir. 1983) (noting the alternative basis that could have been relied upon in *Ushakow*); see also *Dutton v. Evans*, 400 U.S. 74, 81 (1970) (discussing the contours of the conspirator exception as it existed in federal courts prior to the 1975 adoption of the Federal Rules of Evidence).

117. *Ushakow*, 474 F.2d at 1245.

118. See *Da Silva*, 725 F.2d at 832 (citing *Ushakow* to support the statement an interpreter simply serves as a "language conduit"); see also *United States v. Santacruz*, 480 F. App'x 441, 443 (9th Cir. 2012) (same); *United States v. Koskerides*, 877 F.2d 1129, 1135 (2d Cir. 1989) (same); *People v. Romero*, 581 N.E.2d 1048, 1051 (N.Y. Ct. App. 1991) (same).

Although the language conduit theory has its roots in *Ushakow*, the theory firmly took hold following the Second Circuit's 1983 decision in *United States v. Da Silva*.¹¹⁹ There, the defendant was charged with unlawfully importing drugs.¹²⁰ As part of the investigation, the defendant was interviewed by DEA agents.¹²¹ Because the defendant did not speak English, the DEA agents arranged for a U.S. Customs employee to serve as an interpreter during the interview.¹²² The case proceeded to trial, and one of the DEA agents testified (over objection) as to what the interpreter said that the defendant said.¹²³ The defendant was convicted, and his appeal centered on whether the DEA agent's testimony was inadmissible hearsay.¹²⁴

The *Da Silva* court rejected the defendant's argument.¹²⁵ In explaining its decision, the court amalgamated the agency theory and the language conduit theory.¹²⁶ The court began its analysis by saying that an interpreter is "normally to be viewed as the agent of the defendant; hence, the translation is attributable to the defendant as his own admission and is properly characterized as non-hearsay."¹²⁷ That presumption of agency, the court concluded, could only be negated if there was evidence that the interpreter had a "motive to mislead" or there is "reason to believe that the translation is inaccurate."¹²⁸ According to *Da Silva*, if the presumption of agency has not been rebutted by the defendant, then the interpreter "is no more than a language conduit"¹²⁹ regardless of whether the interpreter was a government actor.¹³⁰

After *Da Silva*, federal and state courts nationwide opened their doors to testimony about what a non-testifying interpreter said the defendant said.¹³¹ Some

119. 725 F.2d 828 (2d Cir. 1983).

120. *Id.* at 829.

121. *Id.*

122. *Id.*

123. *Id.* at 830.

124. *Id.*

125. *Id.* at 832.

126. *Id.* at 831–32.

127. *Id.* at 831.

128. *Id.* at 832.

129. *Id.*

130. *Id.* ("The fact that [the interpreter] was an employee of the government did not prevent him from acting as *Da Silva*'s agent for the purpose of translating and communicating *Da Silva*'s statements to [the DEA interviewer].").

131. See, e.g., *United States v. Vidacak*, 553 F.3d 344, 352 (4th Cir. 2009) (stating that the interpreter's "translations did not create double hearsay because [the interpreter] was merely a 'language conduit' and not a declarant under the hearsay rule"); *United States v. Koskerides*, 877 F.2d 1129, 1135 (2d Cir. 1989) ("The interpreter was no more than a language conduit and therefore his translation did not create an additional layer of hearsay."); *United States v. Alvarez*, 755 F.2d 830, 859–60 (11th Cir. 1985) (relying on *Da Silva* to conclude that statements made by the defendant to a government-provided interpreter were not barred by the rule against hearsay); *United States v. Beltran*, 761 F.2d 1, 9 (1st Cir. 1985) (citing *Da Silva* and affirming the admission of statements made to an interpreter because "the translation may be considered an admission by the defendant, which is technically not hearsay"); *People v. Gutierrez*, 916 P.2d 598, 600–01 (Colo. App. 1995) (discussing the language conduit and agency theories before concluding that the trial court correctly admitted statements the defendant made to an interpreter); *State v. Robles*, 458 N.W.2d 818, 822 (Wisc. Ct. App. 1990) (holding that as a general rule "a suspect's choice to communicate through an interpreter signals that the interpreter is the suspect's agent" and, therefore, the statements made to the interpreter are "non-hearsay").

did so based on the agency theory,¹³² some based on the language conduit theory,¹³³ while others treated the two theories as one and the same.¹³⁴ The most significant of these cases was the Ninth Circuit's decision in *United States v. Nazemian*.¹³⁵ Decided in 1991, *Nazemian* involved a defendant who was charged with conspiracy to distribute heroin.¹³⁶ During the course of the investigation, the defendant spoke with an undercover DEA agent through an interpreter who had been provided by the DEA.¹³⁷ The interpreter was not a witness at the defendant's trial, but the DEA agent testified as to what the interpreter said that the defendant said.¹³⁸

On appeal, the defendant argued that the DEA agent's testimony was inadmissible hearsay and violated the Confrontation Clause.¹³⁹ After recognizing that "many of the early state cases" treated such testimony as inadmissible hearsay, the court pointed to *Da Silva* and other federal courts that have "recently" rejected the hearsay argument based on the agency and language conduit theories.¹⁴⁰ After surveying the case law from its sister circuits, the *Nazemian* court identified four factors that are "relevant in determining whether the interpreter's statements should be attributed to the defendant under either the agency or conduit theory."¹⁴¹ Those factors are "[1] which party supplied the interpreter [2] whether the interpreter had any motive to mislead or distort [3] the interpreter's qualifications and language skill, and [4] whether actions taken subsequent to the conversation were consistent with the statements as translated."¹⁴²

The court applied those four factors and determined that the interpreter's statements violated neither the hearsay rules nor the Confrontation Clause because the defendant and the interpreter were "identical."¹⁴³ The court reached that conclusion without any discussion or consideration of how language interpretation works. And, the court was unconcerned with the fact that the interpreter was chosen

132. See, e.g., *State v. Umanzor*, 682 S.E.2d 248, at *8 (N.C. Ct. App. 2009) (unpublished table decision) (applying agency theory to determine that statements made to an interpreter were not inadmissible hearsay); see also *Barron-Gonzalez v. State*, 426 S.W.3d 508, 514 (Ark. Ct. App. 2013) (same); *Han Ok Song v. State*, No. 08-13-0059-CR, 2015 WL 631163, at *5 (Tex. Crim. App. 2015) (same).

133. See, e.g., *United States v. Budha*, 495 F. App'x 452, 454 (5th Cir. 2012) (treating interpreters as "language conduits, whose translations of the defendant's own statements are not hearsay"); *State v. Rivera-Carrillo*, 2002-Ohio-1013, 2002 WL 371950 at *17 (Ohio Ct. App. 2002) (holding that an interpreter "was nothing more than a language conduit between appellant and the detectives"); *Cassidy v. State*, 149 S.W.3d 712, 716 (Tex. App. 2004) (same).

134. See, e.g., *United States v. Santacruz*, 480 F. App'x 441, 443 (9th Cir. 2012) (appearing to treat the language conduit and agency theories as a single concept).

135. 948 F.2d 522 (9th Cir. 1991).

136. *Id.* at 524.

137. *Id.* at 525 n.3.

138. *Id.* at 525.

139. *Id.* at 525–26. The defendant did not object to this testimony at trial, therefore, the appellate court's review was limited to determining whether the trial court committed plain error. *Id.* at 525.

140. *Id.* at 526.

141. *Id.* at 527.

142. *Id.*; see *United States v. Bermudez-Chavez*, 473 F. App'x 560, 562 (9th Cir. 2012) (stating that *Nazemian* "articulat[ed] the test for determining whether translated statements should be considered statements of the speaker").

143. *Nazemian*, 948 F.2d at 528.

by the DEA. Similarly, the court devoted no time to the issue of the interpreter's training or experience. Instead, the *Nazemian* court stated in summary fashion that the defendant produced no "specific evidence of bias on the part of the interpreter."¹⁴⁴ The court further assumed that "the translation must have been competent enough to allow communication."¹⁴⁵

In the years since, *Nazemian* has been relied on by federal and state courts as a basis for rejecting both hearsay and Confrontation Clause objections to statements made by a non-testifying interpreter.¹⁴⁶ Several prominent legal commentators have even endorsed the approach set forth in *Nazemian*.¹⁴⁷ As a practical matter, most courts have devoted little discussion to the *Nazemian* factors and have created a *de facto* presumption that the statements are admissible. Consider the Fourth Circuit's decision in *United States v. Vidacack*. There, the defendant—a non-English speaker—was interrogated by an ICE agent with the assistance of a government-supplied interpreter.¹⁴⁸ The defendant was charged with making false statements on immigration forms, and at his trial the ICE agent testified as to what the interpreter (who did not testify) said the defendant said.¹⁴⁹ The Fourth Circuit rejected the defendant's claim that the ICE agent's testimony was inadmissible hearsay.

The *Vidacack* court explained that "an interpreter is no more than a language conduit and therefore his translation does not create an additional level of hearsay."¹⁵⁰ The court further explained that there is a "narrow exception" to this rule in those cases where the "particular facts case significant doubt upon the accuracy of a translated confession."¹⁵¹ And, the court stated that *Nazemian* factors are designed to help determine if the "narrow exception" applies.¹⁵² The exception did not apply in this case, according to the Fourth Circuit, because the ICE agent testified that the interpreter "seemed extremely honest" and "was one of the best translators" the agent had worked with.¹⁵³

Most modern courts have allowed statements made by a non-testifying interpreter to be admitted unless the defendant comes forward with evidence to show

144. *Id.* at 527.

145. *Id.* at 528.

146. *United States v. Romo-Chavez*, 681 F.3d 955, 959, 961 (9th Cir. 2012) (applying the four-factor test from *Nazemian* and concluding that statements made to an interpreter were properly admitted); *United States v. Santacruz*, 480 F. App'x 441, 442 (9th Cir. 2012) (citing *Nazemian* and relying on the four-factor test); *United States v. Vidacack*, 553 F.3d 344, 352 (4th Cir. 2009) (same); *United States v. Cordero*, 18 F.3d 1248, 1252–53 (5th Cir. 1994) (adopting the reasoning of *Nazemian*); *State v. Lopez-Ramos*, 913 N.W.2d 695, 704, 706 (Minn. Ct. App. 2018) (same); Ross, *supra* note 14, at 1954 (stating that "courts often cite *Nazemian* in cases involving a defendant's out of court statements to foreign-language interpreters").

147. FISHMAN & MCKENNA, *supra* note 7, § 27:37 (discussing the *Nazemian* test); BERGMAN ET AL., *supra* note 8, § 8:7 (same).

148. *United States v. Vidacack*, 553 F.3d 344, 347 (4th Cir. 2009).

149. *Id.* at 347–48.

150. *Id.* at 352 (quoting *United States v. Martinez-Gaytan*, 213 F.3d 890 (5th Cir. 2000)).

151. *Id.*

152. *Id.* (relying on a Fifth Circuit case that adopted the *Nazemian* factors).

153. *Id.*

that the interpreter was biased or unreliable.¹⁵⁴ The fact that the interpreter worked for the police department or was otherwise chosen by the government generally has not prevented the courts from admitting the statements.¹⁵⁵ There are, however, an extremely small number of state courts that have adhered to the traditional view that statements made by an interpreter outside of court should be excluded unless (1) the interpreter testifies regarding the statements, or (2) there is clear evidence showing that the defendant selected the interpreter to serve as his agent.¹⁵⁶

It is also worth pointing out that a few modern courts have admitted statements made by a non-testifying interpreter via a different route: the residual hearsay exception set forth in Rule 807.¹⁵⁷ As a general matter, the residual exception applies if a statement (1) “is not specifically covered by a hearsay exception in Rule 803 or 804”; (2) “has equivalent circumstantial guarantees of trustworthiness; (3) it is offered as evidence of a material fact; (4) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (5) admitting it will best serve the purposes of [the Rules of Evidence] and the interests of justice.”¹⁵⁸

One of the courts that has relied on the residual exception in the context of statements made to an interpreter is the Oregon Court of Appeals. In *State v. Montoya-Franco*, the defendant was interviewed with the assistance of two interpreters employed by the police department.¹⁵⁹ At trial, the statements that the defendant made to the interpreters were admitted through testimony by the officers who conducted the interview.¹⁶⁰ Prior to offering the testimony, the prosecution introduced evidence regarding the training, experience, and trustworthiness of the

154. See, e.g., *United States v. Martinez-Gaytan*, 213 F.3d 890, 893 (5th Cir. 2000) (stating that “if a defendant does not take issue with the accuracy of a translation, as reported by one who heard the translation, during the course of the translated conversation or subsequent events, a hearsay problem rarely arises,” but concluding that this case presented sufficient concerns to require additional consideration by the district court before permitting the statements to be admitted at the defendant’s suppression hearing); *People v. Morel*, 798 N.Y.S.2d 315, 317 (N.Y. App. Term. 2005) (stating that precedent only requires “that the proof permit an inference of the declarant’s actual or implied authorization to the translator to perform that function to establish the necessary agency relationship”).

155. See, e.g., *State v. Robles*, 458 N.W.2d 818, 821 (Wisc. Ct. App. 1990) (holding that a police officer who interpreted during another officer’s interview of the defendant was the defendant’s agent for purposes of the hearsay analysis); *United States v. Alvarez*, 755 F.2d 830, 859–60 (11th Cir. 1985) (treating an ATF agent who interpreted for another ATF agent as the defendant’s agent).

156. See, e.g., *Durbin v. Hardin*, 775 S.W.2d 798, 801 (Tex. App. 1989) (finding that statements made by the defendant to an interpreter were hearsay and refusing to apply the agency theory because “there is nothing in the record to support an adoption by [the defendant] of the interpreter as her agent”).

157. See, e.g., *State v. Montoya-Franco*, 282 P.3d 939 (Or. Ct. App. 2012); *State v. Terrazas*, 783 P.2d 803, 808 (Ariz. Ct. App. 1989).

158. FED. R. EVID. 807(a). Additionally, the residual exception cannot be used unless the proponent of the evidence provides pre-trial notice of its intent to rely on the exception.

159. *Montoya-Franco*, 282 P.3d at 940.

160. *Id.* at 940. The interpreters testified at trial, but their testimony was limited to establishing their training and experience. *Id.* at 940. The interviewing officer was called to testify as to what the interpreters told him that the defendant said. *Id.* at 940.

interpreters.¹⁶¹ The trial court determined that the testimony was admissible under the residual exception.¹⁶²

The *Montoya-Franco* court affirmed and began by making clear that the statements made by the interpreters to the interviewing officer were hearsay that would be inadmissible unless an exception or exemption applied. As the court put it: “An out-of-court translation of a non-English speaker’s statements to a third-party constitutes hearsay because the interpreter’s translation constitutes an assertion of the English meaning of the original statement.”¹⁶³ After distinguishing a prior decision that refused to apply the residual exception,¹⁶⁴ the court explained that the exception applied here because the prosecution laid the appropriate foundation.¹⁶⁵ More specifically, the prosecution called both interpreters who discussed their training, experience, and the manner in which they interpreted the defendant’s statements.¹⁶⁶ The prosecution also established that the statements were highly probative and that admission of them served the purposes of the Rules of Evidence.¹⁶⁷

By relying on the residual exception, the court—unlike most of its sister courts nationwide—necessarily recognized that neither the language conduit theory nor the agency theory provided a basis for admitting the testimony.¹⁶⁸ As explained below, the *Montoya-Franco* was correct in that regard. It was also correct that if a statement made by a non-testifying interpreter is to be admitted under the hearsay rules, the only available option (given the lack of any other applicable hearsay exemption or exception) is compliance with the substantial requirements of the residual exception.¹⁶⁹ Of course, a finding that a hearsay statement is admissible under the residual exception does not mean that it ultimately will be allowed in a defendant’s criminal trial because (as discussed in Part II below) of the Confrontation Clause.

161. *Id.* at 943.

162. *Id.* at 943–44.

163. *Id.* at 941.

164. *Id.* at 943 (distinguishing *State v. Rodriguez-Castillo*, 188 P.3d 268 (Or. 2008) on the basis that the prosecution in that case had failed to lay an adequate foundation for admission under the residual clause).

165. *Id.* at 943–44; *see also* *State v. Terrazas*, 783 P.2d 803, 808 (Ariz. Ct. App. 1989) (affirming admission of statements made by the defendant to an interpreter under the residual exception); *State v. Tinajero*, 935 P.2d 928, 932–33 (Ariz. Ct. App. 1997) (same).

166. *Montoya-Franco*, 282 P.3d at 943–44.

167. *Id.* at 944.

168. The residual exception requires a finding that no other exception or exemption applies; thus, by resorting to the residual exception the court necessarily rejected the other approaches. Moreover, the *Montoya-Franco* court noted “we reject without discussion defendant’s unreserved contention that the evidence did not qualify under [the residual exception] on the ground that the translated statements may have been ‘covered’ by another hearsay exception . . . as an agent’s statement.” *Id.* at 944 n.2.

169. It should be the rare case where a statement made by a non-testifying interpreter will be admitted under the residual exception. The requirement that the statement have circumstantial guarantees of trustworthiness will pose a substantial obstacle, especially in those cases where the interpreter is a police officer or other government employee. Additionally, it will be difficult for the prosecution to establish that admitting a non-testifying interpreter’s statements will best serve the interests of justice given the accuracy concerns surrounding the interpretations provided by non-certified and often poorly trained police interpreters.

C. The language conduit and agency theories are *fundamentally flawed*.

“Wrong is wrong, even if everyone is doing it.” This pearl of wisdom, often attributed to St. Augustine,¹⁷⁰ is applicable to the language conduit and agency theories that most modern courts have used to sidestep the hearsay problem presented when the government offers evidence of what a non-testifying interpreter said the defendant said. As explained below, both theories are fundamentally flawed, inconsistent with the law, and rest on faulty factual premises.

1. *Interpreters are not language conduits*

The interpreter is “merely a language conduit.”¹⁷¹ This phrase has been repeated in case after case to justify admitting out-of-court statements made by a non-testifying interpreter. But, it is demonstrably false. The entire language conduit theory is based on a misconception about what interpreters do and how language interpretation works.¹⁷²

To understand what interpreters do, it is perhaps best to begin with an explanation of what they do not do. Interpreting is not “merely a process of decoding, or transliteration.”¹⁷³ An interpreter “does not provide for a one-to-one correspondence between words or concepts in different languages.”¹⁷⁴ And, an interpreter is not “an invisible pipe, with words entering in one language and existing—completely unmodified—in another language.”¹⁷⁵ The act of interpreting is incredibly complex, and an interpreter’s function is not to provide a literal word-for-word translation.¹⁷⁶

Rather, an interpreter’s job is to convey meaning from one language (the source language), to another language (the target language).¹⁷⁷ It is often said that “interpreters do not interpret words; they interpret concepts.”¹⁷⁸ To perform this job, an interpreter must make a “series of complex judgments based on numerous verbal and non-verbal cues—a task that requires considerable skill and an understanding of cultural differences, idioms, dialect idiosyncrasies, and possible multiple meanings

170. GOOD READS, <https://www.goodreads.com/quotes/126110-right-is-right-even-if-no-one-is-doing-it> (last visited Apr. 3, 2019).

171. *United States v. Ushakow*, 474 F.2d 1244, 1245 (9th Cir. 1973).

172. *See Taylor v. State*, 130 A.3d 509, 528 (Md. Ct. Spec. App. 2016) (referring to the language conduit theory as a “fallacy or misconception that ignores the reality of language interpretation”).

173. Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. Rev. 999, 1031 (2007).

174. *United States v. Charles*, 722 F.3d 1319, 1324 (11th Cir. 2013).

175. Brief for the Massachusetts Ass’n of Court Interpreters, Inc. as Amicus Curiae Supporting Petitioner, *Ye v. United States*, 808 F.3d 395, No. 10576 (9th Cir. 2015) (quoting Susan Berk-Seligson, *The Bilingual Courtroom* 219 (2002)).

176. Brief of Interpreting and Translation Professors as Amici Curiae Supporting Petitioner, *Ye v. United States* at 4 (U.S. Supreme Court No. 15-1002) (2016).

177. *Charles*, 722 F.3d at 1324.

178. National Association of Judiciary Interpreters and Translators, *Frequently Asked Questions, Court and Legal Interpreting and Translating*, <https://najit.org/resources/the-profession/#faq> (last visited Jan. 13, 2019).

of words and phrases.”¹⁷⁹ The interpreting process is more art than science,¹⁸⁰ and it requires considerable discretion on the part of the interpreter.¹⁸¹ As one experienced interpreter explained, “[t]here is no such thing as a perfect translation . . . Interpretations are performed by humans and humans are not machines . . . Because there are no definite rules or vocabulary, two interpreters may give different renditions of the same passage and both may be correct.”¹⁸²

To perform effectively, an interpreter “must listen to what is being said, comprehend the message, abstract the entire message from the words and word order, store the idea, search his or her memory for the conceptual and semantic matches, and reconstruct the message (keeping the same register or level of difficulty as in the source language).”¹⁸³ To do this effectively, an interpreter must have “an extensive vocabulary of great depth and breadth in two languages,” as well as an understanding of a “large number of semantic fields.”¹⁸⁴ An interpreter also needs to be aware of “how native speakers use certain words and syntactic structures in context, and what connotations certain words have for speakers from a particular region or social group.”¹⁸⁵ This requires knowledge of “the variety of meaning relations among words to one another, including synonymy, homonymy (i.e., homonyms, homophones, and homographs) and polysemy.”¹⁸⁶

Contrary to what many courts appear to believe, a person is not qualified to serve as an interpreter simply because he or she is bilingual.¹⁸⁷ It has been said that bilingualism “does not qualify one to interpret, just like having two hands does not qualify one to be a concert pianist.”¹⁸⁸ Fluency in the source language and the target

179. Brief for the Massachusetts Ass’n of Court Interpreters, Inc. as Amicus Curiae Supporting Petitioner, *Ye v. United States*, 808 F.3d 395, No. 10576 (9th Cir. 2015).

180. Debra L. Hovland, *Errors in Interpretation: Why Plain Error is Not Plain*, 11 *Law & Ineq.* 473, 487 (1993).

181. See Roxana Cardenas, “You Don’t Have to Hear, Just Interpret!”: *How Ethnocentrism in the California Courts Impedes Equal Access to the Courts for Spanish Speakers*, *COURT REVIEW* 27 (Fall 2001), <https://eulita.eu/wp/wp-content/uploads/files/CardenasYouDon%27tHaveToHear%2CJustInterpret.pdf>; see also Ross, *supra* note 14 at 1966 (stating that “translation involves subjectivity and discretion”).

182. *Id.* at 27; see also Michael B. Shulman, Note, *No Hablo Ingles: Court Interpretation as a Major Obstacle to Fairness for Non-English Speaking Defendants*, 46 *VAND. L. REV.* 175, 177 (1993) (“Perfect interpretations do not exist, as no interpretation will convey precisely the same meaning as the original testimony.”).

183. *State v. Montoya-Franco*, 282 P.3d 939 (Or. Ct. App. 2012) (quoting Cathy Rhodes, *Court Certification*, 1 *Access to Justice Journal* 1, 2 (1999)).

184. DUEÑA GONZÁLEZ ET AL., *supra* note 2, at 726–27.

185. *Id.*

186. *Id.* at 729.

187. *Id.* at 13 (“There is also a persistent belief that court interpreting is a role that any bilingual can perform—including university professors, secretaries, court librarians, police officers, friends, relatives, lawyers, or any other untested, alleged bilingual.”); Admin. Office of the U.S. Courts, *Federal Court Interpreter Orientation Manual and Glossary*, 22 (May 8, 2014), https://www.uscourts.gov/sites/default/files/federal-court-interpreter-orientation-manual_0.pdf (“A common error is the belief that any person who knows two languages can interpret.”).

188. Cardenas, *supra* note 181 at 26 (attributing the quote to Jon Leeth, who previously worked at the Administrative Office of the U.S. Courts as the director of the Office of Court Reporting and Interpreting Services).

language is simply the starting line for an interpreter.¹⁸⁹ An interpreter needs “deep familiarity” with both cultures¹⁹⁰ because “much of the information required to determine the speaker’s meaning is not contained in the words of the speaker, but instead is supplied by the listener. Comprehension therefore depends upon a shared perceptual context such that the inferences the listener draws are the ones the speaker intended.”¹⁹¹

The difficulty inherent in interpreting is compounded when the conversations being interpreted involve legal issues and the specialized jargon that pervades the legal system.¹⁹² Absent training and experience, it can be very hard for an interpreter to appropriately convey these complicated concepts. Additionally, the stakes are incredibly high when an interpreter is working with a non-English speaker who finds himself involved in the criminal justice system.¹⁹³ In that context, a “mistranslation of a simple fact can cause irreparable damage to the individual and to the justice process.”¹⁹⁴ Sadly, there are numerous examples of cases where an interpreter incorrectly translated a defendant’s statements with disastrous consequences.¹⁹⁵

Although the federal court system¹⁹⁶ and many state court systems¹⁹⁷ require courtroom interpreters to complete a certification process to ensure minimal competency, there are no similar requirements for individuals who serve as interpreters during police interrogations.¹⁹⁸ Further evidencing the difference between being bilingual and being competent to interpret is the fact that less than 10% of examinees are able to pass the Federal Court Interpreter Certification

189. Elena M. De Jongh, *Foreign Language Interpreters in the Courtroom: The Case for Linguistic and Cultural Proficiency*, 75 *The Modern Language Journal*, 285 (1991).

190. *Id.* at 288.

191. Ahmad, *supra* note 173 at 1036.

192. DUEÑA GONZÁLEZ ET AL., *supra* note 2, at 733

193. *Id.* at 167 (explaining the importance of accurate interpreting in the legal system because “[o]ne misinterpreted word, phrase, or tone could mean the difference between a fair trial and a grave injustice”).

194. *Id.* at 40; *see also* Admin. Office of the U.S. Courts, *Federal Court Interpreter Orientation Manual and Glossary*, 25 (May 8, 2014), https://www.uscourts.gov/sites/default/files/federal-court-interpreter-orientation-manual_0.pdf (“The potentially grave consequences of inaccurate legal interpretation mandate that great skill and caution be utilized by interpreters.”).

195. *See* Hon. Lynn W. Davis et al., *The Changing Face of Justice: A Survey of Recent Cases Involving Courtroom Interpretation*, 7 *HARV. LATINO L. REV.* 1, 18–24 (2004) (providing examples of circumstances where errors by interpreters negatively impacted criminal defendants); *see also* *State v. Ramirez*, 732 N.E.2d 1065, 1067–70 (Ohio Ct. App. 1999) (reversing the defendant’s conviction based on errors committed by the interpreter when conveying the *Miranda* warnings to defendant).

196. *See* 18 U.S.C. § 1827 (requiring the Administrative Office of the U.S. Courts to create a certification program for interpreters who appear in the federal courts); *see also* FED. R. EVID. 604 (stating that a courtroom interpreter “must be qualified”).

197. *See* Nat’l Ass’n of Judiciary Interpreters & Translators, *Language Assistance for Law Enforcement*, NAJIT POSITION PAPER 3 (Mar. 31, 2006), <https://najit.org/wp-content/uploads/2016/09/LanguageforLawEnforcement2006.pdf> (stating that “35 states belong to the Consortium for State Court Interpreter Certification, a project of the National Center for State Courts”).

198. DUEÑA GONZÁLEZ ET AL., *supra* note 2, at 444 (explaining that the “Court Interpreters Act of 1978 and similar state statutes that apply to the courts, do not explicitly apply to the criminal investigation process, including arrest, detention, and custodial interrogation”).

Examination.¹⁹⁹ It is imperative to have competent and skilled interpreters in the courtroom, but what happens in a police interrogation room often dictates the result at trial. The erroneous translation of even one word during a police interrogation can be the difference between a conviction and an acquittal.²⁰⁰ Thus, the U.S. Department of Justice has recommended that police agencies use certified interpreters when interrogating a suspect who does not speak English.²⁰¹

Nevertheless, police agencies often use “untrained, untested, foreign-language-speaking law enforcement personnel” to serve as interpreters.²⁰² The police agencies wrongly assume that an individual’s ability to “speak two languages to any degree automatically qualifies” them to engage in the complex process of interpreting in a “high-stakes setting.”²⁰³ In many jurisdictions, there are no standards, no certifications, and no specialized training for these stationhouse interpreters.²⁰⁴ Rather, an individual is tasked with serving as interpreter simply because he or she is available and possesses some ability to speak a foreign language.²⁰⁵

Studies conducted by linguistics experts have identified alarming problems in police interviews conducted using these stationhouse interpreters.²⁰⁶ One of the studies looked at how interpreters conveyed the *Miranda* warnings to suspects. It found situations where the warnings were “severely distorted.”²⁰⁷ Below are a few of the more egregious examples:

- (1) “You have the right to pass liquids through pipes, silence.”
- (2) “If you remain silent, everything will be used against you in court.”
- (3) If you wants . . . with us without a university graduate or a . . . you have the right to stop the tips of something.²⁰⁸

Another study found that some police agencies were using interpreters whose language skills were at “advanced beginner or low intermediate level,”²⁰⁹ which is plainly insufficient for the criminal justice environment.

199. *Id.* at 471. (reporting that 5% of test-takers passed the examination); *see also* Florida Bar Journal, *Court Interpreting: Linguistic Presence v. Linguistic Absence* (July/Aug. 2018), <https://www.floridabar.org/the-florida-bar-journal/court-interpreting-linguistic-presence-v-linguistic-absence/> (stating that the overall certification rate is 8%).

200. *See* DUEÑA GONZÁLEZ ET AL., *supra* note 2, at 40;

201. 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. 41,455, 41,461 (June 18, 2002).

202. DUEÑA GONZÁLEZ ET AL., *supra* note 2, at 445.

203. *Id.*

204. *Id.* (stating that police agencies “rely on untrained, untrusted, foreign-language-speaking law enforcement personnel to perform complex tasks such as interrogating, translating, and interpreting in languages in which these employees have no specialized training”).

205. *Id.* at 445.

206. *Id.* at 474–75 (discussing various studies that have identified errors of interpreters used by law enforcement agencies).

207. *Id.* at 475.

208. *Id.* at 475–76. *See also* State v. Ramirez, 732 N.E.2d 1065, 1068 (Ohio Ct. App. 1999) (reversing the defendant’s conviction because a police-provided interpreter failed to accurately interpret the *Miranda* warnings prior to the defendant making an incriminating statement).

209. *Id.* at 474.

These errors are troubling and highlight the dangers inherent in courts assuming that an interpreter does nothing more than mechanically and precisely pass along information. Some might respond to this criticism by arguing that one of the factors in the *Nazemian* language conduit test is “whether actions taken subsequent to the conversation were consistent with the statements translated.”²¹⁰ The problem, however, is that in most cases of interpretative error “the existence of the failure is not directly knowable” because “neither [the defendant nor the interviewing officer] possesses the linguistic abilities to verify the integrity of the interpretation.”²¹¹ Professor Maneer Ahmad has referred to this type of issue as a “black box problem”—neither party knows what the other is actually saying, thus they lack the ability to identify and correct any interpretation errors.²¹²

At the end of the day, interpreting is “an imprecise and subjective process in which an interpreter must make split-second judgments based on context, cultural understanding, evaluation of multiple meanings of a word, and a host of other factors.”²¹³ Far from being a mere pass-through, an interpreter is an actual participant in the conversation who makes “countless subjective decisions . . . in the process of understanding the speaker’s message, converting it to a second language, and delivering it to the listener.”²¹⁴

Thus, when an interpreter tells a police officer that the defendant said X, Y, or Z, the interpreter is a separate “declarant” for purposes of the hearsay rules.²¹⁵ He or she is making an “assertion”²¹⁶ that the words the defendant said in a foreign language have a certain meaning in English. When an interpreter “translates words from a non-English language into English, the rendering of an opinion [by the interpreter] is inherent in the situation.”²¹⁷ The words spoken by the interpreter are the interpreter’s words, and not the defendant’s.²¹⁸ The early courts had it right—a “witness may not testify to another’s statements made in conversation through an interpreter, because such testimony, being based on interpretation rather than personal knowledge, is hearsay.”²¹⁹

The language conduit theory’s dominance and staying power among the modern courts is particularly surprising given that it was born in a *per curiam* opinion (*Ushakow*) that lacked any analysis or discussion of the issue. Drawn to its simplicity and surface-level appeal, courts across the country have adopted the theory without any serious consideration of its underlying foundation. Of the relatively few modern

210. *United States v. Nazemian*, 948 F.2d 522, 527 (9th Cir. 1991).

211. Ahmad, *supra* note 173, at 1036.

212. *Id.*

213. Brief for the Mass. Ass’n of Court Interpreters, Inc. as Amicus Curiae in Support of Petitioner at 4, *Ye v. United States*, 808 F.3d 395, No. 10576 (9th Cir. 2015).

214. *Id.*

215. See FED. R. EVID. 801(b) (defining “declarant” to mean “the person who made the statement”).

216. See FED. R. EVID. 801(a) (defining “statement” to mean “a person’s oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion”).

217. *Taylor v. State*, 130 A.3d 509, 529 (Md. Ct. Spec. App. 2016) (alteration to the original in the quoted text) (quoting *Malekar v. State*, 26 Md. App. 498, 508 (1975)).

218. See *State v. Montoya-Franco*, 282 P.3d 939, 941 (Or. Ct. App. 2012) (“An out-of-court translation of a non-English speaker’s statements to a third party constitutes hearsay because the interpreter’s translation constitutes an assertion of the English meaning of the original statement.”).

219. *Gallegos v. People*, 403 P.2d 864, 868 (Colo. 1965).

courts that have dug into the issue and tested the premise on which the theory is built, all have correctly concluded that the theory is flawed and irreconcilable with the reality of language interpretation.²²⁰ As the Court of Special Appeals of Maryland put it, the language conduit theory is a “fallacy or misconception that ignores the reality of language interpretation.”²²¹

The language conduit theory also represents a fundamental misunderstanding of how the hearsay rules operate. Even if the interpreter was simply a repeater of the defendant’s statements who provided the interviewing officer with a verbatim account of what the defendant said, the interpreter’s out-of-court statement would *still* be hearsay.²²² It would be no different than the following scenario: Defendant whispers to Officer 1 “I robbed the bank.” Officer 1 turns to Officer 2 and says, “Defendant said he robbed the bank.” If the prosecution called Officer 2 to testify, it would present a classic hearsay-within-hearsay problem. Thus, Rule 805 would require an exception or exemption for each statement.²²³ The statement from Defendant to Officer 1 would fall within the party opponent statement exemption in Rule 801(d)(2), but the statement from Officer 1 to Officer 2 would not fall within an exception or exemption. Thus, Officer 2’s testimony would be inadmissible. It does not matter that Officer 2 was simply parroting, verbatim, what Defendant told Officer 1.²²⁴ It is classic hearsay.²²⁵ Given that the hearsay rules prevent the admission of a defendant’s exact words (as spoken and understood in English) if they were repeated to the witness by a non-testifying third party, it strains logic to say that the hearsay rules permit the admission of a statement that a third-party heard from an interpreter who said the defendant uttered the words in a foreign language.

220. See, e.g., *United States v. Charles*, 722 F.3d 1319, 1324 (11th Cir. 2013) (rejecting the language conduit theory in the context of the Confrontation Clause); *State v. Rodriguez-Castillo*, 188 P.3d 268, 272–73 (Or. 2008) (rejecting the language conduit theory and finding that the interpreter’s statement was an independent assertion for purposes of the hearsay rules). See also *United States v. Romo-Chavez*, 681 F.3d 955, 966 (9th Cir. 2012) (Berzon, J., concurring) (“We should not bend the hearsay rules out of shape so as to treat statements by one person as if they were statements by another, unless the equivalence is proven.”).

221. *Taylor v. State*, 130 A.3d 509, 528 (Md. Ct. Spec. App. 2016) (rejecting the language conduit theory in the context of a Confrontation Clause).

222. See *State v. Derryberry*, 528 P.2d 1034, 1036 (Or. 1974) (en banc) (“The testimony of the police officers that they heard the witness Clark say that he heard the defendant say that he stole the furniture was ‘double hearsay.’ Thus, that testimony was inadmissible as substantive evidence upon the ground that it was hearsay unless it came within some exception to the general rule prohibiting the use of hearsay testimony.”).

223. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *EVIDENCE* § 8:79 (5th ed. 2012) (“To satisfy FRE 805, each statement in the chain must fit ‘an exception,’ and this term should be read also to reach statements that qualify as ‘not hearsay’ under FRE 801(d).”).

224. See *Moseley v. Commonwealth*, 960 S.W.2d 460, 462–63 (Ky. 1997) (concluding that the trial court should not have allowed a detective to repeat what other first responders told the detective the defendant said). See also *State v. Reinhart*, 811 N.W.2d 258, 264 (Neb. 2012) (finding that a state trooper’s testimony about what an informant told him the defendant said was inadmissible hearsay that the trial court improperly admitted).

225. See generally *Hickey v. Settlemier*, 864 P.2d 372, 377 (Or. 1993) (en banc) (holding that a reporter’s statement on a videotape repeating what the defendant said was inadmissible hearsay).

The concept of a person serving as a “language conduit” is entirely inconsistent with how the hearsay rules—particularly the hearsay-within-hearsay rule—operate. The modern courts should take a lesson from their 19th and early 20th century predecessors by rejecting the language conduit theory and holding that out-of-court statements made by a non-testifying interpreter are inadmissible hearsay.

2. *The “agency theory” contradicts agency law.*

The agency theory that many modern courts have applied to admit statements made by a non-testifying interpreter is inconsistent with well settled principles of agency law. The problem is not with the theory itself—a defendant can make an interpreter his agent, and if he does so, the agent’s statements are admissible under the hearsay exemption found in Rule 801(d)(2)(D). Rather, the problem is one of application. More specifically, in applying the agency theory the courts have created a “presumption of agency” that has resulted in interpreters being deemed a defendant’s agent in circumstances where that conclusion lacks legal support.

Rule 801(d)(2)(D) exempts from the rule against hearsay any statements “made by the party’s agent or employee on a matter within the scope of that relationship and while it existed.”²²⁶ The determination of whether an individual was the party’s agent is a “preliminary question” that must be resolved by the trial court under Rule 104(a).²²⁷ The proponent of the evidence has the burden of proving by a preponderance of the evidence that an agency relationship existed between the declarant and the party.²²⁸ The court must consider the statement in making its decision, but the statement itself is insufficient to establish the existence of an agency relationship.²²⁹ Thus, the proponent of the statement must prove an agency relationship “by independent evidence before out-of-court statements by a purported agent can be deemed admissions by a party-opponent.”²³⁰ To satisfy this burden, the proponent must come forward with “more than intuitive judgments emanating from broad generalities.”²³¹

When determining whether the proponent has met its burden, the courts apply the common law of agency.²³² The common law of agency is reflected in the

226. FED. R. EVID. 801(d)(2)(D).

227. See FED. R. EVID. 104(a) (“The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible.”); FED. R. EVID. 801 advisory committee’s note to 1997 amendment (making clear that Rule 104(a) applies to the determination of whether an agency relationship existed under Rule 801(d)(2)(D)). See also *Hilao v. Estate of Marcos*, 103 F.3d 767, 775 (9th Cir. 1996) (“The existence of an agency relationship is a question for the judge under Rule 104(a) . . .”).

228. See *United States v. Bonds*, 608 F.3d 495, 507 (9th Cir. 2010) (explaining that for purposes of Rule 801(d)(2)(D), the government was required to prove agency “by a preponderance of the evidence”); *Lippay v. Christos*, 996 F.2d 1490, 1497 (3d Cir. 1993).

229. See FED. R. EVID. 801(d)(2).

230. *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 116 (1st Cir. 2003).

231. *Id.* at 117.

232. See *id.* at 116; WEISSENBERGER & DUANE, *supra* note 30 at § 801.20 (“The substantive law of agency governs whether the declarant had speaking authority.”).

Restatement (Second) of Agency.²³³ And according to the Restatement, “[a]gency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act.”²³⁴ The term “fiduciary relation” means that the agent’s “function is to act for the benefit” of the principal.²³⁵

To establish an agency relationship, three elements must be established: “[1] manifestation by the principal that the agent shall act for him, [2] the agent’s acceptance of the undertaking and [3] the understanding of the parties that the principal is to be in control of the undertaking.”²³⁶ Although agency can be established without a formal contract, it is a “consensual relationship” that cannot be established without one person (the principal) manifesting an intent that another person (the agent) “shall act in his behalf and the other person consents to represent him.”²³⁷ Manifestation can be done “orally or in writing, or by some other conduct by the principal which may be interpreted as an intent to appoint an agent.”²³⁸ The well settled rule that “agency is *never* to be presumed”²³⁹ is especially important for the purposes of the current discussion.

Undoubtedly, in some situations an interpreter may be the defendant’s agent and, therefore, the interpreter’s statements would be attributed to the defendant and admissible under Rule 801(d)(2)(D).²⁴⁰ Consistent with the law set forth above, the agency theory should not be applied unless the prosecution shows by a preponderance of the evidence that the defendant manifested an intention to have the interpreter serve as his agent. The idea that an interpreter who works for, or was provided by, a government entity is presumptively the agent of a criminal defendant during a police interview flies in the face of agency law and basic common sense.

Do the courts sincerely believe that if Detective 1 uses his bilingual colleague, Detective 2, to interpret during an interrogation of a non-English speaking suspect that the suspect has the right to control Detective 2 in the manner that a principal controls an agent? Is it reasonable to assume that in such a situation Detective 2 has a duty of loyalty to the *suspect* the way that an agent does to a principal? Does it make sense to say that a non-English speaking suspect has

233. See *Kolstad v. Amer. Dental Ass’n*, 527 U.S. 526, 542 (1999) (“The common law as codified in the Restatement (Second) of Agency (1957) provides a useful starting point for defining this general common law.”).

234. RESTATEMENT (SECOND) OF AGENCY § 1(1) (AM. LAW INST. 1958).

235. WARREN A. SEAVEY, AGENCY § 3 C. (1964).

236. *Id.* at cmt. b.

237. HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, THE LAW OF AGENCY AND PARTNERSHIP § 12 (2d ed. 1990).

238. *Id.* at § 26, cmt. a.

239. *Karl Rove & Co. v. Thornburgh*, 39 F.3d 1273, 1296 (5th Cir. 1994) (emphasis added). See also *Kuenzle v. HTM Sport-UND Freizeitgeräte AG*, 102 F.3d 453, 459 (10th Cir. 1996) (“An agency relationship cannot be presumed, but rather must be clearly demonstrated.”); *Dickinson v. City of Huntsville*, 822 So. 2d 411, 416 (Ala. 2001) (“Agency may not be presumed.”); GREG ABBOTT & DOUG COULSON, 5 TEX. PRAC. GUIDE BUS. & COM. LITIG. § 28.29 (2018) (“The law does not presume the existence of an agency relationship.”).

240. See, e.g., *Chao v. State*, 478 So. 2d 30, 32 (Fla. 1985) (affirming the introduction of statements made by a defendant to an interpreter where the interpreter was a bilingual relative of the defendant who he brought to the police station for the purpose of interpreting).

voluntarily manifested an intent to make Detective 2 his agent when the topic was never discussed, the suspect was not given the option of providing his own interpreter, and the suspect has had no opportunity to ascertain the training and experience of Detective 2? Is it reasonable to conclude that a defendant who has no other way of speaking with Detective 1 has impliedly made Detective 2 his agent simply by speaking to him?

The answer to all of these questions is “no.” As the Court of Appeals of Arizona put it, the agency theory “[is] an artifice . . . where the interpreter has been selected by prosecutorial forces investigating the defendant’s participation in a crime.”²⁴¹ Of the modern cases that have relied on the agency theory to admit statements made by a non-testifying interpreter, few have considered agency law principles or rigorously analyzed the issue. Although Rule 801(d)(2)(D) and the law of agency both require that the party claiming an agency relationship prove one existed, most courts today have done the opposite when it comes to statements made to an interpreter. They have impermissibly created a presumption of agency and placed the burden on the opposing party to rebut the presumption by proving that an agency relationship did *not* exist.²⁴²

Some courts have strayed so far from the governing legal principles that reading their opinions seems a bit like being in Alice in Wonderland’s world where is up is down and down is up. For example, in *People v. Quan Hong Ye*, the New York Supreme Court’s Appellate Division relied on the agency theory to affirm the admission of an officer’s testimony about what another (bilingual) officer told him the defendant said during an interview.²⁴³ According to the court, there was no evidence that the interpreter was biased or the interpretation inaccurate.²⁴⁴ Thus, the agency exception applied “even though the interpreter was a law enforcement officer *primarily acting on behalf of the Police Department.*”²⁴⁵

It is difficult to square the *Hong Ye* court’s conclusion with agency law principles—chiefly the rule that an agent acts for the principal and is under the principal’s control. Aside from being inconsistent with well settled legal principles, this type of approach is fundamentally unfair to non-English speaking suspects. A suspect who finds himself in a police interview with an officer and an interpreter he

241. *State v. Terrazas*, 783 P.2d 803, 808 n.3 (Ariz. Ct. App. 1989). *See also* *Rosell v. State*, 433 So. 2d 1260, 1263 (Fla. Dist. Ct. App. 1983) (referring to the state’s argument that the defendant had adopted the interpreter’s statements as “specious”); *Durbin v. Hardin*, 775 S.W.2d 798, 801 (Tex. Ct. App. 1989) (refusing to apply the agency in a civil case because “there is nothing in the record to support an adoption by [the defendant] of the interpreter as her agent . . . there is no evidence that [the defendant] asked that an interpreter be brought to the scene”); Gregory J. Klubok, Note, *The Error in Applying the Language Conduit-Agency Theory to Interpreters Under the Confrontation Clause*, 89 ST. JOHN’S L. REV. 1399, 1417 (2015) (“When a defendant is being interrogated by law enforcement, there is absolutely no manifestation by the defendant that he consents to the agency relationship.”).

242. *See, e.g.*, *United States v. Santacruz*, 480 F. App’x 441, 442–43 (9th Cir. 2012) (treating a sheriff’s deputy as the defendant’s “‘language conduit’ or agent” and stating that the defendant “presented no evidence supporting an assertion that [the deputy] was likely to mislead or distort the translations”); *State v. Robles*, 458 N.W.2d 818, 822 (Wisc. Ct. App. 1990) (holding that a police officer was the defendant’s agent because there was no “showing” by the defendant that the officer was biased or provided an inaccurate interpretation).

243. *People v. Quan Hong Ye*, 889 N.Y.S.2d 556, 557 (N.Y. App. Div. 2009).

244. *Id.*

245. *Id.* (emphasis added).

has never met before should not be treated as though he has voluntarily chosen the interpreter as his agent.²⁴⁶ When the interpreter is another police officer or employee of the police agency, he or she is laboring under (at the very least) an appearance of a conflict of interest. Because of this “inherent conflict of interest” language specialists have concluded that “a police officer or detective should not be assigned as an interpreter in any custodial interrogation.”²⁴⁷ Nevertheless, it happens routinely.

Rule 801(d)(2)(D) was intended to apply in situations where a principal-agent relationship truly existed—i.e., attorney and client, employer and employee.²⁴⁸ Those situations are world’s away from a non-English speaker who is suspected of a crime being interrogated with the assistance of an interpreter he does not know, did not select, has no ability to control, and is associated with the investigating agency. There will be situations where a proper analysis of the applicable legal principles results in an interpreter being viewed as the defendant’s agent.²⁴⁹ But, the overwhelming majority of modern cases applying the agency theory do not involve such situations. The courts should reject the “presumption of agency” that has prevailed in recent years and replace it with an approach that requires the proponent of the statement to establish that the interpreter was, in fact, the defendant’s agent as that term has been defined in agency law.

II. THE CONFRONTATION CLAUSE PROBLEM

When the government seeks to introduce out-of-court statements against a criminal defendant, the hearsay rules are just the first hurdle to admissibility that must be cleared. If a statement clears the hearsay hurdle, then it becomes necessary to consider an even more substantial hurdle—the Confrontation Clause of the Sixth Amendment.²⁵⁰ A small number of courts have addressed the Confrontation Clause issue presented by introducing statements since the Supreme Court’s groundbreaking 2004 decision in *Crawford v. Washington*.²⁵¹ Of those courts, a slim majority have found that a defendant has no Sixth Amendment right to cross examine the

246. See generally *State v. Mitjans*, 408 N.W.2d 824, 831 (Minn. 1987) (“[T]he case for admission of the defendant’s statements in a criminal prosecution is certainly stronger if the interpreter on whose interpretation the witness relies is the defendant’s own interpreter or an independent interpreter appointed to assist the defendant rather than one employed as a police officer.”).

247. *Id.* at 478, 482 (reporting that the Philadelphia Police Department concluded that except in emergency situations police employees “are not to be used as interpreters during interrogations”). See also *SUMMIT CTY. SHERIFF’S OFFICE & CITY OF LORAIN POLICE DEP’T, THE SUMMIT/LORAIN PROJECT*, 9, 46 (2004) (“[I]t is debatable whether a bilingual officer can remain neutral and independent in a role as a language mediator.”); Klubok, *supra* note 241, at 1419 (footnote omitted) (“If the interpreter, as the language conduit-agency theory suggests, is an agent of the defendant, then the interpreter is breaching his duty of good faith by acting on behalf of an adverse party.”).

248. See *MICHAEL R. FONTHAM, TRIAL TECHNIQUES & EVIDENCE* § 6.15.4 (4th ed. 2013) (“Most frequently, Rule 801(d)(2)(D) is used to introduce statements of employees relating to matters within their employment.”).

249. See generally *Ross supra* note 14, at 1982 (providing examples of situations where the interpreter would actually be the defendant’s agent).

250. See *MERRITT & SIMMONS, supra* note 29, at 701 (explaining the relationship between hearsay and the Confrontation Clause).

251. *Crawford v. Washington*, 541 U.S. 36 (2004).

interpreter.²⁵² The federal circuit courts are split on this issue, with the Fifth and Ninth Circuits finding no Confrontation Clause violation, and the Eleventh Circuit reaching the opposite conclusion.²⁵³

Given the importance of the issue and the existence of a circuit split, the issue is ripe for Supreme Court review. Absent a drastic change in the Court's understanding of the Confrontation Clause, the approach endorsed by the Eleventh Circuit should prevail because statements made by a non-testifying interpreter are "testimonial" as that term has been defined by Supreme Court precedent. The statements, therefore, cannot be admitted unless the interpreter testifies, or the defendant had a prior opportunity to cross examine the interpreter. To understand why that is true, a brief overview of the Court's Confrontation Clause jurisprudence is necessary.

A. Overview of the Supreme Court's Confrontation Clause Jurisprudence

The Confrontation Clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."²⁵⁴ It is beyond peradventure that the "central concern of the Confrontation Clause is to ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact."²⁵⁵ The Court has made clear that "rigorous testing" means cross examination—"the greatest legal engine ever imagined for the discovery of truth."²⁵⁶ Although what the Confrontation Clause requires has been relatively easy to determine, the question of when the Clause applies has proven difficult to answer. Clearly, the Confrontation Clause guarantees a criminal defendant the right to cross examine those "who bear testimony against him."²⁵⁷ But, what does that mean? Who is a "witness" against the defendant?

The Supreme Court has grappled with those questions, with varying results. The past forty years can be divided into two eras of Confrontation Clause jurisprudence. The first era began in 1980 with the Court's decision in *Ohio v. Roberts*.²⁵⁸ In *Roberts*, the Court rejected a literal reading of the Confrontation Clause because "it would require, on objection, the exclusion of any statement made by a declarant not present at trial" and "would abrogate virtually every hearsay

252. See *United States v. Ye*, 808 F.3d 395, 401–02 (9th Cir. 2015) (finding no Confrontation Clause violation where the translator testified to the statements the defendants made by a non-testifying interpreter). See also *United States v. Orm Hieng*, 679 F.3d 1131, 1141 (9th Cir. 2012); *United States v. Budha*, 495 F. App'x 452, 454 (5th Cir. 2012); *Hernandez v. State*, 662 S.E.2d 325, 330 (Ga. Ct. App. 2008); *People v. Morel*, 798 N.Y.S.2d 315, 319 (N.Y. App. Term 2005); *Cassidy v. State*, 149 S.W.3d 712, 716 (Tx Ct. App. 2004).

253. See *United States v. Charles*, 722 F.3d 1319, 1330–31 (11th Cir. 2013) (finding a Confrontation Clause violation where an officer testified about what a non-testifying interpreter said that the defendant said during an interview, but affirming the defendant's conviction because the violation did not amount to plain error).

254. U.S. CONST. amend. VI.

255. *Maryland v. Craig*, 497 U.S. 836, 845 (1990).

256. *California v. Green*, 399 U.S. 149, 158 (1970) (footnote omitted).

257. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009) (internal quotations omitted).

258. *Ohio v. Roberts*, 448 U.S. 56 (1980).

exception.”²⁵⁹ The *Roberts* Court determined that the Confrontation Clause permitted an absent witness’s out-of-court statement to be admitted if the statement “bears adequate indicia of reliability.”²⁶⁰ A prosecutor could show that a statement was sufficiently reliable by either showing that the statement fell within a “firmly rooted hearsay exception” or possessed “particularized guarantees of trustworthiness.”²⁶¹ The *Roberts* approach was favorable to the prosecution because it rarely led to the exclusion of statements that were admissible under the hearsay rules.²⁶²

The second era began in 2004 when the Supreme Court issued its watershed decision in *Crawford v. Washington*.²⁶³ The *Crawford* Court rejected *Roberts*, describing its reliability approach to the Confrontation Clause as “amorphous” and inconsistent with the Framers’ intent.²⁶⁴ According to *Crawford*, the *Roberts* approach resulted in courts “admit[ting] core testimonial statements that the Confrontation Clause plainly meant to exclude.”²⁶⁵ The Court explained that a person is a “witness” for Confrontation Clause purposes if he made a “testimonial” statement that is being used against the defendant.²⁶⁶ After *Crawford*, a witness’s testimonial statement is “inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.”²⁶⁷ Thus, post-*Crawford* the key question when the prosecution seeks to introduce an out-of-court statement is “does it qualify as testimonial?” Although the *Crawford* Court did not define the term “testimonial,” it explained that testimony is “typically a solemn declaration or affirmation made for the purpose of establishing or proving a fact.”²⁶⁸ Importantly, the Court did make clear that “[s]tatements taken by police officers in the course of interrogations” are testimonial.²⁶⁹

In the nearly fifteen years since *Crawford*, the Supreme Court has decided a series of cases that have attempted to clarify what constitutes a testimonial statement.²⁷⁰ From these cases, a test has emerged that focuses on the “primary purpose” of the statement when it was made.²⁷¹ A statement is testimonial if the primary purpose was “to establish or prove past events potentially relevant to later criminal prosecution.”²⁷² If the primary purpose was something else (i.e., to address

259. *Id.* at 63.

260. *Id.* at 66; *see also Melendez-Diaz*, 557 U.S. at 312 (stating that *Roberts* announced a “since-rejected theory that unconfrosted testimony was admissible as long as it bore indicia of reliability”).

261. *Roberts*, 448 U.S. at 66.

262. *See Crawford v. Washington*, 541 U.S. 36, 63 (2004) (explaining the flaws in the *Roberts* approach).

263. *Id.*

264. *Id.* at 63, 66.

265. *Id.* at 63.

266. *Id.* at 68.

267. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009).

268. *Crawford*, 541 U.S. at 51.

269. *Id.* at 52.

270. *See generally Williams v. Illinois*, 132 S.Ct. 2221, 2232 (2012) (plurality) (stating that “*Crawford* has resulted in a steady stream of new cases in this Court” and listing the cases).

271. *Davis v. Washington*, 547 U.S. 813, 822 (2006).

272. *Id.*

an ongoing emergency), then the statement is non-testimonial.²⁷³ For purposes of the current discussion, the two most relevant post-*Crawford* cases are *Melendez-Diaz v. Massachusetts*²⁷⁴ and *Bullcoming v. New Mexico*.²⁷⁵ Both dealt with the testimonial nature of laboratory reports that were prepared as part of a criminal investigation. The Court found Confrontation Clause violations in both cases.

The defendant in *Melendez-Diaz* faced cocaine distribution charges after he was found in possession of nineteen baggies of the drug.²⁷⁶ As part of the investigation, the police submitted the nineteen baggies to a state laboratory for confirmation that they contained cocaine.²⁷⁷ After testing the drugs, analysts prepared three “certificates of analysis” reporting that the substance in the seized baggies was cocaine.²⁷⁸ Each certificate was sworn to before a notary public as required by state law.²⁷⁹ The case went to trial, and the prosecution sought to introduce the three certificates without calling the analysts who signed them.²⁸⁰ The defendant objected, arguing that he had a Sixth Amendment right to confront the analysts.²⁸¹ The objection was overruled, the defendant was convicted, and he appealed all the way to the Supreme Court.²⁸² The *Melendez-Diaz* Court reversed his conviction, finding that the defendant had a right to confront the analysts because the certificates were testimonial statements under *Crawford*.²⁸³

In reaching that conclusion, the Court explained that the certificates were designed for the purpose of proving at trial that the substance was of a particular “composition, quality, and . . . net weight.”²⁸⁴ The analysts who prepared them were, therefore, “‘witnesses’ for purposes of the Sixth Amendment.”²⁸⁵ The government had argued that the Confrontation Clause was not implicated because the certificates simply stated the results of “neutral, scientific testing” and were, therefore, less prone to manipulation than normal testimony.²⁸⁶ Swiftly rejecting that argument, the Court pointed out that, scientific or not, the defendant was entitled to cross examine the analysts who conducted the testing.²⁸⁷

The Court observed that there were several areas of cross examination that the defendant may have wished to pursue with the analysts. Those included possible bias (given that many laboratories are operated by law enforcement agencies), incompetence, lack of training and experience, or poor judgment.²⁸⁸ According to

273. *Michigan v. Bryant*, 562 U.S. 344, 345 (2011).

274. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

275. *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

276. *Melendez-Diaz*, 557 U.S. at 308.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 309.

281. *Id.*

282. *Id.*

283. *Id.* at 329.

284. *Id.* at 311.

285. *Id.*

286. *Id.* at 317.

287. *Id.* at 318.

288. *Id.* at 319–20.

the Court, forensic testing “requires the exercise of judgment and presents a risk of error,”²⁸⁹ and “[c]onfrontation is one means of assuring accurate forensic analysis.”²⁹⁰ Underscoring the fact that post-*Crawford* the reliability of the statement is irrelevant to the Confrontation Clause question, the *Melendez-Diaz* Court noted that the analysts who prepared the certificates would be subject to cross examination even if “all analysts always possessed the scientific acumen of Mme. Curie and the veracity of Mother Theresa.”²⁹¹

Two years after *Melendez-Diaz*, the Court issued its decision in *Bullcoming*.²⁹² In *Bullcoming*, the defendant was arrested for DUI.²⁹³ A blood sample was sent to the state laboratory for determination of the defendant’s blood alcohol concentration.²⁹⁴ An analyst performed the test and recorded the result in a forensic laboratory report.²⁹⁵ The analyst who completed the report did not testify at trial; rather, the prosecution admitted the report through another analyst who was familiar with the testing process and had reviewed the report.²⁹⁶ The defendant argued that report was testimonial and that he had the right to cross examine the analyst who actually prepared the report, as opposed to a surrogate.²⁹⁷ The New Mexico Supreme Court agreed that the report was testimonial, but it held that the opportunity to cross examine the surrogate analyst satisfied the Confrontation Clause because (1) the certifying analyst was a “mere scrivener who simply transcribed” results generated by a machine; and (2) the surrogate analyst was able to testify regarding the testing process, the operation of the machine, and the results of the defendant’s test.²⁹⁸

The *Bullcoming* Court disagreed and reversed the defendant’s conviction.²⁹⁹ According to the Court, the lower courts incorrectly “permitted the testimonial statement of one witness [the certifying analyst], to enter into evidence through in-court testimony of a second person [the surrogate analyst].”³⁰⁰ The Court explained that the certifying analyst was not a “mere scrivener”; rather, he received the blood sample, ensured it was intact, matched the sample number and the report number, and conducted the test using a particular protocol.³⁰¹ All of those activities were things the defense could have asked about on cross examination.³⁰²

Furthermore, *Bullcoming* made clear that even if the certifying analyst simply wrote down a machine generated number “the comparative reliability of an

289. *Id.* at 320.

290. *Id.* at 318.

291. *Id.* at 319 n.6.

292. *Bullcoming v. New Mexico*, 564 U.S. 647 (2011).

293. *Id.* at 651.

294. *Id.*

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at 657.

299. *Id.* at 668.

300. *Id.* at 657–58.

301. *Id.* at 660.

302. *Id.*

analyst's testimonial report drawn from machine-produced data does not overcome the Sixth Amendment bar."³⁰³

The Court was also unpersuaded by the argument that the ability to cross examine a surrogate analyst satisfied the Confrontation Clause.³⁰⁴ Although the surrogate may have been familiar with the testing procedures, he could not testify as to how this particular test was conducted and whether the procedures were followed. Moreover, defense counsel could not cross examine the surrogate on issues relating to the certifying analyst's potential "incompetence, evasiveness, or dishonesty."³⁰⁵ In support of its decision, the *Bullcoming* Court reiterated just how strict the Confrontation Clause is post-*Crawford*:

[T]he text of the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement to be developed by the courts . . . [it is not] the role of the courts to extrapolate from the words of the Confrontation Clause to the values behind it, and then enforce its guarantees only to the extent they serve (in the court's view) those underlying values.³⁰⁶

The next section will discuss how the courts have applied the Confrontation Clause to out-of-court statements made by non-testifying interpreters.

B. Cases Applying the Confrontation Clause to Statements Made by Non-Testifying Interpreters

The issue of whether it violates the Confrontation Clause to admit out-of-court statements made by a non-testifying interpreter has divided the federal circuit courts,³⁰⁷ as well as the state courts.³⁰⁸ The split has led to calls for Supreme Court intervention that have yet been unheeded.³⁰⁹ It is undoubtedly an issue that is ripe for review.

Although there has been a flurry of litigation in this area recently, at least one court considered the question nearly a century and a half ago. The case was *People v. Fat*,³¹⁰ and it was decided by the Supreme Court of California in 1880. There, the defendant was charged with committing perjury during a preliminary hearing.³¹¹ Because the defendant did not speak English, he testified through an

303. *Id.* at 661.

304. *Id.* at 661–62.

305. *Id.* at 662.

306. *Id.* (internal quotations and alterations omitted).

307. Compare *United States v. Orm Hieng*, 679 F.3d 1131, 1135 (9th Cir. 2012) (finding no Confrontation Clause violation) with *United States v. Charles*, 722 F.3d 1319, 1331 (11th Cir. 2013) (finding a Confrontation Clause violation, but refusing to reverse because the violation did not constitute plain error).

308. Compare *Hernandez v. State*, 662 S.E.2d 325, 327 (Ga. Ct. App. 2008) (finding no Confrontation Clause violation) with *Taylor v. State*, 130 A.3d 509, 512 (Md. Ct. Spec. App. 2016) (finding a Confrontation Clause violation).

309. *Petition for Writ of Certiorari, United States v. Ye*, (2016) (No. 15-1002) (seeking Supreme Court review of "[w]hether the Confrontation Clause permits the prosecution to introduce an out-of-court, testimonial translation, without making the interpreter available for cross-examination").

310. *People v. Fat*, 54 Cal. 527 (1880).

311. *Id.* at 527.

interpreter at the preliminary hearing.³¹² At his perjury trial, the prosecution introduced the transcript of the defendant's preliminary hearing without calling the stenographer or the interpreter.³¹³ The *Fat* court reversed the defendant's conviction because the trial court violated the "the right and privilege of the accused to [confront] and cross-examine the witnesses in the case."³¹⁴ Additionally, the court stated that the "interpreter, or some other witness to the facts, should have been called, on the part of the prosecution . . . The defendant would then have had the privilege of cross-examination, which was denied him on the trial of this case."³¹⁵ As the Supreme Court of the Territory of Hawaii stated when addressing a related issue in its 1911 decision in *Hawaii v. Kawano*:

The right to subject an interpreter, on the witness stand, to cross-examination on the foreign expressions and terms used by him as interpreter, or used by the witness for whom he has acted as interpreter, is a right well recognized by law, and is founded upon the general rules and principles which govern the cross-examination of other witnesses.³¹⁶

Neither *Fat* nor *Kawano* cited the Sixth Amendment (which had not yet been incorporated to the states),³¹⁷ but both decisions demonstrate that—while the approaches may have changed over the years—the question of whether the defendant has a right to cross examine the interpreter is not new.

During the *Roberts* era of Confrontation Clause jurisprudence, the prevailing view was that a defendant did not have a Sixth Amendment right to cross examine an interpreter about what the interpreter said the defendant said outside of court. As with the hearsay issue discussed at length above, the Ninth Circuit's decision in *United States v. Nazemian* is one of the most cited cases issues on this issue. In *Nazemian*, the court rejected the defendant's Confrontation Clause challenge on the basis that the interpreter and the defendant were "identical for testimonial purposes."³¹⁸ Thus, there was no Confrontation Clause problem in the eyes of *Nazemian* because a defendant has no right to cross examine himself. The Ninth Circuit's Confrontation Clause analysis was grounded in the *Ohio v. Roberts* determination that the admission of "reliable" out- of-court statements did not implicate the Confrontation Clause.³¹⁹

Despite the seismic shift in Confrontation Clause jurisprudence that was *Crawford*, the Ninth Circuit has continually reaffirmed *Nazemian*. The most extensive discussion of the issue can be found in *United States v. Orm Hieng*, which

312. *Id.* at 529.

313. *Id.* at 531.

314. *Id.* at 531–32.

315. *Id.*

316. *Hawaii v. Kawano*, 20 Haw. 469, 474 (1911) (finding that the trial court erred by refusing to allow defendant's attorney to cross-examine the interpreter regarding certain aspects of the interpretation).

317. *See Pointer v. Texas*, 380 U.S. 400, 403 (1965) (incorporating the Sixth Amendment right to confront witnesses to the states through the Fourteenth Amendment).

318. *United States v. Nazemian*, 948 F.2d 522, 528 (9th Cir. 1991).

319. *Id.* at 525, 527–28 (stating the *Roberts* test and proceeding to explain why the statements made by the interpreter were trustworthy and unbiased); *Taylor v. State*, 130 A.3d 509, 536 (Md. Ct. Spec. App. 2016) ("One major indication that *Nazemian* retains little if any authoritative weight is that the case was decided under the pre-*Crawford* paradigm.").

was decided by the Ninth Circuit in 2012.³²⁰ In that case, the defendant argued that the trial court violated the Confrontation Clause by permitting a law enforcement officer to testify as to what a non-testifying interpreter said the defendant said during an interview.³²¹ The court recognized that there was “some tension between the *Nazemian* analysis and the Supreme Court’s recent approach to the Confrontation Clause.”³²² But, it found that *Nazemian* was not “clearly irreconcilable” with *Crawford* and its progeny because none of the Supreme Court’s cases addressed a scenario where the statement in question “may be fairly attributed directly” to the defendant who “cannot complain that he was denied the opportunity to confront himself.”³²³

Judge Marsha Berzon authored a separate concurrence that questioned whether *Nazemian* remained good law. She stated that “*Nazemian* rests, at bottom, on a pre-*Crawford* understanding of the unity between hearsay concepts and the Confrontation Clause analysis[, and] its ultimate conclusion . . . seems in great tension with” *Melendez-Diaz* and *Bullcoming*.³²⁴ Because a single panel of the court could not overrule *Nazemian*, Judge Berzon urged her colleagues to consider en banc review in a later case.³²⁵ That has yet to happen. Instead, the Ninth Circuit has continued to rely on *Nazemian* to reject Confrontation Clause challenges to out-of-court statements made by a non-testifying interpreter.³²⁶ The Fifth Circuit has also relied on *Nazemian*, as well as *Orm Hieng*’s conclusion that *Nazemian* remains good law.³²⁷

The Eleventh Circuit, however, has taken a different path. In *United States v. Charles*, a law enforcement officer questioned the Creole-speaking defendant using an interpreter who was under contract with the Department of Homeland Security.³²⁸ When the case proceeded to trial, the law enforcement officer “told the jury what the interpreter told him [the defendant] had said.”³²⁹ The interpreter did not testify, and the defendant was convicted.³³⁰ On appeal, the defendant argued that her Confrontation Clause rights were violated.³³¹ The Eleventh Circuit agreed, finding that the defendant had a “Sixth Amendment right to confront the interpreter,

320. *United States v. Hieng*, 679 F.3d 1131, 1139–41 (9th Cir. 2012).

321. *Id.* at 1136–39.

322. *Id.* at 1140.

323. *Id.*

324. *Id.* at 1149 (Berzon, J., concurring).

325. *Id.* Judge Berzon did not urge the court to grant en banc review in *Orm Hieng* itself because the court was reviewing the issue for plain error given the defendant’s failure to properly object before the trial court. *Id.*

326. *See, e.g., United States v. Ye*, 808 F.3d 395, 401 (9th Cir. 2015) (“[W]e already have held that *Nazemian* remains binding circuit precedent because it is not clearly irreconcilable with *Crawford* and its progeny.”).

327. *United States v. Budha*, 495 F. App’x 452, 454 (5th Cir. 2012).

328. *United States v. Charles*, 722 F.3d 1319, 1321 (11th Cir. 2013).

329. *Id.*

330. *Id.* at 1320–21.

331. *Id.* at 1321. Because the defendant did not raise the issue below, the Eleventh Circuit reviewed the conviction for plain error. *Id.* at 1322.

who is the declarant of the out-of-court testimonial statements that the government sought to admit through the testimony of the [law enforcement] officer.”³³²

Applying *Crawford*, the court determined that the interpreter’s statements to the officer regarding what the defendant said were testimonial because they were made in the context of a police interrogation.³³³ The court further explained that there were “two sets of testimonial statements that were made out-of-court by two different declarants”—the defendant was the declarant of the foreign language statements, and the interpreter was the declarant of the English statements.³³⁴ After discussing how language interpretation works, the *Charles* court roundly rejected the legal fiction that the defendant and the interpreter were one and the same.³³⁵ And, the court made clear that the reliability of the statement is irrelevant for Confrontation Clause purposes.³³⁶ The court also pointed to *Melendez-Diaz* and opined that if the “results of ‘neutral, scientific testing’ do not exempt the witness who performed the test from cross-examination, certainly the Confrontation Clause requires an interpreter of the concepts and nuances of language to be available for cross-examination at trial.”³³⁷

Of the relatively few state courts to address the Confrontation Clause issue post-*Crawford*, most have found no violation on the basis that the interpreter was the functional equivalent of the defendant who has no right to cross examine himself.³³⁸ Yet in a thorough and well-reasoned opinion, the Maryland Court of Special Appeals reached the opposite conclusion in *Taylor v. State*.³³⁹ The defendant in *Taylor* was deaf, and he was interrogated by the police with the assistance of a sign language interpreter.³⁴⁰ At trial, the prosecution introduced an audio recording of the interpreter’s English translations of what the defendant said in sign language.³⁴¹ The audio recording was introduced during the officer’s testimony, and the interpreter did not testify even though the accuracy of the interpreter’s translations was a disputed issue at trial.³⁴² The trial court rejected the defendant’s Confrontation Clause objection, and he was convicted.³⁴³

After surveying the applicable law, the *Taylor* court reversed the conviction because “the trial court committed reversible error when it admitted the interpreter’s extrajudicial account of [the defendant’s] statements after [the defendant] had

332. *Id.* at 1323.

333. *Id.*

334. *Id.* at 1324.

335. *Id.*

336. *Id.* at 1327–28.

337. *Id.* at 1329.

338. See, e.g., *State v. Munoz*, No. 1 CA-CR 08-1033, 2010 WL 1729483, ¶ 29 (Ariz. Ct. App. Apr. 29, 2010) (finding no Confrontation Clause right to cross examine an interpreter who translated the victim’s statements because “the interpreter’s translation of the victim’s statements into English is not *the interpreter’s* testimony against Appellant and does not transform *the interpreter* into a witness against him”); *Hernandez v. State*, 662 S.E.2d 325, 330 (Ga. Ct. App. 2008) (concluding that the Confrontation Clause was not violated because the interpreter’s statements were considered the statements of the defendant, and the defendant “would not have the right to, in essence, confront himself”).

339. *Taylor v. State*, 130 A.3d 509, 512 (Md. Ct. Spec. App. 2016).

340. *Id.* at 513.

341. *Id.* at 515.

342. *Id.*

343. *Id.* at 515–16.

asserted his rights under the Confrontation Clause.”³⁴⁴ The court determined that the interpreter’s statements as to what the defendant said were testimonial under *Crawford*.³⁴⁵ Moreover, the *Taylor* court explained that the government’s argument that the interpreter was “‘merely a relay’ is no more persuasive than the faulty assertion of the Supreme Court of New Mexico [in *Bullcoming*] that a forensic lab technician served as a ‘mere scrivener,’ who did nothing more than record the results of a machine-generated test.”³⁴⁶ Finally, the court stressed that cross examination of the interpreter could have addressed important issues such as the interpreter’s fluency, experience, methods, and trustworthiness.³⁴⁷ Even if the interpreter was perfectly competent and honest, “questioning of the interpreter might illuminate the precise meaning of a particularly important statement.”³⁴⁸

The Eleventh Circuit in *Charles* and the Maryland Court of Special Appeals in *Taylor* correctly concluded that it violates the Confrontation Clause to admit what an interpreter said the defendant said during a police interview, unless the interpreter testifies or is unavailable and was previously subject to cross examination. There can be no genuine debate that statements made by an interpreter during a police interview are “testimonial” under *Crawford*.³⁴⁹ After all, the entire purpose of a police interview is to obtain information for possible use at a later criminal trial.³⁵⁰ No court has held otherwise. Rather, courts like the Ninth Circuit in *Nazemian* and its progeny have attempted to sidestep the entire Confrontation Clause issue by pretending that the defendant and the police officer conversed directly in English without any interpreter present. If the defendant is the “speaker . . . the Sixth Amendment simply has no application because a defendant cannot complain that he was denied the opportunity to confront himself.”³⁵¹

As Judge Berzon recognized in her *Orm Hieng* concurrence, this approach reflects a view of the Confrontation Clause that was rejected by *Crawford*. The idea that a defendant who seeks to cross examine the interpreter (who oftentimes works for the investigating agency) is effectively seeking to cross examine himself flies in the face of reality and contradicts the Supreme Court’s Confrontation Clause jurisprudence. As the *Charles* and *Taylor* courts correctly recognized, the interpreter and the defendant “are not one and the same.”³⁵² Language interpretation is a complex process that requires skill, judgment, and discretion.³⁵³ Treating the defendant and the interpreter as though they are the same person “disregards the difficult realities of real-time language interpretation,” and prevents the defendant

344. *Id.* at 517.

345. *Id.* at 524 (“The interpreter, responding to a police request, made recorded statements, inside a police interview room, to detectives investigating [the defendant’s] past criminal conduct, and for the purpose of producing evidence that might be used to prosecute [the defendant]. ‘Such statements . . . are inherently testimonial.’” (quoting *Davis v. Washington*, 547 U.S. 813, 830 (2006))).

346. *Id.* at 527.

347. *Id.* at 529–30.

348. *Id.* at 530.

349. *Id.* at 521.

350. *Id.*

351. *United States v. Hieng*, 679 F.3d 1131, 1140 (9th Cir. 2012).

352. *United States v. Charles*, 722 F.3d 1319, 1324 (11th Cir. 2013); *Taylor*, 130 A.3d at 533.

353. *Taylor*, 130 A.3d at 537.

from exercising his right “to confront an interpreter about bias, proficiency, and errors or inaccuracies in the translation.”³⁵⁴

The Supreme Court made clear in *Melendez-Diaz* and *Bullcoming* that the Confrontation Clause provides a defendant with the right to cross examine those who make testimonial statements, regardless of how reliable the statements may appear to be on their face. As the Court explained, “[d]ispensing with confrontation because testimony is obviously reliable is akin to dispensing with jury trial because a defendant is obviously guilty.”³⁵⁵ A comparison of the current issue to *Melendez-Diaz* and *Bullcoming* leads to the conclusion that a defendant has a right to cross examine the interpreter.

In both cases, the Court explained that there were areas ripe for cross-examination of the certifying analyst. Those included, bias, training and experience, proficiency, and methodology.³⁵⁶ Every concern that the *Melendez-Diaz* Court stated with respect to the accuracy of the lab report is present (indeed, even more present) with statements made by an interpreter. Just as there have been well documented errors in laboratory testing, there have been well documented errors in language interpretation. If the Confrontation Clause is designed to “weed out not only the fraudulent analyst, but the incompetent one as well,” there is no reason to believe it was not designed to also “weed out” the fraudulent and incompetent interpreters. If the prosecution wishes to introduce testimony about what an interpreter said the defendant said during a police interview, then the Confrontation Clause requires the prosecution to call the interpreter at trial or establish that the interpreter is “unavailable and the accused has had a prior opportunity to confront that witness.”³⁵⁷

III. GUIDANCE TO LAW ENFORCEMENT AGENCIES AND PROSECUTORS GOING FORWARD

Law enforcement agencies and prosecutors are likely to respond to this Article by arguing that calling the interpreter to testify is impractical and will make it more difficult to successfully prosecute guilty offenders. Prosecutors will point out that in many cases, the interpreter—even if available—will be unable to testify as to what he or she told the officer that the defendant said during a police interview. This is so because the interpreter may not remember the details of the interview. Unlike the investigating officer, an interpreter is not typically invested in the case, takes no notes, writes no reports, and may conduct multiple interpretations per day.

There is a relatively straightforward solution to this problem. Police officers should record the interview. In our modern world, this is easy to accomplish—the officer simply needs a smartphone or tablet, almost all of which have video and audio recording capabilities. When the case goes to trial, a prosecutor (who was unable or unwilling to call the interpreter) would have an option for ensuring that the jury hears what the defendant said during the interview without violating the hearsay rules or the Confrontation Clause.

354. *Id.*

355. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 317–18 (2009) (quoting *Crawford v. Washington*, 541 U.S. 36, 62 (2004)).

356. *Id.* at 321.

357. *Bullcoming v. New Mexico*, 564 U.S. 647, 657 (2011).

All the prosecutor would have to do is place the interviewing officer on the stand, authenticate the recording, and then play the relevant parts of the defendant's uninterpreted statement as spoken in the defendant's foreign language. The courtroom interpreter could then translate the defendant's statements into English for the jury, the same as the courtroom interpreter would if the defendant or any other non-English speaker testified at trial. Proceeding in this fashion eliminates the hearsay and Confrontation Clause issues discussed above because the defendant's statements on the recording would be party opponent statements (albeit foreign language ones) under Rule 801(d)(2)(A). And, the courtroom interpreter's translation would not pose a hearsay problem because it would occur inside the courtroom. Any concerns about the interpreter's in-court translation of the defendant's statement could be raised by defense counsel and addressed by the court in the same manner that it addresses all issues involving a courtroom interpreter's performance.³⁵⁸

Indeed, two state courts have recognized that recording the defendant's interview could obviate, or at least minimize, the current problem. In *State v. Mitjans*, the Supreme Court of Minnesota explained that "prudent police investigators who wish to reduce substantially the risk of subsequent suppression of statements" taken from non-English speaking suspects should consider several options, including "tape-record[ing] the interrogation of the defendant."³⁵⁹ And, in *Commonwealth v. AdonSoto*, the Supreme Judicial Court of Massachusetts went so far as to announce that "[g]oing forward, and where practicable, we expect that all interviews and interrogations using interpreter services will be recorded."³⁶⁰

Any relatively minor cost or inconvenience caused by recording police interviews of non-English speaking suspects will be significantly outweighed by the benefits of reduced litigation, improved accuracy, and increased protection of the defendant's rights. There may be situations where recording the interview is impossible. In those situations, the prosecution should call the interpreter to testify if it seeks to introduce what the interpreter said the defendant said. If the interpreter is unavailable (and was not previously subject to cross examination), or the interpreter is available but unable to recall what the defendant said, then the prosecution will be unable to introduce the statements. That result may be undesirable in a particular case, but it is the result dictated by the Rules of Evidence and the Sixth Amendment to the U.S. Constitution.

IV. CONCLUSION

The question of whether the hearsay rules and/or the Confrontation Clause prevent a witness from testifying as to what an interpreter said the defendant said in

358. See Admin. Office of the U.S. Courts, *Federal Court Interpreter Orientation Manual and Glossary* 27 (May 8, 2014), https://www.uscourts.gov/sites/default/files/federal-court-interpreter-orientation-manual_0.pdf (setting forth the process that federal courts follow when challenges are made to the interpretation offered by a courtroom interpreter).

359. *State v. Mitjans*, 408 N.W.2d 824, 831 (Minn. 1987); see also Klubok, *supra* note 241, at 1426 ("[W]hen an interpreter is needed at an interrogation, the prosecutor or law enforcement official could record it.").

360. 58 N.E.3d 305, 315 (Mass. 2016).

a police interview is one the courts have dealt with for many years. As it relates to the hearsay issue, the courts have provided different answers to that question at different points in our history—with the early courts favoring exclusion and the modern courts favoring admission. To justify the admission of this category of evidence, the courts have created the language conduit and agency theories. Although in many circumstances the law evolves in a positive way over time, this is not one of them. The early courts were correct in their determination that the hearsay rules prohibit evidence about what a non-testifying interpreter said the defendant said outside of court. The language conduit and agency theories applied by the modern courts are fatally flawed.

Similarly flawed is the approach a majority of the courts have taken to answering the Confrontation Clause question. Although currently minority viewpoints, the Eleventh Circuit's decision in *United States v. Charles* and the Maryland Court of Special Appeal's decision in *Taylor v. State* represent appropriate applications of the Supreme Court's post-*Crawford* Confrontation Clause jurisprudence. If the prosecution wishes to introduce evidence about what a non-English speaking defendant said during a police interrogation, then it must call the interpreter or introduce a recording of the defendant's statements during the interview.