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THE ERROR IN APPLYING THE LANGUAGE CONDUIT-AGENCY THEORY TO INTERPRETERS UNDER THE CONFRONTATION CLAUSE

BY GREGORY J. KLUBOK[†]

INTRODUCTION

In 2001, a trial was held in *United States v. Yurofsky*,¹ a federal fraud and money laundering case against two defendants.² In that case, the government decided to use taped conversations between the defendants against them at trial.³ Most of the recorded conversations occurred in Russian, so the government obtained an interpreter to put the conversations into English.⁴ The interpreter also created a written transcript of the Russian-to-English translation, which defense counsel received.⁵ But unbeknownst to the court or the prosecutor, defense counsel was fluent in Russian.⁶ When the government put the interpreter on the stand, defense counsel cross-examined the interpreter about the accuracy of the translation.⁷ The judge then learned that defense counsel had marked up the translation with approximately one hundred corrections, and the judge ordered counsel to share those corrections with the government.⁸

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¹ 148 F. Supp. 2d 230 (E.D.N.Y. 2001), *aff'd*, 55 F. App'x 13 (2d Cir. 2002).

² *Yurofsky*, 55 F. App'x at 14.

³ *Yurofsky*, 148 F. Supp. 2d at 231.

⁴ *Id.*

⁵ *See id.* at 232.

⁶ *See id.*

⁷ *Id.*

⁸ *Id.*

Upon further examination, the government agreed with defense counsel that approximately eighty of the one hundred identified errors were incorrectly translated.⁹

What is remarkable about that case is not necessarily that the interpreter made mistakes in translating the defendants' statements, but that those mistakes were caught. The interpreter's mistakes were only revealed because the government opted to put the interpreter on the stand, probably because the interpreter was the only one who could testify about the interpretation. Interpreters are used in the criminal justice system, including during police interrogations, when the suspect or defendant does not speak English.¹⁰ But in most federal courts, interpreters of a defendant's statements from a police interrogation are not subject to the Confrontation Clause, and the government is not required to call the interpreter to the stand to admit the interpreted statements into evidence if someone else can testify about the interpretation.¹¹ These courts rely on what is known as the language conduit-agency theory,¹² in which the interpreter's statements are imputed to the defendant because the interpreter is considered to be an agent of the defendant or a language conduit.¹³ Some courts, though, have correctly rejected the application of the language conduit-agency theory to interpreters under the Confrontation Clause and have held that interpreters who translate at police interrogations are subject to the Confrontation Clause.¹⁴

This exclusion of interpreters from the Confrontation Clause is contrary to the Confrontation Clause, which states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be

⁹ *Id.*

¹⁰ See Maxwell Alan Miller et al., *Finding Justice in Translation: American Jurisprudence Affecting Due Process for People with Limited English Proficiency Together with Practical Suggestions*, 14 HARV. LATINO L. REV. 117, 142–47 (2011); Beth G. Lindie, Note, *Inadequate Interpreting Services in Courts and the Rules of Admissibility of Testimony on Extrajudicial Interpretations*, 48 U. MIAMI L. REV. 399, 420–31 (1993).

¹¹ See generally *United States v. Romo-Chavez*, 681 F.3d 955 (9th Cir. 2012); *United States v. Orm Hieng*, 679 F.3d 1131 (9th Cir. 2012); *United States v. Santacruz*, 480 F. App'x 441 (9th Cir. 2012); *United States v. Boskovic*, 472 F. App'x 607 (9th Cir. 2012); *United States v. Nazemian*, 948 F.2d 522 (9th Cir. 1991).

¹² Although most courts use the term "language conduit theory," this Note uses the phrase "language conduit-agency theory" because courts using the theory simultaneously rely on both agency and language conduit principles.

¹³ See *Orm Hieng*, 679 F.3d at 1139; *Nazemian*, 948 F.2d at 525–28.

¹⁴ See *United States v. Charles*, 722 F.3d 1319, 1323–25 (11th Cir. 2013).

confronted with the witnesses against him.”¹⁵ This means that defendants in criminal proceedings have the right to cross-examine the witnesses against them.¹⁶ Moreover, even if a defendant could subpoena the witnesses against him, the burden is on the government, not the defendant, to produce those witnesses at trial.¹⁷

There are several reasons why interpreters of a defendant’s statements from a police interrogation should be subject to the Confrontation Clause. The language conduit-agency theory conflicts with recent Supreme Court jurisprudence on the Confrontation Clause. Moreover, the language conduit-agency theory is rooted in hearsay, not the Sixth Amendment. The language conduit-agency theory’s imputation of translated statements to the defendant improperly conflates the Confrontation Clause with the hearsay rules. The language conduit-agency theory’s use of an agency relationship has no basis in agency law. Finally, the language conduit-agency theory improperly relies on the reliability of the interpreter. Thus, the language conduit-agency theory should be rejected as applied to the Confrontation Clause. Therefore, interpreters of a defendant’s statements at a police interrogation, like all other sources of testimonial statements, should be subject to the Confrontation Clause.

Part I of this Note explains the origins of the Confrontation Clause and recent Supreme Court jurisprudence on the topic. Part II of this Note explains the current split of authority among the United States Courts of Appeals on whether interpreters who translate at police interrogations are subject to the Confrontation Clause. Part III of this Note explains why the language conduit-agency theory is inherently incompatible with the Confrontation Clause and why the government should have to call the interpreter who translated a defendant’s statements at a police interrogation to the stand if it wants to introduce the interpreter’s statements into evidence. Finally, Part IV explains how prosecutors can use interpreters at interrogations without running afoul of the Confrontation Clause.

¹⁵ U.S. CONST. amend. VI.

¹⁶ *Davis v. Alaska*, 415 U.S. 308, 315–16 (1974).

¹⁷ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 324 (2009).

I. THE CONFRONTATION CLAUSE

A. *Origins and Colonial History*

The roots of the Confrontation Clause can be traced to the English common law and British politics before the American Revolution.¹⁸ Since at least the seventeenth century, English commentators commended their country's open and confrontational nature of judicial proceedings, even extending to the cross-examination of adverse witnesses.¹⁹ This was in stark contrast to mainland Europe's use of the civil-law system, which allowed—indeed, relied upon—the private examination of witnesses and the reading of such *ex parte* testimony into the record.²⁰

Confrontation in England gained momentum after the trial of Sir Walter Raleigh, who was convicted of treason in 1603.²¹ Raleigh had been implicated in treason by Lord Cobham.²² Officials in England had obtained Cobham's statements outside the presence of Raleigh, and those statements were read into the record at trial.²³ At trial, Raleigh insisted that Cobham be brought before him, stating that he could make Cobham recant his implicatory statements.²⁴ The court refused to do so, and Raleigh was convicted and sentenced to death.²⁵ Due in part to

¹⁸ See *Crawford v. Washington*, 541 U.S. 36, 43–47 (2004).

¹⁹ *Id.* at 45–47. The adversarial nature of English courts, as opposed to civil-law courts, was also praised by noted jurist William Blackstone in his *Commentaries on the Laws of England*, in which he noted that the “open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination” of civil-law courts. 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 373–74 (Wayne Morrison ed., Cavendish Publ'g Ltd. 2001) (1768) (footnote omitted).

²⁰ *Crawford*, 541 U.S. at 43.

²¹ *Id.* at 44–45.

²² *Id.* at 44.

²³ *Id.*; Michael L. Siegel & Daniel Weisman, *The Admissibility of Co-conspirator Statements in a Post-Crawford World*, 34 FLA. ST. U. L. REV. 877, 881 (2007).

²⁴ Siegel & Weisman, *supra* note 23.

²⁵ *Crawford*, 541 U.S. at 44; Allen D. Boyer, *The Trial of Sir Walter Raleigh: The Law of Treason, the Trial of Treason and the Origins of the Confrontation Clause*, 74 MISS. L.J. 869, 889–90 (2005). Although he was given the death sentence, Raleigh was not immediately executed. *Id.* at 895. He spent some time in prison and was then given command of an English fleet in 1617 that was charged with finding gold in Guiana. *Id.* The expedition did not find gold, but instead attacked a Spanish settlement. *Id.* Upon return to England, the King put Raleigh on trial before a private commission to placate the Spanish. *Id.* The commission decided to execute Raleigh based on the original death sentence from the 1603 trial. *Id.*

the uproar over the conduct of Raleigh's trial, England soon thereafter passed a series of laws that preserved the right of confrontation at trial.²⁶

The Confrontation Clause was added to the United States Constitution because the use of such *ex parte* examinations continued at times in the colonies. After fighting the Seven Years' War, England was faced with a large amount of war debts.²⁷ To help pay for this debt, England levied new taxes on the colonists.²⁸ One of those taxes was contained in the Sugar Act, which taxed sugar imports to the colonies.²⁹ In 1765, Parliament passed the Stamp Act, which required all newspapers, pamphlets, and legal documents to be on official stamped paper.³⁰ Violations of the Stamp Act and the Sugar Act were tried in admiralty courts, which were civil-law courts that were devoid of many of the protections that defendants enjoyed under the common law.³¹ In admiralty court, the burden of proof was on the defendant, not the government.³² There was also no right to confrontation in admiralty courts; in fact, admiralty courts "routinely took testimony by deposition or private judicial examination."³³ Trial in the admiralty courts was met with protest in the colonies, partly because there was no right of confrontation in the admiralty courts.³⁴ In light of the lack of confrontation in pre-Revolutionary times, the Confrontation Clause was added to the Sixth Amendment of the Constitution.

²⁶ *Crawford*, 541 U.S. at 44.

²⁷ BENJAMIN L. CARP, *DEFIANCE OF THE PATRIOTS: THE BOSTON TEA PARTY & THE MAKING OF AMERICA* 15 (2010). The British national debt almost doubled during the Seven Years' War, and the British victory meant that more money had to be used to occupy the newly-won territory in North America. 1 JOHN MURRIN ET AL., *LIBERTY, EQUALITY, POWER: A HISTORY OF THE AMERICAN PEOPLE* 183 (7th ed. 2016).

²⁸ ROBERT J. ALLISON, *THE AMERICAN REVOLUTION: A CONCISE HISTORY* 5–11 (Oxford Univ. Press, Inc. 2011).

²⁹ MURRIN ET AL., *supra* note 27, at 185–86.

³⁰ *Id.* at 187.

³¹ *Crawford*, 541 U.S. at 47–48; 30 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE: FEDERAL RULES OF EVIDENCE* § 6345 (West 1977).

³² WRIGHT & GRAHAM, *supra* note 31.

³³ *Crawford*, 541 U.S. at 47–48.

³⁴ *Id.* at 48. Congress, in response to the Stamp Act, protested that "trial by jury is the inherent and invaluable right of every British subject in these colonies." The Declaration of the Stamp Act Congress (1765), *reprinted in* *COLONIES TO NATION, 1763–1789: A DOCUMENTARY HISTORY OF THE AMERICAN REVOLUTION* 64 (Jack P. Greene ed., 1975).

B. Recent Supreme Court Jurisprudence

In recent years, the Supreme Court has transformed the Confrontation Clause in such a way that makes the language conduit-agency theory inherently incompatible with the Confrontation Clause. The Confrontation Clause was incorporated into constitutional jurisprudence in 1965 with *Pointer v. Texas*.³⁵ Prior to 2004, the leading case on the Confrontation Clause was *Ohio v. Roberts*.³⁶ Under *Roberts* and its progeny, statements from an unavailable witness that were deemed to have “adequate indicia of reliability” or that fell under a “firmly rooted hearsay exception” satisfied the Confrontation Clause even though the defendant never confronted the declarant.³⁷ But in *Bourjaily v. United States*,³⁸ the Court eroded the requirement that the witness be unavailable, instead focusing on the reliability of the statements.³⁹ Until 2004, it was this *Roberts* test that was used by courts in analyzing the Confrontation Clause.

But the *Roberts* test was rejected by *Crawford v. Washington*⁴⁰ and its progeny, which have revolutionized the Confrontation Clause in recent years. In *Crawford*, the defendant was convicted of assault after he stabbed a man.⁴¹ During their investigation of this assault, police officers interrogated the defendant’s wife, who gave an account of the stabbing.⁴² At trial, the defendant’s wife did not testify due to the marital privilege, but in Washington, the marital privilege does not extend to a spouse’s statements that would be admissible under an exception to the hearsay rules.⁴³ In that case, the defendant’s wife helped to organize the assault, so her statements were admitted as statements against interest.⁴⁴ The

³⁵ 380 U.S. 400, 403 (1965).

³⁶ 448 U.S. 56 (1980).

³⁷ *Id.* at 66 (internal quotation omitted); *see also Crawford*, 541 U.S. at 60.

³⁸ 483 U.S. 171 (1987).

³⁹ *Id.* at 182–84.

⁴⁰ 541 U.S. 36.

⁴¹ *Id.* at 38, 41.

⁴² *Id.* at 39–40.

⁴³ *Id.* at 40.

⁴⁴ *Id.*

defendant then claimed that his Confrontation Clause rights were violated because the government did not call his wife to the stand.⁴⁵

The Supreme Court agreed with the defendant. Reinforcing that the Confrontation Clause applies to both in-court and out-of-court statements,⁴⁶ the Court held that all testimonial statements fell within the scope of the Confrontation Clause.⁴⁷ The Supreme Court also rejected the notion that the Confrontation Clause could be satisfied through admissibility under the Federal Rules of Evidence, stating that “we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’”⁴⁸ The Supreme Court rejected the *Roberts* test, stating that it did not provide “any meaningful protection.”⁴⁹ The Court held that although the Confrontation Clause does promote the reliability of evidence, it mandates “that reliability be assessed in a particular manner: by testing in the crucible of cross-examination.”⁵⁰ Noting that statements elicited through police interrogation are testimonial, the Supreme Court held that the admission of the defendant’s wife’s testimony without the government calling her to the stand violated the Confrontation Clause.⁵¹

The Supreme Court did not provide a definition of testimonial in *Crawford*. The Court waited until *Davis v. Washington*⁵² to do so. In that case, the Court stated:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no

⁴⁵ *Id.*

⁴⁶ *Id.* at 50–51.

⁴⁷ *Id.* at 59.

⁴⁸ *Id.* at 61.

⁴⁹ *Id.* at 68.

⁵⁰ *Id.* at 61.

⁵¹ *Id.* at 68–69 (“Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.”).

⁵² 547 U.S. 813 (2006).

such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.⁵³

Accordingly, any statements made during a police interrogation, when the information elicited is not used to respond to an active emergency, are testimonial.⁵⁴

Five years after *Crawford*, the Supreme Court decided another Confrontation Clause case, *Melendez-Diaz v. Massachusetts*.⁵⁵ In *Melendez-Diaz*, the defendant was charged with distributing cocaine.⁵⁶ As part of the evidence against the defendant, the police seized nineteen plastic bags of cocaine that the defendant and his accomplices tried to hide in a police car.⁵⁷ Those bags were submitted to a state lab to conduct tests.⁵⁸

At trial, the government offered the bags into evidence with three certificates of analysis, which stated that the bags, as shown by a forensic analysis, contained cocaine.⁵⁹ The defendant objected to the certificates, arguing that allowing the certificates into evidence without having the lab technician who conducted the forensic analysis on the stand would violate the Confrontation Clause, particularly in light of *Crawford*.⁶⁰ The objection was overruled, and the defendant was convicted.⁶¹

The Supreme Court agreed with the defendant, holding that the defendant's rights under the Confrontation Clause were violated when the certificates of analysis were admitted into evidence without putting the lab technician on the stand.⁶² As an initial matter, the Supreme Court noted that the certificates of analysis were testimonial.⁶³ Testimonial statements can include affidavits, depositions, and prior testimony.⁶⁴ Although called

⁵³ *Id.* at 822.

⁵⁴ *Id.*; *Crawford*, 541 U.S. at 52.

⁵⁵ 557 U.S. 305 (2009).

⁵⁶ *Id.* at 308.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 309.

⁶¹ *Id.*

⁶² *Id.* at 329.

⁶³ *Id.* at 310.

⁶⁴ *Id.*

certificates of analysis, they were akin to affidavits because they contained sworn-to statements of fact.⁶⁵ Thus, these certificates of analysis were subject to the Confrontation Clause.⁶⁶

The government made several arguments, all rejected by the Court, worth mentioning. The government argued that the Confrontation Clause did not apply because the certificates of analysis themselves were not accusatory, but only became relevant when viewed with the other evidence.⁶⁷ The Supreme Court rejected that argument, noting that nothing in the Sixth Amendment necessitates that the evidence be accusatory, only that the witness be against the defendant.⁶⁸ There, the lab technician, by virtue of his certificate of analysis, became a witness against the defendant, implicating the Confrontation Clause.⁶⁹

The government also claimed that the certificates of analysis satisfied the Confrontation Clause because the certificates were the “resul[t] of neutral, scientific testing.”⁷⁰ The Supreme Court stated that that was a return to the *Roberts* test, the “since-rejected theory that unfronted testimony was admissible so long as it bore indicia of reliability.”⁷¹ Thus, the fact that the certificates of analysis and the testing may have been reliable is of no relevance to the Confrontation Clause.⁷²

The government also had an argument based on judicial economy. The government argued that it would be too burdensome to always call the lab technician to the stand whenever some sort of forensic analysis was conducted in a criminal case.⁷³ But the Court rejected that argument too, noting that “[t]he Confrontation Clause may make the prosecution of criminals more burdensome, but that is equally true of the right

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 313.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 317 (alteration in original).

⁷¹ *Id.* at 312, 317.

⁷² *See id.* at 317–18.

⁷³ *Id.* at 325.

to trial by jury and the privilege against self-incrimination.⁷⁴ The Court could not disregard the Confrontation Clause because it was convenient to do so.⁷⁵

Finally, in *Bullcoming v. New Mexico*,⁷⁶ the Supreme Court dealt with surrogate testimony under the Confrontation Clause. Surrogate testimony is when someone familiar with the policies and procedures of a process, but who did not actually conduct the process at issue, testifies about that process.⁷⁷ In *Bullcoming*, the defendant was charged with aggravated driving while intoxicated (“DWI”) after failing field sobriety tests.⁷⁸ Since the defendant refused to submit to a breathalyzer test, the police obtained a warrant to conduct a blood alcohol test.⁷⁹ After the defendant’s blood was drawn at a hospital, it was sent to a laboratory for analysis, where it was revealed that the defendant’s blood alcohol concentration (“BAC”) was 0.21, well over the legal limit.⁸⁰

At trial, the government stated that it would not be calling the analyst who actually performed the analysis of defendant’s blood because the analyst had been placed on unpaid leave.⁸¹ Instead, the government stated that it would put another analyst on the stand who could testify about the general policies and procedures of the laboratory.⁸² Defense counsel objected, arguing that such surrogate testimony would violate the defendant’s rights under the Confrontation Clause.⁸³ The objection was overruled, and the defendant was convicted of aggravated DWI.⁸⁴

The Supreme Court held that such surrogate testimony violated the Confrontation Clause, overruling the New Mexico Supreme Court. The Supreme Court rejected the analysis of its New Mexico counterpart that there was no Confrontation Clause violation because the analyst merely “transcribed” information

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ 131 S. Ct. 2705 (2011).

⁷⁷ *Id.* at 2710.

⁷⁸ *Id.* at 2710, 2711.

⁷⁹ *Id.* at 2710.

⁸⁰ *Id.* at 2710–11. In New Mexico, it is illegal to operate a motor vehicle with a BAC of .08 or higher. N.M. STAT. ANN. § 66-8-102 (West 2010). Because the defendant’s BAC was at or higher than .16, the defendant was charged with aggravated DWI. *Id.*

⁸¹ *Bullcoming*, 131 S. Ct. at 2711–12.

⁸² *Id.* at 2712.

⁸³ *Id.*

⁸⁴ *Id.*

from a machine used to analyze the defendant's blood.⁸⁵ The Supreme Court noted that surrogate testimony could not show what exactly the lab technician did to test the blood or show any errors in the testing process.⁸⁶ The Supreme Court held that when the results of the test performed by the lab technician were introduced, the lab technician who actually conducted those tests became a witness against the defendant, thus implicating the Confrontation Clause.⁸⁷

There are a few concepts that are clear from the Supreme Court's recent jurisprudence on the Confrontation Clause. First, statements elicited during police interrogations, when there is no ongoing emergency to respond to, are testimonial.⁸⁸ Second, there is no reliability exception to the Confrontation Clause.⁸⁹ No matter how reliable some testimonial statements may be, they are still subject to the Confrontation Clause.⁹⁰ Even if the declarant is a neutral person with no interest in the litigation, the defendant still has the right to cross-examine the declarant.⁹¹ Third, surrogate testimony does not satisfy the Confrontation Clause.⁹² Fourth, the Confrontation Clause is separate from the rules of evidence.⁹³ Unfortunately, the courts that apply the language conduit-agency theory to interpreters under the Confrontation Clause ignore these concepts.

II. TRANSLATOR TESTIMONY AND CONFRONTATION: THE CIRCUIT SPLIT

A. *The Ninth Circuit and the Majority View*

Most circuit courts that have faced the question of whether interpreters' statements from police interrogations are subject to the Confrontation Clause have held that they are not. The most aggressive circuit in holding that interpreters who translate a defendants' statements during police interrogations are not subject to the Confrontation Clause is the United States Court of

⁸⁵ *Id.* at 2714, 2715 (quoting *State v. Bullcoming*, 226 P.3d 1, 8 (N.M. 2010)).

⁸⁶ *Id.* at 2715.

⁸⁷ *Id.* at 2716.

⁸⁸ *Crawford v. Washington*, 541 U.S. 36, 52 (2004).

⁸⁹ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 317–18 (2009).

⁹⁰ *Id.*

⁹¹ *Id.* at 318–19.

⁹² *Bullcoming*, 131 S. Ct. at 2715–16.

⁹³ *Crawford*, 541 U.S. at 61.

Appeals for the Ninth Circuit, whose jurisprudence on the application of the language conduit-agency theory to the Confrontation Clause dates back to the 1991 case of *United States v. Nazemian*.⁹⁴ *Nazemian* was the first case to apply the language conduit-agency theory, which had previously only been used to get around the hearsay rules,⁹⁵ to the Confrontation Clause. Under the language conduit-agency theory, the translator is considered to be a language conduit or agent of the defendant, so the translator's statements are imputed to the defendant.⁹⁶ Since the defendant cannot cross-examine himself, there is no Confrontation Clause issue.⁹⁷

Nazemian and subsequent cases utilized four factors to determine if a translator was acting as an agent or language conduit of the defendant. The four factors from *Nazemian* are (1) the party that supplied the translator; (2) whether the interpreter had a motive to lie; (3) the interpreter's language expertise; and (4) "whether actions subsequent to the conversation were consistent with the statements as translated."⁹⁸ The fact that the government is the party supplying the translator, though, does not automatically preclude the translator from being an agent of the defendant.⁹⁹ Those factors answer the initial question, according to the Ninth Circuit, of whether the interpreter's statements can be imputed to the defendant under the language conduit-agency theory.¹⁰⁰

*Crawford v. Washington*¹⁰¹ and its progeny have not changed the Ninth Circuit's application of the language conduit-agency theory to the Confrontation Clause. In a post-*Crawford* case, *United States v. Orm Hieng*,¹⁰² the Ninth Circuit reiterated its

⁹⁴ 948 F.2d 522 (9th Cir. 1991). The Fourth and Fifth Circuits have also adopted the Ninth Circuit's interpretation of the language conduit-agency theory as applied to the Confrontation Clause. See *United States v. Shibin*, 722 F.3d 233, 248–49 (4th Cir. 2013); *United States v. Budha*, 495 F. App'x 452, 454 (5th Cir. 2012).

⁹⁵ See *United States v. Ushakow*, 474 F.2d 1244, 1245 (9th Cir. 1973).

⁹⁶ *United States v. Orm Hieng*, 679 F.3d 1131, 1139 (9th Cir. 2012) (noting that if the language conduit-agency theory applies, "the defendant cannot claim that he was denied the opportunity to confront himself"); *Nazemian*, 948 F.2d at 527–28.

⁹⁷ *Orm Hieng*, 679 F.3d at 1139.

⁹⁸ *Nazemian*, 948 F.2d at 527; *Orm Hieng*, 679 F.3d at 1139.

⁹⁹ *United States v. Romo-Chavez*, 681 F.3d 955, 959–60 (9th Cir. 2012); *United States v. Santacruz*, 480 F. App'x 441, 442–43 (9th Cir. 2012); *Nazemian*, 948 F.2d at 527–28.

¹⁰⁰ *Nazemian*, 948 F.2d at 527.

¹⁰¹ 541 U.S. 36 (2004).

¹⁰² 679 F.3d 1131 (9th Cir. 2012).

application of the language conduit-agency theory to the Confrontation Clause and decided that *Crawford* and its progeny did not necessitate a change in such application.¹⁰³ The Ninth Circuit in *Orm Hieng* concluded that *Crawford* and its progeny only require confrontation of the person who made the statement.¹⁰⁴ Under the language conduit-agency theory, the statement is imputed to the defendant, who cannot cross-examine himself.¹⁰⁵ The court in *Orm Hieng* further held that *Crawford* and its progeny never addressed the question of whether a translator is the declarant under the language conduit-agency theory, or even whether the language conduit-agency theory applies.¹⁰⁶ The court concluded that it “can apply *Nazemian* without running afoul of *Crawford*.”¹⁰⁷

Significantly, *Nazemian* and subsequent Ninth Circuit cases are unclear and ambiguous in explaining whether they are holding that an interpreter is a language conduit or an agent of the defendant, or both. Whichever rationale the Ninth Circuit has used, there is no basis for the interpreter to be either a language conduit or an agent of the defendant.¹⁰⁸ *Nazemian*’s reference to the “agency-language conduit theory” only adds to such ambiguity.¹⁰⁹ Indeed, after finding that there was no Confrontation Clause issue, the Ninth Circuit in *Nazemian* held that it was not erroneous for the United States District Court for the Central District of California to consider the translator as a language conduit or an agent, without explaining which one, or both, applied.¹¹⁰ The Ninth Circuit then stated that since the interpreter was a language conduit or agent of the defendant, there was no Confrontation Clause issue.¹¹¹

Two more post-*Crawford* Ninth Circuit cases that were decided within two months of each other show the inability of that circuit to clearly explain whether the interpreter is a

¹⁰³ *Orm Hieng*, 679 F.3d at 1139–40 (9th Cir. 2012).

¹⁰⁴ *Id.* at 1140.

¹⁰⁵ *Id.* at 1139.

¹⁰⁶ *Id.* at 1140.

¹⁰⁷ *Id.*

¹⁰⁸ *See infra* Part III.

¹⁰⁹ *United States v. Nazemian*, 948 F.2d 522, 526 (9th Cir. 1991) (quoting *United States v. Felix-Jerez*, 667 F.2d 1297, 1300 n.1 (9th Cir. 1982)) (internal quotation marks omitted).

¹¹⁰ *Id.* at 528.

¹¹¹ *Id.*

language conduit or agent of the defendant, or both. In *United States v. Boskovic*,¹¹² the Ninth Circuit, in applying the language conduit-agency theory, only used the term “language conduit.”¹¹³ The words agent and agency as applied to the language conduit-agency theory were nowhere to be found in that case.¹¹⁴ But less than two months later, in *United States v. Santacruz*,¹¹⁵ the Ninth Circuit held that there was no Confrontation Clause issue because the interpreter was a language conduit or agent of the defendant—once again, without explaining which one, or both, applied.¹¹⁶ That case, like the other Ninth Circuit cases on the issue, did not contain any sort of analysis using the principles of agency.¹¹⁷

Significantly, no Ninth Circuit case has ever decided whether interpreters’ statements from pretrial interrogations are testimonial.¹¹⁸ Instead, the Ninth Circuit has avoided the question by holding that, as a preliminary matter, there is no Confrontation Clause issue because the statements belong to the defendant under the language conduit-agency theory.¹¹⁹

B. *The Eleventh Circuit Creates a Circuit Split*

The language conduit-agency theory as applied to the Confrontation Clause was rejected for the first time in *United States v. Charles*.¹²⁰ In that case, the United States Court of Appeals for the Eleventh Circuit rejected the language conduit-agency theory because interpreters do not translate word-for-word, but rather translate ideas and concepts, so the defendant and the translator had different statements.¹²¹ Moreover,

¹¹² 472 F. App’x 607 (9th Cir. 2012).

¹¹³ *Id.* at 608.

¹¹⁴ *See id.*

¹¹⁵ 480 F. App’x 441 (9th Cir. 2012).

¹¹⁶ *Id.* at 443.

¹¹⁷ *See generally* *United States v. Romo-Chavez*, 681 F.3d 955 (9th Cir. 2012); *United States v. Orm Hieng*, 679 F.3d 1131 (9th Cir. 2012); *United States v. Santacruz*, 480 F. App’x 441 (9th Cir. 2012); *United States v. Boskovic*, 472 F. App’x 607 (9th Cir. 2012); *United States v. Nazemian*, 948 F.2d 522 (9th Cir. 1991).

¹¹⁸ *See generally* *Romo-Chavez*, 681 F.3d at 955; *Orm Hieng*, 679 F.3d at 1131; *Santacruz*, 480 F. App’x at 441; *Boskovic*, 472 F. App’x at 607; *Nazemian*, 948 F.2d at 522.

¹¹⁹ *See generally* *Romo-Chavez*, 681 F.3d at 955; *Orm Hieng*, 679 F.3d at 1131; *Santacruz*, 480 F. App’x at 441; *Boskovic*, 472 F. App’x at 607; *Nazemian*, 948 F.2d at 522.

¹²⁰ 722 F.3d 1319 (11th Cir. 2013).

¹²¹ *Id.* at 1324.

colloquial expressions and differences in dialect make translation all the more difficult.¹²² Because the statements of the defendant and the interpreter differed, the interpreter was not a language conduit.¹²³ The Eleventh Circuit also found that the interpreter's statements were testimonial because they were elicited during a police interrogation.¹²⁴ Since the statements were testimonial and the language conduit-agency theory did not apply, the interpreter was subject to the Confrontation Clause.¹²⁵

The government in *Charles* urged the court to adopt the language conduit-agency theory as per the Eleventh Circuit's prior reasoning in *United States v. Alvarez*.¹²⁶ The Eleventh Circuit in *Alvarez*, analyzing the hearsay rules, used the language conduit-agency theory to make a translator's statements party-opponent statements under Federal Rule of Evidence 801(d)(2)(C) or (D).¹²⁷ But *Alvarez* did not discuss the Confrontation Clause.¹²⁸

Using *Alvarez*, the Eleventh Circuit in *Charles* pointed out that the language conduit-agency theory does not assume that the defendant was the declarant.¹²⁹ The *Charles* court noted that had the court in *Alvarez* viewed the defendant as the declarant, the statements would have been admitted under Federal Rule Evidence 801(d)(2)(A) as party-opponent statements, and the court would not have had to go to Federal Rule of Evidence 801(d)(2)(C) or (D) for statements authorized by a party or statements by a party's agent.¹³⁰ Finally, the Eleventh Circuit reasoned that even if translators' statements can be considered reliable, *Crawford* specifically rejected reliability as a test under the Confrontation Clause.¹³¹ Therefore, the Eleventh Circuit rejected the language conduit-agency theory's viability under the Confrontation Clause.¹³² Because statements of a defendant taken during police interrogations are testimonial, the Eleventh

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* at 1323.

¹²⁵ *Id.*

¹²⁶ 755 F.2d 830 (11th Cir. 1985).

¹²⁷ *Id.* at 859–60.

¹²⁸ *Charles*, 722 F.3d at 1325.

¹²⁹ *See id.* at 1326.

¹³⁰ *Id.* at 1326–27.

¹³¹ *Id.* at 1327–28.

¹³² *Id.* at 1330–31.

Circuit held that any interpreted statements taken during a police interrogation are also deemed testimonial.¹³³ The Eleventh Circuit thus held that the interpreter who interpreted during the police interrogation was subject to the Confrontation Clause.¹³⁴

III. THE LANGUAGE CONDUIT-AGENCY THEORY IS INCONSISTENT WITH THE CONFRONTATION CLAUSE

There are several reasons why the language conduit-agency theory should be rejected as applied to the Confrontation Clause when a defendant's statements from a police interrogation are being offered into evidence. First, as an initial matter, the Supreme Court has held that statements from police interrogations are testimonial, so those statements fall within the scope of the Confrontation Clause. Second, the language conduit-agency theory's use of an agency relationship has no basis in agency law. Third, the language conduit-agency theory's imputation of statements from an interpreter to a defendant comes from the hearsay rules and has no basis in the Confrontation Clause. Finally, the language conduit-agency theory improperly relies on reliability. Thus, interpreters who translate a defendant's statements at a police interrogation should be subject to the Confrontation Clause if the government wants to introduce the interpreter's statements into evidence.

A. *Interpreters' Statements Are Testimonial*

The Eleventh Circuit in *Charles* was correct to hold that a defendant's interpreted statements from a police interrogation are testimonial. A statement is "testimonial when the circumstances objectively indicate that there is no . . . emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."¹³⁵ Testimonial statements, "at a minimum," include statements taken at police interrogations.¹³⁶ Interpreters are often used during police interrogations,¹³⁷ and statements elicited during police interrogations are "testimonial under even

¹³³ *Id.* at 1323.

¹³⁴ *Id.* at 1330–31.

¹³⁵ *Davis v. Washington*, 547 U.S. 813, 822 (2006).

¹³⁶ *Crawford v. Washington*, 541 U.S. 36, 68 (2004).

¹³⁷ See *Lindie*, *supra* note 10; *Miller et al.*, *supra* note 10.

a narrow standard.”¹³⁸ In such an interrogation, there is no ongoing emergency that the police need to respond to. Indeed, the sole purpose of such an interrogation is to gather evidence for a criminal prosecution. Moreover, statements need not be accusatory to be subject to the Confrontation Clause.¹³⁹ Therefore, statements taken by interpreters during pretrial police interrogations are testimonial.

In defense of the language conduit-agency theory, the Ninth Circuit has inferred that one reason why interpreters are not subject to the Confrontation Clause is that they are reliable, noting that interpreters have no “motive to mistranslate.”¹⁴⁰ Reliability was the old test used in *Ohio v. Roberts*.¹⁴¹ But such a reliability test for the Confrontation Clause has been expressly rejected, several times, by the Supreme Court.¹⁴² In *Crawford v. Washington*,¹⁴³ the Supreme Court, in rejecting the *Roberts* test, stated that “we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence, much less to amorphous notions of ‘reliability.’”¹⁴⁴

The Supreme Court was even more explicit in *Melendez-Diaz*, noting that the *Roberts* test used the “since-rejected theory that unfronted testimony was admissible so long as it bore indicia of reliability.”¹⁴⁵ The Court in *Melendez-Diaz* held that even though scientific testimony may be neutral, and forensic analysts have no personal interest in the outcome of the case, such testimony is subject to the Confrontation Clause.¹⁴⁶ The Court held that confrontation could expose an expert with a “lack of proper training or deficiency in judgment.”¹⁴⁷ Similarly here, even though interpreters may be neutral, they should still be subject to the Confrontation Clause,

¹³⁸ *Crawford*, 541 U.S. at 52.

¹³⁹ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 313 (2009). Statements are not accusatory if they do not make direct accusations of criminality against the defendant, but only inculcate the defendant when taken in conjunction with other evidence. *Id.*

¹⁴⁰ *See United States v. Orm Hieng*, 679 F.3d 1131, 1139 (9th Cir. 2012).

¹⁴¹ *Ohio v. Roberts*, 448 U.S. 56, 66 (1980).

¹⁴² *See supra* Part I.B.

¹⁴³ 541 U.S. 36 (2004).

¹⁴⁴ *Id.* at 61.

¹⁴⁵ *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 312 (2009) (citing *Roberts*, 448 U.S. at 66).

¹⁴⁶ *Id.* at 317.

¹⁴⁷ *Id.* at 320.

and confrontation may expose interpreters who mistranslate defendants' statements. Thus, even if it were to be assumed that interpreters are reliable, that is of no consequence under the Confrontation Clause.

The Confrontation Clause issue arises here because the interpreter who interpreted a defendant's statements at a police interrogation is not called to testify. Instead, a third party who happens to be present during the translation, usually a member of law enforcement, testifies as to what the interpreter translated.¹⁴⁸ That is essentially what surrogate testimony is.¹⁴⁹ But, as noted above, the Supreme Court in *Bullcoming* held that surrogate testimony does not satisfy the Confrontation Clause.¹⁵⁰ Since the translator is the one that is doing the translating, it is that translator, and not anyone else, who must testify.¹⁵¹

Simply put, translated statements of defendants from police interrogations are being elicited for the sole purpose of future criminal prosecution; thus, they are testimonial. Finding that interpreted statements from pretrial interrogations are subject to the Confrontation Clause "involves little more than the application of [the Supreme Court's] holding in *Crawford v. Washington*" and subsequent cases.¹⁵²

B. The Language Conduit-Agency Theory Is a Perversion of Agency Law

One main point of the language conduit-agency theory is that the interpreter is treated as an agent of the defendant, so there is no Confrontation Clause issue.¹⁵³ Despite this, no Ninth Circuit case involving the language conduit-agency theory has ever discussed agency law,¹⁵⁴ perhaps because the language conduit-agency theory's use of agency has no basis in agency law.

¹⁴⁸ See *United States v. Shibin*, 722 F.3d 233, 238–39 (4th Cir. 2013); *United States v. Orm Hieng*, 679 F.3d 1131, 1136, 1138–39 (9th Cir. 2012).

¹⁴⁹ See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2710 (2011).

¹⁵⁰ See *supra* Part I.B.

¹⁵¹ See *Bullcoming*, 131 S. Ct. at 2716.

¹⁵² *Melendez-Diaz*, 557 U.S. at 329.

¹⁵³ *Orm Hieng*, 679 F.3d at 1139; *United States v. Nazemian*, 948 F.2d 522, 528 (9th Cir. 1991).

¹⁵⁴ See *generally* *United States v. Romo-Chavez*, 681 F.3d 955 (9th Cir. 2012); *Orm Hieng*, 679 F.3d at 1131; *United States v. Santacruz*, 480 F. App'x 441 (9th Cir. 2012); *United States v. Boskovic*, 472 F. App'x 607 (9th Cir. 2012); *Nazemian*, 948 F.2d at 522.

Agency is “a consensual relationship in which one person . . . acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. The person represented has a right to control the actions of the agent.”¹⁵⁵ However, the language conduit-agency theory fails to satisfy several essential elements of an agency relationship.

First, one of the requirements of an agency relationship is that the principal must manifest his assent to the agency relationship.¹⁵⁶ Indeed, the requirement of manifestation is part of the definition of agency.¹⁵⁷ Significantly, “[a] manifestation does not occur in a vacuum, and the meaning that may reasonably be inferred from it will reflect the context in which the manifestation is made.”¹⁵⁸

When a defendant is being interrogated by law enforcement, there is absolutely no manifestation by the defendant that he consents to the agency relationship. The defendant has been arrested or is a person of interest in a criminal investigation, and the interpreter just so happens to be present at the interrogation. The defendant was not the person who requested the interpreter; law enforcement did. The defendant in such a situation did not do anything to manifest his acceptance of an agency relationship. And merely allowing the interpreter to translate cannot possibly be a manifestation of assent, as it is black-letter law that only the acts of the principal, not of the agent, may bind the principal and agent together.¹⁵⁹

Another basic element of an agency relationship is that the agent be subject to the principal’s control.¹⁶⁰ The ability of the principal to control the agent is part of the very definition of an

¹⁵⁵ RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006).

¹⁵⁶ *Id.* § 1.01; *Ramos-Barrientos v. Bland*, 661 F.3d 587, 600 (11th Cir. 2011); *Cleveland v. Caplaw Enters.*, 448 F.3d 518, 522 (2d Cir. 2006).

¹⁵⁷ RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. d (2006).

¹⁵⁸ *Id.* § 1.03.

¹⁵⁹ *Velasco v. Gov’t of Indon.*, 370 F.3d 392, 400 n.3 (4th Cir. 2004); *Auvil v. Grafton Homes, Inc.*, 92 F.3d 226, 230 (5th Cir. 1996) (“[There is a] well-established tenet that an agent cannot create his own authority to represent a principal.”); *Kuhn v. City of New York*, 274 N.Y. 118, 134, 8 N.E.2d 300, 306 (1937).

¹⁶⁰ RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (2006); *Kawasaki Kisen Kaisha, Ltd. v. Plano Molding Co.*, 696 F.3d 647, 652 (7th Cir. 2012); *Atrium of Princeton, LLC v. N.L.R.B.*, 684 F.3d 1310, 1315 (D.C. Cir. 2012); *Jurgens v. Poling Transp. Co.*, 113 F. Supp. 2d 388, 399 (E.D.N.Y. 2000) (referring to control as “[t]he most critical element” in an agency relationship).

agency relationship.¹⁶¹ Indeed, without the ability of the principal to control the agent, no agency relationship exists.¹⁶² When looking at the element of control, courts look at the right of the principal to control the agent, not actual control.¹⁶³

When being interrogated by law enforcement, the defendant cannot exercise control over the interpreter. The defendant cannot tell the interpreter to leave the room or not to translate something. If law enforcement officers are conversing amongst themselves on a matter that they do not want the interpreter to translate for the defendant, the defendant cannot order the interpreter to translate it anyway. Simply put, the interpreter in such a situation is controlled by law enforcement, not the defendant. Thus, without the ability of the defendant to control the interpreter, "there is no agency relationship."¹⁶⁴

Lastly, there is no agency relationship between an interpreter and a defendant because the interpreter does not have the power to alter the legal relationship between the principal and third parties. The ability of an agent to do so is one of the "essential characteristics" of the agency relationship.¹⁶⁵ The ability to alter the legal relationship between the principal and third parties means that the agent can "(1) bind the principal in contract with a third person; (2) divest the principal of interest in a thing, such as selling the principal's goods to a third person; (3) acquire new interests for the principal; or (4) subject the principal to tort liability by injuring a third person."¹⁶⁶

As between an interpreter and a defendant, the interpreter cannot alter the legal relationship between the principal and third parties. The interpreter cannot enter into a contract on

¹⁶¹ RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2666 (2013); *In re Rezulin Prods. Liab. Litig.*, 390 F. Supp. 2d 319, 330 (S.D.N.Y. 2005).

¹⁶² *Spagnola v. Chubb Corp.*, 264 F.R.D. 76, 89 (S.D.N.Y. 2010); *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1239 (N.D. Cal. 2004).

¹⁶³ *In re Coupon Clearing Serv., Inc.*, 113 F.3d 1091, 1099 (9th Cir. 1997); *Alkanani v. Aegis Def. Servs., LLC*, 976 F. Supp. 2d 1, 11 (D.D.C. 2013); *A.P.I. Inc. Asbestos Settlement Trust v. Home Ins. Co.*, 877 F. Supp. 2d 709, 722 (D. Minn. 2012).

¹⁶⁴ *In re Rezulin Prods. Liab. Litig.*, 390 F. Supp. 2d at 330.

¹⁶⁵ *Prof'l Commc'ns, Inc. v. Contract Freighters, Inc.*, 171 F. Supp. 2d 546, 551 (D. Md. 2001); *see also* *BancOklahoma Mortg. Corp. v. Capital Title Co.*, 194 F.3d 1089, 1104 (10th Cir. 1999); RESTATEMENT (SECOND) OF AGENCY § 12 (1958).

¹⁶⁶ *Eyerman v. Mary Kay Cosmetics, Inc.*, 967 F.2d 213, 220 (6th Cir. 1992); *see also* RESTATEMENT (SECOND) OF AGENCY § 12 cmt. a (1958).

behalf of the defendant with a third party, divest the principal of interest in property, acquire new property for the principal, or subject the principal to tort liability. There is simply no way for the interpreter to change the legal relationship between the defendant and third parties. The only thing the interpreter does is interpret, which does not change the legal relationship between the defendant and any third parties. Thus, the interpreter cannot be an agent of the defendant.

Even if the elements of an agency relationship were to be disregarded, the interpreter would be breaching his duty to the defendant because agents have “a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship.”¹⁶⁷ Indeed, an agency relationship is a fiduciary relationship, and the agent owes the principal a duty of good faith.¹⁶⁸ Acting on behalf of an adverse party generally violates this duty of good faith.¹⁶⁹

When an interpreter is being used at a pretrial interrogation to translate the defendant’s words into English, the interpreter is acting on behalf of law enforcement. The defendant did not bring the interpreter to the interrogation; law enforcement did. And since law enforcement is presumably investigating a crime that the defendant was a suspect in, and later becomes prosecuted for, law enforcement is adverse to the defendant. This is inherently inconsistent with agency law. If the interpreter, as the language conduit-agency theory suggests,¹⁷⁰ is an agent of the defendant, then the interpreter is breaching his duty of good faith by acting on behalf of an adverse party. If the interpreter is the defendant’s agent for the purposes of translation, then the transaction—that is, the translation—is voidable at the

¹⁶⁷ RESTATEMENT (THIRD) OF AGENCY § 8.03 (2006); *see also* *Robertson v. Chapman*, 152 U.S. 673, 681–82 (1894); *Phillips Petroleum Co. v. Peterson*, 218 F.2d 926, 934 (10th Cir. 1954).

¹⁶⁸ RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006); *Tow v. Amegy Bank N.A.*, 976 F. Supp. 2d 889, 903 (S.D. Tex. 2013); *UBS AG, Stamford Branch v. HealthSouth Corp.*, 645 F. Supp. 2d 135, 144 (S.D.N.Y. 2008).

¹⁶⁹ RESTATEMENT (THIRD) OF AGENCY § 8.03 (2006); *UBS AG, Stamford Branch*, 645 F. Supp. 2d at 144; *Select Creations, Inc. v. Paliafito Am., Inc.*, 911 F. Supp. 1130, 1153–54 (E.D. Wis. 1995).

¹⁷⁰ *See supra* Part II.A.

defendant's option.¹⁷¹ This means that, if the interpreter was the defendant's agent, the defendant could simply void the translation.

The relationship between an interpreter and a defendant is inherently inconsistent with an agency relationship. Some of the elements of an agency relationship are absent, and even if they were present, the interpreter would be violating his duty to the defendant, the principal, by acting on behalf of law enforcement. Thus, an interpreter appearing on behalf of law enforcement cannot possibly be an agent of the defendant.

C. The Language Conduit-Agency Theory Improperly Conflates the Confrontation Clause with the Hearsay Rules

The whole premise of the language conduit-agent theory is that because the statements of an interpreter can be imputed to the defendant, there is no Confrontation Clause issue because the defendant cannot cross-examine himself.¹⁷² But this whole concept of imputation exists under the hearsay rules, not the Confrontation Clause. Essentially, the language conduit-agency theory holds that there is no Confrontation Clause issue if the statement would be a party-opponent statement under Federal Rule of Evidence 801(d)(2). In applying the language conduit-agency theory to the Confrontation Clause, the Ninth Circuit has improperly conflated the Confrontation Clause and the hearsay rules.

This conflation is apparent from the language of *United States v. Nazemian*.¹⁷³ The court there stated that, as a preliminary matter under the Confrontation Clause, it had to decide whether the defendant or the interpreter was the speaker.¹⁷⁴ The court noted that “[t]his threshold question likewise controls the hearsay analysis. If the statements are viewed as [the defendant’s] own, they would constitute admissions properly characterized as non-hearsay under [Federal

¹⁷¹ See *Television Events & Mktg., Inc. v. AMCON Distrib. Co.*, 488 F. Supp. 2d 1071, 1078–79 (D. Haw. 2006); *Hidden Brook Air, Inc. v. Thabet Aviation Int'l Inc.*, 241 F. Supp. 2d 246, 267 (S.D.N.Y. 2002); *Nat'l Credit Union Admin. v. Ticor Title Ins. Co.*, 873 F. Supp. 718, 727 (D. Mass. 1995).

¹⁷² *United States v. Orm Hieng*, 679 F.3d 1131, 1139 (9th Cir. 2012); *United States v. Nazemian*, 948 F.2d 522, 528 (9th Cir. 1991).

¹⁷³ 948 F.2d 522.

¹⁷⁴ *Id.* at 525.

Rule of Evidence] 801(d)(2)(C) or (D).”¹⁷⁵ The court then found that because the interpreter’s statements could be imputed to the defendant, the statements were admissible under both the hearsay rules and the Confrontation Clause.¹⁷⁶

Post-*Nazemian* jurisprudence from the Ninth Circuit further shows the conflation of the hearsay rules and the Confrontation Clause in the language conduit-agency theory. In *United States v. Romo-Chavez*,¹⁷⁷ the defendant challenged the admission of an interpreter’s statements on hearsay and Confrontation Clause grounds.¹⁷⁸ In that case, it was not the interpreter, coincidentally a law enforcement officer, who testified about the interpreted statements, but another law enforcement officer who was present during the interpretation.¹⁷⁹ There, interestingly, the court analyzed the four *Nazemian* factors while analyzing hearsay, not the Confrontation Clause.¹⁸⁰ After the court concluded that the interpreter’s statements did not constitute inadmissible hearsay, the court held that there was no Confrontation Clause issue because, using the hearsay analysis, the interpreter’s statements belonged to the defendant.¹⁸¹

The Ninth Circuit in *United States v. Boskovic*¹⁸² was much more explicit about its conflation of the hearsay rules and the Confrontation Clause. There, the defendant appealed his conviction by asserting that his Confrontation Clause rights were violated when an interpreter’s statements were admitted.¹⁸³ The Ninth Circuit in that case, in a blatant showing of the conflation, stated that if an interpreter is a language conduit, “the statements are viewed as the defendant’s own . . . [and] they do not constitute inadmissible hearsay and their admission does not violate the Confrontation Clause.”¹⁸⁴ The Ninth Circuit found the interpreter’s statements belonged “to [the defendant] and, as party admissions under Federal Rule of Evidence 801(d)(2), they were not hearsay. Their admission did not violate the

¹⁷⁵ *Id.* at 526.

¹⁷⁶ *See id.* at 528.

¹⁷⁷ 681 F.3d 955 (9th Cir. 2012).

¹⁷⁸ *Id.* at 959.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 959–61.

¹⁸¹ *See id.* at 961.

¹⁸² 472 F. App’x 607 (9th Cir. 2012).

¹⁸³ *Id.* at 608.

¹⁸⁴ *Id.*

Confrontation Clause.”¹⁸⁵ There, the court used its hearsay analysis and found that the interpreter’s statements were attributable to the defendant. Thus, the court held that there was no Confrontation Clause issue for the same reason.

Significantly, this conflation is proscribed by the Supreme Court’s separation of the law of evidence from the Confrontation Clause. The Supreme Court in *Crawford* specifically stated that “we do not think the Framers meant to leave the Sixth Amendment’s protection to the vagaries of the rules of evidence.”¹⁸⁶ Moreover, the Supreme Court rejected the old *Roberts* test, which held that evidence that fell under a firmly-rooted hearsay exception did not pose a Confrontation Clause issue.¹⁸⁷ The rejected *Roberts* test did the same thing that the Ninth Circuit is currently doing: conflating the hearsay rules with the Confrontation Clause.¹⁸⁸ For this reason, the language conduit-agency theory is inherently incompatible with the Confrontation Clause.

D. The Language Conduit-Agency Theory Relies on Reliability, an Approach Rejected by Crawford and Its Progeny for the Confrontation Clause

As noted above, the language conduit-agency theory uses four factors to determine if an interpreter is a language conduit or agent of the defendant.¹⁸⁹ One of those factors is given little significance by courts, and the other three all go toward reliability. Reliability, though, is irrelevant under the Confrontation Clause.¹⁹⁰ Moreover, even if reliability were an acceptable test under the Confrontation Clause, interpreters are not reliable to begin with. Thus, the language conduit-agency theory is inherently incompatible with the Confrontation Clause.

¹⁸⁵ *Id.*

¹⁸⁶ *Crawford v. Washington*, 541 U.S. 36, 61 (2004).

¹⁸⁷ *See supra* Part I.B.

¹⁸⁸ *See supra* Part I.B.

¹⁸⁹ *See supra* Part II.A.

¹⁹⁰ *See supra* Part I.B.

1. The *Nazemian* Factors Are Based on Reliability, Which Is Irrelevant Under the Confrontation Clause.

Even if the *Nazemian* court were correct in applying the language conduit-agency theory to the Confrontation Clause, such an application is no longer valid after *Crawford* and its progeny. As noted above, the language conduit-agency theory takes four factors into account when deciding whether an interpreter is a language conduit: the party that supplied the interpreter; whether the interpreter had a motive to lie; the interpreter's language expertise; and "whether actions subsequent to the conversation were consistent with the statements as translated."¹⁹¹ Courts do not give the first factor much importance, as the fact that the government provided the translator does not necessarily mean that the interpreter cannot serve as a language conduit.¹⁹² The three latter factors, though, all go toward reliability. However, as noted above, the Supreme Court has expressly rejected reliability as a suitable test under the Confrontation Clause.¹⁹³ Since the *Nazemian* factors go toward reliability, the language conduit-agency theory is inherently incompatible with the Confrontation Clause.

The second factor of the language conduit-agency theory, whether the interpreter had a motive to lie, has no plausible goal other than to ensure the interpreter's reliability. Indeed, courts have regularly found such a factor to go toward reliability.¹⁹⁴ The third factor, the interpreter's language expertise, must also go toward reliability. The whole point of ensuring that the interpreter has sufficient training in a language is to ensure that the translation is accurate, which bears on reliability.¹⁹⁵ Finally, the final language conduit factor, whether the defendant's

¹⁹¹ *United States v. Orm Hieng*, 679 F.3d 1131, 1139 (9th Cir. 2012); *United States v. Nazemian*, 948 F.2d 522, 527 (9th Cir. 1991).

¹⁹² *United States v. Romo-Chavez*, 681 F.3d 955, 959–60 (9th Cir. 2012); *United States v. Santacruz*, 480 F. App'x 441, 442–43 (9th Cir. 2012); *Nazemian*, 948 F.2d at 527–28.

¹⁹³ *See supra* Part I.B.

¹⁹⁴ *Boyd v. City of Oakland*, 458 F. Supp. 2d 1015, 1033 (N.D. Cal. 2006); *State v. Anderson*, 733 P.2d 517, 520 (Wash. 1987).

¹⁹⁵ *Saavedra v. State*, 297 S.W.3d 342, 348–49 (Tex. Crim. App. 2009); *see Diaz v. State*, 743 A.2d 1166, 1182–83 (Del. 1999); *State v. Rodriguez*, 682 A.2d 764, 769 (N.J. Super. Ct. Law Div. 1996).

subsequent actions are consistent with the translation, could only serve to reinforce the accuracy of the translation; thus, it goes to reliability.¹⁹⁶

But the Supreme Court rejected reliability as an acceptable test under the Confrontation Clause.¹⁹⁷ Since the language conduit factors bear on reliability, the language conduit-agency theory is inherently incompatible with the Confrontation Clause.

2. Interpreters Are Not Necessarily Reliable

Not only is reliability not an acceptable test under the Confrontation Clause, but interpreters are not reliable to begin with. Thus, even if the Confrontation Clause could be satisfied by reliability, interpreters' statements would not meet that standard. Interpreters are not always accurate, and interpreters cannot possibly be language conduits because they do not translate word-for-word.

There are a few reasons that could explain why interpreters are not always accurate. First, at least in federal court, there are no uniform qualifications for interpreters; instead, they vary from district to district, and sometimes from courtroom to courtroom.¹⁹⁸ In addition, federal courts only administer proficiency tests for Spanish interpreters, not interpreters of any other language.¹⁹⁹ Interpreters could also be unfamiliar with a different dialect of a language.²⁰⁰ Moreover, interpreters do not translate word-for-word, but instead translate concepts and ideas.²⁰¹ In so doing, interpreters are not language conduits, but are using their own judgment in determining what words to use. Finally, interpreters can become subject to mental fatigue after thirty to forty minutes of interpreting, which results in "a marked loss of accuracy."²⁰²

¹⁹⁶ *Saavedra*, 297 S.W.3d at 348–49.

¹⁹⁷ *See supra* Part I.B.

¹⁹⁸ Virginia Benmaman & Isabel Frammer, *Foreign Language Interpreters and the Judicial System*, in, CULTURAL ISSUES IN CRIMINAL DEFENSE 139 (Linda Friedman Ramirez ed., 3d ed. 2010).

¹⁹⁹ *Id.* at 137–38.

²⁰⁰ *See* John Eligon, *In Court, Lost in Translation*, N.Y. TIMES (July 29, 2011, 11:55 AM), <http://cityroom.blogs.nytimes.com/2011/07/29/lost-in-translation/>.

²⁰¹ *United States v. Charles*, 722 F.3d 1319, 1324 (11th Cir. 2013); Benmaman & Frammer, *supra* note 198, at 163–64.

²⁰² Benmaman & Frammer, *supra* note 198, at 170–71.

As a result, in addition to *United States v. Yurofsky*,²⁰³ there are many instances of inaccurate interpreters in the American legal system. In *United States v. Santos*,²⁰⁴ a magistrate judge found that a tape recording had been inaccurately interpreted.²⁰⁵ The judge found that the transcript of the conversation contained “numerous significant omissions and unnecessary additions and remarks.”²⁰⁶ In *Rodriguez v. State*,²⁰⁷ an interpreter was so inaccurate that the court instructed the jury as such and brought in a new translator.²⁰⁸ In *Ouanbenboune v. State*,²⁰⁹ a murder case, the court held that the trial interpreter’s “inaccuracies did fundamentally alter the context of [the defendant’s] testimony.”²¹⁰ In *Ponce v. State*,²¹¹ as a trial judge was advising a defendant of the rights he was waiving by pleading guilty, an interpreter was translating that colloquy for the defendant.²¹² But the translation was so inaccurate that defendant did not know what rights he was waiving by pleading guilty, so the defendant’s guilty plea was vacated because he did not waive his rights knowingly and intelligently.²¹³ In *People v. Cabrera*,²¹⁴ the interpreter at trial was so inaccurate that some of the jurors, during deliberations, noted the inaccuracies and provided a different translation for the entire jury.²¹⁵ The list goes on and on, but the point is clear: Mistakes happen during translations. The most effective way to discover these mistakes would be through cross-examination, the only remedy that the Confrontation Clause provides.

²⁰³ 148 F. Supp. 2d 230 (E.D.N.Y. 2001), *aff’d*, 55 F. App’x 13 (2d Cir. 2002); see *supra* Introduction.

²⁰⁴ No. 92-289(RLA), 1993 WL 278557 (D.P.R. 1993).

²⁰⁵ *Id.* at *1.

²⁰⁶ *Id.*

²⁰⁷ 518 S.E.2d 131 (Ga. 1999).

²⁰⁸ *Id.* at 136.

²⁰⁹ 220 P.3d 1122 (Nev. 2009).

²¹⁰ *Id.* at 1125.

²¹¹ 9 N.E.3d 1265 (Ind. 2014).

²¹² *Id.* at 1271.

²¹³ *Id.* at 1271–72, 1274.

²¹⁴ 281 Cal. Rptr. 238 (Cal. Ct. App. 1991).

²¹⁵ *Id.* at 242.

IV. A SOLUTION

Obtaining for trial the same interpreter from an interrogation could be a difficult task for the prosecutor; after all, a trial can take place a year or more after an interrogation, and people die, move, become ill, or otherwise become unreachable. But there is a simple solution here. The problem with the language conduit-agency theory only arises if the prosecutor wants to use the interpreter's statements from an interrogation at trial. There is no Confrontation Clause issue if the defendant's own statements, as opposed to the interpreter's statements, are admitted.²¹⁶ Thus, whenever an interpreter is needed at an interrogation, the prosecutor or law enforcement official could record it. Whether it is a video or only an audio recording is unimportant, as long as the interrogation is audible. Before trial, the prosecutor would eliminate the interpreter's statements and only keep the defendant's statements in his native language and the interrogator's questions.²¹⁷ At trial, the prosecutor would have an interpreter, and not necessarily the same interpreter from the interrogation, translate the defendant's statements from the interrogation. That translator would be on the stand, so

²¹⁶ See *United States v. Brown*, 441 F.3d 1330, 1358–59 (11th Cir. 2006) (holding that admission of the defendant's own statement did not violate Confrontation Clause); *United States v. Zizzo*, 120 F.3d 1338, 1354 (7th Cir. 1997) (noting that a defendant's own statements "obviously pose no problem" under the Confrontation Clause).

²¹⁷ The interrogator's questions would be admissible at trial. In order to constitute hearsay, the statement or conduct in question must be an assertion, FED. R. EVID. 801(a), and questions are not hearsay because they are not assertions. *United States v. Coplan*, 703 F.3d 46, 84 (2d Cir. 2012) (holding that "as a matter of law, questions are not 'assertions' within the meaning of Rule 801" and are therefore not hearsay); *United States v. Wright*, 343 F.3d 849, 865 (6th Cir. 2003) ("[A] question is typically not hearsay because it does not assert the truth or falsity of a fact."). Without any assertions, questions cannot be offered for their truth, so they are not hearsay under Federal Rule of Evidence 801(c)(2). *People v. Gholam*, 99 A.D.3d 441, 443, 951 N.Y.S.2d 526, 528 (4th Dep't 2012) (holding, under New York law, that "[q]uestions themselves are not hearsay because they are not offered for their truth"). Additionally, questions are not testimonial under the Confrontation Clause because questions cannot "establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington*, 547 U.S. 813, 822 (2006); see also *United States v. Johnson*, No. 3:14-CR-02, 2014 WL 3954998, at *10 (N.D.W. Va. Aug. 13, 2014) (noting that questions are not testimonial under Confrontation Clause); *Davenport v. Davis*, No. 07-12047, 2009 WL 960411, at *4 (E.D. Mich. Apr. 7, 2009) (rejecting, in habeas corpus proceeding, the Confrontation Clause claim because "the victim did not answer any of [the officer's] questions; thus, there were no testimonial statements made by the victim to the officer"). Thus, the interrogator's questions would be admissible.

defense counsel could cross-examine him. Because that translator's interpretation would be the only one shown to the jury, the Confrontation Clause would be satisfied. There would not even be any issues with surrogate testimony because the same interpreter who did the translation shown to the jury would be subject to cross-examination.²¹⁸ Thus, the solution for prosecutors to the flaws in the language conduit-agency theory is for the prosecutor to introduce a recording of the interrogation, excise the interpreter's statements from that recording, and have a new interpreter at trial translate the defendant's statements.

CONCLUSION

There is only one way to satisfy the Confrontation Clause: calling the witness to the stand so the defendant can cross-examine him. That rule should be substituted for the language conduit-agency theory when applied to interpreted statements of a defendant from a police interrogation because the language conduit-agency theory is inherently incompatible with the Confrontation Clause. The language conduit-agency theory's imputation of an interpreter's statements to the defendant comes from the hearsay rules and has no basis in the Confrontation Clause. Its use of an agency relationship has no basis in agency law. It ignores the reality that interpreters make mistakes and are not always accurate. If the government wants to introduce interpreted statements of a defendant from a police interrogation, then the government should have to call the interpreter to the stand. Subjecting the interpreter to the Confrontation Clause is consistent with the Supreme Court's jurisprudence in *Crawford* and its progeny. Interpreters, like all other purveyors of testimonial statements, should be subject to the "crucible of cross-examination."²¹⁹

²¹⁸ See *Bullcoming v. New Mexico*, 131 S. Ct. 2705, 2718 (2011) (stating that the prosecution could have avoided a Confrontation Clause issue involving surrogate testimony by having the analyst who testified at trial redo the blood test himself instead of having him testify about a blood test that he did not conduct).

²¹⁹ *Crawford v. Washington*, 541 U.S. 36, 61 (2004).