

論文題目: Who Is the Declarant of the English Translation of the Defendant's Out-of-Court Foreign Language Statement?
An "Authenticated Conduit" Theory

提出者: 田村(伊東) 智子 (Tomoko Tamura Ito)

授与機関: Harvard University (ハーバード大学)

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Abstract

The U.S. circuit courts are currently split on their interpretation of "interpreters." In interpreter-assisted custodial interviews, a police officer listens to the non-English-speaking suspect's statements given to the officer in the form of an English translation given by an interpreter. The officer later testifies in court to what the defendant stated during this interview, at which point a big questions arises as to who exactly the declarant is of the statement this officer is now testifying to in court. If the answer is "the defendant," then the officer is simply testifying to the defendant's own prior statement, which raises no hearsay issue. This is the position taken by the majority,¹ which maintain that the interpreter, who is a mere "language conduit," serves as the defendant's "agent" during the interview, and that, therefore, according to the Federal Rules of Evidence 801(d)(2)(C) or (D), the interpreter's statement becomes the defendant's own statement.²

In 2013, however, the 11th Circuit adjudicated that the police officer was only testifying to the English statement made by the interpreter, which was a translation of what the defendant had said in the original language,³ making the officer's testimony inadmissible hearsay, and that by not subpoenaing the interpreter to be cross-examined by the defendant, the lower court had violated the defendant's Confrontation Clause right⁴ guaranteed by the Supreme Court's 2004 ruling in *Crawford*⁵ and its progeny.

The thesis, comprising legal analysis and linguistic analysis, contends that the declarant of the English-language translation of a non-English speaking suspect's out-of-court testimony "must" become no one else but the suspect, not by making the interpreter the suspect's "agent" by FRE 801(d)(2)(C) or (D), but by ensuring that every interpreter passes muster as a true "language conduit," thus applying FRE 801(d)(2)(A). The "agent-and-conduit interpreter" theory is a hybrid of the traditional agency law's vicarious admission and a 20th-century "legal fiction"⁶ about a foreign-language interpreter. The theory employs "a party opponent's vicarious admission" claiming that

when two parties enter into a conversation through an interpreter, the interpreter becomes a “dual agent” for both parties, who presume that the interpreter is acting as a “conduit,” making the interpreter’s translation *prima facie* accurate unless shown otherwise. The theory, however, embodies critical logic dilemmas, deriving from the unfortunate fusion of “agent” and “conduit,” two unrelated and rather incompatible concepts, resulting in: 1) question-begging logic for accuracy, 2) superfluousness, and 2) opportunistic application. Thus, in Part I: Legal Analysis, the thesis re-separates “agent” and “conduit” for independent scrutiny and demonstrates that no “agency relationship” takes place between the suspect and the interpreter in a police interview because the suspect neither consents to it nor controls the interpreter, the two conditions required by the agency law. The thesis further argues that imposition on the suspect of any such consent to an assumed agency relationship with an interpreter in a police interview will violate the suspect’s “non-waivable” 5th Amendment due process right against “potential verballing.” Pointing out the long legislative or judicial neglect and failure that have condoned the rampant use of unqualified interpreters, e.g., “ad hoc” bilingual officers, a problem which Berk-Seligson, Gonzalez, et al., etc. have also warned against,⁷ the thesis criticizes the absence of interpreter quality assurance in the upstream criminal process, unlike in the downstream, for which the U.S. Congress implemented a certification system as way back as in 1978.

The thesis calls for a complete overhaul of the “agent-and-conduit” theory and maintains that it be replaced by a new “authenticated conduit” measure that enables the application of FRE 801(d)(2)(A) by exerting 21st-century technological and intellectual resources that are becoming increasingly advanced, accessible, and available. Also, to attest to the adequacy of attaining a “true conduit,” the thesis shows that the “true conduit” notion is also in harmony with the doctrine of the copyright law, by delineating the similarities between the protectible elements of the original copyright that continue to exist in its translation and the original declarant’s statement that continues to exist in its English translation rendered by a “conduit” interpreter. As a concrete measure to achieve a “true conduit,” the thesis calls for mandatory introduction of digital video recording (only 22 states have made it mandatory as of Aug., 2015) accompanied also by mandatory check translation authenticated by a certified interpreter who will also act as an expert witness. The thesis contends that both are indispensable, not one being an aid to the other.

Part II: Forensic-Linguistic Analysis is an empirical substantiation for the final contention made in Part I, “indispensability of a check translation,” using an authentic recording of a 2008 Toronto Police custodial interview with a Dari interpreter. Since the recording was submitted as a court exhibit not because of any interpreting issue but because of a mechanical accident that stopped the recording after a little less than 78:00 minutes, the thesis regarded this interpreter as an ideal example all the then parties had found sufficiently “accurate” and “impartial,” i.e., an ideal “conduit” interpreter example.

The thesis attempted to answer: 1) to what extent monolingual parties in a police interview and fact-triers in court can assess the interpreting accuracy and impartiality by only an indirect means without actual verification by a check translation; and 2) how indispensable and crucial a check translation would be in making such verifications.

To answer the 1st question, the thesis looked into: 1) discrepancy in the total utterances between SL and TL; 2) Q-and-A cycle patterns; 6) comparison of pre-utterance pause lengths; 3) time comparison between SL and TL; 4) monolingual extra round-trips; and 5) the interpreter role shift, using Goffman's "animator, principal, and author" tool⁸

The total 1,283 utterances were broken down to: 284 by the police officer (PO); 305 by the interpreter in Dari (ID); 346 by the suspect in Dari (S); 304 by the interpreter as translation from Dari back to English (IE); and 44 by the interpreter as his own words in English (I). The discrepancy between SL and TL (PO and ID; S and IE) immediately implied the existence of extra round-trips in Dari, but their content remained unknown unless and until a check translation was provided, whereas the interpreter's own 44 utterances in English clearly constituted 13 total English extra round-trips. Also, 42 out of these 44 utterances were of Goffman's "principal" category (e.g. advance excuses, permission requests, follow-up explanations before or after making extra round-trips, apologies, questions, or interjections), and the remaining 2 were of the "author" category.

The discourse pattern shown on ELAN clearly revealed police-officer-initiated turn-taking cycles. After deducting 27 affirmations, interjections, etc. from the total 284, the thesis classified the remaining 257 "police-officer-initiated" turn-taking cycles into four patterns: 1) *2-Step Unilateral* (PO-ID); 2) *3-Step Untranslated* (PO-ID-S); 3) *Officer Interrupted by Suspect* (PO-S-IE); and 4) *Full 4-Step Q-&-A Cycle* (PO-ID-S-IE), and showed that the only one that enabled the officer to confirm successful communication with the suspect, albeit indirectly, was *Full 4-Step Q-&-A Cycle* (PO-ID-S-IE), which accounted only for 69.26% of the total 257 cycles, leaving 31.74% as unconfirmable.

There were 36 total extra round-trips in Dari that appeared in 10.1% or 26 out of 257 total PO-initiated cycles, of which only 10 were accompanied by an advance excuse or a follow-up explanation, while among the 13 extra round-trips made in English, only 3 were accompanied by similar excuse or explanation. Meanwhile, the interpreter showed proficiency of 0.504 sec. pre-rendition pause time from English to Dari and 0.428 sec. pause time from Dari to English, with no significant directionality difference ($P=0.0711$).

With the check translation in the 2nd stage, the thesis finally confirmed the SL-TL time correlation, which showed a very high correlation between PO's utterances and the interpreter's translation into Dari ($R=0.81$), and moderately high correlation between the suspect's utterances and the interpreter's translation into English ($R=0.67$). Similarly, the check translation finally verified the content and the purpose of the "extra round-trips" in Dari, all of which were confirmations and clarifications made in Goffman's "principal"

role, in order to prevent mistranslations. The check translation also enabled complete translation accuracy check, which verified that the average translation accuracy rate was 94.59% in total (100% for English-Dari and 90.13% for Dari-English)

Without the check translation, only 69.26% “indirect” accuracy assessment and virtually no impartiality verification were possible, while the check translation enabled a complete accuracy verification, which showed that of 555 total “translation” renditions, the interpreter made 30 inaccurate translations (15 omissions, 9 alterations, 5 reductions, and 1 addition), resulting in 94.59% accuracy. The check translation also proved that of 98 total “non-translation” utterances (44 in English and 54 in Dari) the interpreter made only 2 utterances of the “author” category. As the case-law’s definition of a “conduit” is “accurate and impartial,” only after the check-translation validated all the “principal” utterances as sufficiently “impartial,” the interpreter was finally proven 95.1% “conduit.”

Notes

1. Major rulings include: *Commonwealth v. Vose*, 157 Mass 393 (32 NE 355) (1892); *U.S. v. Ushakow*, 474 F2d 1244 (9th Cir. 1973); *U.S. v. Da Silva*, 725 F2d 828 (2d Cir. 1983); *U.S. v. Koskerides*, 877 F2d 1129 (2d Cir. 1989); *U.S. v. Nazemian*, 948 F2d 522 (9th Cir. 1991); and *U.S. v. Orm Hieng*, 679 F3d 1131 (9th Cir. 2012).
2. The Federal Rules of Evidence 801(d)(2) stipulates five “non-hearsay” categories in which a statement is attributed to the party opponent (“the defendant” in this case) and thus does not become hearsay. FRE 801(d)(2)(A) stipulates that a previous, out-of-court statement made by the party-opponent himself or herself is not hearsay, whereas FRE 801(d)(2) also stipulates that a statement becomes non-hearsay if: (C) it “was made by a person whom the party authorized to make a statement on the subject”; or (D) it “was made by the party’s agent or employee on a matter within the scope of that relationship and while it existed.” The two are often combined as FRE 801(d)(2)(C) or (D) to refer to a party opponent’s “non-hearsay” statement that uses the “agent theory.”
3. *United States v. Charles*, 722 F.3d 1319 (11th Cir. 2013), 1324.
4. *United States v. Charles, id.*, 1331.
5. *Crawford v. Washington*, 541 U.S. 36 (2004).
6. Laster, Kathy and Taylor, Veronica L. (1994). *Interpreters & the Legal System*, Sydney: Federation Press. 113.
7. González, Roseann Dueñas et. al. (2012). *Fundamentals of Court Interpretation: Theory, Policy, and Practice*, 2nd ed. Durham, NC: Carolina Academic Press. 443-530, and Berk-Seligson, Susan (2009). *Coerced Confessions: The Discourse of Bilingual Police Interrogations*, Berlin: Mouton de Gruyter.
8. Goffman, Erving (1981). *Forms of Talk*, Philadelphia: University of Pennsylvania Press. 144.