Requiring the Police Interpreter's In-Court Testimony:
the Best Way to Ensure Accuracy?

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Abstract

A foreign-language-speaking suspect is interviewed by a police officer through an interpreter. The officer later testifies in court to what the suspect said. In common-law courts, this is where a difficult "hearsay" issue has always arisen. The officer testifies to what the interpreter said as to what the suspect had said, and the defendant is unable to cross-examine and confront the interpreter unless the interpreter testifies in court. Although most U.S. courts have dealt with this issue by ruling that because an interpreter is the suspect's "agent" and/or "conduit," no "hearsay" exists, an inter-circuit split is re-emerging. While originally a legal "hearsay" issue, the ultimate question it poses is whether requiring the interpreter's testimony is the best way to ensure translation accuracy. Based on the data from approximately 300 U.S. appellate cases (from 1850 to August, 2018), this paper contends that such in-court testimonies would not help ensure translation accuracy unless, at least, accompanied by mandatory digital recording.

1. Introduction

Two polar opposite court rulings were handed down in the U.S. in 2016, creating concern among interpreting professionals. One was *Taylor v. Maryland*, in which Maryland's appellate court ruled that, by not having the police interview's sign-language interpreters testify, the lower court had violated Taylor's confrontation right, enshrined in the U.S. Constitution (pp. 356-365), while in the other, *U.S. v. Aifang Ye* (9th Cir. 2015), the U.S. Supreme Court denied the certiorari filed by Ye, a Chinese woman convicted of passport forgery in Saipan, who argued that the police interpreter who had translated via telephone was not Ye's "agent or conduit" and thus should have testified about the translation accuracy (*Petition*, pp. 25-36).

This split is only a tip of the iceberg of the two-century-long debate in U.S. courts over the admissibility of interpreter-mediated extrajudicial statements, i.e., whether a "police interpreter" who translated between the suspect and the officer must later testify and be cross-examined in court. The U.S. Supreme Court has remained silent by turning down all the certiorari up to this

day, so the issue continues to remain uncertain for police interpreters and interpreter users.

Legally, this is a long-standing "hearsay" issue; i.e., whether or not an interpreter's translation adds an extra layer of hearsay. The ultimate question, however, comes down to whether or not requiring the interpreter's in-court testimony is the best way to ensure translation accuracy.

2. Statement of the Problem

2.1 Hearsay Issue of Interpreter-Mediated Out-of-Court Statements

In common-law, a statement becomes hearsay when testified to in court by someone who heard the statement only indirectly. These testimonies are fundamentally inadmissible because: 1) indirect/second-hand information is usually less accurate; 2) out-of-court statements (including the interpreter's translation) do not require an oath (with a few exceptions such as depositions) and thus are not subject to perjury; 3) since the original speaker (e.g. the interpreter who made the translation) does not testify, the jury has no opportunity to directly determine the reliability of the speaker and her/his statement (e.g. the interpreter and the translation); and 4) when the statement (e.g. the translation) is against the opposing party (e.g. incriminates the defendant), she/he has no opportunity to cross-examine and confront the original speaker (e.g. the interpreter who made the translation). The last one becomes especially critical in criminal cases as this "confrontation right" is one of the fundamental human rights, which the U.S. Constitution explicitly guarantees. This hearsay obstacle has always stood in the way for presiding judges.

2.2 Impact on Interpreting Profession: Interpreting Professionals' Amici

Though seeming primarily legal, this issue has an enormous impact on judicial interpreters, raising such questions as: 1) Do interpreter-mediated out-of-court statements become hearsay? If so, must interpreters testify in court and be cross-examined? 2) If interpreters must testify directly to the suspect's statements, replacing the police officer, wouldn't this create a conflict with "impartiality and confidentiality" codes, or would this even be realistically possible? 3) Is requiring interpreters' in-court testimonies the best way to ensure translation accuracy?

None of them are easy to answer but have a direct impact on the work of judicial interpreters. This is why when Ye appealed to the U.S. Supreme Court, two major amici were submitted by interpreting professionals. One was by Holly Mikkelson and Barry Olsen of Middlebury Institute of International Studies at Monterey (*Brief of interpreting*, 2016), who called for: 1) a uniform case law in all U.S. courts (pp. 4-7); 2) judicial community's understanding that accurate translation never means mechanical word-switching but is a faithful rendition of what a speaker has "meant" (pp. 7-11); and 3) clear testimony requirements, as they will have a huge impact on confidentiality and impartiality codes and training as they may have to remember "exact words of the defendant" and "her own words" (pp. 11-13). The other was by the Massachusetts Association of Court Interpreters, which took a more progressive position.

Criticizing the "language conduit" theory long employed by the 9th circuit as "wrongly presume[ing] that language interpretation is an objective and precise process" (*Brief for Massachusetts*, pp.6-7), the amicus affirmed that interpreters, not the suspects, are the "declarants" of the translations of the suspects' statements, and thus should testify (pp. 7-14).

To answer the questions states above, the author examined approximately 300 relevant U.S. court cases, dating from 1850 up to 2018, based on which this paper will discuss: 1) how the U.S. courts have dealt with the hearsay issue of interpreter-mediated extrajudicial statements; 2) courts' reasons why the interpreter's testimony was or was not required; 3) what kind of testimonies the interpreters offered, and 4) whether they really ensured translation accuracy.[1]

2.3 Police Interpreter Qualifications and Digital Recording: U.S. and Japan

Two other issues are entwined with this hearsay issue: police interpreter qualifications and digital recording, in both of which, the author's home country Japan shares not a few things in common with the U.S., which, while being one of the world's forerunners in establishing a court interpreter certification system by the 1978 Court Interpreters Act, has lagged behind in ensuring qualified "out-of-court" police interpreters. Except for "sign-language," for which the Americans with Disabilities Act of 1990 requires the law-enforcement to use "qualified" interpreters, "qualifications" of foreign language interpreters in police interviews have never been clearly defined. The Superior Court of Pennsylvania and the Supreme Court of Nevada have even stated that it is the intention of the law-makers not to extend similar protection to "non-English-speaking persons," allowing the continued use of not-so-well-qualified police interpreters (*Commonwealth v. Carrillo*, p. 128; *Baltazar-Monterrosa v. State*, pp. 612-613). In *Carrillo*, an official court interpreter also testified that a police interpreter would not need as high skills or knowledge as a court interpreter (p. 121).

Similarly in Japan, a Tokyo High Court ruling on July 16, 1996 stated that "Article 175 of the Code of Criminal Procedure on 'court interpreters' does not apply to 'police interpreters,' and the skill level and/or impartiality required of court interpreters cannot always be expected of police interpreters" (Gotō and Shiratori, 2013, p.364, translated by the author). This is even more disconcerting as Japan does not yet even have a "court interpreter" certification system.

The lack of clear qualifications is further exasperated by the slow spread of digital recording, both in Japan and the U.S., especially in federal law enforcement. In Japan, recording became mandatory from June, 2019, but the law only covers crimes the highest punishment for which is "capital/life" or subject to statutory panel trials. In 2017, out of 10,828 total foreign arrestees in Japan, 89 cases fell in this category, meaning that digital recording may have been used for only 0.82% (89/10,828) of all the foreign arrestees (*Heisei 29-nen no*; *Heisei 29-nen ni*, p. 1).

In the U.S. as of August, 2015, recording was required only by 21 states and DC (Recording, p.5), and its enforcement is uncertain; e.g., in a 2016 DUI case in Massachusetts, an officer

used a telephonic interpreter for a breathalyzer test, which was not recorded (*Commonwealth v. AdonSoto*, p. 499). As for federal, it began from 2014 but is moving slowly due to reluctance and insufficient accountability (Recent, p. 1559). Of 177 state and 51 federal criminal cases which this paper discusses, only 12 state cases and none of federal were recorded.

3. Paucity of Research on Police Interpreting and This Paper's Research Methodology
3.1 Existing Major Literature on Police Interpreting

The universal "behind-the-closed-door" nature makes empirical research on police interpreting impossibly challenging, resulting in the literature paucity, despite the issue's gravity addressed by many scholars. If, however, researchers managed to gain access to authentic recordings, a "discourse analysis" type research has been possible, and though not many, significant works have been paving the way. Wadensjö conducted one of such earliest analyses (1998, pp. 87-88, pp. 206-223), using Goffman's "animator, principal, and author" framework (1984, pp.144-146), to show that interpreters very "visibly" contribute to the interaction as a third participant.

Berk-Seligson, the author of an extensive research on interpreting in U.S. courts, already addressed in the book's 2002 edition the urgent need for research on police interpreting, criticizing the rampant use of officers as interpreters (1990/2002, pp. 225- 227). She later conducted another research to show how bilingual officers succeed in coercing confessions, based on appellate rulings obtained from Lexis-Nexis, a major case law search engine (2009). Similarly, the 2012 edition of *Fundamentals of court interpretation* by González, Vásquez, & Mikkelson devoted a chapter titled "Language accommodation needs in the custodial interrogation stage of the criminal justice system" and criticized this practice (pp. 443-530).

In Australia, Laster & Taylor (1994), while criticizing "conduit" as a "legal fiction" (p. 113), noted the judiciary's need to rely on this concept to overcome hearsay (p. 112). Then came Hale's 2004 discourse analysis, though it was primarily on in-court interpreting. Nakane (2014), using real police interview recordings, did a discourse analysis, also using Goffman's framework (1984, pp. 144-146), and Mulayim, Lai, and Norma (2015) covered a wide range of academic and practical issues that concern police interpreting practice.

In Japan, judicial interpreting began to draw attention from the 1990's, with the nation's rapid globalization creating new social (including judicial) needs, along with the introduction of the "lay-judge" (the Japanese version of a "jury") system from 2008. While many of these researches were triggered by "in-court" interpreting issues, there is one extensive project on interpreter-mediated "police interrogations" conducted by a team of lawyers and interpreting researchers: a 1992 case in Melbourne involving Japanese defendants on drug trafficking (*Meruborun*, 2012), revealing a multitude of interpreting issues. Still in Japan, too, obtaining discourse data is extremely difficult even in public courts, as audio recording is prohibited (Nakamura, Yoshida, and Kawahara, 2012, pp. 134-135), and access to police-interview data is

virtually impossible; thus a rampant research paucity in Japan as well, except for a few legal researches, e.g., one by Tanaka (2006), using publically available court cases. The author of this paper also did a research on police interpreters' hearsay issue, combining a U.S. case law analysis with an analysis of a Dari-interpreter-mediated police interview (Ito, 2016).[2]

While most of the above researches demonstrated the "non-conduit-ness" of interpreters by illustrating their visible participatory feature in interactions, just as Roy (1992) did on sign-language interpreters, this paper presents a more chronologically macroscopic, sociological picture of the hearsay issue of police interpreters and their testimonies (or their absence).

3.2 Research Methodology

The author used the same methodology as Berk-Seligson's (2009), the use of Lexis-Nexis case law search engine, and processed the data both for quantitative and qualitative analyses. (This paper discusses a portion of the quantitative.) Using "interpreter" and "hearsay" as two key words "in the same paragraph," the author first downloaded a total of 710 U.S. appellate cases of 11 federal circuits and 50 states, dating from 1850 (the earliest possible accessible) all the way up to August, 2018, which were further weeded out with additional key words: e.g., police, admissible, inadmissible, agent, conduit, confrontation, etc. This led to a total of 301 directly relevant cases (federal and states, civil and criminal), broken down to: 51 criminal and 19 civil federal cases; and 177 criminal and 54 civil state cases (Chart 1), which were sorted into four categories (I, II, III, and IV), based on: a) whether the interpreter testified in court or not; and b) whether the interpreter-mediated out-of-court statement was admitted (Chart 2).

Chart 1: Breakdown of Interpreter-Hearsay Cases (Federal & States; Criminal & Civil)

	CRIMINAL				CIVIL				TOTAL
	I	II	III	IV	I	II	III	IV	
FEDERAL	1	4	15	31	0	11	1	7	
	51				19				70
	I	II	III	IV	I	II	III	IV	
STATES	14	33	57	73	1	18	6	29	
	177				54				231
TOTAL	228				73				301

Chart 2: Interpreter's In-Court testimony and Evidential Admissibility

	Interpreter's Testimony & Evidential Admission	Graph Codes	Graph Color
Category I	Interpreter TESTIFIED in court	O Testified	Blue
	Interpreter-mediated evidence was NOT ADMITTED	X Admitted	
Category II	Interpreter DID NOT TESTIFY in court	X Testified	Red
	Interpreter-mediated evidence was NOT ADMITTED	X Admitted	
Category III	Interpreter TESTIFIED in court	O Testified	Green
	Interpreter-mediated evidence was ADMITTED	O Admitted	
Category IV	Interpreter DID NOT TESTIFY in court	X Testified	Purple
	Interpreter-mediated evidence was ADMITTED	O Admitted	

Chart 3 is a chronological picture of the above data, 301 total cases on a scale from 1850 to 2018, in four categories (I, II, III, and IV), each color-coded (Blue, Red, Green, and Purple).
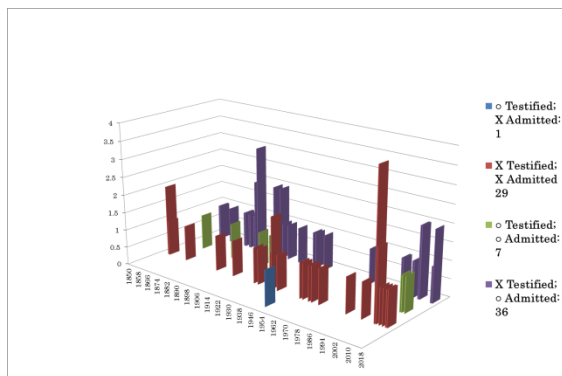
Chart 3: In-Court Testimony & Admissibility (1850 to 2018: Fed & State; Civil & Criminal)
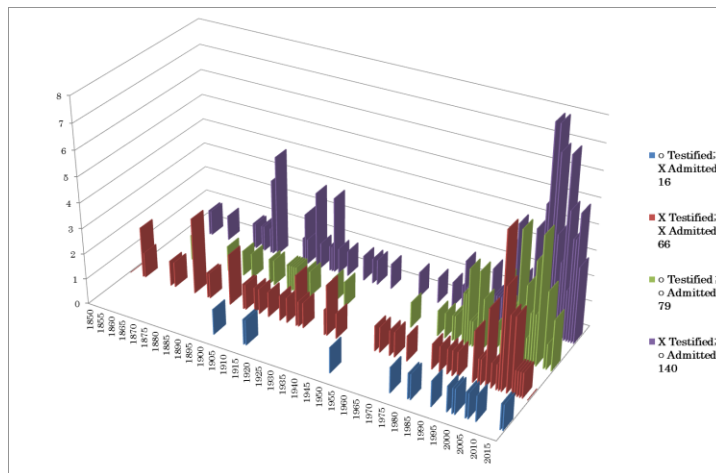
I) Blue: Testified; Not Admitted: 16   III) Green: Testified; Admitted: 79

II) Red: Did Not Testify; Not Admitted: 66   IV) Purple: Did Not Testify; Admitted: 140
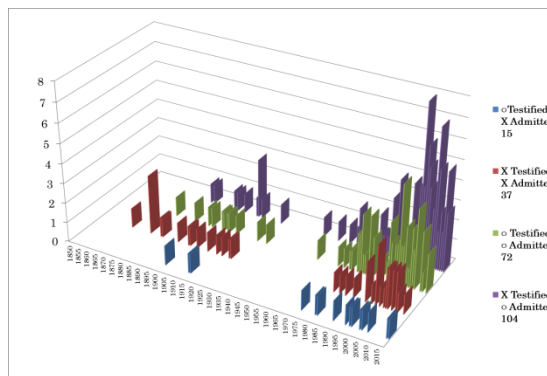
To gain a more clear picture of the chronological development of "criminal" cases, the data in Chart 3 were divided into Civil and Criminal (each federal & states combined) in Chart 4.

Chart 4   Civil (Federal & States): Total 73   Criminal (Federal & States): Total 228

I) Blue: Testified; Not Admitted: 1   I) Blue: Testified; Not Admitted: 15

II) Red: Did Not Testify; Not Admitted: 29   II) Red: Did Not Testify; Not Admitted: 37

III) Green: Testified; Admitted: 7   III) Green: Testified; Admitted: 72

IV) Purple: Did Not Testify; Admitted: 36   IV) Purple: Did Not Testify; Admitted: 104

3.2.1 Interpreters' In-Court Testimonies: Category I and Category III

In both Category I (Blue) and Category III (Green), the interpreters testified in court. Category I (Blue) contains most strict judgments; even when the interpreters testified, the translated

statements were not admitted, while in Category III, they were admitted, thus prompting many questions about the interpreters' testimonies and the reasons for admission and/or rejection.

3.2.2 Category IV: Biggest Controversy & Judicial Split

Category IV (Purple) is the most controversial; statements were admitted without testimonies. Also, rather conspicuous from Chart 4 is the recent surge in Category IV in criminal cases only. The judicial split on this is also corroborated, as the combined figure of Categories II (Did Not Testify; Not Admitted) and III (Testified; Admitted), which follows the traditional hearsay rule, is almost equivalent to the figure of Category IV (Did Not Testify; Admitted) in Chart 5.

Chart 5: Judicial Split in U.S. Courts regarding Interpreters' In-Court Testimony

	Category II	Category III	II + III	Category IV (≒ II + III)
CIVIL	29	7	36 (29+7)	36 (≒ 36)
CRIMINAL	37	72	109 (37+72)	104 (≒ 109)

3.3 Research Limitations

The author notes that all the data in this research come from U.S. appellate rulings, which means that the interpreters depicted in them are those whom the appellants found problematic (e.g. inaccurate, unqualified, etc.), although the lower court had ruled otherwise. The interpreters in this research, therefore, may reflect only a limited portion of the whole judicial picture. Still, these appellate rulings are the binding case laws valid and effective in each jurisdiction, influencing the interpreters every day, which this paper deems highly critical.

4. Out-of-Court Interpreter-Mediated Statements: Theories to Overcome "Hearsay"
4.1 Landmark Rulings in Other Common-Law Courts: the U.K. and Australia

Since interpreter-mediated out-of-court statements have always created a nasty problem, rulings that overcame hearsay or rulings that required interpreters' testimonies both became landmark rulings for later cases, not only in the U.S. but also in other common-law courts.

In the U.K., *R v. Attard,* a 1958 ruling, became such a milestone. The defendant argued that since he only understood Maltese, the officer's testimony to his statements was hearsay. The prosecution stated that the interpreter had acted as a "mere cypher," creating no hearsay (p. 91). The court ruled for the defendant, and the Home Office circulated a "letter to Chief Officer of Police" to "ensure that the interpreter is available" later to testify (p. 92). The Police and Criminal Evidence Act (PACE) of 1984 also paved a way, procedurally, for accuracy verification.

In Australia, an opposite ruling was handed down in 1960 in *Gaio v. R.*, on a murder by a non-English speaking aborigine. Another aborigine was used as an interpreter, who could only testify that "he truly translated," unable to recall details, which had to be supplied by the

officer (p.422). The Australian High Court ruled that the interpreter was like a "telephone" or "mouthpiece," creating no hearsay (p. 422, p. 430). Still, recording also became mandatory from around 1990, enabling accuracy check. In the "Melbourne Case," cited in 3.1, the effort by the rescue team became possible as the interviews had been recorded (*Meruborun*, 2012).

4.2. Legal Theories in U.S. Courts for Overcoming Hearsay Exclusion

In the U.S., four major legal theories have been employed to overcome hearsay: agent theory, conduit theory, present-sense impression theory, and catch-all (residual) theory.
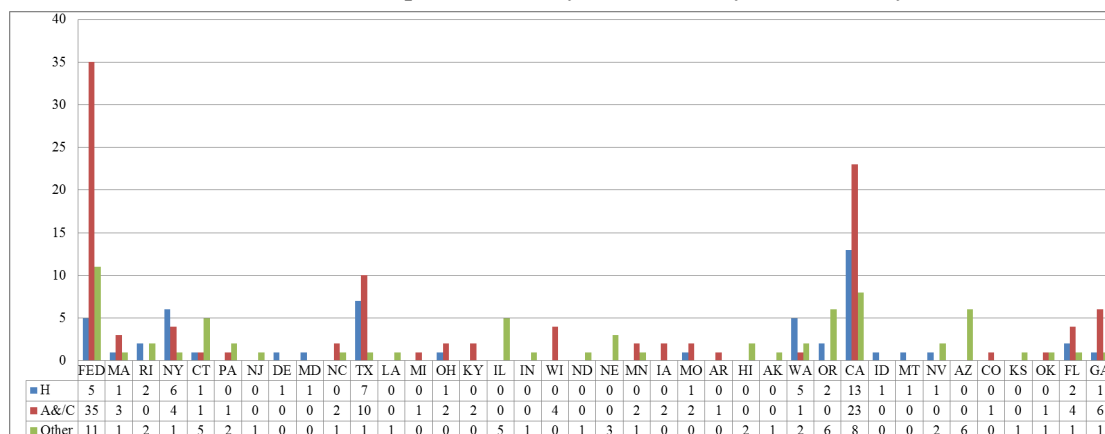
4.2.1 Present-Sense Impression and Catch-All (Residual) Theories

Of the above four, the first two are the most controversial and will be discussed below. The third one, "present-sense impression," looks at interpreting as automatic, stimulus-response behavior with no room for lies or fabrications, just like a sudden, impulsive outcry, e.g., "Gosh, the car's running the red light!" which could qualify as a hearsay exception when quoted in court. Binder's *Hearsay Handbook*, 4th ed. (2015) puts interpreters' "contemporaneous trans-lation" in this category, saying it is no different from "a sports broadcaster's contemporaneous reporting of what he sees taking place on the ball field" (p. 935). Interestingly, Goffman also classified "simultaneous translation" as "animator" (p. 148) or "the talking machine" (p. 144).

   Needless to say, all interpreting professionals, including the author, would agree that as much as the performance may seem effortlessly automatic, an interpreter's instantaneous translation is a product of rigorous training that has enabled extremely complex cognitive multi-tasking (Setton and Dawrant, 2016, p. 296, p. 302). Many judges might have shared this view, as this theory was used only in 2 out of 228 criminal cases and 1 out of 73 civil cases.

   The fourth theory, "catch-all or residual," is what the judges have used when they could not or chose not to use any one of the preceding three theories but still chose to admit the translated statements. The Chart 6 shows which jurisdictions have used which theories most.

Chart 6: Breakdown of "Interpreter-Hearsay/Non-Hearsay" Theories by Jurisdictions

	FED	MA	RI	NY	CT	PA	NJ	DE	MD	NC	TX	LA	MI	OH	KY	IL	IN	WI	ND	NE	MN	IA	MO	AR	HI	AK	WA	OR	CA	ID	MT	NV	AZ	CO	KS	OK	FL	GA
H	5	1	2	6	1	0	0	1	1	0	7	0	0	1	0	0	0	0	0	0	0	0	1	0	0	0	5	2	13	1	1	1	0	0	0	0	2	1
A&C	35	3	0	4	1	1	0	0	0	2	10	0	1	2	2	0	0	4	0	0	2	2	1	0	0	1	0	0	23	0	0	0	1	0	0	1	4	6
Other	11	1	2	1	5	2	1	0	0	1	1	1	0	0	0	5	1	0	1	3	1	0	0	0	2	1	2	6	8	0	0	2	6	0	1	1	1	1

The use of "agent and/or conduit" theory (Red) is predominant, especially in federal courts, followed by California, Texas, Georgia, Florida, etc., while some states have continued to avoid this theory (e.g. Rhode Island, New Jersey, Illinois, Indiana, Oregon, Arizona, etc.: Green). "Hearsay" rulings (Blue) have also existed not in small numbers, denoting that the courts have never been granting blind admission of interpreter-mediated statements.

4.2.2 Agent Theory

The "agent theory" is unique to the U.S., with its origin dating back to 1865 and further to a pre-Revolutionary-War case. In a 1865 civil suit in Massachusetts, *Camerlin v. Palmer*, the plaintiff argued that Mrs. Camerlin, his wife, had never assigned their children's wages to the defendant, but the judge ruled that since Mrs. Camerlin had brought the interpreter to talk with the defendant, her interpreter had acted as her "agent," making the interpreter's words her own (pp. 540-541), citing authority from *Fabrigas v. Mostyn*, a 1773 trial in London. In *Fabrigas*, the accuracy of out-of-court translated statements also became an issue, which the judge admitted, saying, "I think it is very clearly sufficient evidence" (p. 123), with no clear legal explanation. *Camerlin*, however, based its "agency" reasoning on *Fabrigas*.

While *Camerlin* was a civil case, the same "agent theory" was employed in a criminal case 27 years later in the same state of Massachusetts, in *Commonwealth v. Vose*, which became a major ruling to be cited repeatedly thereafter. A French-speaking couple called upon Vose and asked him to perform an abortion. Vose did not speak French, but his wife did and thus acted as an interpreter. The woman died following the abortion, and Vose was indicted. The prosecution called the French man to testify to the conversation between Vose and the deceased woman, which the defendant challenged as hearsay. The judge admitted the testimony, ruling:

> When two persons who speak different languages…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. Each acts upon the theory that the interpretation is correct. Each impliedly agrees that his language may be received through the interpreter. If nothing appears to show that their respective relations to the interpreter differ, they may be said to constitute him their joint agent…They cannot complain if the language of the interpreter is taken as their own…Interpretation under such circumstances is *prima facie* to be deemed correct…(pp. 394-395, underlined by the author).

4.2.2.1 Agency Law's *Respondeat Superior* & Vicarious Admission Applied to Interpreters

What *Vose* made clear is that "*respondeat superior*" and "vicarious admission," agency law's two fundamental principles, can also apply to interpreters and interpreter users. "*Respondeat superior*" means that a principal (the appointer of an agent) will become responsible for the

agent's words and actions as if they were their own. This means that what the agent admits as true will also be regarded as the principal's own admission (of the truth), which is called "vicarious admission," meaning "admission by an agent or a representative." The "agent" theory by *Vose* goes: when two parties speaking different languages start communicating through an interpreter; 1) by this very action, both have appointed the interpreter as their joint-agent, assuming this interpreter's translation will be accurate; 2) this means the interpreter's words will become their own, as the interpreter will be acting as their joint agent, authorized to speak for them (vicarious admission); and therefore, 3) the parties cannot complain later if the interpreter's words are taken as their own, as they are responsible for the interpreter's words as the interpreter's principal or appointer (*respondeat superior*).

4.2.2.2 Interpreter as a Joint Agent for the Suspect and the Police Officer

In *Camerlin*, the interpreter was someone the plaintiff had chosen to talk with the defendant, and in *Vose*, the interpreter was Vose's wife. In either, it is not entirely deniable that there was a tacit approval by the users to appoint the interpreter as their agent, assuming the translation's accuracy. However, why *Vose* became so powerful is that it later enabled the prosecution in countless cases to argue that the suspect who began talking through an interpreter approved the interpreter as her/his agent, and thus she/he cannot complain later about not having a chance to cross-examine the interpreter, as it would be the same as asking to cross-examine oneself.

Chart 4 in 3.2 validates this point. Category IV (Interpreters Did Not testify, but Translations were Admitted) shows a significant surge only in criminal cases over the past few decades, implying that the "agent theory" has become a convenient, expedient tool for the prosecution to circumvent hearsay, which Berk-Seligson (2009) called a "stretch [of] one's credulity" (p. 30).

What is even more disconcerting is the automatic forfeiture of a right to challenge the translation. Agency law dictates that the principal "assumes" that the agent is reliable and trustworthy, but this never actually guarantees that the translation will always be accurate. When it is not, the defendant has a hard time getting the mistranslation excluded. This "accuracy" issue might have been one of the reasons why many courts began to resort to the term "conduit."

4.2.3 Conduit "Theory": a Metaphor Outdating Reddy (1979) by Nearly 100 Years

The metaphorical use of the word "conduit" to refer to an interpreter began in U.S. courts long before and quite independently of Reddy's "Conduit Metaphor" (1979), the first traceable use of which was in a 1887 ruling by the Supreme Court of Missouri. In *State v. Chyo Chiagk*, the Chinese-speaking defendant had been convicted of murder, primarily due to a co-defendant's incriminating testimony translated by an interpreter. The judge, noting the interpreter's accuracy and impartiality issues when the defendant was facing a death penalty in an incomprehensible foreign language, reversed the ruling, stating the defendant had a right to "an inter-

preter…capable and impartial; one who could and would be medium and <u>conduit</u> of an accurate and colorless transmission of questions…and answers" (p. 411, underlined by the author).

The next verifiable appearance of this metaphor was 19 years later in *Fletcher v. Commonwealth*, a 1906 ruling by the Court of Appeals of Kentucky on an assault and rape of a young Austrian woman. Affirming the death penalty, the judge stated that the victim's testimony had been translated by a sworn interpreter, who "was <u>a mere conduit</u> by which the testimony…was conveyed to the grand jury" (p. 577, underlined by the author). In affirming the death penalty, the judge probably wanted to put in record that the entire due process was flawless.

Then about a decade later in 1917, in *Commonwealth v. Brown* in the Supreme Court of Pennsylvania, the interpreter who had translated in the lower court testified but could not remember the exact testimony given by the defendant. Judge Kephart, referring to the interpreter as a "mouthpiece" (p. 527), a synonym of "conduit," affirmed, addressing the judicial plight caused by the lack of an adequate legal theory to overcome hearsay of translated statements while non-English speaking population in Pennsylvania was increasing rapidly.

Then after WWII, the term "conduit" appeared for the fourth time in the dissent opinion of *U.S. v. Plummer*, a 1952 ruling by the U.S. Court of Military Appeals on a rape case in Korea. Criticizing the exonerated defendant, who had made no effort to subpoena the interpreter who might have testified against him, Judge Latimer noted, "Counsel for the accused…was going to develop the theory…that the interpreter was the <u>conduit</u> through which any conversation must travel" (p. 14, underlined by the author), scoring the "conduit" metaphor the defense might have used to argue that the interpreter did not have to testify.

Finally in 1973, in *U.S. v. Ushakow*, a 9th Circuit ruling on marijuana possession, the per curiam opinion stated that Ushakow's co-conspirator who had translated for him was "merely a language conduit" (p. 1245), but with no legal reasoning. Still, *Ushakow* became a crucial threshold, leading to the "agent and/or conduit" theory, which will be discussed in 4.2.3.2.

4.2.3.1 Why "Conduit" with No Legal Ground?

The term "conduit" is only a metaphor with no legal or scientific substantiation. The fact that from 1887 up to 1952, the term appeared only four times indicates that most judges were also aware that a "conduit interpreter" was just an "ideal" or a "legal fiction" as Laster and Taylor put it (1994, pp. 112-113, p. 182). Pöchhacker (2016), quoting Laster & Taylor, also noted that "conduit model" is a "legal fiction necessitated by the inadmissibility of evidence (i.e. information reported by someone other than the witness) in the common-law courtroom" (p.170).

Theoretically, the "agent theory" alone should suffice to overcome hearsay if an agency relationship can be established. The author, therefore, assumes three reasons why many courts began to use the "conduit" notion in addition to "agency." The first is exigency. The recent surge of interpreter-requiring cases has been compelling many judges, such as Judge Scotland

in *People v. Torres*, a 1989 appellate case in California, to resort to the "agent and/or conduit" theory, ruling that the "ancient," rigid approach is "unrealistic and unworkable" (p. 1260).

The second is that the "agent theory" is not applicable to translated statements made by "witnesses" other than the suspect, as that would create double hearsay if and when the officer testifies to them in court. The "agent" theory only enables admission of the other party's self-incriminating statements made previously out of court. They are the opponent's (defendant's) own previous statements, so the defendant cannot claim that her/his confrontation right was violated. If, however, an interpreter can become not only an "agent" but also a "conduit," the interpreter can become a "conduit" regardless of whether she/he is translating for the suspect or other witnesses (e.g. victims), as it would seem absurd that an interpreter becomes a "conduit" only when translating for the suspect but not for the victims or other witnesses, especially for sexually abused children not old enough to testify in court or family members in domestic violence who often recant their previous, "translated" statements made to officers.

The last is the accuracy/reliability issue. As was explained in 4.2.2.1, the "agency relation-ship" binds the suspect with "*respondeat superior*," making the suspect liable for any transla-tion errors that might occur. While "accuracy" is the foremost issue in translation, the "agency" provides no such guarantee. If "conduit" is used as a metaphor for "accuracy," denoting no additions, omissions, or alterations, it is possible that the judges began to combine "conduit" with "agent" to imply that an "agent" interpreter was also "accurate," possibly bolstered by the 1978 Court Interpreters Act, allowing only "qualified" interpreters to serve in front of them.

4.2.3.2 "Agent and/or Conduit": Paradigm Shift from Hearsay to Accuracy Assessment

"Conduit," nevertheless, is not a legal theory, and when it was combined with the "agent" theory, the law shifted the paradigm from a legal "hearsay debate" to a linguistic "accuracy assessment" task, the scope of which may have well gone beyond a trial judge's parameters.

The most prevalent version of "agent and/or conduit" theory is *Nazemian*, a 1991 Ninth Circuit ruling and a binding case law, which is a combination of *Vose* (1892) and a summary of criteria descriptions that were emerging in similar rulings in other jurisdictions, which are: 1) which party supplied the interpreter; 2) whether the interpreter had a motive to mislead; 3) the interpreter's skills and qualifications; and 4) if any discrepancy appeared between the translation and the following events. The law is applied as follows. When two people start talking through an interpreter, they make the interpreter their joint-agent, assuming that the interpreter is accurate, and if the interpreter passes the above 4-tier test, the assessment of which is made by the trial judge on a case-by-case basis, usually *in limine*, and if the judge finds no problem, the interpreter is deemed as an "agent and/or conduit" creating no hearsay.

The "agent and/or conduit" theory was originally invented to circumvent hearsay, leaving the job of "reliability assessment" to the discretion of each trial judge, who is not a linguist and

therefore could only make an "indirect" accuracy assessment based on the above 4-tier criteria. While the post-*Crawford* (2004) reinforced confrontation clause arguments, such as *Charles* (2013) and *Taylor* (2016), would at least reallocate this job to the jury, the jury still needs to make the "accuracy assessment." By having the interpreter testify and be cross-examined in court, to what extent will such translation accuracy assessment become feasible?

5. "Interpreters" Who Translated Out-of-Court Statements in U.S. Criminal Cases

The following Chart 7 shows: 1) what kind of persons served as "interpreters"; 2) whether they testified in court (Red); and 3) whether the courts admitted the translations (Green); for both 11 federal circuits and 50 states combined (189 interpreters for 177 state cases and 53 interpreters for 51 federal cases, comprising a total of 242 interpreters in all 228 criminal cases).

Chart 7: Profile, Testimony, and Evidentiary Admission: Federal and 50 States Combined
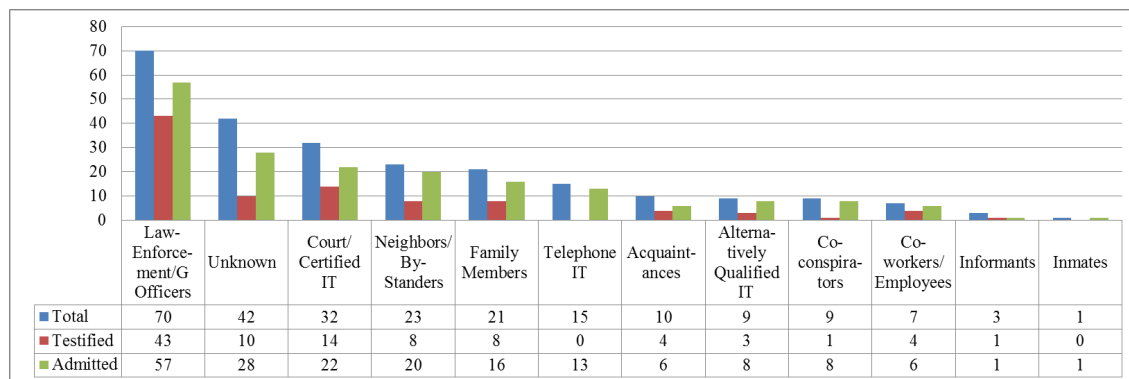

	Law-Enforce-ment/G Officers	Unknown	Court/ Certified IT	Neighbors/ By-Standers	Family Members	Telephone IT	Acquaint-ances	Alterna-tively Qualified IT	Co-conspira-tors	Co-workers/ Employees	Informants	Inmates
Total	70	42	32	23	21	15	10	9	9	7	3	1
Testified	43	10	14	8	8	0	4	3	1	4	1	0
Admitted	57	28	22	20	16	13	6	8	8	6	1	1

Chart 7 classified 242 "interpreters" into 12 profiles (percentage breakdown shown in Chart 8): 1) 70 law-enforcement officers (12 as "direct interviewers"; 58 as "interpreters"); 2) 42 unknown persons (identity not given); 3) 32 certified/court interpreters (definition of "certified" varies; includes sign-language interpreters and court interpreters before the 1978 Court Interpreters Act); 4) 23 neighbors/by-standers ("bilinguals" who happened to be at the site); 5) 21 family members (13 adults; 8 children); 6) 15 telephone interpreters (interpreters via telephone); 7) 10 acquaintances ("bilingual" friends/acquaintances); 8) 9 alternatively qualified interpreters (contract, hospital interpreters, etc.); 9) 9 co-conspirators (other members of the same crime who happened to be "bilingual"); 10) 7 co-workers ("bilingual" co-workers, employees, including teachers); 11) 3 informants ("bilingual" persons who agreed to cooperate with the police); and 12) 1 inmate (a "bilingual" inmate who translated for another in prison).

Chart 8 validates the alarm by Berk-Seligson (2009, pp. 24-31), as law-enforcement officers, either as interpreters or as direct bilingual interrogators, comprise the largest, nearly 30%, followed by 17% of those whose identities are unknown. Those with certifications follow but comprise only 13%. Most disconcertingly, all the remaining (except for "alternatively qualified" and perhaps "telephone") are "untrained," "ad hoc" persons (neighbors/by-standers, family

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members, acquaintances, co-conspirators, informants, and inmates), though they often helped in non-custodial/emergency settings, and not just the suspects but also victims/other witnesses.

Chart 8: Out-of-Court "Interpreters" in U.S. Appellate Rulings
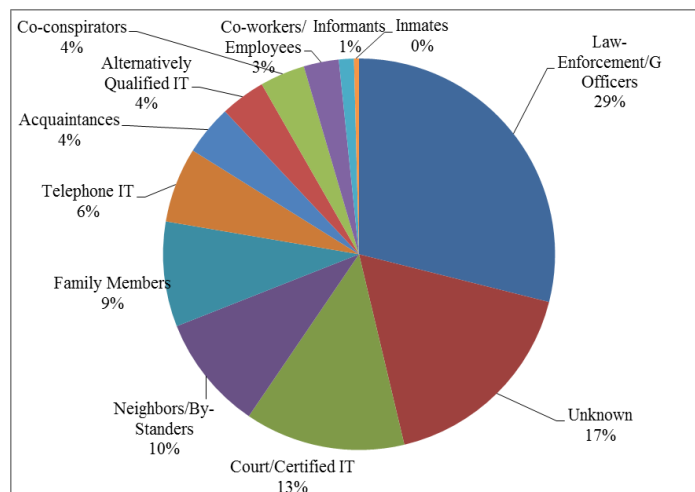
Not surprisingly, very few of these ad-hoc bilinguals took the witness stand, as is evident from Chart 7, and yet, the courts still admitted most of their out-of-court translations. In order to elucidate the extent of this practice, the data in Chart 7 has been re-projected into Chart 9, which shows: 1) Testimony Ratio (Green): the percentage of those who testified; 2) Admission Ratio (Red): the percentage of translation admission (whether they testified or not); and 3) Ratio Gap (Blue): the gap between (1) and (2)---the gap between Testimony Ratio (T) and the Admission Ratio (A)---(Gap points=A-T). This "Ratio Gap" shows the courts' "leniency" for evidentiary admission. From highest down: inmates (100 pts, though the total number is only 1), telephone interpreters (86.67 pts), co-conspirators (77.78 pts), alternatively qualified (55.56 pts), neighbors/by-standers (52.18 pts), unknown (42.86 pts), family members (38.09 pts), co-workers (28.57 pts), court/certified (25 pts), law-enforcement officers (20 pts), acquaintances (20 pts), and informants (0 pts, though the total number is 3).

Chart 9: Interpreters "In-Court" Testimony Ratio, Evidential Admission Ratio, Ratio Gap

	Inmates	Telephone IT	Co-conspira-tors	Alternative-ly Qualified IT	Neighbors/By-Standers	Unknown	Family Members	Co-workers/ Employees	Court/ Certified IT	Law-Enforce-ment/G Officers	Acquaint-ances	Informants
Ratio Gap	100	86.67	77.78	55.56	52.18	42.86	38.09	28.57	25	20	20	0
Admission Ratio	100	86.67	88.89	88.89	86.96	66.67	76.19	85.71	68.75	81.43	60	33.33
Testimony Ratio	0	0	11.11	33.33	34.78	23.81	38.1	57.14	43.75	61.43	40	33.33

The very high points for co-conspirators might mean that that whatever the translations, the courts might have just admitted them. More alarming is an even higher figure for telephone interpreters, the use of whom has been increasingly rapidly. Their qualifications are usually not very transparent, except for that they have signed up with an often globally operating service provider which has a business contract with the police. Just as O'Laughlin (2016), Director of Boston University Interpreter Program and a long-time Massachusetts court interpreter and interpreting expert affirms, since telephone interpreters are "usually paid less than in-person interpreters," they "may have much less abilities, and are typically not certified legal interpreters," and the translation quality is often marred by their physical absence (pp. 12-13). While the ratio gap of unknown interpreters is not as high (42.86 pts), it is extremely high for telephone interpreters (86.67 pts) whose profiles are similarly unknown. The author notes that three of the recent major court rulings on this issue, *U.S. v. Charles* (11th Cir. 2013), *U.S. v. Aifang Ye* (9th Cir. 2015), and *Commonwealth v. AdonSoto* (Massachusetts, 2016) all involved "telephone interpreting" used by the law-enforcement, none of which was audio-recorded.

The rather low figures for certified/court interpreters are partly due to some of the early state court rulings such as *State v. Terline* in Rhode Island (1902) or *People v. Jan John* in California (1902), which followed the rigid hearsay rule and did not admit the interpreters' testimony who could not recall the content of what they had translated, which will be discussed in 6.1 below. Finally, what is also conspicuous is the high testimony ratio of law-enforcement officers acting as interpreters, which brings the next question as to what kind of testimonies they provided.

6. Interpreters' In-Court Testimonies: What They Testified To

The purpose of hearsay exclusion is to protect the defendant's right to challenge a witness who testifies against her/him. When an officer testifies to what she/he heard through an interpreter's translation, the hearsay exclusion sets in "if" the declarant (=original speaker) of the translation is the interpreter, not the suspect. Therefore, the question is: what kind of testimony is the interpreter expected to present? Is she/he expected to reproduce what the defendant said exactly, or would it suffice just to state under oath that she/he translated everything accurately, or is a more detailed explanation on the given translation necessary?

6.1 Interpreter's Long-Term Memory

In a 1902 California ruling (*People v. Jan John*), the interpreter who had translated in the lower court testified that he had translated everything accurately, and the stenographer also testified that he had recorded everything faithfully (p. 221). Judge Temple flatly rejected these testimonies, with the following analogy. John Doe heard a crime confession from a defendant but soon after he narrated it to Richard Doe he forgot all the detail. Later Richard Doe testifies in court to what he heard from John Doe very accurately, and John Doe also testifies that at the

time he narrated the confession to Richard Doe, he had a perfect memory though he cannot recall anything now. According to the judge, such testimonies have no evidential value.

Similarly, in a 1980 ruling in Oregon (*State v. Letterman*), Shirley Shisler, an impeccably qualified sign-language interpreter (herself a sign-language trainer at Oregon College of Education and the only sign-language interpreter in Oregon with Legal Skill Certification by the National Registry), could not recall any detail of what she had translated during the police interview, except for that she had translated everything very faithfully and accurately (p. 1147). For Judge Campbell, everything Ms. Shisler stated had "an aura of trustworthiness" (p.1152), but without any specific testimony as to what the defendant had said, not from the officer but from Ms. Shisler directly, it was extremely difficult to overcome hearsay (pp. 1151-1154).

What these illustrate is that an interpreter, no matter how qualified or capable, cannot replace the officer in offering an in-court testimony. Note-taking is a vital part of interpreters' work in aiding short-term memory, but the well-known fact is that their notes are not word-for-word dictation but are quick capturing of the key words, concepts, logic relationships and flow of arguments, usually in symbols and abbreviations, as the Rozan method dictates "record and render the idea rather than the words" (Setton and Dawrant, 2016, p.199).

6.2 Testimonies Given by Interpreters in U.S. Appellate Rulings
6.2.1 Fact Witness and Expert Witness

There are two types of witnesses courts commonly recognize: fact/percipient witnesses and expert witnesses. Though the distinctions are often difficult (Ryskamp, 2018), "fact witnesses" are those who testify to what they directly heard or saw (witnessed), while "expert witnesses" present their "opinions" based on their professional expertise. An "expert witness" is defined by the U.S. Federal Rules of Evidence 702 as a person who: 1) is qualified as an expert by knowledge, skill, experience, training, or education; 2) testifies in the form of an opinion or with scientific, technical, or other specialized knowledge; 3) testifies based on sufficient facts or data; and 4) has applied reliable principles and methods.
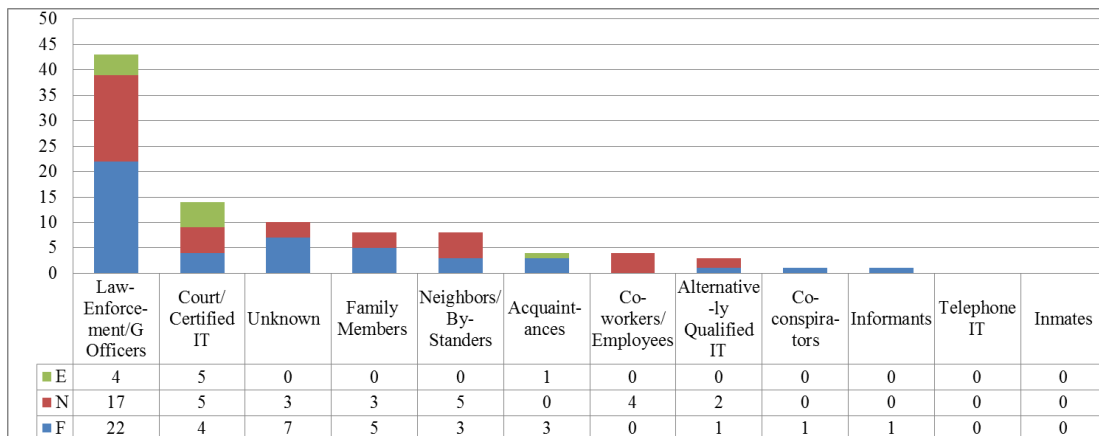
Legal professionals who are still not very familiar with how interpreters use their cognitive skills may expect that interpreters can provide "fact witness" type testimonies, e.g. a detail account of what the suspect stated. However, as was explained in 6.1, this is extremely difficult. It is the police officer's job to testify to the content of the suspect/witness's statement. Also, interpreters, if professional, would have an ethical issue giving a testimony as a prosecutorial witness due to their confidentiality and impartiality codes (Ito, 2016, pp. 135-136). On the other hand, interpreters' testimony which only states that "they translated everything accurately" has no real verification effect. The testimonies about one's bilingual upbringing or language experience do help to some extent, but they do not directly authenticate accuracy, meaning that the only other logically viable testimony is the "expert witness" type testimony,

which only "professionally trained" interpreters with "experience" can provide as "translation experts." With this argument in mind, the author further analyzed the types of testimonies the "interpreters" in these appellate cases provided about their extrajudicial translations.

6.2.2 Did the Interpreters Testify as Fact Witness or Expert Witness?

Of all the 242 interpreters in 228 federal and state criminal cases, a total of 96 interpreters testified (78 in state and 18 in federal courts). Chart 10 classified their testimonies into three types: A) Fact-Witness-Type: just like the interviewing officer, the interpreter was able to recall and state what the defendant had said; B) Neither-Type: the interpreter only stated that she/he had translated accurately, sometimes with an account of her/his language background and/or experience; C) Expert-Witness-Type Testimony: the interpreter explained specific translation points, including translation strategies used to substantiate their accuracy.

Chart 10: Types of Testimonies Given by Out-of-Court "Interpreters" in Appellate Rulings

	Law-Enforce-ment/G Officers	Court/ Certified IT	Unknown	Family Members	Neighbors/ By-Standers	Acquaint-ances	Co-workers/ Employees	Alternative-ly Qualified IT	Co-conspira-tors	Informants	Telephone IT	Inmates
E	4	5	0	0	0	1	0	0	0	0	0	0
N	17	5	3	3	5	0	4	2	0	0	0	0
F	22	4	7	5	3	3	0	1	1	1	0	0

The "Fact-Witness-Type (Blue)" testimonies accounted for nearly half (49%), followed by the "Neither-Type (Red)" (40.6%), and the "Expert-Type" (10.4%), meaning that only about 10% of the "interpreters" were able to give the kind of testimonies that would directly help verify the translation accuracy, and as many as 40% could only state that "she/he had translated accurately" with no details. Of the 22 "Fact-Type" testimonies by police officers, 11 officers had interviewed the suspects directly, and of the 32 officers who only interpreted, the "Fact-Type" was 11 (34.4%), "Neither-Type" 17 (53.1%), and 4 (12.5%) actually gave an "Expert-Type" testimony, one of whom was "certified" by the city. Further analysis of "officer inter-preters" will come in a separate paper, but the author notes two things: 1) even police officers, when they focus on "interpreting," become unable to recall details, a tendency shared with "court/certified" and "alternatively qualified" interpreters or "neighbors/by-standers" and "co-workers/employees" who just happened to help translate; and 2) if officers must be used, the best solution would be to provide training and encourage/require them to become certified.

7. Conclusion: At Minimum, Mandatory Digital Recording Must Accompany Testimonies

Though the current judicial split focuses primarily on "hearsay" and "an interpreter's testimony," judges and law-makers must note that just requiring an interpreter's in-court testimony alone may not help translation accuracy verification; at minimum, video-recording must also become mandatory, however small the offense. This way the interpreter can testify not as a "fact witness" against the defendant, which is the officer's job, but as an "expert witness" who explains the linguistic/cultural reasons for the translation accuracy. This will also help "separate sheep from goats," as those who testify can no longer just state they "translated accurately" only, but will have to explain why and how their translation was accurate.

About the author

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Notes

1. This paper contains a part of the discussion in Tamura (2018) with new additional data from August, 2017 to August, 2018, and a part of what the author presented at the 19th JAITS Annual Conference, September 7-8, 2018 and Critical Link No. 9, June 14-16, 2019.
2. Ito is the author's legal last name.

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