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CONSTITUTIONAL LAW/ EVIDENCE—UNITED STATES V. CHARLES: A POST-CRAWFORD ANALYSIS OF AN INTERPRETER AS A DECLARANT: DID THE ELEVENTH CIRCUIT TAKE ITS DECISION A BRIDGE TOO FAR?

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NOTES

CONSTITUTIONAL LAW/EVIDENCE—*UNITED STATES V. CHARLES*: A POST-CRAWFORD ANALYSIS OF AN INTERPRETER AS A DECLARANT: DID THE ELEVENTH CIRCUIT TAKE ITS DECISION A BRIDGE TOO FAR?[1]

INTRODUCTION

Consider this quotation:

> In *United States v. Nazemian* we held that, under appropriate circumstances, a person may testify regarding statements made by the defendant through an interpreter without raising either hearsay or Confrontation Clause issues because the statements are properly viewed as the defendant's own, and the defendant cannot claim that he was denied the opportunity to confront himself.[2]

Now, contrast it with the following:

> Two of our sister circuits have applied the "language conduit" rule to conclude that an oral interpreter's statements are really statements of the speaker for purposes of the Confrontation Clause . . . . Although we have cited the language conduit rule with approval in the hearsay context, we recently held that it does not apply in the Confrontation Clause context.[3]

These two quotes serve to illustrate the collateral damage being caused by the current state of jurisprudential confusion[4] surrounding the Sixth Amendment's Confrontation Clause.[5] The confusion started in

1. In September, 1944, the Allies executed Operation Market Garden where nearly 36,000 troops parachuted up to sixty five miles behind enemy lines in the Netherlands in an attempt to secure bridges in advance of ground troops. The plan was overly ambitious and failed. The idiomatic expression "a bridge too far" has come to mean overextension or overreach. *See generally* CORNELIUS RYAN, A BRIDGE TOO FAR (Simon & Schuster, 1974).

2. United States v. Orm Hieng, 679 F.3d 1131, 1139 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 775 (2012).

3. United States v. Curbelo, 726 F.3d 1260, 1273 n.9 (11th Cir. 2013) (referencing its recent decision in United States v. Charles, 722 F.3d 1319, 1327-28 (11th Cir. 2013)) (internal citations omitted).

4. Justice Scalia has written that the Court has become an "obfuscator of last resort," and its decisions have left their Confrontation Clause jurisprudence "in a shambles." Michigan v. Bryant, 131 S. Ct. 1143, 1168 (2011) (Scalia, J., dissenting).

5. "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI.

2004 with the Supreme Court's decision in *Crawford v. Washington*.[6] There, although the Court decided that the clause applies to all testimonial hearsay statements, it stated it would "leave for another day any effort to spell out a comprehensive definition of 'testimonial.'"[7] The Court's subsequent Sixth Amendment decisions have done nothing to clarify the matter and arguably have resulted in even greater confusion and uncertainty regarding the Confrontation Clause's scope.[8]

This uncertainty has affected other previously settled areas of law. One of those areas concerns the admissibility of interpreted statements made by a foreign-language speaking defendant.[9] Until recently, the courts[10] had uniformly held that a defendant's translated statement could be used as evidence against him without subjecting the interpreter to cross-examination.[11] There was no need to cross-examine the interpreter because under either a "language conduit" theory or an "agency" theory, the words of the interpreter were attributed to the defendant as his own.[12] As his own words, the defendant could not claim an inability to confront himself so the Confrontation Clause was inapplicable.[13]

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

7. *Id.* at 68.

8. *See supra* note 4; *see also* discussion *infra* Part III.

9. The scope of this Note is limited to a defendant's own statements as translated by an interpreter. Interpreted statements of witnesses are not discussed.

10. This Note focuses on the federal circuit courts and their handling of this issue.

11. *E.g.*, United States v. Desire, 502 F. App'x 818, 822 (11th Cir. 2012) (holding that defendant's out-of-court translated statements are not subject to the confrontation clause because they are party admissions and the interpreter is the party's agent), *cert. denied*, 133 S. Ct. 1851 (2013); United States v. Budha, 495 F. App'x 452, 454 (5th Cir. 2012) ("We have held that, except in unusual circumstances, interpreters may be considered language conduits, whose translations of the defendant's own statements are not hearsay and do not implicate defendant's confrontation rights."), *cert. denied*, 133 S. Ct. 1243 (2013); United States v. Orm Hieng, 679 F.3d 1131, 1139 (9th Cir. 2012) ("A defendant and an interpreter are treated as identical for testimonial purposes if the interpreter acted as a 'mere language conduit' or agent of the defendant."), *cert. denied,* 133 S. Ct. 775 (2012); United States v. Santacruz, 480 F. App'x 441, 443 (9th Cir. 2012) (finding no Confrontation Clause issue when the deputy who translated the defendant's statements acted only as a language conduit), *cert. denied,* 133 S. Ct. 2850 (2013); United States v. Vidacak, 553 F.3d 344, 352 (4th Cir. 2009) ("Accordingly, we conclude that the interpreter . . . was, under the circumstances of this case, no more than a 'language conduit' . . . ."); United States v. Sanchez-Godinez, 444 F.3d 957, 960 (8th Cir. 2006) (stating that an interpreter is nothing more than a language conduit and does not create an additional layer of hearsay (citing Unites States v. Koskerides, 877 F.2d 1129, 1135 (2d Cir. 1989))); United States v. Stafford, 143 F.App'x 531, 533 (4th Cir. 2005) (per curiam) (finding defendant's statements were admissible as party-opponent admissions and an unofficial interpreter was nothing more than a language conduit).

12. The "language conduit" and "agency" theories are discussed *infra* Part I.

13. *E.g.*, *Orm Hieng*, 679 F.3d at 1139 (finding no Confrontation Clause issue because "[a] defendant and an interpreter are treated as identical for testimonial purposes . . . .").

The basic premise of the language conduit theory is that a skilled interpreter is a neutral party whose translation does not add or detract meaning from the speaker's words.[14] Recently, in *United States v. Charles*, a panel of the Eleventh Circuit Court of Appeals rejected this reasoning and held that, for Confrontation Clause purposes, the interpreter, not the foreign language speaker, is the declarant of the translated words and must be available for cross-examination.[15]

The issue this Note seeks to resolve is whether, and in what circumstances, *Crawford's* reasoning is applicable to those cases where an interpreter has been used to translate a defendant's testimonial statement and is unavailable for cross-examination. Is the Eleventh Circuit correct in their conclusion that a defendant can be considered the declarant of an interpreter's statements for hearsay but not for Confrontation Clause purposes?[16] Or, has the court's decision misapplied *Crawford* and overextended the reach of the Confrontation Clause?

This Note will argue that the underlying issue determining the admissibility of an unavailable interpreter's translation is the proper application of the law of agency and not the more recently espoused language conduit theory.

In *United States v. Charles*, the Eleventh Circuit based its finding of two separate declarants on an analysis of the inherent difficulties in language translation.[17] This Note will argue that the basis for this finding is flawed. Whether an interpreter should be viewed as the declarant of the translated words depends on whether the interpreter is the agent of the speaker.[18] And, a finding of agency is not dependent upon the quality of the translation.[19]

Part I of this Note will give a historical overview of the courts' application of agency law and the language conduit theory to the admissibility of an interpreter's translation when the interpreter was unavailable to testify. Part II.A of this Note will analyze how agency law should be applied to situations involving interpreters. Parts II.B and C will assess the proper application of hearsay rules and Confrontation Clause jurisprudence and examine the current mistakes courts make when applying those principles. Part III of this Note will argue that,

14. *See* United States v. Charles, 722 F.3d 1319, 1327 (11th Cir. 2013).
15. *Id.* at 1323.
16. *Id.* at 1326-28.
17. *See id.* at 1324.
18. United States v. Da Silva, 725 F.2d 828, 831-32 (2nd Cir. 1983).
19. Commonwealth v. Vose, 32 N.E. 355, 355 (1892).

because of the current state of uncertainty as to the applicability of the Confrontation Clause to this issue, states should consider adopting measures such as a "notice and demand" procedure, or what I call an "interpretation warning" to provide some measure of certainty.

I. INTERPRETERS, THE AGENCY AND THE LANGUAGE CONDUIT THEORIES

For both hearsay and Confrontation Clause purposes, there are currently two basic legal concepts that allow for the admission of third-party testimony pertaining to a defendant's statements as translated by an interpreter.[20] For purposes of this Note, I will refer to them as the "agency theory" and the "language conduit theory." This Note is primarily concerned with statements that are admissible as not hearsay under Rules 801(d)(2)(C) and (D) of the Federal Rules of Evidence.[21]

Part A of this section will provide a brief overview of the agency theory that was prevalent in the late nineteenth century and continued throughout the twentieth century. Part B will discuss those later twentieth century cases that applied the language conduit theory and which became the prevailing mode of analysis in the era of *Ohio v. Roberts*.[22]

20. There are also some outlier cases that hold interpreted statements are admissible as present sense impressions under FED. R. EVID. 803(1). *See, e.g.*, Palacios v. State, 926 N.E.2d 1026, 1032 (Ind. Ct. App. 2010) (finding daughter's statements as interpreter for her mother made contemporaneously were admissible as present sense impressions). However, that is a minority position and its continued viability has clearly been called into doubt by the Supreme Court in Davis v. Washington, 547 U.S. 813 (2006). There, the trial court had admitted the victim's affidavit as a present sense impression, but the Supreme Court held it inadmissible unless the defendant had an opportunity to confront the witness. *Id.* at 820, 830. *See also* Melendez-Diaz v. Massachusetts, 557 U.S. 305, 316 (2009) (where the Court reaffirmed its position that a defendant's confrontation right extends to statements otherwise admissible under a present sense impression exception to the hearsay rule).

21. The pertinent parts of Rules 801(d)(2)(C) and (D) provide as follows:

> (d) STATEMENTS THAT ARE NOT HEARSAY. A statement that meets the following conditions is not hearsay:
>
> . . .
>
> (2) *An Opposing Party's Statement*. The statement is offered against an opposing party and:
>
> . . .
>
> (C) was made by a person whom the party authorized to make a statement on the subject;
>
> (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; . . . .

FED. R. EVID. 801(d)(2)(C)-(D).

22. Ohio v. Roberts, 448 U.S. 56 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36 (2004).

A. *An Interpreter as the Agent of the Declarant*

The definition of agency has changed little since Restatement (First) of Agency was adopted in 1933.[23] Under the agency theory, an interpreter is viewed as either the agent of the defendant or a dual agent for both the defendant and the other party to the conversation.[24]

Two of the earliest examples of the application of the agency theory involve cases from Massachusetts. The first is *Camerlin v. Palmer Co.*[25] Decided by the Massachusetts Supreme Judicial Court in 1865, this case involved Mrs. Camerlin, who spoke only French and whose husband abandoned her leaving her to care for herself and their children without any means of support.[26] With the aid of an interpreter named Lucy Mongios, Mrs. Camerlin had a conversation with Mr. Packard, owner of the Palmer Co., in which he agreed to hire her children.[27]

Later, a dispute arose over whether Mrs. Camerlin had agreed to assign the children's wages to the defendant in return for the defendant's support of her family.[28] Mr. Packard was allowed to testify as to what Mrs. Camerlin had said through the words of the interpreter.[29]

On appeal, the court affirmed and held that the interpreter was Mrs. Camerlin's agent, "employed by her to communicate with Packard, and the statements made through such interpreter to him as to what she said are to be taken to be truly stated."[30] The interpreter's statements were attributable to Mrs. Camerlin on the basis of the agency relationship.

The second case is that of *Commonwealth v. Vose*.[31] In *Vose*, the defendant, Thomas Vose, was convicted of providing an abortion to

23. RESTATEMENT (FIRST) OF AGENCY (1933). The Restatement defines agency as "the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *Id.* § 1(1). The only change made by the 1958 Restatement (Second) of Agency was the substitution of the words "fiduciary relation" for "relationship." Although there is a Restatement (Third) of Agency, revised in 2006, because courts have been quoting from the Second Restatement and using its language as authority for their decisions since its adoption, it appears to be a more accurate reflection of current law.

24. United States v. Da Silva, 725 F.2d 828, 832 (2nd Cir. 1983) ("The fact that Stewart was an employee of the government did not prevent him from acting as Da Silva's agent for the purpose of translating and communicating Da Silva's statements to Tripicchio. *See* Restatement (Second) of Agency § 392 (1958) (dual agency permitted).").

25. Camerlin v. Palmer Co., 92 Mass. 539 (1865).

26. *Id.* at 539.

27. *Id.* at 539-40.

28. *Id.* at 540.

29. *Id.* at 540-41.

30. *Id.* at 541.

31. Commonwealth v. Vose, 32 N.E. 355 (1892).

Mary Tallon, who later died.[32] Tallon spoke only French and Vose spoke only English, but Vose's wife spoke French and acted as an interpreter for them.[33] At trial, a witness who understood only English and who was present for the interpreted conversation was allowed to testify to the interpreted words.[34] With respect to the admissibility of the witness's testimony, the court found as follows:

> When two persons who speak different languages, and who cannot understand each other, converse through an interpreter, they adopt a mode of communication in which they assume that the interpreter is trustworthy, and which makes his language presumptively their own. 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 to do for both that in which they have a joint interest. They wish to communicate with each other, they choose a mode of communication, they enter into conversation, and the words of the interpreter, which are their necessary medium of communication, are adopted by both, and made a part of their conversation as much as those which fall from their own lips. They cannot complain if the language of the interpreter is taken as their own by any one who is interested in the conversation.[35]

As these early cases demonstrate, it was the long-established concept of agency that enabled courts to admit an interpreter's statement.[36] The use of agency law to determine admissibility continued into the twentieth century.[37] However, subsequent decisions did not

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Some commentators see the beginnings of modern agency law in the Roman law where a father's sons and the family's slaves could form binding contracts for the family unit known as the "paterfamilias." Others look towards the medieval "Statute of the Staple" of 1353 that concerned a master's liability for a servant's torts. For a more thorough analysis of the historical beginnings of agency law, *see* O. W. Holmes, Jr., *Agency*, 4 HARV. L. REV. 345 (1891); Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 518-22 (2010).

37. *See, e.g.*, United States v. Da Silva, 725 F.2d 828 (2d Cir. 1983) ("The fact that [the interpreter] was an employee of the government did not prevent him from acting as Da Silva's agent . . . ."); Boicelli v. Giannini, 224 P. 777, 779 (Cal. Dist. Ct. App. 1924) ("An interpreter who is selected by two persons speaking different languages as a medium of their communication with each other is regarded as their joint agent for that purpose . . . and such statements of the interpreter are admissible as original evidence and are in no sense hearsay . . . ."); Guan Lee v. United States, 198 F. 596, 601 (7th Cir. 1912) (adopting the agency theory reasoning in *Massachusetts v. Vose* and holding that third party testimony is admissible without calling the interpreter to testify); Meacham v. State, 33 So. 983 (Fla. 1903)

remain focused on a finding of agency.[38] Courts began to incorporate the notion of the "reliability of the interpretation" into their analysis and the language conduit theory exception was born.[39]

B. *Interpreter as a Language Conduit*

It is sometimes a common misconception that words spoken in one language can be translated word-for-word into another. In fact, language does not work that way and different languages are not susceptible to such direct word substitutions.[40] In a conscious, decision-making process interpreters carefully choose words in order to accurately translate a speaker's meaning and concepts into another language.[41] Linguists explain that language has both a "semantic," or "fixed, concept-free meaning," as well as a "pragmatic" meaning that is dependent upon the context in which the words are used.[42] As a result, different interpreters put to the same task may choose different words to convey the same meaning.[43] Sometimes those results lack consistency.[44]

Ambiguity can exist even when both parties speak the same language.[45] For example, contractual disputes are testaments to the inability to achieve a true "meeting of the minds."[46] Yet, despite all this difficulty, it is clear that we can and do achieve a level of understanding that allows us to function as a society.

The concept of an interpreter as a language conduit appears to be

(finding that a third party who hears a conversation involving a translator may testify to his understanding of the conversation. The use of an interpreter affects the weight but not the competency of the evidence).

38. As discussed in Part I.B, *infra*, courts have blended the agency and language conduit analysis into one factor test used to find the existence of either or both. *See infra* note 64.

39. For a discussion of the language conduit theory and associated cases, *see infra* Part I.B.

40. Muneer I. Ahmad, *Interpreting Communities: Lawyering Across Language Difference*, 54 UCLA L. Rev. 999, 1031 n.99 (2007) (stating that the classic view that translation is a simple word substitution is a "defective view of language").

41. *Id.* at 1032-33.

42. *Id.*

43. *Id.* at 1036 ("[M]uch of the information required to determine the speaker's meaning is not contained in the words of the speaker, but instead is supplied by the listener.").

44. *Id.* at 1039-40.

45. *Id.* at 1033 ("[M]iscommunication is a prominent feature of daily life experience as well, suggesting how significant a barrier the subjectivity inherent to personhood is to the process of effective communication, even when the speaker and the listener speak the same language.").

46. *Id.* at 1032 n.101.

grounded in the difficulties associated with language translation.[47] The language conduit rule has been stated as follows: "[a]bsent a motive to mislead, distort or some other indication of inaccuracy, when persons speaking different languages rely upon a translator as a conduit for their communication, the statements of the translator should be regarded as the statements of the persons themselves without creating an additional layer of hearsay."[48] Courts have articulated four factors used in determining whether an interpreter should be considered a mere language conduit. They are, "which party supplied the interpreter, whether the interpreter had any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements translated."[49]

The first indication that an interpreter was considered a mere language conduit was in the 1973 Ninth Circuit case of *United States v. Ushakow*.[50] There, the court stated that "Carlon [the interpreter] was translating and was merely a language conduit between Ushakow and Chicas."[51] *Ushakow* was a per curiam opinion and the court summarily characterized Carlon as a language conduit without discussing its reasoning.[52]

In the 1974 case of *United States v. Santana*, two co-conspirators, Quinones and Rimbaud, had used another co-conspirator, Hysohion, to translate between them.[53] At Quinones's trial, Hysohion did not testify, but Rimbaud was allowed to testify to what Hysohion said Quinones had said.[54] The Second Circuit upheld the admission of Rimbaud's testimony based upon the agency theory; Hysohion had been Quinones's

47. Because accurate language translation is difficult, finding that an interpreter is merely a language conduit means the interpreter's translation is accurate and reliable because it does not add to or detract meaning from the foreign-language speaker's words. In United States v. Nazemian, 948 F.2d 522 (9th Cir. 1991), the court found that because "mistranslation potentially could have threatened the DEA's objectives" and because the defendant's subsequent actions were consistent with an accurate translation, the court found the translation was accurate and the interpreter was a "mere language conduit." *Id.* at 528.

48. State v. Patino, 502 N.W.2d 601, 610 (Wis. Ct. App. 1993) (citations omitted).

49. *Nazemian*, 948 F.2d at 527. The language conduit theory was also adopted by the Second Circuit when it stated that, "[an] interpreter was no more than a language conduit and therefore his translation did not create an additional layer of hearsay." United States v. Koskerides, 877 F.2d 1129, 1135 (2nd Cir. 1989). *See also* BARBARA BERGMAN ET AL., WHARTON'S CRIMINAL EVIDENCE § 6:7, 113-14 (15th ed. 1998).

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

51. *Id.* at 1245.

52. *Id.*

53. United States v. Santana, 503 F.2d 710, 717 (2d Cir. 1974).

54. *Id.*

agent.[55] However, the court indicated that "[t]he real concern here is less the hearsay nature of the Rimbaud testimony than it is the reliability of the Hysohion translation."[56] The court went on to articulate certain factors they used to evaluate and determine whether an interpreter's translation was reliable:

> We have however, no reason to distrust the translation. No motive has been shown on the part of Hysohion to mislead either Rimbaud or Quinones. More importantly, as an external indicium of reliability attaching to the Hysohion translation, the actions that followed these conversations were entirely consistent with the content of the conversations as translated . . . . We thus think it was proper to admit Rimbaud's testimony regarding these translated conversations.[57]

While the Second Circuit could have ended its discussion after finding the existence of agency, it chose to follow up with an analysis of the reliability of the translation.[58] As the above quotation shows, the existence of "an external indicium of reliability"[59] was a factor in the court's decision to admit the translation.

In fact, this type of reliability analysis was not new. The Supreme Court had used it four years earlier in *Dutton v. Evans* when discussing whether admission of certain hearsay evidence would violate the Confrontation Clause.[60] Ten years later, in *Ohio v. Roberts*, the Court

55. *Id.* (stating that "[a]s for that part of the conversation in which Hysohion acted as translator, he functioned as an agent for the two co-conspirators, Rimbaud and Quinones, which rendered admissible Rimbaud's testimony regarding statements made by Hysohion as an agent for Quinones.").

56. *Id.*

57. *Id.*

58. Prior to discussing the reliability of the Hysohion translation the court stated, "[a]s for that part of the conversation in which Hysohion acted as translator, he functioned as an agent for the two co-conspirators, Rimbaud and Quinones, which rendered admissible Rimbaud's testimony regarding statements made by Hysohion as an agent for Quinones." *Id.* For a discussion as to why the reliability of a translation is irrelevant to the formation of an agency relationship, see *infra* Part II.A.

59. *Santana*, 503 F.2d at 717.

60. In Dutton v. Evans, 400 U.S. 74 (1970), the Court considered the admissibility of an out-of-court statement offered to prove the truth of the matter asserted and stated that the Confrontation Clause was not violated where the statement's reliability could be shown via an independent "indicia of reliability." After going through several factors, the Court stated:

> These circumstances go beyond a showing that Williams had no apparent reason to lie to Shaw. His statement was spontaneous, and it was against his penal interest to make it. These are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant.

Id. at 89.

pronounced the "indicia of reliability" concept as the determinative factor in deciding whether or not a witness's testimonial, out-of-court statement is admissible without confrontation.[61] Subsequent to the Court's decision in *Roberts*, this concept of an interpreter as a language conduit continued to gain traction with the courts and has become the prevalent mode of analysis.[62] In *Santana*, because the Second Circuit used the same "external indicium of reliability" language, it is likely they were discussing the constitutionality of the admission.[63]

The distinction between the agency and language conduit theories has eroded because the courts have blended the analysis so that now the accuracy of the translation implies agency, which in turn makes the interpreter a mere language conduit.[64] As long as the underlying interpretation is reliable, the interpreter can be seen as a language conduit/agent, and a testimonial identity exists between the defendant and the interpreter.[65]

Those circuits that have had the opportunity to address this issue have been consistent in their overall approach.[66] This consistency,

61. Ohio v. Roberts, 448 U.S. 56 (1980) ("In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate 'indicia of reliability.' Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."). *Id.* at 67.

62. *See supra* note 11 for a listing of cases where the court based its decision on the language conduit theory.

63. In discussing the reliability issue, the *Santana* court references its prior decision in United States v. Puco, 476 F.2d 1099 (2nd Cir. 1973). *Santana*, 503 F.2d at 717. In *Puco*, the court was discussing the constitutionality of admitting the prior trial testimony of a co-conspirator where the defense declined to put him on the stand. *Puco,* 476 F.2d at 1102-05. Since the discussion in *Puco* concerned constitutional, not hearsay issues, it is likely the court in *Santana* was conducting a reliability analysis to answer constitutional issues as well.

64. *See, e.g.*, United States v. Da Silva, 725 F.2d 828, 832 (2nd Cir. 1983) ("Where, however, there is no motive to mislead and no reason to believe the translation is inaccurate, the agency relationship may properly be found to exist. In those circumstances the translator is no more than a 'language conduit,' . . . and a testimonial identity between declarant and translator brings the declarant's admissions within Rule 801(d)(2)(C) or (D).") (citations omitted). *See also* United States v. Santacruz, 480 F. App'x 441, 443 (9th Cir. 2013) ("Consideration of [the four language conduit factors] supports a finding that Deputy Davalos was a *'language conduit' or agent* of Santacruz's and that the statements should be attributed to Santacruz.") (emphasis added).

65. United States v. Orm Hieng, 679 F.3d 1131, 1139 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 775 (2012) ("A defendant and an interpreter are treated as identical for testimonial purposes if the interpreter acted as a 'mere language conduit' or agent of the defendant.").

66. As the Ninth Circuit explained in United States v. Nazemian:

> [A]ll of the federal circuits which have considered the question recently have taken the view that the translator may in some circumstances be viewed as an agent of the defendant, and the translation hence be attributable to the defendant

however, no longer exists.[67]

II. THE POST-CRAWFORD SPLIT—THE NOT-SO-RELIABLE RELIABILITY ANALYSIS

Although the Sixth Amendment guarantees a criminal defendant the right to confront the witnesses against him,[68] neither it nor *Crawford* "address the question whether, when a speaker makes a statement through an interpreter, the [court is required] to attribute the statement to the interpreter."[69] The threshold admissibility question becomes whether an interpreter is the declarant of his own words.[70] The answer to that question controls both the hearsay and constitutional analysis.[71]

In 2013, the Eleventh Circuit, in *United States v. Charles*,[72] for the first time found that the difficulties inherent in language translation provided a constitutional basis for finding an interpreter and a foreign-language speaker were two declarants.[73] In this section of the Note, the author will argue that the court improperly based its determination on the language conduit theory[74] as an outgrowth of the now abandoned "independent indicia of reliability" reasoning articulated in *Dutton v. Evans* and *Ohio v. Roberts*.[75] A determination of declarants cannot be found in the reliability of the translation.[76] It can only be determined by a careful analysis of whether the interpreter is truly an agent of the speaker.[77] If the interpreter is the speaker's agent, then the translated

> as her own admission. Other cases have taken the view that there is no hearsay problem where the interpreter acts merely as a "language conduit."

United States v. Nazemian, 948 F.2d 522, 526 (9th Cir. 1991) (citations omitted).

67. The Eleventh Circuit created the split with their decision in United States v. Charles, 722 F.3d 1319, 1324 (11th Cir. 2013), when they held that the fact words were spoken in two different languages meant that there were two declarants for Confrontation Clause purposes.

68. U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

69. *Orm Hieng*, 679 F.3d at 1140.

70. *Nazemian*, 948 F.2d at 525-26.

71. *Id*.

72. *Charles*, 722 F.3d at 1319.

73. *Id.* at 1324.

74. In *Charles*, the court undertakes an extensive discussion regarding the difficulties inherent in language translation. *Id.* They then conclude that reliability, which forms the basis for finding an interpreter is a language conduit, cannot satisfy Confrontation Clause concerns. *Id.* at 1327. While that may be true, reliability has nothing to do with agency and agency, not reliability nor a language conduit finding, determines the declarant.

75. *See supra* notes 60 and 61.

76. Crawford v. Washington, 541 U.S. 36, 61 (2004) ("Where testimonial statements are involved we do not think the Framers meant to leave the Sixth Amendment's protections to the vagaries of the rules of evidence, much less to amorphous notions of 'reliability.'").

77. *See infra* Part II.B for a full discussion of why agency makes an interpreter's

words are attributable to the defendant and the Confrontation Clause is inapplicable because a defendant cannot argue an inability to confront his own statement.[78] Part II.A of this Note will analyze how agency law should be applied to situations involving interpreters. Parts II.B and C will assess the proper application of hearsay rules and Confrontation Clause jurisprudence and examine the current mistakes courts make when applying those principles.

A. *Agency*

As previously stated, identifying the declarant is the threshold admissibility question governing both the hearsay and Confrontation Clause analysis.[79] While the language conduit theory may suffice to make an out-of-court statement admissible for hearsay purposes,[80] it cannot be used for Confrontation Clause purposes because the translation's reliability is the determinative factor.[81] However, a finding that the interpreter is the agent of the foreign language speaker will satisfy Confrontation Clause concerns.[82]

The Restatement (Second) of Agency defines "agency" as "the fiduciary relation which results from the manifestation of consent by [the principal] to [the agent] that [the agent] shall act on [the principal's] behalf and subject to his control, and consent by the [agent] so to act."[83] The creation of an agency relationship *requires an agreement* between the parties.[84] The agreement creates an agency relationship even when

translation admissible as evidence against a defendant without confrontation.

78. United States v. Nazemian, 948 F.2d 522, 525-26 (9th Cir. 1991).

79. *Id.*

80. As discussed in Part I *supra*, reliability determines admissibility under the language conduit theory and it is "the rules of evidence [that] are designed primarily to police reliability . . . ." Bullcoming v. New Mexico, 131 S. Ct. 2705, 2720 n.1 (2011) (Sotomayor, J., concurring).

81.

> [B]oth the confidential informant and Ms. Nazemian took subsequent actions which were consistent with Agent Eaton's testimony as to the content of those conversations, *providing additional evidence that the translations were accurate*. Under the circumstances of this case, it was not plainly erroneous for the district court to treat the interpreter as a mere language conduit or as Nazemian's agent for purposes of conducting conversations with Agent Eaton.

Nazemian, 948 F.2d at 528 (emphasis added); *Crawford*, 541 U.S. 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.").

82. For a discussion of why an agency relationship will satisfy Confrontation Clause concerns, *see infra* Part II.C.

83. RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

84. *Id.* § 1, cmt. b.

the parties did not intend it or the resulting legal consequences.[85] Circumstantial evidence may be used to show the existence of agency.[86]

An agent may act with either actual or apparent authority.[87] Actual authority is present when "by written or spoken words or other conduct of the principal which, reasonably interpreted, causes the agent to believe that the principal desires him so to act on the principal's account."[88] The principal's manifestation to the agent can be determined through the principal's words or conduct.[89]

Apparent authority exists when "written or spoken words or any other conduct of the principal which, reasonably interpreted, causes [a] third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him."[90] This is a subjective belief based upon what a third party reasonably believed to be true as a result of the principal's manifestations.[91]

It is generally assumed that the principal will choose a reliable agent who will act in a competent manner, but there is no prerequisite competency test to satisfy.[92] For example, in *United States v. Buttram*, the court found the defendant was criminally responsible for the acts of his agent, even though the agent was legally insane.[93] The words and actions of agents can legally bind their principals even when the agent could not be bound by those same acts and words.[94]

The establishment of an agency relationship is a question of preliminary fact under Federal Rules of Evidence, Rule 104(a).[95] The standard of proof in such an inquiry is a preponderance of the evidence.[96] In addition to any independent evidence, courts may consider the out-of-court statements themselves when making their Rule 104(a)

85. *Id.*

86. Moriarty v. Glueckert Funeral Home, Ltd., 155 F.3d 859, 866 (7th Cir. 1998); RESTATEMENT (SECOND) OF AGENCY § 7, cmt. b (1958).

87. Itel Containers Int'l Corp. v. Atlanttrafik Express Serv. Ltd., 909 F.2d 698, 702 (2d Cir. 1990).

88. *Id.* (quoting RESTATEMENT (SECOND) OF AGENCY § 26 (1958)).

89. *Itel Containers Int'l Corp.*, 909 F.2d at 702-03.

90. *Id.* at 703 (quoting RESTATEMENT (SECOND) OF AGENCY § 27 (1958)).

91. RESTATEMENT (SECOND) OF AGENCY § 2, cmt. a (1958).

92. *Id.* § 21, cmt. a.

93. United States. v. Buttram, 432 F. Supp. 1269, 1272-73 (W.D. Pa. 1977), *aff'd*, 568 F.2d 770 (3d Cir. 1978).

94. *Id.*; RESTATEMENT (SECOND) OF AGENCY § 21, cmt. a (1958).

95. United States v. Flores, 679 F.2d 173, 178 (9th Cir. 1982) ("Under Fed.R.Evid. 104(a), the judge decides the preliminary question of whether agency exist[s]."); Condon Bros., Inc. v. Simpson Timber Co., 92 Wash. App. 275, 285-86 (1998) (Whether a declarant is a speaking agent . . . is a question of preliminary fact . . . .").

96. United States v. Franco, 874 F. 2d 1136, 1139 (7th Cir. 1989).

determinations.[97]

There is a discrepancy regarding the manner in which courts determine the existence of agency that depends on whether the criminal case before the court involves a foreign language interpreter.[98] In criminal cases involving interpreters, *if* certain factors are present, *then* the existence of agency is *presumed*.[99] In other criminal cases that do not involve foreign language interpretations but where the existence of agency is at issue, *evidence* is introduced to *establish* the existence of an agency relationship.[100]

This differential treatment is clearly illustrated with the following brief case analyses. First, consider the evidentiary analysis present in the non-interpreter criminal cases. In *United States v. Buttram*, defense counsel argued that the purported agent, Exum, had been adjudged legally insane and could not have been the defendant's agent.[101] The court found that "Exum's insanity is irrelevant to the operation of this [801(d)(2)(C) and (D), the agency] hearsay exception and the only issue is whether or not the evidence at trial supported the existence of an agency-principal relationship between Exum and Buttram."[102] The court went on to examine the circumstances and found that there was "persuasive evidence at trial of an agent-principal relationship."[103]

While the court in *Buttram* found the existence of agency, the court in *United States v. Pacelli*, examined the facts and determined that there was no agency relationship and excluded the evidence.[104] In *Pacelli* the trial court allowed a witness to testify to certain statements Pacelli's wife made at a meeting in Pacelli's basement.[105] The appellate court found there was no evidence presented that Pacelli's wife was authorized as his agent to speak on the matter.[106] In addition, the court held that agency could not be inferred from the surrounding circumstances because "[t]wo of the four alleged declarants . . . were not even related to [Pacelli], and

97. Bourjaily v. United States, 483 U.S. 171, 181 (1987).

98. *Compare Buttram*, 432 F. Supp. at 1273 ("The government *presented persuasive evidence* at trial of an agent-principal relationship . . . .") (emphasis added), *with* United States v. Da Silva, 725 F.2d 828, 831-32 (2d Cir. 1983) ("[P]rovided the interpreter has a sufficient capacity, and there is no motive to misrepresent, the interpreter is treated as the agent . . . unless circumstances are present which would *negate the presumption* of agency.") (emphasis added) (quoting 4. J. WEINSTEIN & M. BERGER, EVIDENCE, 801-279, n.34 (1981)).

99. *See supra* note 98.

100. *See supra* note 98.

101. *Buttram*, 432 F. Supp. at 1272.

102. *Id.*

103. *Id.* at 1273.

104. United States v. Pacelli, 491 F.2d 1108 (2d Cir. 1974).

105. *Id.* at 1111.

106. *Id.* at 1117.

it is far from obvious that the statements attributed to [Pacelli's] wife were instigated by [Pacelli]."[107]

Sometimes, a court will examine the facts and determine that circumstances intervene to terminate an existing agency relationship. For example, in *United States v. Petraia Mar. Ltd.*, the court held that "an agent's statements [cannot] be imputed to the principal if the parties have conflicting litigation positions . . . ."[108] As a result, the existing agency relationship between the crew and Petraia Maritime ended when immunity was granted.[109]

As is evident from the cases cited, when faced with the question of agency in non-interpreter criminal cases, courts routinely make preliminary determinations of fact as to whether an agency relationship can be found.[110] As is also evident in *Buttram*, an agent's legal capacity to bind himself to his own actions or to act rationally or responsibly towards the principal is irrelevant when it comes to determining whether the agency relationship exists.[111]

A court should make its agency determination only after examining the facts and circumstances of the case.[112] Unfortunately, the courts have not consistently conducted an evidentiary analysis to make such preliminary factual findings when the agency question concerns a foreign language interpreter.[113]

In contrast to the evidentiary analysis present in the non-interpreter cases, with cases involving interpreters the courts simply presume the existence of agency if certain factors are present.[114] For example, in *United States v. Da Silva*, the Second Circuit adopted a comment from the evidence treatise of J. Weinstein and M. Berger as authority for the finding of agency.[115] That comment was: "[p]rovided the interpreter has *sufficient capacity*, and there is no *motive to misrepresent*, the interpreter is treated as the agent of the party and the statement is admitted as an admission unless circumstances are present which would negate the

107. *Id.*

108. United States v. Petraia Mar. Ltd., 489 F. Supp. 2d. 90, 97 (2007).

109. *Id.*

110. Condon Bros., Inc. v. Simpson Timber Co., 92 Wash. App. 275, 284-86 (1998); United States v. Flores, 679 F.2d 173, 178 (9th Cir. 1982).

111. United States v. Buttram, 432 F. Supp. 1269, 1272 (1977) ("[I]nsanity is irrelevant to the operation of [801(d)(2)(C) and (D)] and the only issue is whether or not the evidence at trial supported the existence of an agency-principal relationship . . . .").

112. *Pacelli*, 491 F.2d at 1117; *see also Petraia Mar. Ltd.*, 489 F. Supp. 2d at 99 ("Considering all the circumstances of this case, the Court finds that . . . .").

113. *See supra* note 98.

114. United States v. Da Silva, 725 F.2d 828, 831-32 (2d Cir. 1983).

115. *Id.* (quoting 4 J. WEINSTEIN & M. BERGER, EVIDENCE 801-279 n.34 (1981)).

presumption of agency."[116]

When juxtaposed against non-interpreter cases, problems with this statement are clearly evident. First, a determination of the agency relationship is not predicated upon the capacity of the agent to act as such.[117] If the principal makes an unwise choice and utilizes an incompetent interpreter, that choice has nothing to do with whether an agency relationship was formed.[118]

Second, statements made by an agent may be admitted for the truth of what they assert irrespective of the agent's motivation.[119] As seen in *Buttram*, even statements made by legally insane individuals bind the principal if an agency relationship can be established.[120]

Third, and most importantly, the existence of agency is not presumed.[121] Agency is formed when the principal manifests consent that the agent shall act on his behalf and subject to his control, and the agent agrees to do so.[122] Agency is a voluntary relationship that must be entered into by the consent of both parties:

> The relation of agency is created as the result of conduct by two parties manifesting that one of them is willing for the other to act for him subject to his control, and that the other consents so to act. The principal must in some manner indicate that the agent is to act for him, and the agent must act or agree to act on the principal's behalf and subject to his control.[123]

Under the current mode of analysis, whether courts seek to admit an interpreter's statements under an agency theory or a language conduit theory, the factors used to make the determination are essentially the same: "which party supplied the interpreter, whether the interpreter had

116. *Id.* at 831-32 (emphasis added).

117. United States v. Buttram, 432 F. Supp. 1269, 1272-73 (1977).

118. *Id.* at 1272. *See also* RESTATEMENT (SECOND) OF AGENCY § 376 cmt. a (1958) (an agent who has told the principal of his lack of skill does not violate a duty to the principal . . . if he exercises as much skill . . . as he has").

119. RESTATEMENT (SECOND) OF AGENCY § 286 cmt. a (1958).

120. *Buttram*, 432 F. Supp. at 1272.

121. In *Buttram*, the court did not presume the existence of agency but required the government prove its existence before it would hold the principal liable for the agent's actions. The court stated the government sustained its burden with persuasive evidence. 432 F. Supp. at 1273.

122. United States v. Thomas, 377 F.3d 232, 237-38 (2d Cir. 2004) ("[W]e have defined an agency relationship as 'the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act.'") (quoting United States v. Whiting Pools, Inc., 674 F.2d 144, 148 (2d Cir.1982)); United States v. LaBare, 191 F.3d 60, 65 (1st Cir. 1999) ("[A]n agent is one who acts for another by agreement and whose work is subject to control by the principal."); RESTATEMENT (SECOND) OF AGENCY § 1 (1958).

123. RESTATEMENT (SECOND) OF AGENCY § 1, cmt. a (1958).

any motive to mislead or distort, the interpreter's qualifications and language skill, and whether actions taken subsequent to the conversation were consistent with the statements as translated."[124] This dual use of the same factors simply serves to exacerbate the problem.

There are times when it would be inappropriate to find the existence of an agency relationship between a foreign-language speaker and the interpreter. For example, in *United States v. Sanchez-Godinez*, a Spanish-speaking ATF agent was used as an interpreter.[125] The general rule is that use of a government employee as an interpreter does not prevent the formation of an agency relationship between the interpreter and the foreign-language speaker.[126] However, in this case, the interpreter/ATF agent also asked questions that he would normally ask in his capacity as a law enforcement officer.[127] Although the court stated that the actions of the ATF interpreter raised hearsay concerns, they ultimately found the actions were harmless error and refused to overturn the conviction on those grounds.[128]

In *United States v. Charles*, the court discussed what it considered to be a matter of first impression regarding the interplay of interpreters, agency, hearsay and the Confrontation Clause. It held that, for Confrontation Clause purposes, an interpreter who is the defendant's agent must still be considered a separate declarant and must be available for cross-examination.[129] It did so, however, without a proper analysis of the agency relationship.[130]

In *Charles*, the defendant spoke Creole.[131] The Customs and Border Patrol officers used an interpreter employed by a telephonic language translation service in order to converse with Charles.[132] The service used had been under contract by the Department of Homeland

124. United States v. Curbelo, 726 F.3d 1260, 1273 n.9 (2013) (quoting United States v. Nazemian, 948 F.2d 522, 527 (1991)); 2 WHARTON'S CRIMINAL EVIDENCE § 6:7 (15th ed. 1998).

125. United States v. Sanchez-Godinez, 444 F.3d 957, 959 (8th Cir. 2006).

126. *Id.* at 960.

127. *Id.*

128. *Id.* at 961.

129. United States v. Charles, 722 F.3d 1319, 1323 (11th Cir. 2013).

130. In a footnote, the majority writes that the language conduit theory is used to "establish the competence and trustworthiness of the interpreter so that the *interpreter's* out-of-court statements *on their own* can be admitted under the criteria of Rules 801(d)(2)(C) or (D)." *Id.* at 1327, n.9 (emphasis added). As previously discussed, an agency relationship does not arise simply because an interpreter is competent and trustworthy. Agency requires the principal manifest consent and that the agent consents to so act. *See supra* note 122.

131. *Charles*, 722 F.3d at 1321.

132. *Id.*

Security to provide translation services.[133] There was no indication that either Charles or the CBP officer knew the interpreter.[134] In determining whether Charles manifested her consent that the language-line interpreter act as her agent in translating her Creole words into English, the court may look at the translation itself for evidence of such manifestation.[135] However, the translation itself is insufficient under a Rule 104(a) determination to find the existence of agency.[136]

In this case, the court based its decision on the difficulties of language translation and never made any preliminary determination as to whether an agency relationship existed.[137] However, it is possible that had the court conducted such a preliminary investigation, an agency relationship could have been found. In this case, the interpreter was an employee of a telephonic language translation service.[138] As an employee, he was an agent of his employer.[139] As an agent, he owed his employer a duty of care and loyalty.[140] Part of those duties would necessarily involve providing an accurate translation for those clients who use the service.[141] Doing otherwise would undermine the employer's business and the agent would be acting adversely towards his principal.[142] It is also logical to assume the employer would not knowingly hire incompetent translators because to do so would be to invite business failure. While the interpreter's competence does not establish an agency relationship with Charles,[143] it is more likely that Charles would have manifested consent to have the interpreter act as her agent if he were competent.

It appears Charles was in custody during the interrogation.[144] While the record does not reflect it, it can be assumed that she was read and understood her Miranda Rights.[145] Had this not been the case, it would

133. *Id.*

134. *Id.*

135. Bourjaily v. United States, 483 U.S. 171, 181 (1987).

136. In *Bourjaily*, the Court left open the question of whether independent corroborative evidence is required. *Id.* at 181. *See also* FED. R. EVID. 801(d)(2)(C & D) 1997 amendment advisory committee's note.

137. "Charles is the declarant of her out-of-court Creole language statements and the language interpreter is the declarant of her . . . English language statements. . . . [G]iven the nature of language interpretation, the statements of the language interpreter and Charles are not one and the same . . . ." *Charles* 722 F.3d at 1324.

138. *Id.* at 1321.

139. RESTATEMENT (SECOND) OF AGENCY § 2 (1958).

140. *Id.* §§ 379, 387.

141. *Id.* § 379.

142. *Id.* § 389.

143. *See supra*, notes 122, 130 and cases cited within.

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

145. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

surely have been grounds for appeal and no such argument was made in this case.[146]

At this point, Charles knew that she did not have to speak with the CBP officers.[147] Yet, they provided her with a means of voluntarily doing so and by utilizing the independent translation service she knowingly, intelligently and voluntarily agreed to speak to them through the interpreter they provided.[148] She made no objection to the service nor did she request a different interpreter.[149] Arguably, her actions manifested her desire to speak with the CBP officers, and her assent to using the interpreter provided for that purpose. Accordingly, as a preliminary matter, the court could have found a preponderance of the evidence supported a finding of the existence of an agency relationship and that the statements of the interpreter were made during the course of the agency relationship and about a matter within the scope of the agency.[150]

When an out-of-court statement is admitted because of a finding of agency, the basis for the admission rests not on the statement's reliability, but upon the fact that either the agent was authorized to speak for his principal or the statement was made during the course of and pertaining to the agency.[151] Conversely, when an out-of-court statement is admitted because the interpreter is considered a language conduit, the basis for admission rests on reliability, not on the law of agency.[152] A determination of reliability may show the interpreter neither added nor detracted from the foreign-language speaker's words or intended meaning, but it does not mean he acted as the speaker's agent.[153]

146. The sole basis of appeal was that, "admission of the CBP officer's trial testimony of what the interpreter said to him violated her Sixth Amendment Confrontation Clause rights." *Charles*, 722 F.3d at 1321.

147. The Supreme Court stated that a person subjected to custodial interrogation "must be warned that he has a right to remain silent." *Miranda*, 384 U.S. at 444.

148. *Id*. at 444-45 (finding that a waiver of Miranda rights must be made knowingly, intentionally and voluntarily).

149. A reading of the facts in *Charles* reveals no such request was made. *See* 722 F.3d at 1321-22.

150. United States v. Rioux, 97 F.3d 648, 660 (2d Cir. 1996).

151. United States v. S.B. Penick & Co. 136 F.2d 413, 416 (1943) ("An agent's declarations within the scope and in the course of his agency are admissible against his principal.").

152. In United States v. Charles, 722 F.3d 1319, 1327 (11th Cir. 2013), the court stated, "*Da Silva*'s view of an interpreter as a 'language conduit,' adopted by our circuit in *Alvarez*, was premised on the court's assessment of the interpreter's reliability and trustworthiness . . . ." Clearly, the language conduit analysis is grounded in the reliability of the translation.

153. In order to form an agency relationship, the principal must manifest consent that an agent, act on his behalf and subject to his control, and the agent must consent to do so. RESTATEMENT (SECOND) OF AGENCY § 1 (1958). Just because someone is an adept

However, just because a foreign language speaker has formed an agency relationship with an interpreter does not mean the interpreter/agent has the requisite skill that makes the resulting translation reliable enough to qualify him as a "mere language conduit."[154] While the language conduit analysis may allow a testimonial statement to qualify for a hearsay exception, only a finding of agency will allow it to survive a Confrontation Clause analysis.[155]

B. *A Hearsay Analysis: Should a Witness be Allowed to Testify to an Interpreter's Translation of a Foreign-Language Speaker's Words When the Interpreter is Unavailable?*

An interpreted statement can take many forms[156] but the two most common out-of-court situations where interpreters are used are when the police question a foreign-language speaking suspect and when police are conducting undercover investigations involving foreign-language speaking individuals.[157] Statements may or may not be testimonial.[158] However, for hearsay analysis purposes, the testimonial nature of the statement is irrelevant.[159]

Once a court finds that an agency relationship exists between the interpreter and the foreign-language speaker the interpreter's statement may be admissible as "not hearsay" under Federal Rules of Evidence,

interpreter does not mean the foreign language speaker manifested consent or that the interpreter agreed.

154. "[A] view of an interpreter as a 'language conduit' . . . [depends] on the court's assessment of the interpreter's reliability and trustworthiness . . . ." *Charles*, 722 F.3d at 1327; *See also supra* note 130.

155. "Even though an interpreter's statements may be perceived as reliable and thus admissible under the hearsay rules, the Court in *Crawford*, rejected reliability as too narrow a test for protecting against Confrontation Clause violations." *Charles*, 722 F.3d at 1327.

156. *E.g.*, People v. Jackson, 808 N.W.2d 541, 548-52 (Mich. Ct. App. 2011) (finding that a nurse who held a patient's hand and interpreted his hand squeezes in response to questions was an interpreter); Germano v. Int'l Profit Ass'n, Inc., 544 F.3d 798, 803 (7th Cir. 2008) (holding that a communications assistant employed by a telecommunications relay service who facilitated phone communications for a hearing-impaired subject was an interpreter).

157. *United States v. Alvarez*, 755 F.2d 830 (11th Cir. 1985) is an example of an undercover drug investigation case, and *United States v. Da Silva*, 725 F.2d 828 (2nd Cir. 1983) is an example of custodial interrogation.

158. Crawford v. Washington, 541 U.S. 36, 68 (2004) ("Whatever else the term [testimonial] covers, it applies at a minimum to . . . police interrogations.").

159. United States v. Nazemian, 948 F.2d 522, 526 (9th Cir. 1991) ("This threshold question likewise controls the hearsay analysis. If the statements are viewed as Nazemian's own, they would constitute admissions properly characterized as non- hearsay under FED. R. EVID. 801(d)(2)(C) or (D).").

Rules 801(d)(2)(C) or (D).[160] Rule 801(d)(2)(C) applies if it is a "statement . . . offered against an opposing party and . . . was made by a person whom the party authorized to make a statement on the subject."[161] Because this rule requires authorization to speak on the subject, damaging admissions would likely be inadmissible because the agent would not be authorized to make them.[162]

Rule 801(d)(2)(D) allows for the admission of a broader class of statements.[163] The statement need not be specifically authorized.[164] It is admissible against an opposing party so long as it is "made by the party's agent . . . on a matter within the scope of that relationship and while it existed."[165]

Statements by a party's agent are often admitted as statements that are not hearsay under section 801(d)(2)(C) or (D).[166] For example, in *United States v. S.B. Penick & Co.*, the court admitted an agent's oral admissions and follow-up letters against his principal in a products liability case because they were made in the scope and course of the agency.[167] Similarly, in *United States v. Miller*, on several occasions, a bank guard took bonds from the defendant to the bank tellers to be cashed.[168] The guard died before trial.[169] The court found ample evidence that the bank guard had acted as the defendant's agent and the tellers were allowed to testify to conversations regarding messages the defendant gave them through the bank guard.[170]

Because a testifying witness can only understand a foreign-language speaking defendant's statements through the interpreter's translation, multiple layers of hearsay are often present.[171] Although it does not involve a foreign language, the case of *United States v. Portsmouth Paving Corp.* is instructive because it involves multiple

160. Section (d) of Rule 801 reads: "Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay: . . . ." FED. R. EVID. 801(d).

161. *Id.* § 801(d)(2)(C).

162. United States v. Portsmouth Paving Corp., 694 F.2d 312, 321 (1982).

163. *Id.* at 321.

164. *Id.*

165. *Id.*; FED. R. EVID. 801(d)(2)(D).

166. United States v. Pena, 527 F.2d 1356, 1360 (5th Cir. 1976) ("It is undisputed that a party's out-of-court admission is admissible against him and is not generally considered to be hearsay. . . . In many instances, the statement of an agent of a party will likewise be admissible as a vicarious or representative admission of his principal.").

167. United States v. S.B. Penick & Co., 136 F.2d 413, 415 (2d Cir. 1943).

168. United States v. Miller, 246 F.2d 486, 490 (2d Cir. 1957).

169. *Id.*

170. *Id.*

171. *See infra*, notes 190-94, and associated text.

layers of hearsay.[172] *Portsmouth Paving* involved the bid rigging of paving jobs in Virginia.[173] A portion of the disputed evidence concerned a phone call made by Remington to Saunders.[174] Saunders was not in his office so Remington spoke with Saunders's secretary, requested she contact Saunders, ask him a question about a pending job, and get back to him with the answer.[175] A short time later the secretary called Remington back and stated, "Mr. Saunders said that the air is clear in Chesapeake."[176] When Remington took this phone call, another subject, Waterfield, was standing in Remington's office doorway.[177] Waterfield testified that when Remington hung up the phone with Saunders's secretary, he stated, "[t]hat was Curtis Saunders' secretary and she said that the sky was clear in Chesapeake."[178]

The court identified three levels of hearsay.[179] The first level concerned the statement made by Saunders that "the air is clear in Chesapeake."[180] This was admissible against Saunders as his own statement under Rule 801(d)(2)(A).[181]

The second level of hearsay concerned the secretary's statement.[182] Under Rule 805, multiple layers of hearsay are admissible as long as there is an exception for each layer.[183] Here, the court found the secretary's statement to Remington admissible under the broader terms of Rule 801(d)(2)(D).[184] The court found that there was ample evidence to believe that the secretary was Saunders's agent and that the comment relayed to Remington was made within the scope of that agency because part of her job concerned relaying messages from Saunders to business callers.[185]

The third layer of hearsay concerned Waterfield's recitation of what Remington said were Saunders's secretary's statements repeating what Saunders had just told her.[186] Here, the court found that Rule 803(1)

172. United States v. Portsmouth Paving Corp., 694 F.2d 312 (4th Cir. 1982).
173. *Id.* at 315-16.
174. *Id.* at 321.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.*
179. *Id.* at 322.
180. *Id.* at 321.
181. *Id.*
182. *Id.*
183. *Id.*
184. *Id.* at 321-22.
185. *Id.*
186. *Id.* at 322.

applied.[187] Rule 803(1) concerns the admissibility of present sense impressions.[188] Because Remington's remarks were made immediately upon hanging up the phone, and they concerned the just-completed conversation with the secretary, the court admitted them as a present sense impression.[189]

Like *Portsmouth Paving Corp.*, the cases involving interpreters have multiple layers of hearsay. This occurs because first, there is a foreign language speaker who utters a statement. If the interpreter were to testify as to the foreign language statements made by the opposing party, then that statement would be admissible against the speaker as a statement offered against an opposing party that was made by that party in an individual capacity.[190]

However, when an interpreter translates the foreign-language speaker's words into English for the benefit of a third party, the third party cannot testify to the words that were spoken in the foreign language because he does not understand them. When the third party testifies, all he can testify to is the out-of-court English translation of the interpreter.[191] Although in *Portsmouth Paving Corp.* all the parties spoke English, it should be noted that Remington never heard the words Saunders said to his secretary because that conversation took place away from Remington's location.[192] Remington heard words uttered by the secretary that he never heard Saunders speak.[193] This is analogous to hearing words spoken in a foreign language; if you don't understand them, it is like not hearing them at all.[194]

Once the court makes a determination as to whether an interpreter's statements can be admitted without violating the hearsay rules of evidence, then it is necessary to determine whether the statements are

187. *Id.*

188. *Id.*

189. *Id.*

190. United States v. Stafford, 143 F. App'x 531, 533 (2005) ("[The defendant's] statements to Conley about the trip to Jamaica were his own statements, and were admissible as admissions by a party-opponent . . . ." (citing FED. R. EVID. 801(d)(2(A))).

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

192. *Portsmouth Paving Corp.*, 694 F.2d at 321.

193. Remington testified over counsel's objection as follows:

> Well, I called Mr. Saunders' office, and the secretary said he wasn't in. And I said, "You think you could get him on the car radio?" And she said, "Yes, I'll try." So a few minutes later she came back on the air and said, "Mr. Saunders said that the air is clear in Chesapeake."

Id.

194. There is one small difference. You could testify that the speaker said something in a foreign language that you heard but did not understand. If you don't hear or witness a phone conversation, the mere fact it occurred at all becomes hearsay.

testimonial and whether they are admissible under a Sixth Amendment Confrontation Clause analysis.[195]

C. *A Confrontation Clause Analysis—the Admissibility of an Interpreter's Statements*

For twenty-four years prior to *Crawford*,[196] *Ohio v. Roberts* governed the landscape of Confrontation Clause jurisprudence.[197] Its "adequate indicia of reliability" test was met if evidence either fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness."[198] In 2004, *Crawford* changed that analysis.[199] The Court abandoned the rule that reliable testimonial evidence was admissible without confrontation.[200] Yet, the court declined to fully define "testimonial:"

> We leave for another day any effort to spell out a comprehensive definition of "testimonial." Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.[201]

However, Justice Rehnquist believed that making such a sweeping change without fully defining testimonial would lead to mass prosecutorial confusion. He wrote:

> [T]he thousands of federal prosecutors and the tens of thousands of state prosecutors need answers as to what beyond the specific kinds of "testimony" the Court lists, see *ibid.,* is covered by the new rule. They need them now, not months or years from now. Rules of criminal evidence are applied every day in courts throughout the country, and parties should not be left in the dark in this manner.[202]

It wouldn't take long before the Court had its opportunity to shed some light into the testimonial darkness.

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195. Crawford v. Washington, 541 U.S. 36, 61 (2004) ("Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . . .").

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

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

198. *Crawford*, 541 U.S. at 40 (quoting *Roberts*, 448 U.S. at 66).

199. In *Crawford*, the Court rejected the *Roberts* non-confrontation test for admissibility of testimonial statements and said, "[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *Crawford*, 541 U.S. at 68-69.

200. *Id.*

201. *Id.* at 68.

202. *Id.* at 75-76 (Rehnquist, J., concurring).

In the Confrontation Clause cases that followed, the Court continued to wrestle with what sort of evidence and witnesses would be considered testimonial.[203] It is against this background of confusion and contradiction that the circuit courts have analyzed the more recent cases involving the admissibility of an interpreter's statement, and it is because of this uncertainty that an unfortunate circuit split has occurred.[204] This split is unnecessary and could have been avoided with the proper application of agency law.

As we have seen, courts have historically considered an interpreter as either the agent of the declarant or a mere language conduit.[205] Under a current application of either theory, the interpreter and the translation must be deemed reliable and accurate before it is attributable to the defendant.[206]

When the Supreme Court in *Crawford* rejected this "reliability test" method of ascertaining the admissibility of testimonial evidence as violating the Confrontation Clause,[207] the courts were stuck with a self-created quandary - how to admit an interpreter's translated words if the statements are testimonial and the interpreter is unavailable to testify.[208]

203. Williams v. Illinois, 132 S. Ct. 2221, 2223-24 (2012) (finding that the testimonial nature of DNA evidence depends upon the primary purpose for which it is collected); Bullcoming v. New Mexico, 131 S. Ct. 2705, 2710 (2011) (determining whether the lab analyst who conducted the testing must testify or whether a surrogate's testimony will suffice); Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009) (considering whether sworn laboratory certificates of analysis were testimonial); Davis v. Washington, 547 U.S. 813, 822 (2006) (finding that "testimonial" depends upon the primary purpose of the police investigation).

204. The split occurred with the 11th Circuit's decision in United States v. Charles, 722 F.3d 1319 (11th Cir. 2013), where, for the first time, a court held that the difficulties associated with language translation means an interpreter must be considered a separate declarant for Confrontation Clause purposes. *Id.* at 1323.

205. United States v. Koskerides, 877 F.2d 1129, 1135 (2d Cir. 1989) ("The interpreter was no more than a language conduit and therefore his translation did not create an additional layer of hearsay."); United States v. Da Silva, 725 F.2d 828, 831 (2d Cir. 1983) ("[T]he prevailing view is that the translator is normally to be viewed as an agent of the defendant; hence the translation is attributable to the defendant as his own admission and is properly characterized as non-hearsay under Rule 801(d)(2)(C) or (D) . . .").

206. *Charles*, 722 F.3d at 1327.

207. *Crawford*, 541 U.S. at 61 ("[W]e 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.'"); *see also Bullcoming,*131 S.Ct. at 2720 n. 1 (2011) (Sotomayor, J., concurring) ("The rules of evidence, not the Confrontation Clause, are designed primarily to police reliability; the purpose of the Confrontation Clause is to determine whether statements are testimonial and therefore require confrontation.").

208. It is self-created because when interpreted statements were involved, the courts decided that the finding of agency required an overlay of reliability not present in other cases where there was no interpreter. *Compare Charles*, 722 F.3d at 1327 (stating that the court's assessment of an interpreter's trustworthiness and reliability make him a language conduit and support admissibility under Fed. R. Evid. §§ 801(d)(2)(C) or (D)), *with* United States v.

When interpreted statements are testimonial in nature, the reliability test standard of the language conduit theory cannot overcome *Crawford's* confrontation requirement.[209]

1. Why and When a Translated Statement May be Considered Testimonial in Nature

Despite the fact that in *Crawford* the Supreme Court did not provide a comprehensive definition of what it considered to be testimonial, they did indicate three potential definitions. First, testimonial could mean "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact."[210] Second, that "[s]tatements [given to] police officers in the course of interrogations are . . . testimonial . . . ."[211] Finally, they also indicated that a statement is testimonial if it is a "statement[] that [was] made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial."[212]

In *Melendez-Diaz*, the Court expanded its definition of "testimonial" to include certifications of lab test results created in preparation for trial.[213] They considered such certifications to be "functionally identical to live, in court testimony, doing 'precisely what a witness does on direct examination.'"[214] The Court indicated that while the Confrontation Clause certainly applies to conventional witnesses as, "[those] who [have] personal knowledge of some aspect of the defendant's guilt[,]"[215] such an application "identifies the core of the right to confrontation, not its limits."[216]

The Court again distinguished testimonial from non-testimonial statements in *Davis v. Washington*.[217] There, the court held the testimonial nature of police interrogations depended upon its primary purpose.[218] Statements are testimonial if the primary purpose is to "establish or prove past events potentially relevant to later criminal

Portsmouth Paving Corp., 694 F.2d 312, 322 (4th Cir. 1982) (finding that admissibility was premised upon the statement being made by an agent and concerning a matter within the scope of the agency made during the existence of the agency relationship).

209. *See supra* note 199 and accompanying text.

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

211. *Id.* at 52.

212. *Id.*

213. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310 (2009).

214. *Melendez-Diaz*, 557 U.S. at 310-11 (quoting Davis v. Washington, 547 U.S. 813, 830 (2006)).

215. *Melendez-Diaz*, 557 U.S. at 330.

216. *Id.* at 315.

217. Davis v. Washington, 547 U.S. 813 (2006).

218. *Id.* at 822.

prosecution," but not if it is "to enable police assistance to meet an ongoing emergency."[219]

Since the Court does not limit the Confrontation Clause's reach to "conventional" witnesses, it is clear that interpreted statements that consist of "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"[220] are testimonial and subject to the Confrontation Clause.[221] It is also clear that a police interrogation, whether recorded or not, results in testimonial statements when its primary purpose is to obtain information to aid in a prosecution.[222] In *Charles*, the Eleventh Circuit held that because the statements resulted from a police interrogation and were offered to prove the truth of the matter asserted, the translated statements at issue were testimonial.[223]

Even if a court considers the speaker and the interpreter to be two different declarants, it is likely that many translated statements would be non-testimonial. For example, an interpreter's statements provided to assist police in responding to an ongoing emergency would be non-testimonial.[224] Translated statements would also be non-testimonial if they were not prepared in anticipation of trial.[225]

2. Why a Translated, Testimonial Statement May Be Admitted Without Confrontation When The Interpreter Is The Speaker's Agent

It is clear that testimonial hearsay cannot be admitted simply because it passes some out-of-court reliability test.[226] In *Crawford*, the Court clearly indicated that the only method of testing the reliability of testimonial evidence was the Sixth Amendment's "crucible of cross examination."[227] As a result, the language conduit theory, which tests the reliability of an interpreter's translation, must fail under a

219. *Id.*

220. *Melendez-Diaz*, 557 U.S. at 329 (Thomas, J. concurring) (quoting White v. Illinois, 502 U.S. 346, 365 (1992)..

221. *Id.*

222. *Davis*, 547 U.S. at 829-30.

223. United States v. Charles, 722 F.3d 1319, 1323-24 (11th Cir. 2013).

224. *Davis*, 547 U.S. at 822. ("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.").

225. *Id.* ("[Statements] are testimonial when the circumstances objectively indicate that . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.").

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

227. *Id.*

Confrontation Clause analysis.[228] The answer to this dilemma, proposed by this Note, is the proper application of agency law.

Consider more closely the non-interpreter case of *United States v. Petraia Maritime Ltd.*[229] On August 14, 2004, the Coast Guard boarded a vessel and interrogated several members of the crew regarding whether they were properly operating the vessel's oily water separator and incinerator.[230] Based upon the answers provided, on August 18, the Coast Guard arrested two of the crewmembers and held them as material witnesses.[231] On August 20, after being granted immunity from prosecution, those two crewmembers provided written statements.[232] On October 6, they testified before the grand jury concerning federal law violations by the defendant, Petraia Maritime Ltd.[233]

The government motioned in-limine for a determination that all the statements provided by these individuals were admissible against Petraia Maritime under the Federal Rules of Evidence, Rule 801(d)(2)(D).[234] After an exhaustive pre-trial analysis, the court concluded that once the government offered immunity, the agency relationship between the crewmembers and their employer was broken.[235] Their interests had become adverse.[236] However, the court found the statements given during the initial interrogation on August 14 were admissible against the defendant because, at that time, the crewmembers were agents of the defendant.[237] Although the government insisted the evidence would not be offered for the truth of what it asserted, the court noted it could be admitted even for its truth without running afoul of the Confrontation Clause.[238]

228. *Charles*, 722 F.3d at 1327.
229. United States v. Petraia Mar. Ltd., 489 F. Supp. 2d 90 (D. Me. 2007).
230. *Id.* at 92.
231. *Id.*
232. *Id.* at 93.
233. *Id.*
234. *Id.* at 94.
235. *Id.* at 94-99.
236. *Id.* at 96.
237. *Id.* at 95 n.4.
238.

> At trial, some of these initial statements by the crew members may have been considered by the jury for their truth . . . . To the extent that these statements were considered for their truth, the Court is satisfied that such statements fall within the purview of Rule 801(d)(2)(D) admissions. Although it does not appear that the issue of the admissibility of a corporate defendant's vicarious admissions has been decided by any court *post-Crawford,* courts which have addressed the admissibility of other categories of 801(d)(2) statements have found their admissibility to present no Confrontation Clause problems . . . . Because these statements are 801(d)(2)(D) admissions of Defendant and, as such,

In *Charles*, the court was faced with two speakers.[239] Charles spoke in Creole and the interpreter spoke in English.[240] But why should that matter? Recall that in *United States v. Portsmouth Paving Corp.*, the court was faced with a statement made by Saunders (speaker number one) that was repeated by his secretary/agent (speaker number two) over the phone to Remington, a third party.[241] There was no inquiry by the court as to whether the secretary accurately conveyed Saunders's message.[242] Indeed, the accuracy of the message was immaterial because the statement was made by an agent, and statements of agents made within the scope of the agency relationship bind principals even if inaccurate and not what the principal wanted or intended.[243]

In *Charles*, the court stated that an interpreter's "reliability and trustworthiness [are] principles supporting the admissibility of the interpreter's statements under Rules 801(d)(2)(C) or (D)."[244] They then went on to say that "[e]ven though an interpreter's statement may be perceived as reliable . . . *Crawford* rejected reliability as too narrow a test for protecting against Confrontation Clause violations."[245]

While it is true that *Crawford* rejected reliability, it is a complete mischaracterization of agency law to state that "reliability and trustworthiness" are what support the admissibility of an agent's statements.[246] As stated by the court in *United States v. McKeon*, "[i]f [an] agent ma[kes an] admission without adequate information, that goes to its weight, not to its admissibility."[247]

> are defined as "not hearsay," the Court finds that their admission, even for the truth, does not violate the Confrontation Clause.

Id.

239. United States v. Charles, 722 F.3d 1319, 1324 (2013).

240. *Id.* at 1320-21.

241. United States v. Portsmouth Paving Corp., 694 F.2d 312, 321 (4th Cir. 1982).

242. *Id.* Interestingly, Remington testified that the secretary said "the *air* is clear "while Waterfield testified that the message was "the *sky* was clear." *Id.* (emphasis added). This serves to illustrate that there is no accuracy or reliability requirement concerning a principal's message, as relayed by an agent.

243. For a discussion of how the statements of agents bind their principals, *see supra* Part II.A.

244. *Charles*, 722 F.3d at 1327.

245. *Id.*

246. Pappas v. Middle Earth Condo Ass'n, 963 F.2d 534 (2d Cir. 1992).

> The Advisory Committee Notes [to Rule 801(d)(2)(D)] observe that because admissions against a party's interest are received into evidence without many of the technical prerequisites of other evidentiary rules—such as, for example, trustworthiness and personal knowledge—admissibility under this rule should be granted freely.

Id. at 537.

247. United States v. McKeon, 738 F.2d 26, 31 (2d Cir. 1984) (quoting Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc., 32 F.2d 195, 198 (2d Cir. 1984)).

Crawford addressed the admissibility of testimonial hearsay.[248] It should be noted that Rule 801 of the Federal Rules of Evidence concerns evidence considered "not-hearsay."[249] Since *Crawford*, courts have concluded that its ruling does not apply to various subsections of Rule 801(d)(2) considered as "not hearsay," including the agency exemptions of subsections (C) and (D).[250]

In *Charles*, the Eleventh Circuit concluded that because Charles spoke in Creole and the interpreter spoke in English, there were two different declarants making two sets of testimonial statements and she had the constitutional right to confront the interpreter.[251] The court premises its finding of two different declarants on the fact that each spoke in a different language and that Charles could not understand English.[252] The court then went on to say that "the interpreter's reliability and trustworthiness [are] principles supporting the admissibility of the interpreter's statements under Rules 801(d)(2)(C) or (D), but having no bearing on the Confrontation Clause."[253] As discussed below, the court's holding is based upon a faulty application of agency law.

In *Charles*, the court's discussion of reliability is misplaced. If we revisit the case of *United States v. Portsmouth Paving Corp*, we can see how the agent/secretary's statement to a third party was admissible against her principal/boss without regard for the reliability or accuracy of the statement.[254] Applying the same principal in *Charles*, an agent/ interpreter's statement is admissible against the principal/defendant irrespective of its reliability or accuracy.[255]

248. Crawford v. Washington, 541 U.S. 36, 68 (2004) (stating that non-testimonial hearsay statements could altogether be exempted from Confrontation Clause scrutiny).

249. FED. R. EVID. § 801(d) reads, "[s]tatements that are not hearsay. A statement that meets the following conditions is not hearsay."

250. *See, e.g.*, United States v. Tolliver, 454 F.3d 660, 665-66 (7th Cir. 2006) (finding the admission under § 801(d)(2)(A) of recorded conversations between a defendant and an informant when the defendant is the declarant does not violate the Confrontation Clause); United States v. Lafferty, 387 F. Supp. 2d 500, 511–12 (W.D. Pa. 2005) (holding that an adoptive admission under Rule 801(d)(2)(B) is admissible against a defendant without cross-examination and stating, "[i]t would appear that the four statements set forth in F.R.E. 801(d)(2)(A) through (D) would be admissible against a criminal defendant consistent with the Sixth Amendment without an opportunity for cross-examination being provided because the nature of these four statements would make them the statements of the criminal defendant."); United States v. Jenkins, 419 F.3d 614, 618 (7th Cir. 2005) (stating that *Crawford* does not apply to co-conspirator statements admitted under 801(d)(2)(E)).

251. United States v. Charles, 722 F.3d 1319, 1325 (2013).

252. "[G]iven the nature of language interpretation, the statements of the language interpreter and Charles are not one and the same." *Id.* at 1324.

253. *Id.* at 1327.

254. United States v Portsmouth Paving Corp., 694 F.2d 312, 321-22 (4th Cir. 1982).

255. *Id.*

Similarly, the court finds *Crawford* applicable because they assert the basis for a Rule 801(d)(2)(C) or (D) exception is the "reliability and trustworthiness . . . of the interpreter's statements."[256] But, reliability and trustworthiness are nothing more than factors to be evaluated under a preliminary question of fact determination made under Rule 104(a).[257] Once agency is found, the parties have "[chosen] a mode of communication [where the] words of the interpreter . . . are [a] necessary medium of communication . . . and made a part of their conversation as much as those which fall from their own lips."[258] Reliability is simply not part of the agency equation.

To summarize, testimonial evidence admissible under 801(d)(2(C) and (D) should not be excluded under *Crawford* for two basic reasons. First, agency law provides that the words of the agent are attributable to the principal.[259] Second, *Crawford* concerns testimonial hearsay and evidence admitted under the five subsections of Rule 801(d)(2) are considered "not hearsay."[260] If a court ultimately decides that the Sixth Amendment excludes admission of an agent's testimonial statements against his principal without confrontation, then at least that reasoning should be based on something other than a flawed application of a reliability analysis that is irrelevant to the determination of agency.

III. THE CONSTITUTIONAL REACH OF THE CONFRONTATION CLAUSE INTO THE RULES OF EVIDENCE IS UNCERTAIN; STATES WOULD BE WISE TO ADOPT "NOTICE-AND-DEMAND" STATUTES AND "INTERPRETATION WARNINGS" TO SOLVE THE PROBLEM

As we have seen, the Court's Confrontation Clause jurisprudence is fractured.[261] In *Crawford v. Washington*, the Court abandoned the "reliability" test it articulated in *Ohio v. Roberts*.[262] No longer are

256. *Charles*, 722 F.3d at 1327.

257. United States v. Flores, 679 F.2d 173, 178 (9th Cir. 1982).

258. Commonwealth v. Vose, 32 N.E. 355 (1892).

259. "[D]eclarations . . . of an agent . . . are admissible . . . against the principal just as his own declarations or conduct would be admissible." Hamburg-Am. Steam Packet Co. v. United States, 250 F. 747, 749 (2d Cir. 1918).

260. "Nor is the availability of the declarant relevant under Fed.R.Evid. 801(d)(2)(D). Although such availability may be a critical issue when dealing with hearsay statements that are otherwise generally inadmissible . . . Rule 801 defines certain statements as *not being hearsay*." Pappas v. Middle Earth Condo. Ass'n, 963 F.2d 534, 538 (2d Cir. 1992).

261. *See generally* Natasha Crawford, Williams v. Illinois*: Confronting Experts, Science, and the Constitution*, 64 MERCER L. REV. 805 (2013) (discussing the fractured nature of the Supreme Court regarding Confrontation Clause cases).

262. Crawford v. Washington, 541 U.S. 36, 68-69 (2004) (rejecting *Roberts's* reliability analysis and holding that cross-examination is the constitutionally mandated method of testing the reliability of out-of-court testimonial statements).

testimonial, out-of-court statements admissible against a defendant simply because they are otherwise reliable. The Sixth Amendment demands that reliability be assessed by cross-examination.[263] The phrase "witnesses against" was interpreted as those who bore testimony and "'[t]estimony', in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'"[264] In *Melendez-Diaz* and *Bullcoming*, the dissent unsuccessfully tried to cabin the definition of "witness" to those who had personal knowledge of the incident.[265] In *Williams v. Illinois*, the Court appeared to "walk back" from the all inclusive scope of its definition of "witness" by holding that lab workers' tests must be "targeting individuals" for prosecution or the analysts are not witnesses.[266]

Through this constitutional fog it is difficult to see how the court will ultimately resolve the issue presented by the Eleventh Circuit's decision in *Charles*. The Supreme Court's denial of certiorari of each case involving this issue seemed to indicate the issue was settled.[267] Now that the Eleventh Circuit has held otherwise, it is more likely the Court will agree to hear a case to decide the issue. The problem is that with the degree of confusion that exists, it is nearly impossible to predict the outcome.[268]

263. *Id.*

264. *Id.* at 51.

265. "By insisting that every author of a testimonial statement appear for confrontation, on pain of excluding the statement from evidence, the Court does violence to the Framers' sensible, and limited, conception of the right to confront 'witnesses against' the defendant." Melendez-Diaz v. Massachusetts, 557 U.S. 305, 349 (2009) (Kennedy, J., dissenting).

266. "The Cellmark report is very different. It plainly was not prepared for the primary purpose of accusing a targeted individual." Williams v. Illinois, 132 S. Ct. 2221, 2243 (2012).

267. Since *Crawford*, the following cases involving interpreted statements were denied certiorari: United States v. Desire, 502 F. App'x 818 (11th Cir. 2012), *cert. denied*, 133 S. Ct. 1851 (U.S. 2013); United States v. Budha, 495 F. App'x 452 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1243 (U.S. 2013); United States v. Romo-Chavez, 681 F.3d 955 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 995 (U.S. 2013); United States v. Santacruz, 480 F. App'x 441 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 2850 (U.S. 2013); United States v. Orm Hieng, 679 F.3d 1131 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 775 (U.S. 2012); United States v. Boskovic, 472 F. App'x 607 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 561 (U.S. 2012). Other decisions exist but were not appealed to the Supreme Court.

268. As Justice Scalia observed in *Michigan v. Bryant*, "today's opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort. Michigan v. Bryant, 131 S. Ct. 1143, 1168, (2011) (Scalia, J., dissenting).

A. *States Should Adopt "Notice and Demand" Procedures to Guard Against the Inadmissibility of Interpreted Statements When The Interpreter Is Unavailable as a Witness*

In the context of translated statements, a legislative answer to this dilemma can be found not in the rules of evidence, but in the realm of criminal procedure. As the Court stated in both *Melendez-Diaz* and *Bullcoming*, states are free to adopt "notice and demand" statutes that would require the prosecution to notify the defendant that they intended to present an analyst's report without calling the analyst to testify.[269]

At its core, a "notice and demand" statute provides that a prosecutor may provide notice to the defendant of the prosecutor's intent to offer the reports containing the results of scientific tests without calling the analyst to testify.[270] Once notice is received, the defendant then has to object to the use of the report without the analyst's live testimony.[271] As the Supreme Court has pointed out, many jurisdictions have had long-standing notice and demand procedures that "render . . . otherwise hearsay forensic reports admissible while specifically preserving a defendant's right to demand that the prosecution call the author/ analyst of [the] report."[272] As long as the procedures are not burden shifting, courts have upheld their constitutionality.[273] In addition, the costs associated with instituting notice and demand statutes are less than requiring the analyst appear to testify.[274] States should give serious consideration to instituting the same "notice and demand" procedure regarding the admission of translated statements.

269. *See Melendez-Diaz*, 557 U.S. at 326-27 (2009); Bullcoming v. New Mexico, 131 S. Ct. 2705, 2718 (2011).

270. *Melendez-Diaz*, 557 U.S. at 326.

271. 5 JONES ON EVIDENCE § 34:27.50 (7th ed.).

272. *Bullcoming*, 313 S. Ct. at 2718 (2011) (quoting Brief of National District Attorneys Association, et al. as Amici Curiae in Support of Respondent); *see* Brief of Law Professors as Amici Curiae in Support of Petitioner, Melendez-Diaz v. Massaschusetts, 557 U.S. 305 (2009) (No. 07-591), 2008 WL 2521264, at *14 n.2 (S. Ct. June 25, 2009) (providing a listing of states who had adopted "notice and demand" procedures at the time of *Melendez-Diaz*).

273. In *Melendez-Diaz*, the Court specifically mentioned the then-existing statutes in Geogia, Ohio, Texas, and Colorado as conforming to the non-burden shifting constitutional mandate. *Melendez-Diaz*, 557 U.S. at 326-27. *See also id.* at 326 n.11.

274. In Pennsylvania, the court's Criminal Procedure Rules Committee evaluated the cost benefit of adopting a notice-and-demand statute against the cost of having the analyst testify and found that there would be fewer expenses and the burden would be lessened if the statute were adopted. Their rule change proposal has not yet been submitted to the Pennsylvania Supreme Court for its review. Pa. Criminal Procedure Rules Committee, 2013 Pa. Reg. Text 314886 (Netscan), *available at* Westlaw Next, "2013 PA REG TEXT 314886 (NS)", proposed and adopted regulations.

B. *States Should Implement an "Interpretation Warning" to Assure the Admissibility of an Interpreted Statement When the Interpreter is Unavailable to Testify*

A second alternative that states may adopt is to give a warning similar to the long-established "Miranda Warning."[275] Such a warning might be called an "Interpretation Warning."[276] Police officers throughout the country are familiar with and provide suspects with Miranda warnings thousands of times each day.[277] Thus, the burden and cost of requiring an "interpretation warning" would be minimal.[278]

This "interpretation warning" would be given to a foreign-language speaking suspect or defendant prior to any police questioning.[279] In *Davis*, the Court held that if the primary purpose of a police investigation were "to establish or prove past events potentially relevant to later criminal prosecution,"[280] then the questioning would result in a testimonial statement. With respect to police questioning, the warning would only apply where statements would be testimonial in nature.

In *Melendez-Diaz*, the Court stated that "[t]he defendant *always* has the burden of raising his Confrontation Clause objection"[281] and that "[i]t is common to require a defendant to exercise his rights under the Compulsory Process Clause in advance of trial."[282] In addition, in even

275. This is, of course, the now familiar, "you have the right to remain silent" warning police officers routinely provide criminal suspects prior to interrogation, implemented as a result of the Court's decision in *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

276. I am unaware of any jurisdiction that currently uses or has proposed the use of such a warning. Nevertheless, there is nothing that precludes its use.

277. Procedures for advising suspects of their Miranda rights are often written into police procedure manuals. For example, the New York State Police Field Manual instructs: "After securing custody of an arrested person(s) and before any questioning or interrogation of the person(s) *advise* the person(s) of their rights. *Read* to them from the NYSP Miranda Warning Card . . . ." *New York State Police Field Manual*, § 31E3(a) 31-13 (2013) (on file with author).

278. Any "start up" costs that were associated with the implementation of giving Miranda warnings have long since been assumed into every police department's budget. Similarly, most – if not all – police departments provide suspects arrested for alcohol related driving offenses with warnings concerning a failure to take a mandated test to determine the alcohol content of the motorist's blood. These warnings are also commonly available in pre-printed "pocket card" form that police officers carry with them. The cost of pre-printed, "interpreter warning" pocket cards on a department's budget would be negligible.

279. In Davis v. Washington, the Court held that if the "primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution," then the statements are testimonial. Davis v. Washington, 547 U.S. 813, 822 (2006). Interpretation warnings should be given any time the resulting statements would be considered testimonial.

280. *Id.*

281. Melendez-Diaz v. Massachusetts, 557 U.S. 305, 327 (2009).

282. *Id.*

more forceful language, the Court asserted "[t]here is no conceivable reason why he cannot similarly be compelled to exercise his Confrontation Clause rights before trial."[283]

The institution of an "interpretation warning" would provide notice to the suspect that by engaging in a conversation with the police where the use of an interpreter is necessary, he waives his right to confront the interpreter at trial. In both the "notice and demand" procedure and the "interpretation warning" procedure, waiver or assertion takes place prior to trial. The Supreme Court has placed no limit on pre-trial timing.[284]

Of course, unlike with Miranda, refusal to waive the confrontation right would not necessarily result in the inability to use the defendant's interpreted words at trial; it simply means that like an analyst, the interpreter may need to testify. However, it may result in the police taking additional steps to ensure audio or AV recordings adequately record the suspect's foreign language words.

Even better, states could implement both procedures. Police could give an "interpretation warning" at the time they question the suspect. If the suspect refuses to waive his Sixth Amendment confrontation rights, then his interpreted statements could still be admitted without the need to call the interpreter if his counsel later agreed to waive either by stipulation or through a notice and demand procedure.

CONCLUSION

For over one hundred years prior to the Supreme Court's decision in *Crawford v. Washington*, courts have admitted as evidence a defendant's translated statements without the need to have the interpreter testify. Whether the statement was admitted because it was "part of [a] conversation . . . [that fell] from [the parties] own lips,"[285] or admissible under the agency or language conduit theories, the result was the same. *Crawford* and its progeny have called that long-standing practice into question and, at least in the Eleventh Circuit, have substantively changed its applicability.

The Court has so far decided that the Confrontation Clause applies to unconventional witnesses, such as laboratory analysts.[286] An interpreter may or may not fall into that category. Like the analyst, it is unlikely that the interpreter will have personal knowledge of the events.

283. *Id.*

284. Nothing in Justice Scalia's opinion in *Melendez-Diaz* gives any indication that a warning provided at the time of arrest or questioning would be "too soon" before a trial.

285. Commonwealth v. Vose, 157 Mass. 393, 395 (1892).

286. *Melendez-Diaz*, 557 U.S. at 315.

However, unlike the analyst who conducts his testing without a suspect's input or participation, the interpreter's declaration is entirely dependent upon the suspect's speech. Unless a suspect chooses the analyst who then works subject to his control, there is no agency relationship. And I believe that the agency relationship is the distinguishing feature that makes an interpreted testimonial statement admissible without confrontation.

Clearly, language is ambiguous. Even when two people communicate in the same language, problems arise. Those problems are compounded when translation is necessary. In the multi-cultural, multi-lingual society in which we live, language translation is and will continue to be an indispensible part of our existence. I do not believe this necessity undermines our constitutional right to confrontation.

But in keeping with the understanding that our rights are individual rights, "endowed [to us] by [our] Creator" and "[t]hat to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,"[287] we must allow for the individual to voluntarily, knowingly and intelligently waive those rights if he chooses.[288] By providing interpretation warnings and notice and demand statutes that adequately allow the individual defendant to exercise or waive those rights, we protect the freedom of choice embodied in our founding doctrines.

*Daniel Benoit**

287. THE UNANIMOUS DECLARATION OF THE THIRTEEN UNITED STATES OF AMERICA, 1 Stat. 1-3 (1776).

288. In *Miranda v. Arizona*, the Court held that a suspect may waive his rights "provided the waiver is made voluntarily, knowingly and intelligently."
Miranda v. Arizona, 384 U.S. 436, 444 (1966).

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